2026 EDITION

Guide to D&O Insurance for IPOs and Direct Listings

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Leverage our IPO and direct listing knowledge and expertise

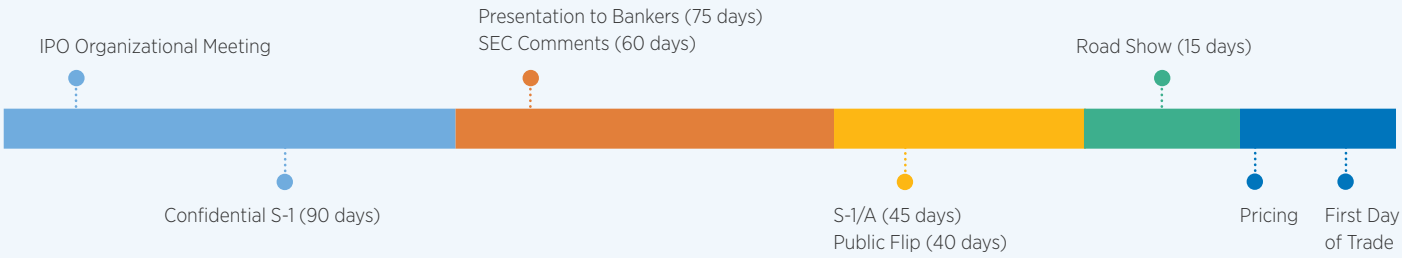
Gallagher is the market leader when it comes to placing D&O insurance for companies going public. Experience matters when it comes to IPOs and direct listings. You want a specialist on your insurance brokerage team to work through all the D&O insurance issues that will arise before, during and after the process of going public, as well as during your life as a public company.

There is significant complexity to the process of protecting a company and its directors and officers as they undertake the process of going public. This interactive resource is your guide to the D&O insurance process for IPOs and direct listings.

Private to public milestones timeline

Click/tap an area of the timeline to learn more about the D&O insurance process for companies going public. While the timeline below is specific to IPO companies, the milestones are relevant to both IPO and direct listing companies. Both types of companies must have their public company D&O insurance program ready to be put in place before their stock starts trading on a public exchange, and both types of companies benefit from getting an early start on the process of placing their public company D&O insurance.

IPO Milestones Timeline



D&O Insurance Process

PREPARE

- Develop strategy
- Evaluate
  - Private company insurance
  - International
  - Cyber
  - Other insurance lines
- Governance counseling
  - Corporate governance policies
  - Choice of forum and exculpation provisions

LAUNCH

- Implement carrier NDA
- Refine limits analysis
- Negotiate with markets
- Preliminary board presentation
- Schedule executive and employee compliance training

BROKER

- Negotiate coverage and pricing
- Negotiate warranty statements
- Present insurance program

IMPLEMENT

- Finalize program
- Execute warranties
- Additional subjectivities
- Coordinate coverage transition
- Bind IPO coverage

SUPPORT

- Counseling
- Training/education
- Market updates
- Claims support

Are you going public through a de-SPAC transaction? Read our Guide to D&O Insurance for De-SPAC Transactions

Source: Gallagher

1 Prepare

A. Develop a strategy

Setting the strategy involves taking a first look at a number of key questions. Some of these questions include the following:

- What is the timing of our public listing and are we on a dual track?
- If doing an IPO, what is the size of our offering, and will we have selling shareholders?
- What is our philosophy on risk transfer and buying D&O insurance limits?
- Which insurance carriers are the best fit for our needs? Do we have any special or unusual risk exposures?
- Who are the key executives who will be involved in the insurance process?
- How involved does the board of directors want to be in making decisions about D&O insurance?

An initial strategy session can go a long way to making the overall process run smoothly and efficiently.

B. Evaluate

i. Private company insurance

Consider ensuring that you have at least $5 million to $10 million of D&O insurance limits in place as a private company. This move protects Ds and Os should the company be acquired instead of going public. It also ensures that the subsequent public company D&O insurance program is not vulnerable to having warranty statements apply to this first $5 to $10 million layer of insurance. Finally, consider whether you need IPO- or direct listing-specific endorsements such as “roadshow coverage” and “failed IPO coverage.”

▶ Learn more about
Private Company Litigation

ii. International

Newly public companies can suddenly find themselves subject to intense scrutiny, including in non-US jurisdictions. Before going public, make sure that you have analyzed your non-US subsidiaries and made a determination as to whether a local D&O policy might be warranted. Just because your US-issued policy says in the text of the contract that it is supposed to respond worldwide does not mean that it actually will. Many foreign jurisdictions require that D&O insurance policies, if placed, be placed locally.

iii. Cyber

This is an exploding area of concern for many companies, and in some cases, effectively managing this exposure is fundamental to the success of a company. This is a board-level issue that needs to be addressed in a timely and comprehensive way.

Learn more in our 2026 Cyber Outlook.

iv. Other insurance

A newly public company has to be ready for public-company scrutiny and having a buttoned-up insurance risk management program across all lines of insurance (not just D&O insurance) is critical. This is something the board will care about at least by proxy season given the required disclosures concerning a board's role in enterprise risk management.

▶ Read now

Guide to D&O Insurance for Foreign IPOs and Direct Listings

This guide serves as a roadmap for foreign private issuers seeking to list on a US exchange.

C. Governance counseling

i. Corporate governance policies

D&O insurance is important — and consideration should also be given to implementing corporate governance policies that tend to help mitigate D&O risk. Examples include: insider trading policies (including the correct implementation of 10b5-1 trading plans), corporate communications policies and appropriate indemnification agreements.

ii. Choice of forum provisions

Your charter documents (certificate of incorporation and corporate bylaws) are a place where you can make strategic choices about where you will be sued in the future. State choice of forum provisions are a must.

Equally important are federal choice of forum provisions. Including this Delaware law provision (which can be influential for other states as well) in your charter documents may help you avoid having a suit challenging the disclosure being brought in state court in addition to federal court.

iii. Exculpation provisions

Delaware law has, for many years, allowed companies to include a provision in their certificate of incorporation that has the effect of shielding directors from monetary liability in some circumstances. In 2022, the Delaware legislature expanded this protection in a limited way to officers. Still, some protection is better than nothing. You will want to include "exculpation" provisions in your certificate of incorporation before you go public.

Learn more about:

- Exculpation Provisions
- Officer Exculpation Under Delaware Law
- Officer Exculpation in 2025

▶ Read about the
Benefits of 10b5-1 Trading Plans

▶ Learn more about
State Forum Selection Provisions

▶ Considering reincorporation?
Read about Alternatives to Delaware

2 Launch

A. Implement carrier NDA

Companies that choose to file confidentially will want to have their broker ask each insurance carrier to sign an NDA before being sent the confidential S-1 filing. Ask your Gallagher account executive about how we have greatly streamlined this process.

B. Refine limits analysis

Choosing D&O insurance limits shouldn't be limited to peer data benchmarking and reference to overly broad cuts of settlement data that may not be directly relevant to you. Consider a customized approach, the type of approach that Gallagher is able to offer clients through its proprietary database.

C. Negotiate with markets

Given the current litigation environment for IPO and direct listing companies, you need significant lead time and a clear strategy to optimize your insurance coverage. Management and the board will want to consider issues like what level of self-insured retention (like a deductible) makes sense given current market pricing for IPO and direct listing company D&O insurance.

The good news is that market conditions are much more favorable than they have been in the recent past. With a good process, a company can expect a range of options customized to their appetite for risk.

D. Brief board of directors

Even very sophisticated boards of directors may not be familiar with all the current issues at play when it comes to protecting themselves and their companies against the types of claims that are filed against newly public companies. A good practice is to have your broker brief your board on the current litigation environment as well as D&O insurance market dynamics.

E. Schedule executive and employee training

Being employed by a public company can be very different from being an employee of a private company. Schedule your "We're public. Now what?" training to fall either right before or right after the date the company starts trading in the stock market so that employees gain a timely understanding of things like tipper-tippee insider trading liability and the like. This training can be provided by your outside counsel, Gallagher or both.

3 Broker

A. Negotiate coverage and pricing

While the cost of D&O Insurance for a new public company is more expensive than the same coverage for a mature public company, pricing for IPO companies has improved. The muted IPO activity of the past few years has meant that insurers are competing harder to win the business of IPOs that are pricing, resulting in a competitive process and lower prices.

In addition, coverage terms can be very favorable if negotiated upfront by a skilled broker. If you are working with a carrier that has panel counsel, you will want to vet this list before finalizing your carrier decision. If you are asking outside counsel to review the terms and conditions of your D&O insurance policies, you will want to loop outside counsel into your broker's process sooner rather than later.

