Gallagher

2026 EDITION

Guide to D&O Insurance for De–SPAC Transactions

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Going public through a spac business combination: Leverage our D&O insurance experience and knowledge

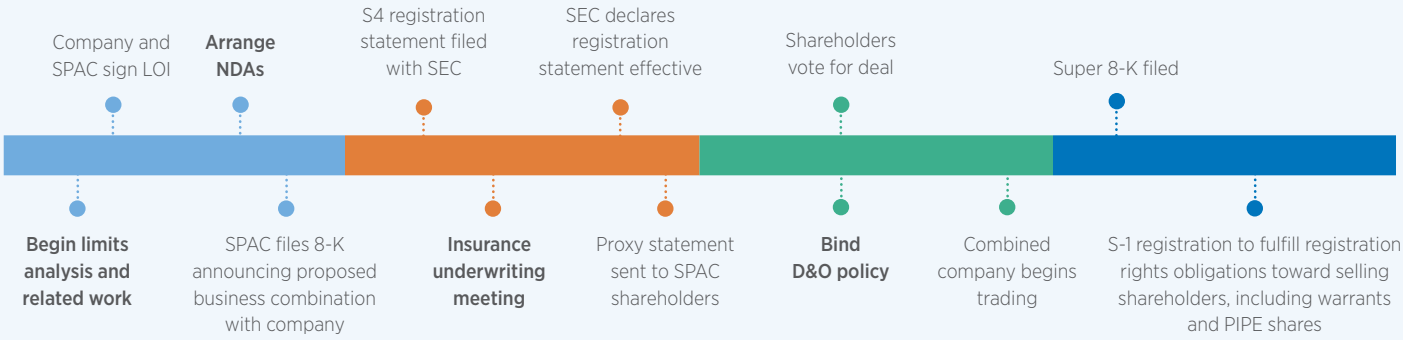
Gallagher is the market leader when it comes to placing D&O insurance for companies going public, be it through an IPO, direct listing or merger with a SPAC (a “de-SPAC” transaction). Experience matters in this arena.

You want a specialist on your insurance brokerage team to work through all the D&O liability insurance issues that will arise before, during and after the process of going public, as well as during the life of your 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 resource is your guide to the D&O insurance process for de-SPAC transactions.

De–SPAC going public timeline

See the timeline below to learn more about the D&O insurance process for companies going public through a de-SPAC transaction. Your public-company-ready D&O insurance policy must be ready to bind before your stock starts trading on a public exchange. **The key to an optimized outcome? Working with an experienced insurance broker and starting early.**



D&O Insurance Process

PREPARE

- Select D&O broker
- Develop strategy
- Evaluate
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  - SPAC's tail policy
  - International insurance
  - Cyber insurance
  - Other insurance lines
- Governance counseling
  - Corporate governance policies
  - Choice of forum and exculpation provisions
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- Negotiate coverage and pricing
- Negotiate warranty statements
- Present Insurance program
- Schedule compliance training

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- Coordinate private to public coverage transition
- Bind program the day before the combined company begins trading

SUPPORT

- Continued carrier communications
- Counseling
- Training/education
- Market updates
- Claims support

Source: Gallagher

If you are a foreign private issuer listing on a US exchange, there can be some additional elements of complexity when it comes to securing the right D&O insurance for you. This can include questions such as which carriers are right for you and whether you are more or less likely to be sued. Contact your Gallagher account executive to discuss these issues further. Also, read our Guide to D&O Insurance for Foreign IPOs and Direct Listings for more information.

1 Prepare

A. Develop a strategy

Setting the strategy involves taking a first look at several key questions, including the following:

- 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?
- What does the SPAC's insurance look like, and what is the best way to integrate it with the coverage for the combined entity?

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

B. Evaluate

i. Private company insurance

Ideally, you will have had at least $5 million to $10 million of D&O insurance limits in place as a private company. When purchasing your private company D&O insurance, consider whether you need an endorsement to ensure that your private company policy will provide coverage should you attempt to take steps to go public but fail. This move protects Ds and Os should the process of undertaking a de-SPAC transaction lead to an unfortunate or unexpected outcome.