B. Negotiate higher limits warranties

Higher limit warranties are conditions precedent (subjectivities) to a new layer of D&O insurance being placed for a company. When a company buys an additional, new layer of insurance (a higher limit) that it did not purchase the previous year, the insurance carriers may require that the buyer affirm the following with respect to that new layer or layers: the buyer's directors and officers know of nothing that's likely to give rise to a claim. Exceptions must be disclosed, and coverage for the disclosed exceptions will normally be excluded from the new layer or layers of insurance being placed. Should a claim arise, the warranties will be tested. In some circumstances, carriers may assert that no coverage is available because the warranty was inaccurate (i.e., something that should have been disclosed was not). The stakes are high and insurance carrier warranty language can vary dramatically. You will want to review any proposed higher limits warranty language carefully.

C. Present insurance program

D&O insurance is personal to board members. In our experience, most boards like to hear about the proposed insurance program directly from their insurance broker. This allows the board to have a robust discussion about personal liability and the proposed D&O insurance program.

4 Implement

A. Finalize program

Almost there. Now is the time to ensure that all involved stakeholders have agreed to the final form of the D&O insurance program that will be implemented. For many companies, this includes a sign-off from the full board of directors or at least a committee of the board of directors.

B. Execute warranties

Each newly purchased layer of insurance may require a warranty statement that says, in effect, that the company and its directors and officers know of nothing that is likely to give rise to a claim. Companies have a duty to update any material changes in risk before the program is bound.

C. Address subjectivities

Subjectivities are carrier-imposed condition precedents to their insurance becoming effective. Common subjectivities for a company first going public include: (1) the initial offering or reference price, (2) the offering's registration statement being declared effective by the SEC for trading to begin, and (3) higher limits warranties.

Even these sorts of housekeeping items can have complications. For example, sometimes insurers attempt to impose a restriction on the final offering size to give themselves the opportunity to increase their premium if the offering size increases dramatically in the final hours. The most critical subjectivity, however, is usually the higher limits warranties.

D. Coordinate coverage transition

Some brokers recommend sending your private company insurance program into run-off. This may or may not be the right choice in your case. If you can get it, the better coverage path is almost always for the public company policy to provide "look-back" coverage. This path is also more cost-efficient because it lets you avoid purchasing private company runoff.

E. Bind the public company D&O insurance program

The SEC has declared your registration statement effective and you have either priced your IPO or set the reference price for your direct listing — Congratulations! Before you pop the champagne, call your broker to convey the price and your authorization to bind the D&O insurance program. You want the insurance to be in place before your first trade the next morning. Now you are done with the insurance process — but if anything changes, for example if the company is unexpectedly sued immediately after pricing (it has happened), call your broker right away with this update.

▶ Learn more about

Do You Need a Tail Policy For Your Private Company D&O Insurance?

5 Support

A. Counseling

One of the reasons companies hire Gallagher is the ongoing support we are able to offer on topics ranging from insurance and claims to corporate governance as it impacts D&O risk. Talk to your account executive to find out more.

B. Training/Education

Congratulations on going public — now the challenge of life as a public company begins. Keeping directors, officers and the company on track includes training and education. To help our friends and clients, Gallagher provides a variety of resources, including webinars and white papers. You can also sign up to receive our weekly blog on topics related to D&O risk and corporate governance, the D&O Notebook. In addition, your account executive can send you our latest Board Education Resource Guide, which includes information about a variety of resources, including Gallagher's own customized sessions.

C. Market update

The insurance market is a dynamic system, and the IPO and direct listing D&O insurance market can be very different from the market for more mature public companies.

D. Claims advocacy

All companies hope that paying for D&O insurance will turn out to have been a waste of money — but sometimes claims arise and the policy is triggered. Claims, and even the possibility of a claim, should be reported to your broker as soon as possible. In the midst of everything else, you do not want to find out that you had a misstep when it comes to your compliance with the terms of your D&O policy.

▶ Learn more about
The Biggest D&O Themes of 2026: IPOs, DExit and Mandatory Securities Arbitration

Questions about this Guide? Comments? Compliments?

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▶ Additional resources

D&O Notebook

Ongoing series providing practical, actionable insights on directors and officers liability (D&O) risk, shareholder litigation trends, SEC enforcement actions and corporate governance developments.

Appendix

Looks Bad, Might Be a Coincidence?
Insider Stock Sales, 10b5–1 Trading Plans, and the SEC's New Rules

Did senior executives at Silicon Valley Bank (SVB) sell shares while in possession of material nonpublic information shortly before the demise of the company? If they did, they violated the federal laws against insider trading.

But while the press and others were quick to rush to judgment, a quick search of the Securities and Exchange Commission (SEC) filings potentially tells a very different story, one of compliance with the then-current rules when it comes to 10b5-1 trading plans. More about this later in this article.

A good 10b5-1 trading plan provides an affirmative defense against illegal insider trading. For a well-intentioned director or officer, having such a plan can mean the difference between avoiding years of painful insider trading litigation or not.

The SEC recently updated the rules on 10b5-1 trading plans[1] so there are fewer opportunities to engage in activity that could be considered insider trading.

In this article, we'll look at the purpose of 10b5-1 trading plans and the highlights of the SEC's new rules. Then, I'll briefly discuss the controversy over executives at Silicon Valley Bank selling stock ahead of its demise.

The purpose of 10b5-1 trading plans

Insiders of publicly traded companies have long relied on 10b5-1 plans to sell their stock at predetermined times using formulas that set the amount, price and date.

Available since 2000, these plans are designed to provide a safe harbor against accusations of illegal insider trading.

Should we care if insiders have a safe way to sell shares? Yes.

Equity compensation for directors and officers is designed to align their incentives with those of the shareholders they serve — but it's meaningless if they can never safely turn it into cash.

Risk is part of business, and the pace of business today is either fast or faster. This leaves executives vulnerable to charges of insider trading if they happen to sell shares prior to unexpected events that cause their stock price to decline.

When directors, officers and other insiders sell stock in a predetermined, formulaic way after a cooling-off period, it is less likely that these insiders profited from trading while in possession of material nonpublic information.

And any system set up by humans is subject to potential corruption. Indeed, the SEC has been scrutinizing 10b5-1 plans for quite some time.[2]

This culminated in 2021 when SEC Chair Gary Gensler said there were "real cracks in our insider trading regime," and "freshening up" Rule 10b5-1 would address these issues.

In December 2022, the SEC updated its rules on 10b5-1 trading plans. Below are the key highlights that directors, officers, and the companies they serve need to know in order to properly use 10b5-1 trading plans.

Of course, general counsel and compliance officers will want to review the full text of the final rule.[3]

Note that the new rules do not address Rule 10b5-1 plans for the repurchase of shares by issuers. While the SEC had proposed new rules[4] for these as well, those rules have not yet been finalized.

New rule: Cooling-off period

Some — but not all — companies already have a waiting period between when the 10b5-1 plan is adopted and the first trade. This is referred to as the "cooling off" period.

The old SEC rules, however, did not require a cooling-off period. Theoretically, someone could have adopted the 10b5-1 plan and traded that same day — and people have.

The final rule points to academic research that shows this type of scenario was happening, and that it was "abnormally profitable" for insiders.

This sort of thing defeats the point of the plan, which is, in part, to demonstrate that the insider did not have material nonpublic information at the time of the trade.

The new rules require a cooling-off period. For directors and officers, trading under the plan may not begin until the later of:

1. Ninety days after the adoption of the Rule 10b5-1 plan (or any modification of a plan); or
2. Two business days following the disclosure of the issuer's financial results in a Form 10-Q or Form 10-K for the fiscal quarter in which the plan was adopted (for foreign private issuers, in a Form 20-F or Form 6-K) that discloses the issuer's financial results.

In any event, the required cooling-off period is subject to a maximum of 120 days after adoption of the plan.

The SEC notes that the fixed and variable components (90 days/two days after disclosing financial results) will reduce the opportunity to trade on material nonpublic information.

For all other persons, the cooling-off period is set at 30 days after the adoption of a 10b5-1 plan.

Will the long cooling-off period make 10b5-1 plans less attractive? Maybe.

But the alternative is running the risk that you are an insider who, in good faith, made a naked trade — only to have the company's stock drop precipitously in a shocking and unexpected way.

On balance, many insiders will elect to use 10b5-1 plans notwithstanding the long cool-off period.