Another advantage of purchasing $5 million to $10 million of private company D&O insurance is that this coverage ensures that the subsequent public-company D&O insurance program is not vulnerable to having warranty statements apply to this first $5 million or $10 million layer of insurance.

Private company D&O insurance policies are typically one-year policies, so keep an eye on your renewal date. You could find yourself needing to renew your private company D&O insurance policy even amid your go-public activities.

▶ Read about
Litigation Scenarios Private Companies Face Today and How D&O Insurance Can be a Critical Safeguard.

ii. SPAC tail coverage

Find out the level of coverage the SPAC has and ensure that it retains that level throughout merger negotiations and post merger. If the SPAC is extending its investment period to continue to negotiate or close the merger, it may be tempting to reduce the limit of its original SPAC IPO D&O policy to save on costs. However, reducing that limit will mean additional indemnification burdens on the target company. Understanding the level of coverage on the SPAC side and the costs associated with it will be key to ensuring the right level of coverage for the combined entity.

Historically, the practice was for SPACs to purchase D&O insurance policies that were of the same duration as the SPAC (be it 18 months or two years). These policies also had pre-negotiated terms for the SPAC tail policy. This meant that carriers and the SPAC sponsors knew at the time of the SPAC IPO what the cost of the tail policy would be.

However, having the SPAC purchase a separate tail may no longer be the best option. SPAC teams and their target companies will want to discuss the possibility of placing a combined go-forward D&O policy that covers:

- The SPAC and its directors and officers for post-merger claims related to pre-merger activities
- The private company target and its directors and officers for post-merger claims related to pre-merger activities
- The go-forward operating company and its directors and officers for future claims

This kind of policy is sometimes referred to as "the SPACage" or "the de-SPACage." Why purchase this kind of combined policy? The main reason is that the combined policy can save substantially on premium costs compared to the historical way of doing things. However, this new way is complex and requires bespoke policy language negotiations with the carrier by a knowledgeable SPAC insurance broker. It also only works when all parties are on the same page when it comes to contract terms and limits of insurance, especially since there will be one limit of insurance covering many different parties, as outlined above.

iii. SPAC IPO policy extension

In the last two years, multiple SPAC teams ran into longer SEC review times, a harder seller's market and a slew of other macro issues that made it difficult to complete a business combination within their original investment period. Many had to seek extensions to the SPAC, which meant needing to extend their D&O insurance policy periods.

The insurance market is open to providing these types of extensions, but SPAC teams still need to plan ahead and budget additional funds to cover extension premiums for their IPO D&O policies.

iv. International

Newly public companies can suddenly find themselves subject to intense scrutiny, including in non-US jurisdictions. Before going public, make sure you have analyzed your non-US subsidiaries and determine 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 it actually will. Many foreign jurisdictions require D&O insurance policies, if placed, be placed locally.

It is also worth noting that starting in 2024, most SPACs have domiciled in the Cayman Islands. Many do not plan to redomicile in the US after the merger, so all parties need to understand their jurisdiction plans post-merger and fold their insurance coverage discussion into those plans.

v. Cyber

Cybersecurity 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 topic is a board-level issue that needs to be addressed in a timely and comprehensive way.

vi. Other insurance

A newly public company has to be ready for public company scrutiny. You will want to button up your insurance risk management program across all lines of insurance (not just D&O insurance) before you promenade onto the public company stage. Remember too that the board will care about this at least by proxy season, given the required disclosures concerning a board's role in enterprise risk management.

▶ Learn more about
Protecting Directors and Officers of Foreign Subsidiaries.

▶ 2026 Cyber Insurance Market Outlook
With Cyber Liability Insurance Becoming More Ubiquitous and Complex, Get Our Insights Into Trends and What to Expect.

C. Governance counseling

i. Corporate governance policies

While D&O insurance is important, careful consideration should also be given to implementing corporate governance policies that can 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 and exculpation 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.