New rule: Emphasizing good faith

10b5-1 plans have always operated under the assumption that those with material nonpublic information would act in good faith and not trade opportunistically.

A major concern that animates the new rules, however, is the SEC's belief that not everyone uses 10b5-1 trading plans in good faith. The SEC is addressing this in the new rules by explicitly discussing the good faith required to benefit from the safe harbor.

Good faith certification

In order to benefit from the affirmative defense safe harbor against illegal insider trading afforded by 10b5-1 plans, the SEC now requires that directors and officers certify at the time of the adoption of a new or modified Rule 10b5-1 plan that:

1. They are not aware of material nonpublic information about the issuer or its securities; and
2. They are adopting the contract, instruction or plan in good faith and not as part of a plan or scheme to evade the prohibitions of Rule 10b5-1.

The SEC believes that the certification will "reinforce directors' and officers' cognizance of their obligation not to trade or enter into a trading plan while aware of material nonpublic information about the issuer or its securities."

The SEC advises directors and officers to consult with legal counsel on the definition of "material nonpublic information" so they can make a truthful representation.

From the final rules:

Legal counsel can assist directors and officers in understanding the meaning of the terms "material" and "nonpublic information." However, the issue of whether a director or officer has material nonpublic information is an inherently fact-specific analysis. Thus, a director or officer's completion of the proposed certification would reflect their personal determination that they do not have material nonpublic information at the time of adoption of a Rule 10b5-1 plan.

Good faith condition

In addition to being **entered into** in good faith, the SEC also says that 10b5-1 trading plans need to be "operated" in good faith.

The final rules add the condition that the person who entered into the Rule 10b5-1 contract, instruction or plan "has acted in good faith with respect to" the contract, instruction or plan.

The SEC modified the original proposed language "operated in good faith," as there was some concern that "operated" could refer to brokers who executed the trades authorized by the insider.

The rule applies only to those activities the insider has control of and not, for example, cancellations directed by the issuer that are outside the control or influence of the insider.

This new requirement is intended to address the SEC's belief that sometimes, "corporate insiders may try to improperly influence the timing of corporate disclosures to benefit their trades under a Rule 10b5-1 trading arrangement, such as by delaying or accelerating the release of material nonpublic information."

One such example could be the delay of negative news until after a pre-planned sale is executed.

New rule: Restricting overlapping plans and single trade plans

The SEC's final rule on 10b5-1 trading plans now restricts multiple overlapping plans and single-trade arrangements.

The restriction only applies to plans involving open-market trades and not purchases and sales as part of employee benefit plans, ESOPs or DRIPs, for example.

Multiple plans. The SEC sees multiple, overlapping 10b5-1 trading plans as opening the door for insider trading.

For example, an insider could set up trades for dates that the issuer will likely release material nonpublic information, and then selectively cancel trades or terminate plans on the basis of material nonpublic information.

Similarly, an insider could circumvent the cooling-off period by setting up multiple plans and deciding later which trades to execute and which to cancel after they become aware of material nonpublic information, but before its release to the public.

The new rule allows insiders to maintain two separate 10b5-1 plans at the same time, but only so long as trading under the later-commencing plan will not begin until after all trades under the earlier plan are completed or expire.

The cooling-off period for the later-commencing plan would still apply if the date of adoption was the date the earlier-commencing plan terminated.

It's worth noting that insiders sometimes use multiple brokers to execute trades pursuant to a single 10b5-1 plan to cover securities in different accounts. The final rules allow this.

In addition, insiders will not lose the affirmative defense if they close a securities account with one financial institution and transfer to a different one.

Single-trade plans. The final rules also limit the use of single-trade plans. Only one is allowed in any consecutive 12-month period.

Tax exception. In a sensible move that recognizes the burden of needing to pay taxes in cash when illiquid stock vests, the SEC's new rules do allow multiple plans in the context of certain "sell-to-cover" transactions to satisfy tax withholding obligations at the time an award vests.

The key is the appropriate use of these plans, including the insider's not having control over the timing of the sales.

New rule: Updated disclosure requirements

Prior to the new rules, whether an insider disclosed that a transaction was pursuant to a 10b5-1 trading plan was up to the insider. It was certainly a best practice to do so, but it wasn't required.

The new rules dramatically expand issuer disclosure requirements when it comes to insider trading.

For example, issuers will now be required to annually disclose their insider trading policies. Quarterly disclosure of trading arrangements, whether through a 10b5-1 trading plan or otherwise, is now also a requirement.

This disclosure requirement includes details about the plans such as the duration of the plan and the aggregate number of securities to be transacted. Note, however, that the price at which securities are transacted does not have to be disclosed.

The new rules also make it compulsory to disclose on Forms 4 and 5 when transactions were made pursuant to a 10b5-1 trading plan through a new checkbox.

In addition, Section 16 reporting persons are now required to disclose gifts of securities on Form 4, a form that has a much shorter deadline for filing compared to Form 5.

Timing of compliance with the new rules.

There is some complexity when it comes to the timing of when compliance must begin for some parts of the rules. For the most part, however, April 1, 2023, is the key date.

Law firm Latham & Watkins has provided a good overview of key dates and how to comply (PDF).[5]

Got 99 problems, but insider trading ain't one.

In light of all these changes, is it still worth adopting a 10b5-1 plan to sell stock, versus transacting without one?

The answer is definitively, yes.

As some executives learn far too late, the alternative may be dealing with an investigation or prosecution about whether you traded on material nonpublic information.

It would be hard to overstate what a catastrophic, stressful, career-limiting, and potentially personally bankrupting situation that can be.

Consider, for example, the Silicon Valley Bank situation. Executive sales have been widely reported, including sales by the CEO of over $30 million[6] in the course of the prior two years.

And of course, the SEC and Department of Justice are investigating these sales.[7] It is too soon to know what exactly happened here, although the press is certainly rushing to judgment.

However, while it is certainly not the headline, it has also been widely reported that many of these sales — including sales by the former CEO[8] — were pursuant to 10b5-1 trading plans.

SVB insiders have many challenges right now, but if these trading plans were appropriately adopted and deployed, being convicted and going to jail for insider trading isn't one.

Author: Priya Huskins

[1]"SEC Adopts Amendments to Modernize Rule 10b51 Insider Trading Plans and Related Disclosures," *U.S. Securities and Exchange Commission*, 14 Dec 2022.

[2]"Rule 10b5-1 Plans in the Hot Seat, Subject to Close Scrutiny by SEC, DOJ," *Lewis Brisbois Bisgaard & Smith LLP*, 9 Mar 2023.

[3]"Insider Trading Arrangements and Related Disclosures," *U.S. Securities and Exchange Commission*, 2022. PDF file.

[4]"Share Repurchase Disclosure Modernization," *U.S. Securities and Exchange Commission*, Dec 2021. PDF file (hosted on Skadden, Arps, Slate, Meagher & Flom LLP website).

[5]"Amended Rule 10b5-1 and New Insider Trading Disclosure: Frequently Asked Questions," *Latham & Watkins* LLP, 23 Jan 2023. PDF file.

[6]Frank, Robert "SVB Execs Sold $84 Million of the Bank's Stock Over the Past 2 Years, Stoking Outrage Over Insider Trading Plans," *CNBC*, 14 Mar 2023.

[7]Li, Yun. "SEC and Justice Department Are Investigating SVB's Collapse, Including Insider Stock Sales," *CNBC*, 14 Mar 2023.

[8]"SVB CEO Sold $3.6 Million in Stock Days Before Bank's Failure," *Bloomberg*, 10 Mar 2023.

Mind the Gap: State Forum Selection Provisions

Though the federal court dismissed a derivative suit about state corporate law against The Gap, the plaintiff vigorously fought the validity of forum selection.

Companies that are serious about managing director and officer litigation risk have been adopting choice of forum provisions. Such provisions continue to permit shareholders to sue directors and officers if shareholders want to do so.

At the same time, these provisions cut down on duplicative litigation. Federal forum provisions keep federal securities laws in federal court, while state forum provisions keep state corporate matters in state court.

Not everyone is happy with this efficiency. When it comes to state forum provisions, The Gap case is one such example where the plaintiff vigorously fought the validity of forum selection. Notwithstanding the plaintiff's objections, the court decided in favor of The Gap.

Fortunately for the plaintiff, though, the decision has not created any gap in the plaintiff's ability to seek the redress they need.

A review of The Gap's derivative suit

I've covered The Gap's derivative diversity lawsuit (Lee v. Fisher) previously.

The outcome of the federal district court's decision was that The Gap won a motion to dismiss because the plaintiff attempted to bring a derivative lawsuit in a federal court, and The Gap had state choice of forum bylaws that stated derivative suits must be brought in a Delaware court only.

This was despite the fact that, among other claims, the plaintiff cited Section 14(a) of the Securities Exchange Act of 1934, and such a claim can only be brought in federal court. (Section 14(a) claims allege omissions and misrepresentation in a corporation's proxy statements.)

As I wrote previously:

> The court rejected plaintiffs' argument against dismissal of the case, including the 14(a) claim. The court noted that the absence of the ability to bring a 14(a) claim in Delaware state court does not mean that absolutely no remedy is available to plaintiffs in Delaware state court. As such, dismissal was proper.

Plaintiffs appealed the district court's dismissal to the Ninth Circuit. Plaintiffs lost again when the Ninth Circuit affirmed the district court's dismissal. Plaintiffs then asked for an en banc review by the Ninth Circuit (which means that a broader panel of judges reviews the case).

The Gap's en banc review: The plaintiff's arguments

In June 2023, the Ninth Circuit conducted an en banc review[1] of the case. There were a number of arguments presented to the en banc court.

First, the plaintiff argued that The Gap forum selection bylaws were void because they violated the Exchange Act's anti-waiver provision, which states "[a]ny condition, stipulation, or provision binding any person to waive compliance with any provision of this chapter or of any rule or regulation thereunder, . . . shall be void."

The court disagreed, stating that the plaintiff still had the option to bring a case against The Gap under Section 14(a) through a direct action in federal court.

Next, the plaintiff argued that The Gap's forum-selection clause is unenforceable because an enforcement would violate the federal forum's strong public policy of allowing a shareholder to bring a Section 14(a) derivative action.

The plaintiff cited a Supreme Court Decision in J.I. Case Co. v. Borak (1972) as proof. But upon further review, the court noted that "a close look at Borak in its historical context and in light of subsequent Supreme Court developments … compels the conclusion that Borak does not establish a strong public policy to allow shareholders to bring § 14(a) claims as derivative actions."

The court then stated that the plaintiff did not "carry her heavy burden of showing the sort of exceptional circumstances that would justify disregarding a forum-selection clause."

Finally, the plaintiff argued that the bylaws were invalid under Section 115 of the Delaware General Corporation Law (DGCL). Section 115 states[2] that bylaws cannot prohibit internal corporate claims to be brought only in Delaware.

Of this, the court said the plaintiff's derivative action was not, in fact, an internal corporate claim:

> Because the Delaware Supreme Court has indicated that federal claims like Lee's derivative § 14(a) action are not "internal corporate claims" as defined in Section 115, and because no language in Boilermakers Local 154 Retirement Fund v. Chevron Corp., … Section 115, or the official synopsis that accompanies Section 115, operates to limit the scope of what constitutes a permissible forum-selection bylaw under Section 109(b) of the DGCL, the en banc court concluded that The Gap's forum-selection clause is valid under Delaware law.

The en banc court's decision

Ultimately, the en banc court decided that the federal district court's original decision to grant a motion to dismiss on the grounds of The Gap's bylaws was, in fact, proper.

In other words: The plaintiff is not allowed to bring a derivative suit in federal court due to The Gap's state choice of forum bylaws, and the plaintiff is also not allowed to bring a Section 14(a) suit in state court, because a Section 14(a) case can only be heard in federal court.

Note that this outcome still leaves plaintiffs with the ability to bring their federal court claim in federal court. They just have to do it as a direct suit and not a derivative suit.

Litigation Venues for D&O) Litigation

	Federal Securities Cases	Internal Corporate Claim
Federal Court	Yes	No
Delaware Court	No	Yes

This decision effectively created a split between the Ninth Circuit and the Seventh Circuit whose decision in Seafarers Pension Plan v. Bradway[3] rejected Boeing's state forum bylaws and allowed derivative Section 14(a) claims in federal court.

Takeaways

Some people erroneously believe that this decision leaves investors with no recourse[4] to hold directors and officers accountable. This couldn't be further from the truth.

Investors can still bring breach of fiduciary duty suits derivatively in Delaware and claim that the proxy is misleading — they just can't rely on Section 14(a). In addition, as mentioned earlier, if plaintiffs do want to cite Section 14(a), they can file a direct suit in federal court.

When corporations adopt forum selection bylaws in their charter, they ensure that plaintiffs have appropriate venues for remedies, but not needlessly duplicative, expensive venues.

This is a responsible, pro-shareholder position. After all, it's shareholders who pay defense costs, not to mention the cost of D&O insurance. The latter will be more expensive when duplicative litigation remains a threat .

Author: Priya Cherian Huskins

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[1] Lee v. Fisher," *United States Court of Appeals for the Ninth Circuit (en banc)*, 1 June 2023. PDF file.

[2] "Delaware Code Title 8, Corporations, Chapter 1, Subchapter I," *Delaware General Assembly*, accessed 13 Jan 2026.

[3] Seafarers Pension Plan v. Bradway, *United States Court of Appeals for the Seventh Circuit*, 7 Jan 2022. PDF file.

[4] "Will Courts Prevent Investors from Holding Managers Accountable?" *Bloomberg*, 12 Dec 2022.

Should We Place a Tail Policy on Our Private Company D&O Insurance Before an IPO?

A question that comes up at the time of an IPO is this: Should we place a tail policy on our private company D&O insurance?

Although this is a complex question, the answer is straightforward: No, if you can avoid a past acts date on your public company policy. I'll use the rest of this article to explain why.

Private versus public company D&O insurance

Private company D&O insurance differs from public company D&O insurance in various ways.

Typically, companies make the switch between these two different types of insurance at the time of an IPO (You can find a link to our guide to this process here.) The switch is mandatory.

To help give context to the discussion here, it's important to keep in mind that a characteristic of all D&O insurance policies is that they are claims-made policies, meaning that the policy that responds to a claim is the policy that is in place at the time a claim is made.

(This contrasts with occurrence policies. With occurrence policies, the policy that responds is the policy that was in place at the time of the alleged wrongful act.)

A little background on tail policies

If a claims-made policy like a D&O insurance policy is not renewed, then claims that occur after the end of the last policy period go uncovered. Companies that are continuing in business, of course, typically renew their policies.

A time when a policy is typically not renewed is when a company is acquired. This is a time where a "tail policy" (also known as a "run-off policy") might be purchased.

Here's a refresher on what tail policies are:

A tail policy covers what would otherwise be a gap in coverage for Ds and Os after the sale of a company. The gap exists because the D&O policy of the acquiring company will typically not respond on behalf of the selling company's Ds and Os for claims that arise post-closing that relate to pre-closing activities.

When a tail policy is purchased, the insurance carrier for the selling company agrees to hold open the D&O insurance policy for a specified period of time **past** the policy's normal expiration date. In the United States, six years is the standard. In other words, if a claim arises within six years after a company is sold, the selling company's Ds and Os will be covered under their original D&O insurance policy.

The argument for putting a tail on a pre-IPO private company policy

Of course, a company doing an IPO isn't ceasing its business, so why does the tail policy question come up?

The answer is the difference between the private and public forms of D&O insurance. These two types of insurance do not cover exactly the same thing.

Most notably for this discussion, the public company form of D&O insurance covers the corporate entity only for securities claims (i.e., a claim alleging violation of laws regulating securities, or a claim brought derivatively on behalf of a securities holder).

This is a real concern, and the cost to defend and settle this litigation is high.

By contrast, the private company form of D&O insurance covers the corporate entity in a broader set of circumstances than just securities claims.

Since the coverage grants are different, the argument for putting a tail on the private company D&O policy goes like this:

1. What if a non-securities claim arises against the corporate entity after the IPO for activities that predate the IPO?
2. The public company policy will not cover this claim, but a private company policy would have.
3. Thus, we should put a six-year tail on the private company policy.

Why a tail policy doesn't work in these situations

The argument I just laid out sounds nice in theory. However, there are a couple of problems with the argument.

First, all private company policies have exclusions for any claims having to do with being a public company.

Thus, even if you put a tail on a private company policy and a claim arises during the six-year tail period, the private company policy will not respond if the claim has anything to do with the IPO or status as a public company.

Moreover, when you put a tail on your private company D&O policy, the carriers handling your go-forward public company policy are likely to put a "past acts" (also known as a "prior acts") date on the public company policy (the policy that would typically respond to anything having to do with your IPO).

That's because insurers have a principle that only one insurance policy can respond to a claim.