Another way to limit duplicative litigation is to implement federal choice of forum provisions. These are allowed under Delaware law, which can be influential for other jurisdictions as well. It is a good idea to include these provisions in your company's charter documents, as they may help you avoid having a suit challenging the disclosure being brought in state court in addition to federal court.

Delaware companies can now take advantage of limited exculpation provisions for their officers. This is something you will want to implement before becoming a public company.

D. Implement non-disclosure agreements (if needed)

Sometimes the SPAC's S-4 registration statement will be filed confidentially. If that is the case, you will want to have your broker ask each insurance carrier to sign a non-disclosure agreement (NDA) before being sent the confidential S-4 filing. In addition, some companies are more comfortable speaking to insurance carriers with an NDA in place. Ask your Gallagher account executive about how we have greatly streamlined this process.

▶ Learn more about

Federal Choice of Forum Provisions.

2 Launch

A. Broker sets up insurance carrier underwriting meeting

Your D&O insurance broker will facilitate a meeting with insurance carriers. This is an opportunity for the carriers to get to know the company and for them to ask questions. This is a critical part of the D&O insurance underwriting process for a company that is about to go public.

B. Refine limits analysis

Choosing D&O insurance limits should not be limited to peer data benchmarking and referencing 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 insurance markets

The current litigation environment for companies undertaking a de-SPAC transaction is a challenging one. Short-seller attacks are an especially pernicious risk for de-SPACing companies. Significant lead time and a clear strategy will help you optimize your insurance coverage. Management and the board will want to consider a variety of issues, including what type of D&O insurance program structure makes the most sense for the company, given the current pricing environment and the company's own unique risk profile.

Coverage terms in the D&O insurance contract can be challenging but will remain broad 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.

D. 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. Be sure to work with your broker to review and, as needed, negotiate the language of the higher limits warranties.

▶ Learn more about
SPAC Litigation and Enforcement Data From 2025 and Insights Into 2026.

E. Present insurance program to management

The final D&O insurance program should not be a "big reveal." Rather, your broker should be updating you on the progress of your D&O insurance program negotiations as they happen. That way, you can weigh in on certain strategic decisions, such as what self-insured retention (like a deductible) to take. During this process, the final pricing of your program options will come into sharper focus as well. Ultimately, you and your broker will come up with a joint recommendation for the board of directors.

F. Brief the board of directors

Even very sophisticated boards of directors may be unfamiliar with all the current issues at play when it comes to protecting themselves and their companies against the types of claims filed against new public companies. A good practice is to have your broker brief your board on the current litigation environment, as well as D&O insurance carrier market dynamics.

In our experience, most boards like to hear about the proposed insurance program directly from their insurance broker. This step allows the board to have a robust discussion about personal liability and the proposed D&O insurance program. Your board will likely want to provide input on the D&O insurance program structure and how much in limits should be purchased.

G. Schedule executive and employee compliance 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 on a national exchange 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 Implement

A. Finalize program

Things like the valuation of the company may not have been as clear earlier in the process as they are toward the end of the going public timeline. In addition, management and the board may have been mulling certain key decision points. As the SPAC shareholder vote approaches, however, all aspects of the D&O insurance program need to be finalized.

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 D&O program is bound.

C. Additional subjectivities

Subjectivities are carrier-imposed condition precedents to their insurance becoming effective. These conditions, be they answers to outstanding carrier questions or other items, need to be addressed at this time. A common subjectivity that will be addressed in due course is that the company start trading on an exchange. The most critical subjectivity, however, is usually the higher limits warranties.

D. Coordinate private-to-public coverage transition

Some brokers routinely recommend sending your private company insurance program into runoff. This may or may not be the right choice in your case. If you can get it, the better coverage path is 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.

▶ Learn whether

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

E. Bind the public company D&O insurance program

The SPAC shareholders have voted in favor of the business combination, and your private company will begin trading as a public company the next day — congratulations! Before you pop the champagne, email your broker instructions to bind the D&O insurance program.