When a carrier puts a past acts date on a policy, they are putting an exclusion on a policy for all claims related to activities that took place before the past acts date. The past acts date will be the date of the new public company policy, which is to say the IPO.

Now ask yourself this question: If I get sued over statements made in my registration statement, such as misstated financials or really anything having to do with the pre-IPO history of my company as expressed in my S-1 registration statement, what might happen?

It's obvious: Anything related to disclosures in the registration statement took place before the IPO date. Coverage denied. Thus, companies embarking on an IPO and faced with the question of coverage have to make a choice about what they prioritize; they can't have perfect continuity between private company and public company D&O insurance.

The choice is between broad coverage for the corporate entity and maximizing coverage for your security claim. In the latter situation, you will want to ensure a past acts date won't interfere with getting your claim paid.

The solution: A policy without a past acts date

Ideally, your public company D&O policy will not have a past acts date and will respond to any claim that arises during the policy period.

Your broker will begin building your public company D&O insurance policy during the IPO preparation process. Your public company D&O insurance form needs to be in place and ready to respond to any claims before the first trade on the day of your IPO.

So, for example, if you have a claim that comes in the day after your IPO, it's the public company policy that will respond. Without a past acts date, the carrier will not have the ability to make an argument to deny coverage based on the timing of the activities that are the subject of the claim.

The decision to put a tail on your private company D&O policy is just one of many decisions to be made as you place D&O insurance for an IPO company. Some of the decisions, like whether to put a tail policy on your private company D&O policy, involve non-obvious considerations. (Note: There can be unusual circumstances in which carriers refuse to provide policies without a past acts date; for the reasons discussed above, this puts your company in a potentially difficult situation.) Other decisions are more complex and nuanced. This is why it's critical that you work with a broker who understands what your coverage priorities are, how securities claims actually work, and how the D&O claims process works, too.

Author: Priya Cherian Huskins

How Often Do You Need to Bolster Your Defense Arsenal? (Updating Personal Indemnification Agreements)

Let's assume that you were given a personal indemnification agreement when you became an officer or director of the company you serve. These agreements are a critical part of the protection equation when it comes to being able to defend yourself against frivolous litigation.

A good question that comes up often is this one: How often should a personal indemnification agreement be updated?

As a general matter, I recommend updating these agreements as the litigation environment evolves, which is to say every three to five years or so. Just as we update D&O insurance policies to keep up with litigation trends, it also makes sense to refine personal indemnification agreements.

Changes to a good agreement will be incremental and can often seem unimportant when considered one by one. Moreover, according to Gallagher's proprietary database of D&O-related litigation, in any given year, more than 95% of public companies will not see any kind of litigation at all.

Given that, do you even need to update your indemnification agreements? Yes. Optimizing protection for directors and officers is all about planning for unusual situations. Once a "situation" arises, it's too late to wish that you were better prepared.

Below is a list of some of the protections that I find are often missing from older forms of indemnification agreements. Some — but not all — of the protections on the list below can also be addressed by D&O insurance. How friendly the terms will be will depend, among other things, on what is available in the market at the time your D&O insurance policy is negotiated.

Remember, too, that a D&O insurance policy is a contract with a true arms-length, third-party D&O insurance carrier, and these policies are generally renewed annually. By contrast, personal indemnification agreements are issued by companies that are eager to have you serve as a director or officer, and the agreements typically change only if you agree to the change.

Coverage for "informal" investigations

Regulators like the Securities and Exchange Commission, the Department of Justice and others do not necessarily limit themselves to investigating an individual through a formal procedure. Enforcement actions often start with an informal conversation — and you'd do well to bring your lawyer along to this informal chat. It's all too easy to fall into a trap for the unwary; an experienced lawyer will stop you from tripping yourself up.

But, who will pay for this lawyer? Definitely not you personally if you have an indemnification agreement that includes investigations as a trigger for coverage, whether they are formal or informal. Older indemnification agreements often lack clear coverage for informal investigations.

Definition of success

As a reminder, Delaware law requires that a determination be made as to whether or not an indemnitee is entitled to indemnification before any payments are made. "Success on the merits[1]" entitles an indemnitee to the payment. But what is "success on the merits" in a world where trials are rare and many actions are settled by making a large payment without any admission of fault?

More modern forms of indemnification agreements typically have robust definitions of what constitutes success on the merits. This definition of success can explicitly include everything from dismissals to settlements to even no-contest pleas.

Wealth security policies

Independent directors sometimes purchase wealth security policies, which are personal policies designed to protect an independent director should company indemnification and company insurance be unavailable.

Problems can arise vis-à-vis indemnification if you have an older form of indemnification agreement that states it will not pay for anything if any insurance has responded. This type of provision creates unnecessary confusion. Modern policies resolve the issue by clarifying that payment by a wealth security policy carrier doesn't eliminate the company's obligation under the indemnification agreement.

Who decides if insurance is not permitted by law

Many older indemnification agreements contain an exclusion that says the company will not pay if indemnification is "prohibited by law." This seems reasonable until you ask the question, "In whose opinion?" An indemnitee would certainly prefer that the controlling opinion not be the company's lest the company approach the question with the wrong set of incentives.

Advancement of expenses

As a reminder, the right to the advancement of expenses is not a separate right from the right of indemnification. Older forms of indemnification agreements generally include this right, but it is often less robust than more modern forms.

For example, the older agreements often fail to specifically include provisions that can be helpful outside of the United States in regions where the right to the advancement of legal fees is less clear. Another often missing provision is a provision forestalling a company's attempt to seek a "bar order" from a court to avoid advancing legal fees.

D&O insurance tail policies

Modern forms of indemnification agreements often contain specific provisions that address a company's obligation vis-à-vis D&O insurance, including the obligation to obtain a six-year tail policy if the company is purchased in an M&A transaction (or another change-of-control transaction takes place).

This is a good example of a provision that has become more important over time. There was a time when the purchase of a six-year D&O tail policy for the selling Ds and Os was an uncontroversial and routine deal point. Today, many buyers will try to negotiate this point, often to the detriment of the selling Ds and Os if this issue was not already addressed properly in an indemnification agreement.

Specific performance

An indemnification agreement is a contract. What happens if the company decides that it doesn't want to fulfill its obligations, for example, by failing to advance your legal fees in a timely way? In this situation, you don't want to sue your company and, after years of litigation, have them reimburse you for your legal fees; given the very high price of D&O litigation defense work, you want your company to fulfill its promise to pay your legal fees as they are incurred.

Adding a provision to your indemnification agreement that the company has agreed to the remedy of specific performance goes a long way to ensuring that you won't go bankrupt trying to pay your own legal fees.

These are just a few provisions that are often ripe for improvement in older forms of indemnification agreements. You can optimize your protection by asking someone who sees a lot of indemnification agreements to review and update your form of indemnification agreement every few years. Be sure to get help from someone who sees these agreements not only when they are being entered into, but also when they are actually being used.

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[1]Passannante, William. "A D&O's Success on 'the Merits or Otherwise' Should Eliminate Insurance Company Attempts To Recoup Defense Costs," *Mondaq*. 22 May 2014.

State Choice of Forum Provisions: Streamlining Fiduciary Duty Lawsuits, Including Diversity Suits

As some recent lawsuit dismissals have demonstrated, state choice of forum provisions have helped companies control what was otherwise the problem of duplicative, multi-jurisdictional breach of fiduciary duty suit litigation.

I've written at length about federal forum provisions as a remedy for frivolous Section 11 lawsuits. But before federal forum provisions became a hot topic, their predecessor, state choice of forum provisions, were a theoretical solution to end frivolous multi-jurisdictional litigation for internal corporate matters such as breach of fiduciary duty suits.

As some recent fiduciary duty suit dismissals have demonstrated, state choice of forum provisions remain an important protection companies should insert in their charter documents.

State choice of forum provisions: A brief background

State choice of forum provisions are put into companies' bylaws to limit where shareholder plaintiffs can bring certain types of litigation, namely:

- Derivative suits
- Fiduciary duty suits
- Claims under the Delaware General Corporation Law (DGCL)
- Other claims regarding internal affairs of the corporation

These choice-of-forum provisions have helped companies control what was otherwise the problem of duplicative, multi-jurisdictional breach of fiduciary duty suit litigation, particularly in the M&A context. They were first suggested in the 2010 case In re Revlon, Inc. Shareholders Litigation, and many corporations subsequently adopted them.

The Delaware Chancery court confirmed the efficacy of these provisions to confine breach of fiduciary duty suits to just one state in Boilermakers Local 154 Retirement Fund v. Chevron Corp.

Not long after the 2013 decision in Chevron, Delaware legislators amended the DGCL to explicitly authorize state choice of forum provisions, but only if the choice of forum was Delaware (and not some other state).

From a memo at Sidley Austin LLP on the matter:

> The new legislation will essentially codify the Delaware Court of Chancery's June 2013 decision in Boilermakers Local 154 Retirement Fund v. Chevron Corporation, 73 A.3d 934 (Del. Ch. 2013), which upheld the statutory and contractual validity of board-adopted forum selection bylaws. Conversely, it will reject the Delaware Court of Chancery's September 2014 decision in City of Providence v. First Citizens BancShares, Inc., 99 A.3d 229 (Del. Ch. 2014), which upheld the validity of a Delaware corporation's board-adopted forum selection bylaw that designated North Carolina, the state in which the corporation is headquartered, as the exclusive forum for litigating internal corporate claims.

The Gap case

In 2020, Gap was hit with a derivative diversity lawsuit, claiming that Gap directors "deceived stockholders and the market by repeatedly making false assertions about the Company's commitment to diversity," and that "Gap has failed to create any true racial or ethnic diversity at the very top of the Company — on its Board of Directors and executive management team."

Along with these statements is a list of allegations against Gap directors, including breach of fiduciary duty, aiding and abetting breach of fiduciary duty, abuse of control, unjust enrichment, and violation of Section 14(a) of the Securities Exchange Act of 1934.

The fact that Gap stated in its corporate bylaws that derivative suits must be brought in Delaware meant the company positioned itself for a win when it came to where this particular lawsuit could be brought.

And indeed, that is what has happened. In April 2021, the case against Gap brought in a federal district court in Northern California was dismissed—not on the merits of the underlying case but on the grounds of state choice of forum provisions in Gap's corporate bylaws.

According to the court's order to grant a motion to dismiss:

> The Gap's Bylaws contains a forum selection clause which requires any derivative claims brought on behalf of the Gap to be brought in the Delaware Court of Chancery. ... A forum selection clause is appropriately enforced through the doctrine of forum non conveniens. ..."The doctrine of forum non conveniens allows a court to dismiss a case properly before it when litigation would be more convenient in a foreign forum."

The court pointed out that whenever such forum provisions exist, the plaintiff has the burden to prove that the transfer to another forum is unwarranted. The court reiterated that it "must enforce a forum-selection clause unless the contractually selected forum affords the plaintiffs no remedies whatsoever."

In the case of Gap, the court pointed out that:

> Plaintiff does not contend the clause is the product of fraud or overreaching or that trial in Delaware would be so gravely difficult and inconvenient that she would, for all practical purposes, be deprived of her day in court. ... Thus, the only remaining issue is whether enforcing the forum selection clause would contravene the strong public policy of the forum in which the suit is brought.

Based on its analysis, the court found that the plaintiff in the Gap case failed to demonstrate that "enforcing the forum selection clause would contravene a strong public policy of this forum."

Plaintiffs also attempted to argue that their case should not be dismissed because, in addition to asserting breach of fiduciary duty claims, the plaintiffs brought a claim under Section 14(a) of the Securities Exchange Act of 1934 (such a claim can only be brought in federal court).

The court rejected the plaintiffs' argument against dismissal of the case, including the 14(a) claim. The court noted that the absence of the ability to bring a 14(a) claim in Delaware state court does not mean that absolutely no remedy is available to plaintiffs in Delaware state court. As such, dismissal was proper. (Note that California courts have not taken a consistent position[1] on this last point.)

The Gap is not the only lawsuit in recent times where choice of forum came into play. Facebook recently won a motion to dismiss[2] its diversity lawsuit in part due to state choice of forum provisions. Oracle recently also won a motion to dismiss[3] its diversity suit as well. In both cases, part of the argument for the motion to dismiss was the fact that the company's bylaws selected Delaware as the choice of forum for the litigation.

Takeaways for both new and mature public companies

New and mature public companies should ensure that their corporate bylaws contain state choice of forum provisions. Such provisions keep shareholders' ability to pursue fiduciary duty suits intact while also ensuring that the same litigation is not being pursued duplicatively in multiple state courts.

State choice of forum provisions are particularly important given the frequency of M&A-related litigation, the rise in political litigation such as diversity lawsuits, and the overall increase in derivative suit severity. Now is the time to review your corporate bylaws and ensure that they include state choice of forum provisions.

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[1]Seal, Dean. "Oracle, Ellison Dodge Investor Suit Over Board Diversity," *Law 360*. 24 May 2021.

[2]"Court Dismisses Board Diversity Suit Against Facebook Directors," *Paul Weiss*. 24 Mar 2021.

[3]Beyoud, Lydia. "Oracle Wins Dismissal of Shareholders' Board Diversity Suit," *Bloomberg Law*. 24 May 2021.

More Good News on Section 11 Cases for Newly Public Companies

More good news on the Section 11 front for new public companies: Some California-based public companies that have adopted federal choice of forum provisions are winning their motions to dismiss in state court. Now, a state court in Utah has also granted a motion to dismiss a Section 11 suit due to federal forum provisions.

Federal choice of forum provisions in a company's charter documents (sometimes call the "Grundfest Clause," named for Stanford Professor Joe Grundfest, who originally highlighted the solution) purport to make federal court the exclusive forum for all Section 11 cases.

As a reminder, Section 11 cases involve allegations of material misstatements or omissions in a company's S-1 and other registration statements and can currently be brought in federal or state court; sometimes they are brought in both over the same set of facts.

The insertion of federal forum provisions in a company's charter documents still allows shareholders to bring Section 11 suits in federal courts, while at the same time eliminating state courts as an additional, duplicative venue for this type of litigation.

In April 2021, in Volonte v. Domo, Inc., a Utah state court found that federal forum provisions are generally valid and enforceable, and that it was appropriate to enforce them in the case at hand.

After a lengthy analysis that looked at both the validity of Domo's bylaws and the plaintiff's arguments, the court found that "case law makes it clear that Domo's bylaws are binding between Domo and its shareholders." Despite the plaintiff's best efforts to argue otherwise, Domo defendants won their motion to dismiss.

This is particularly good news given the sheer volume of companies that are going public, be it through a traditional IPO, a direct listing, or de-SPAC transaction. All of these transactions involve registration statements, which makes these new public companies particularly vulnerable to securities litigation.

Domo now joins a growing list of companies that have eliminated duplicative and thus frivolous Section 11 litigation with federal choice of forum provisions.

Status of Current FFP State Court Litigation as of 5/18/2021

Case Name and Location	Motion to Dismiss Status
Wong v. Restoration Robotics, Inc. San Mateo County, California	Granted On appeal
In re Uber Technologies, Inc. Securities Litigation San Francisco County, California	Granted Notice of appeal field
In re Dropbox, Inc. Securities Litigation San Mateo County, California	Granted Notice of appeal field
In re Sonim Technologies, Inc. Securities Litigation San Mateo County, California	Granted
In re Tintri, Inc. Securities Litigation San Mateo County, California	Denied on procedural grounds: MTD filed too late
Panther Partners v. Jerry Guo (Casa Systems) New York County, New York	Granted (Dismissal unrelated to FFPs)
Volonte v. Domo, Inc. Utah County, Utah	Granted Reconsideration request field

While shareholders still have a forum to pursue meritorious claims in federal court, the Domo decision — along with others like it — helps cement the path that a company can take to avoid duplicative, frivolous litigation in multiple courts.

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New Protection for Corporate Officers: Delaware Exculpation

The Delaware legislature has expanded protection from monetary liability in certain circumstances to senior officers.

It's a banner year for Delaware corporations when it comes to protecting their directors and officers. Earlier this year, the Delaware legislature took steps that will allow captives to become a more viable alternative to traditional D&O insurance. More recently, the Delaware legislature has expanded the ability[1] of corporations to protect officers from monetary liability in some circumstances. Delaware corporations should take steps to implement this newest protection as soon as possible.

Quick background

In 1985, most businesspeople were disturbed by the outcome of Smith v. Van Gorkom. This was a case involving a cash-out merger of TransUnion for a substantial premium over the market price of this publicly traded stock.

Nevertheless, in a 3-2 decision, the Delaware Supreme Court found that the Court of Chancery erred in dismissing the fiduciary duty of care suit against the TransUnion directors. The parties ended up settling the case for $23.5 million, which was $13.5 million more than the company's D&O insurance policy.