Most companies choose to bind their public company D&O insurance program shortly after the SPAC shareholders vote in favor of the deal, but the timing can be different in some circumstances. In all cases, however, you want the public company D&O insurance program to be in place before the first trade of your stock as a public company on a national exchange.

What if your deal does not close? This can happen for a variety of reasons, including perhaps so many redemptions that a minimum cash condition for closing was not met. Whatever the reason, if you are not going to close the deal, you will, of course, not bind the new D&O insurance program. Instead, your existing private company D&O insurance policy will remain in place.

Unfortunately, some SPAC deals fall through instead of closing. If this happens to you, you might find yourself in a dispute with a SPAC over a failed deal. It is a good idea to discuss various deal termination scenarios ahead of time with your broker to understand the need for or availability of coverage.

4 Ongoing support

A. Counseling

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

B. Support for corporate activities

Are you opening a new subsidiary in a foreign country, planning a follow-on offering or perhaps contemplating M&A activities? These are all times to contact your D&O insurance broker to determine if these activities will impact your D&O insurance. In the case of M&A, your broker should be able to assist with things like insurance due diligence and the placement of any needed reps and warranties policies.

C. Board 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 view and sign up to receive our weekly blog on topics related to D&O risk and corporate governance, the D&O Notebook as well as issues that pertain to SPACs and de-SPACs in our Executive Risk & Finance article series. In addition, your Gallagher 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.

Our annual Board Education Resource Guide lists a variety of events for directors that are being hosted by leading organizations across the US.

D. D&O Liability and insurance market update

The insurance market is a dynamic system, and the legal landscape can shift quickly. An experienced D&O insurance broker can help you stay abreast of the latest developments.

E. Claims advocacy

All companies hope they will never need to use their D&O insurance — but sometimes claims arise, and the policy is triggered. Claims — even the possibility of a claim — should be reported to your broker as soon as possible. In the midst of everything else, you don't want to find out that you had a misstep when it comes to your compliance with the terms of your D&O policy.

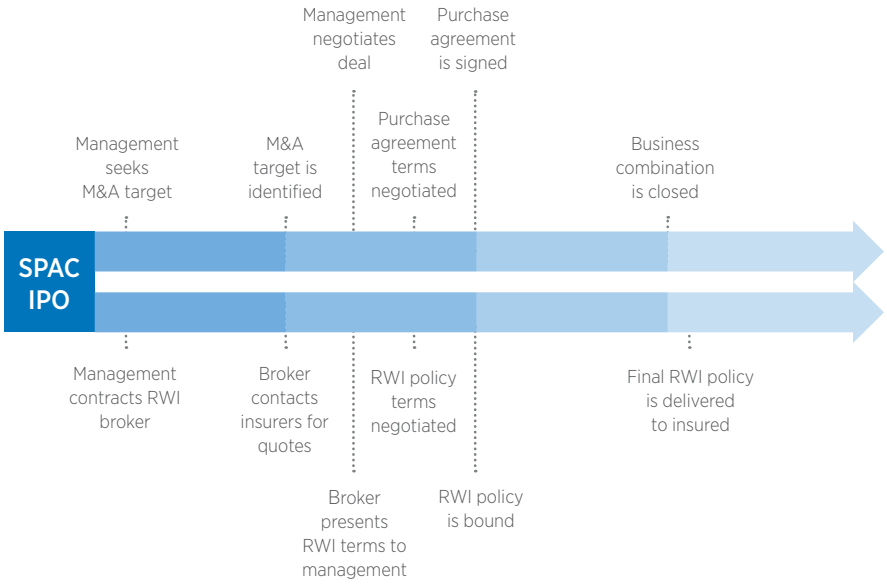
▶ Learn more about

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

F. What about M&A Reps and Warranties Insurance (RWI)?

Some SPACs have folded RWI into their acquisition strategies. RWI is now used in almost all transactions done by private equity (PE) firms and is considered the market standard in the PE world. Pricing for RWI is currently competitive, making it an attractive way to ring-fence certain risks. With many SPACs backed by PE firms, some sophisticated SPACs continue to use reps and warranties insurance as part of their business combination process. With increased scrutiny from regulators and shareholders of the nature of a SPAC team's due diligence efforts ahead of the merger with its target, the RWI process has helped several SPACs carry out and document a robust diligence process. Insurers have also become familiar with SPAC structures, and many of them are willing to offer coverage at very reasonable premiums. With close to 30 insurers competing against each other in the RWI market, a good broker who specializes in SPAC RWI will likely be able to find several attractive options for coverage.