To be sure, the record reflects hasty decision-making on the part of the board. Nevertheless, a major post-Van Gorkom concern was whether this decision would cause businesspeople to be reluctant[2] to serve on corporate boards.

While public reporting indicates that the individual directors did not, in fact, end up paying[3] all of the settlement personally due to the beneficence of the acquiror, the threat of personal financial liability was all too real.

The Delaware legislature reacted swiftly to the threat of losing competent directors. By 1986, Delaware General Corporation Law Section 102(b)(7)[4] was in place.

As originally constructed, DGCL Section 102(b)(7)[5] allows Delaware corporations to include in their certificates of incorporation a provision that greatly reduces the possibility of a director facing personal monetary liability for breaches of fiduciary duty, particularly the duty of care.

While the Van Gorkom case was a direct suit, Section 102(b)(7)'s provisions for directors apply to both direct and derivative suits.

Referred to as "exculpation provisions," Section 102(b)(7) is not a free pass for directors. Directors can still be held personally liable for breaches of their duty of loyalty and good faith (i.e., Caremark claims), intentional misconduct or knowing violations of law, transactions involving improper personal benefits and Section 174 violations concerning lawful dividends, stock repurchases and redemptions.

Plaintiffs' bar innovation

When plaintiffs have tried to bring duty of care suits against directors, exculpatory provisions have allowed corporations and their directors to win their motions to dismiss quickly and efficiently. This has, as intended, discouraged the plaintiffs' bar from bringing these suits.

However, as the plaintiffs' bar knows, officers of a corporation have the same fiduciary duties that directors have, as clarified by a 2009 Delaware Supreme Court decision (Gantler v. Stephens[6]). Realizing this, the plaintiffs' bar has pursued a strategy of bringing duty of care claims against officers, knowing Section 102(b)(7) does not protect them.

Amendments to Delaware General Corporation Law

Amendments to Section 102(b)(7) enable corporations to protect certain officers from personal monetary liability for stockholder claims related to the breach of the duty of care. The Delaware legislature has given corporations the ability to expand exculpation provisions to certain senior officers,[7] such as:

- Chief executive officer
- President
- Chief operating officer
- Chief financial officer
- Chief legal officer
- Controller
- Treasurer
- Chief accounting officer
- The most highly compensated executive officers as identified by public filings with the SEC
- People who consent to be identified as an officer

Exculpation of corporate officers has the same limitations that the exculpation provision has for directors, ensuring that officers also do not have a free pass. In addition, and unlike the case for corporate directors, exculpation for officers only applies to direct suits and not to derivative suits.

Next steps

Similar to the situation for corporate directors, senior corporate officers can have the benefit of the new exculpation provisions only if the corporation takes the affirmative step of putting these provisions in its certificate of incorporation.

Such a step will be relatively easy for companies that are just being formed. Officer exculpation provisions will become as ubiquitous as director exculpation provisions over time.

Existing private companies will want to ask their stockholders to vote to approve officer exculpation provisions after their boards meet and confirm that they want to make such an amendment to their certificates of incorporation.

Existing public companies can also ask stockholders to vote to approve officer exculpation provision amendments to their certificates of incorporation. This might be a good thing to put on the agenda for the next annual stockholder meeting.

Of course, public companies have to think whether proxy advisory firms such as ISS and Glass Lewis will recommend that their clients vote to approve these amendments. At the time of this writing, neither has published a position on the topic.

As a general matter, other matters that tend to reduce frivolous litigation, such as federal choice of forum and state choice of forum provisions, have (ultimately[8]) been supported by proxy advisory services.

A good practice for both public and private boards will be to take the time to discuss and record, in official board meeting minutes, the reasons for adopting officer exculpation provisions.

There are, of course, all the typical reasons companies promise to protect directors and officers, such as the desire to recruit and retain the best talent, as well as the concern that directors and officers be able to make decisions without fear of personal financial liability due to unmeritorious claims.

An additional reason is that, while D&O insurance is a good backstop to the concern for financial liability, it can be expensive, it may not always be available and it cannot address the time wasted by frivolous litigation. Moreover, one law firm notes that officer exculpation is allowed in some other states. Finally, adding officer exculpation at least partially remedies the inconsistent treatment of directors and officers, both of whom have fiduciary duty obligations.

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[1]Helwig, Joan. "Delaware Amends Its Business Entity Laws," *Cogency Global*, 29 Jul 2022.

[2]Radin, Stephen. "The Director's Duty of Care Three Years After Smith v. Van Gorkom," *Hastings Law Journal*, Vol. 39, Issue 3, 1988.

[3]Black, Bernard; Cheffins, Brian; and Klausner, Michael. "Outside Director Liability," *Stanford Law Review*, Vol. 58, pp 1055–1159, 2006.

[4]"Delaware Code Title 8, Chapter 1, Subchapter I," *The Delaware Code Online*, accessed 13 Jan 2026.

[5]"§ 174. Liability of Directors for Unlawful Payment of Dividend or Unlawful Stock Purchase or Redemption; Exoneration from Liability; Contribution Among Directors; Subrogation," *Simplified Codes (Delaware General Corporation Law)*, accessed 13 Jan 2026.

[6]"Gantler v. Stephens," *Supreme Court of the State of Delaware*, 27 Jan 2009. PDF file (hosted on Potter Anderson & Corroon LLP website).

[7]"Exculpation of Officers of Delaware Corporations from Liability for Breach of Fiduciary Duties Now Permitted," *Baker Botts*, 18 Aug 2022.

[8]"ISS 2021 Policy Updates on Federal Forum and Exclusive State Law Forum Provisions, Board Diversity and Other Matters," *Goodwin Procter,* 18 Nov 2020. (Hosted on JD Supra website).

Time to Take the Plunge?
Officer Exculpation Under Delaware Law

For corporate officers, exposure to potential liability is part of the job. Two of the primary protections available to corporate officers come in the form of a tailored D&O insurance program and a favorable indemnification agreement. Relatively recently, the Delaware legislature gifted corporations the ability to extend an additional layer of protection for certain officers by amending their certificates of incorporation to provide for officer exculpation. While some Delaware corporations successfully went through the process of amending their certificates of incorporation to provide for this new protection, more took a wait-and-see approach. This article is for those that might be considering taking the plunge in 2024.

This article will:

- Provide a refresher on officer exculpation under Delaware law
- Share encouraging data from the 2023 proxy season
- Suggest next steps and considerations

Officer exculpation: A quick refresher

We previously discussed officer exculpation under Delaware law shortly after the Delaware legislature amended Section 102(b)(7) of the Delaware General Corporation Law[1] in 2022 to expand exculpation to certain senior officers. As a reminder, before this amendment, which dates back to the mid-'80s,[2] Section 102(b)(7) only allowed Delaware corporations to eliminate or limit (i.e., exculpate) the personal liability of a corporation's director or its stockholders for monetary damages for breaches of those directors' fiduciary duties of care. Director exculpation provisions are commonplace, and it's common for Delaware corporations to include director exculpation provisions in their certificates of incorporation.

The plaintiffs' bar has exploited the fact that officers haven't been extended the same level of protection as directors. Realizing that officers of a corporation have the same fiduciary duties as directors and knowing Section 102(b)(7) didn't protect them, it has more frequently pursued a strategy of bringing duty of care claims against officers.

The amendment to Section 102(b)(7) effectively allows Delaware corporations to include in their certificates of incorporation a provision that greatly reduces the possibility of certain officers facing financial monetary liability for breaches of their fiduciary duty of care.

The Delaware legislature limited officer exculpation to the following officers, as described in Section 3114(b) of Title 10 of the Delaware Code:[3]

- Chief executive officer
- President
- Chief operating officer
- Chief financial officer
- Chief legal officer
- Controller
- Treasurer
- Chief accounting officer
- The most highly compensated executive officers as identified by public filings with the SEC
- People who consent to be identified as an officer

Additionally, and more importantly, Delaware corporations must take the affirmative step of putting officer exculpation provisions in their certificates of incorporation. For corporations that are just being formed, this should be a relatively easy exercise. Private corporations will need to ask their stockholders to vote to approve officer exculpation provisions after their boards meet and confirm they want to make such an amendment to their certificates of incorporation. This is not likely that heavy of a lift here either.

Public companies may face more of a challenge. They also need to put this to a stockholder vote, which requires a proposal in their proxy statement. For public companies, putting anything non-routine up to a stockholder vote is generally met with some hesitation. Officer exculpation is no different. Some of the questions that companies were asking themselves in advance of the 2023 proxy season when it came to this issue included:

- What are the benefits to the company?
- Do our officers really care about this?
- How will our stockholders react to this proposal?
- Will our proposal be met with resistance from proxy advisory firms?
- Should we wait to see what other companies do this year and revisit next year?