M&A RWI Insurance Process



▶ Explore new insights into

RWI Coverage Limits — and What's Driving Optimal Coverage Today.

Ongoing D&O coverage

The operating company must establish a process around its annual D&O insurance renewal. Starting the renewal process with an expert D&O insurance broker early saves time, averts potential frustration and can save on costs. Companies can optimize the renewal process by being prepared and taking a focused approach to their D&O insurance renewal. Getting up to speed on the litigation environment and the current state of the insurance market is a key step. Having trusted advisors on your side helps ensure your success.

Choosing the right insurance broker: Questions to ask

Given the rapidly changing nature of the D&O insurance market and the peculiarities of D&O insurance for private companies on a track to going public, your choice of insurance broker is consequential.

A quirk of the insurance market is that, to optimize your result, you must choose one insurance broker to approach all the viable insurance markets on your behalf. Sending multiple insurance brokers into the market will lead insurance carriers to conclude that you don't know what you are doing and that you are not a serious candidate for their insurance capacity. For this reason, if you are interviewing D&O insurance brokers, instruct them to refrain from sending your name into the market until you have informed them that you have chosen them to be your broker.

Like bankers, lawyers and accountants, different insurance brokers bring with them varying levels of experience and resources. Work with a broker who places a significant amount of premium with the major insurance carriers.

▶ Check out our FutureCast webinar,

Building a Resilient Boardroom,

for actionable insights and best practices for managing board-related risks.

To get the optimal D&O insurance coverage at the best possible price, here are some questions to ask potential D&O insurance brokers before you choose one.

1. What level of experience does the particular brokerage team you are talking to (not just the brokerage firm, but your particular team) have when it comes to placing D&O coverage for companies going public through a de-SPAC transaction?

   It is critical that your D&O insurance broker has extensive and current experience working with companies going public through a de-SPAC transaction. The D&O insurance market for companies going public changes rapidly. Unless your broker is in the market every day, you will miss out on the latest developments in the terms and conditions of your policy, which are critical elements of your negotiated, customized D&O insurance program.

2. What reach does the brokerage team have in the D&O insurance markets?

   Ask whether the brokers on your team have extensive and long-term relationships with SPAC D&O and RWI underwriters. Having a broker with years of experience and rapport built into their underwriter relationships can make a significant difference in the terms and pricing of your policies and the speed with which they can be placed.

3. Will the broker be using a wholesaler or making a direct placement?

   Many brokers only do a limited amount of public company D&O insurance business, particularly for companies becoming publicly traded for the first time. These brokers may be excellent in other areas but will inevitably have to use a "wholesale" broker to work on your going-public D&O insurance if they do not transact a large volume of this business routinely. That can be a big negative for you, especially if there is a claim, because the person you are talking to will have no relationship with the insurance carrier that will be deciding whether to pay or deny your claim.

4. Can your broker clearly articulate the business and legal risks you face?

   There is little chance your D&O or RWI insurance broker will do a good job of ensuring you have insurance coverage for critical risks if your broker cannot clearly articulate them. If your broker is not an expert in understanding the risks you face, you are talking to the wrong person.

5. What experience does your broker have in terms of advocating for coverage payments with carriers on behalf of clients with complex claims?

   Many brokers have an anemic claims function at best, and often the same claims person who handles client auto or workers' compensation claims is also being asked to handle your difficult D&O insurance or RWI claims. Given the complexity of D&O insurance and RWI claims, this is a mistake. Find out if your broker has specialists who can swing into action on your behalf.

It is in your best interest to choose a broker that has the experience and expertise to be able to recommend the most strategic insurance program placement options, as well as one with extensive experience managing the types of claims brought against public companies, including in connection with de-SPAC transactions.

Questions about this Guide? Comments? Compliments?

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Appendix

Foreign Subsidiaries and D&O Insurance: Are You Prepared to Place?

The issue of D&O liability for foreign subsidiaries of U.S. companies is an evolving one. Claims in non-U.S. jurisdictions against directors and officers of subsidiaries of U.S. corporations generally involve regulatory or tax issues. Multinationals can face actions in several countries as cross-border cooperation between regulators continues. Local directors, officers, and country managers are becoming more aware of their personal liability. Frequently, a request for a local D&O policy from a local director is the catalyst for a company to add local polices to their program.

When you need to purchase local policies

Most D&O polices are, according to the insurance contract itself, written on a "global basis." However, some countries require that companies purchase insurance (and pay applicable taxes) in that country in order to have a claim paid in that country, i.e., they require "admitted" insurance. Given the personal nature of D&O insurance for key company executives, our recommendation is typically to purchase local policies where admitted insurance is required.

Some common reasons U.S.-based companies will place a local D&O policy in foreign jurisdictions include:

- A local director will not join the board of a company's subsidiary without an in-country D&O insurance policy in place.
- There can be legal concerns regarding the company's ability to provide indemnification or advancement of defense costs to individuals on the ground. In many countries, the law does not clearly allow a company to indemnify local Ds and Os. In some situations, a D or O may need to be proven innocent before the company can provide indemnification or defense costs.
- Complying with local tax regulations may be a priority. Some countries allow insurance placed in another country to respond (i.e., allow non-admitted insurance), but an additional tax applies. If the insurer cannot collect this tax, it becomes the company's responsibility to self-file these taxes. Failure to file these taxes may result in a penalty or an audit. A local policy can avoid this awkwardness by providing a vehicle for local tax collection.
- A local policy can protect personal assets from being frozen. For example, some local polices are written to provide a budget for household expenses (typically sub-limited) in case bank accounts are frozen.

As part of the underwriting process, insurers will want to understand any exposure to sanctioned countries. If there is an exposure, the policy will likely come with an exclusion for that country. The solution for companies with operations in those countries is to source local insurance with a local broker that is separate from the global program.

Varying strategies for coverage and compliance

A common question I hear is this: My company has a number of foreign subsidiaries; how can I optimize my D&O insurance program for worldwide response and compliance?

You will want to work with your trusted insurance broker to develop a global strategy that is right for your company's risk profile and risk appetite. It is especially helpful to have developed a consistent approach to be used throughout the company well before various local Ds and Os start lobbying for special requests. Waiting until later can ultimately lead to a less efficient solution from a coverage perspective.

Major carriers commonly repeat the statistic that roughly 60% of Fortune 500 companies include some type of locally admitted coverage in their D&O program; in my experience, this seems right.

There are different ways to approach providing local admitted coverage depending on how the company's footprint matches the capabilities of its existing primary D&O insurance carrier. A company's risk management philosophy will play a role as well. For some companies, there is value in being compliant in each and every country, and such companies are willing to undertake the administrative work required to make this happen. Other companies focus on countries that have reached certain criteria such as having local Ds and Os on the ground or having an operation of a meaningful size. Still other companies may choose to rely on the worldwide nature of their primary U.S.-based policy and accept the risk of foreign tax penalties or challenges to indemnification. Oftentimes, a company's approach is a combination of these philosophies and evolves over time.