Almost a year later and with the results from the 2023 proxy season in hand, companies that chose the wait-and-see approach have some data they can use to draw insights as they consider the issues.

By the numbers: Public company stockholders were largely supportive in 2023

Public companies that decided to put an officer exculpation provision up for a stockholder vote last proxy season were generally successful in getting the proposals approved.

Sullivan & Cromwell reported[4] on the results for annual meetings through the first half of 2023 that included an officer exculpation provision proposal. Here are a few of the notable data points:

- 269 US public companies put an officer exculpation proposal up to a vote, including 31 companies in the S&P 500.
- 84% of those proposals met the applicable threshold for charter amendments under the company's organizational documents (typically a majority or supermajority of the company's outstanding shares).
- A determining factor for failed proposals was a low percentage of voted shares (high broker non-votes).
- While proxy advisory firm Glass Lewis generally recommended against these provisions, ISS recommended against only 19% of them; the recommendations did not impact voting results.

Glass Lewis' and ISS' positions in 2023 were generally that they would closely evaluate officer exculpation proposals on a case-by-case basis. Notably, Glass Lewis indicated it would recommend voting against these proposals unless the board provided a compelling rationale for the adoption and the provisions were reasonable.

Looking to the 2024 annual meeting season, voting policies for Glass Lewis and ISS[5] regarding officer exculpation haven't changed, so we should expect similar recommendations from these proxy advisory firms. While proxy advisory firm views on this topic are an important data point, the voting results noted above strongly indicate that stockholders are generally supportive of these proposals despite the concerns expressed by proxy advisory services.

Officer exculpation: Next steps and considerations

For Delaware corporations, particularly those that are public, the prospects of a "yes" vote for an officer exculpation provision proposal this upcoming proxy season are generally good. However, before plotting a course whose destination is officer exculpation, here are a few suggested next steps and considerations:

1. Secure internal alignment about the rationale for the proposal

As previously discussed, good practice for both public and private boards will be to take the time to discuss and record, in official board meeting minutes, the reasons for adopting officer exculpation provisions. This is especially important since this position will need to be detailed in the board's recommendation for the proposal in the proxy statement. The form of board recommendation last proxy season relating to officer exculpation didn't vary much across companies.

In case you are looking for inspiration when it comes to determining the rationale for your corporation's own proposal, here are links to a few company proxy statements that were successful in securing stockholder approval: Fox,[6] SWK Holding Corporation,[7] Guidewire Software[8] and Skillsoft.[9]

2. Build the proposal into your proxy statement timeline

It takes time to ensure an understanding of the required procedures to adopt an officer exculpation provision under your governance documents, Delaware law, exchange listing standards, and Securities & Exchange Commission (SEC) rules. Take the SEC rules, for example: An officer exculpation proposal would require the filing of a preliminary proxy statement[10] since it would, if approved, result in the amendment of the certificate of incorporation. There is also the matter of the voting standards that attach to non-routine matters like this one, and the related discussion that would need to be included in the proxy statement.

All this to say that companies would be wise to take the time to build the proposal into their proxy statement timeline early in the process.

3. Gauge stockholder sentiment and consider proactive outreach

There are a few ways to gain insight into how your own proposal may fare, as well as to how to best ensure a favorable voter turnout. Out of the gate, general voting results on these proposals from last proxy season should provide some comfort in the chances of your proposal getting approved.

To gain a better insight into your situation, consider your largest institutional holders and companies where they hold significant equity positions. If any of those companies put an exculpation provision proposal up for a vote last year and it was approved, it would be a good idea to review how those companies teed up the proposal in their proxy statements.

Another way is to look at how your peers fared in the case that they offered up the proposal.

Additionally, for those companies that proactively conduct institutional stockholder outreach ahead of their annual meeting, it may be worthwhile to include officer exculpation as a topic of discussion and mention that the company is considering adopting it.

Lastly, as noted earlier, the determining factor for failed votes was a low percentage of voted shares, which is why it may make sense to engage a proxy solicitor to help in, among other things, providing an accurate analysis of your stockholder base and garnering a high vote participation.

4. Multi-class companies, you can breathe a sigh of relief

Plaintiff stockholders brought lawsuits against Fox and Snap, both multi-class companies, for the way they structured their officer exculpation proposals. The argument in those cases was effectively that the companies put the proposals up for vote to stockholders together as a single class, as opposed to seeking votes from each separate class. This created a significant amount of angst for similarly situated companies and uncertainty for multi-class companies that were considering including an exculpation provision proposal in their next proxy statement. Vice Chancellor Laster ruled in favor of Fox and Snap by granting summary judgment in March 2023.[11] The plaintiffs filed a notice to appeal with the Delaware Supreme Court,[12] which affirmed the decision on January 17, 2024. Translation: Delaware General Corporation Law doesn't require multi-class companies to seek separate approval from each class to amend their certificates of incorporation to provide for officer exculpation. For more information, see this post from Wilson Sonsini.[13]

Ultimately, for those companies with multiple classes of stock that are looking to put one of these proposals on the ballot, the recent Delaware Supreme Court decision should make the process much easier and less fraught with uncertainty.

5. Officer exculpation isn't a free pass

It's worth noting that officer exculpation isn't a free pass for officers in terms of their fiduciary duties. It wouldn't protect officers from being held personally liable for breaches of their duty of loyalty and good faith, intentional misconduct or knowing violations of law, transactions involving improper personal benefits, and any actions or claims brought derivatively or by the board. This is a point that several companies have made in their proposals. Relatedly, it may be a good idea to conduct fiduciary responsibility refresher training for your directors and officers as part of this general exercise.

6. D&O insurance considerations

Here is a common question that has been asked: Would adding an officer exculpation provision to our certificate of incorporation result in lower D&O premiums? Unlikely. What's more likely is that this issue will become a point of discussion on future D&O insurance program renewal calls. If a company hasn't added officer exculpation, insurers may factor that into how they profile that company's risk in the context of the potential defense and settlement costs associated with stockholder suits brought against officers. So, if your company has successfully adopted an officer exculpation provision, be sure that it's highlighted in connection with your next D&O insurance program renewal.

Parting thoughts: A good option for most companies

For most Delaware corporations, extending exculpation to officers, like federal choice of forum and state choice of forum provisions, should generally be viewed as low-hanging fruit when thinking of how best to reduce the corporation's risk profile, lessen frivolous litigation, and protect its directors and officers. While we continue to recommend that Delaware corporations consider extending exculpation to their officers, each corporation will need to take the time to discuss whether adding officer exculpation makes sense for them. The key will be to ensure that the discussion occurs early enough in the annual meeting and proxy season so that if the decision is to put this proposal in the proxy statement, there is ample time to best position the proposal for approval.

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[1]"Delaware Code Title 8, Chapter 1, Subchapter I," *The Delaware Code Online*, accessed 13 Jan 2026.

[2]"What Happened in Delaware Corporate Law and Governance From 1992–2004?" *University of Pennsylvania Law Review*, Vol. 153, No. 5, May 2005.

[3]"Delaware Code Title 10, Procedure, Chapter 31," *The Delaware Code Online*, accessed 13 Jan 2026.

[4]"Lessons from the 2023 Proxy Season," *Sullivan & Cromwell*, 14 Sep 2023.

[5]"ISS and Glass Lewis Update 2024 Proxy Voting Policies," *Cooley*, 22 Dec 2023.

[6]"2022 Notice of Annual Meeting of Stockholders and Proxy Statement," *Fox Corporation*, filed 3 Nov 2022.

[7]"2022 Annual Meeting & Proxy Statement," *Matrix Service Company*, filed 2022.

[8]"2022 Proxy Statement and Annual Report," *Guidewire Software*, filed 2022.

[9]"2023 Proxy Statement and Notice of Annual Meeting of Stockholders," *Skillsoft,* filed 2023.

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[11]"No Class Vote Was Required for Charter Amendments Exculpating Corporate Officers," *Reed Smith*, 31 Mar 2023.

[12]Murphy, Alexandria. "Delaware Extends Exculpation Rights to Senior Officers: Updates and Guidance on Corporate Charter Amendments," *Womble Bond Dickinson*. 21 Apr 2023.

[13]"Delaware Supreme Court Affirms Important Ruling for Multi-Class Companies Concerning Class Votes," *Wilson Sonsini*. 18 Jan 2024.

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