Depending on your company and its needs, here are some options global companies might consider as a starting point:

1. Rely on the worldwide coverage provided by a master program. In any country that does not allow non-admitted coverage, the insurer will pay loss to the parent company. Most insurers use their best efforts to get payment to individuals anywhere in the world, but if the country has strict restrictions, in-country payment may not be possible without a local insurance policy. Also, if the company is not legally able to provide indemnification or advance defense costs, then there is no insurance policy to step in.
2. Augment local coverage with a DIC (difference in conditions) drop down or tax schedule. If Lloyd's of London is on your program, you can take advantage of their broad license to provide local admitted coverage in an efficient manner in many (but certainly not all) countries.
3. Select a few key countries to purchase local policies. Some companies choose to purchase local policies only in countries that are highly regulated, where they have large assets, or are of particular strategic importance. The process varies from country to country; this approach usually includes a Lloyd's placement along with locally procured policies.
4. Purchase local polices in every country where there is an employee on the ground. This is the most robust approach and most appropriate for large global companies. Collaboration with the primary carrier is a critical element of this approach. A handful of insurers can offer local placements in most countries, or a separate "rest of world" tower may be purchased.

More international D&O options than ever before

There is no one-size-fits-all solution for every company, but many solutions are available to protect local Ds and Os. Since not all insurers have strong global offerings, a thoughtful process is required to match the company's geography and priorities with the insurer that is the best fit. Over the past few years, several insurers have invested in and expanded their international D&O capabilities. This has resulted in more options for companies looking to place international programs. Company engagement with underwriters is also valuable in this process.

Author: Jane Njavro

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

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 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 its diversity lawsuit in part due to state choice of forum provisions. Oracle recently also won a motion to dismiss 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.

Author: Priya Cherian Huskins

More Good News on Section 11 Cases for Newly 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.

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.

Author: Priya Cherian Huskins

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, A	Granted, on appeal
In re Uber Technologies, Inc. Securities Litigation | San Francisco County, CA	Granted, notice of appeal filed
In re Dropbox, Inc. Securities Litigation | San Mateo County, CA	Granted, notice of appeal filed
In re Sonim Technologies, Inc. Securities Litigation | San Mateo County, CA	Granted
In re Tintri, Inc. Securities Litigation | San Mateo County, CA	Denied on procedural grounds: MTD filed too late
Panther Partners v. Jerry Guo (Casa Sytems) | New York County, NY	Granted, (dismissal unrelated to FFPs)
Volonte v. Domo, Inc. | Utah County, UT	Granted, reconsideration request field

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 in 2022 to expand exculpation to certain senior officers. As a reminder, before this amendment, which dates back to the mid-'80s , 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 :

- 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 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 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, SWK Holding Corporation, Guidewire Software and Skillsoft.
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 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 . The plaintiffs filed a notice to appeal with the Delaware Supreme Court , 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.
   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.

Author: Lenin Lopezs

Incorporating in Cayman

At the SPAC conference in June, much conversation centered on new SPAC teams moving away from Delaware to incorporate in the Cayman Islands.

As my readers and listeners know, this strategy shift is not surprising. Factors pushing new SPAC teams in that direction are the 1% excise tax being levied on SPAC redemptions and the negative SPAC environment the Delaware courts have created with their recent decisions.

I recently spoke with Alexandra Low, a senior attorney with Appleby's Cayman Islands Group, to get an idea of what the Cayman incorporation process entails and how SPAC teams should think about this decision. Here is a summary of our conversation.

What are the advantages of incorporating in Cayman?

Alexandra Low: With our firm, there is a rapid turnaround time for incorporation once we get the compliance requirements to set up either the sponsor entity or the SPAC entity.

There is also the ability to tailor constitutional documents to suit applicable listing rules and regulations, and the ability to use different types of shares or warrants as required for particular SPACs. Flexible capital maintenance rules permit distributions and redemption and the repurchase of shares from a wide range of sources if the company needs to meet applicable solvency requirements.

Straightforward statutory merger regimes enable the SPAC to merge with its target. There is robust creditor protection, including in relation to the enforcement of security and facilitating the borrowing of additional funds.

Another advantage is the ability to redomicile to another jurisdiction on the de-SPAC side if required later.

The listing process for a SPAC is generally streamlined. Cayman gives immense flexibility to structure incentives in whatever manner investors demand.

Cayman also offers SPACs incorporating outside of the U.S. a more efficient post-acquisition structure and removes additional U.S. tax, legal or regulatory implications that can arise with a U.S.-domiciled SPAC as opposed to a Cayman-domiciled SPAC.

What about redomiciling?

Alexandra Low: Over 80% of the transactions I have worked on have been successful in redomiciling. In some of the transactions where the choice is to remain a publicly listed Cayman-domiciled company on a U.S. exchange, there's no issue from our perspective. It's more (of an issue) how it will be structured, and it's usually led by tax decisions. We're not usually involved in that process; we just assist.

The only thing I tell clients is you don't ever want to be — even if it's for a few hours — not registered in either jurisdiction.

Yelena Dunaevsky: The details are always so important, and you definitely need good guidance because good, experienced advisors have seen all the pitfalls and how things can go wrong and they can steer their clients from repeating those mistakes.

What is the current litigation environment in the Cayman Islands?

Yelena Dunaevsky: On the U.S. side, securities class actions have been holding fairly steady. What we are seeing is an increase in the number of fiduciary duty cases in Delaware that has been driven by MultiPlan and its progeny. There's a very recent decision out of Delaware in the Hennessy/Canoo case where the court granted the defendant's motion to dismiss — a 180-degree turnaround from what it had done previously in similar cases. What are you seeing on the Cayman side?

Alexandra Low: Failure to consummate the intended business combination transaction can result in several disputes. In some cases, it has led to litigation in the Cayman Islands.

However, the courts of the Cayman Islands are unlikely to recognize or enforce against a Cayman SPAC judgment of courts of the United States predicated upon the civil liability provisions of US federal or state securities laws. We always put in the registration statement disclosure that this is a challenge. Shareholders may have more difficulty protecting their interests, but for SPAC management teams, entities and directors and officers, the Cayman Islands typically offer a more favorable environment.

However, when you look at some of the recent cases, you can assess that Cayman is a favorable jurisdiction.

Yelena Dunaevsky: Litigation concerns are central to the questions I get from clients about incorporating in Cayman. I would say that while it's probably a good bet to incorporate in Cayman, if we're trying to avoid litigation, it's not 100% bulletproof to do so.

What about the insurance side?

Yelena Dunaevsky: Litigation leads us to insurance coverage. On the D&O insurance side, we're looking at risk from litigation and risk from enforcement actions. That's how you calculate what terms and pricing the insurance carrier can offer.

The underwriters are asking where you are incorporated because they've seen all the Delaware litigation, and some of them have been caught in that Delaware litigation.

Some of the carriers that can write robust policies that are designed to protect against securities litigation and other kinds of litigation in the U.S. are restricted from writing policies for companies that are not in the U.S. They may be restricted by the jurisdiction of the entity that's being insured. However, there are still mature, established carriers that are able to write policies with the Cayman insured.

Alexandra Low: The SPAC will negotiate a certain D&O coverage, and if there's a rush to close, the directors may need a little bit more assistance in terms of understanding their coverage. I don't think they always think that through.

And there are times they're in a tricky situation where they need to know what is covered under their insurance. Although you're covered up to the extent that Cayman Islands law provides, it's always important to privately negotiate your coverage too.

Yelena Dunaevsky: Even if the SPAC team that is doing the IPO is working with a knowledgeable SPAC-focused insurance broker to set up their coverage, the target company's management team may be coming from the private company world. They may be unfamiliar with the public company D&O world, which is very, very different.

If they insist on using a broker that they've been using for their private company coverage and who has no public company and SPAC experience, they're making a huge mistake. That broker is typically not familiar with US public company issues, litigation, costs and how the coverage needs to be structured. That's when you run into issues with individual directors who realize they need to start paying out of pocket for something they thought was covered.

What does the near future hold for SPACs?

Alexandra Low: I'm quite positive in terms of the SPAC IPO side. I think the management teams and their U.S. counsel are highly prepared. I think we will see a continued uptick in new SPAC IPOs and a lot of de-SPAC transactions close this year as the market remains favorable.

Yelena Dunaevsky: That's what I'm anticipating as well. It's a cautious green light ahead for the SPAC market.

Author: Yelena Dunaevsky