Swiss Re
Corporate Solutions

SwissGuard®

Why private companies need Directors & Officers (D&O) insurance protection

There is a widely-held belief that directors and officers of privately-held companies are not vulnerable to legal actions relating to their managerial capacities. In reality, privatelyheld companies, their executive officers and board members are susceptible to the same type of lawsuits as publicly-traded companies and face a host of exposures.

Litigation stemming from the above allegations can affect the company's professional reputation and carry a financial burden that could, potentially, impact its ability to continue operating. In fact, an entity's financial viability is often an impetus for lawsuits and can have a notable impact on the management, employees and recipients of services. This requires leadership to carefully consider risk transfer solutions and it underscores the need to purchase a D&O policy.

A key benefit for insurance buyers is defense coverage. Even if there is no merit to claims, defense costs can add up quickly and may negatively impact the financial profile, leaving the entity with significant, unplanned expenses. At a minimum, private companies need D&O coverage to defend the entity against allegations (meritless or not) and to protect the personal assets of Board.

To offer protection to management in response to the above allegations, and to attract talented business leaders, a typical business practice is to have broad indemnification provisions within company by-laws. Where full indemnification is not available or permitted, the personal assets of a company's directors and officers are at risk, emphasizing the need to secure D&O insurance.

It's important to highlight that private companies are exposed to more than just D&O claims. Claims can arise from employment-related matters, civil rights issues and fiduciary breaches. For example, if a company engages in merger & acquisition activity, endures financial difficulty or even amends their business model, this may prompt staff reductions or modifications in benefits, which can give rise to employment and fiduciary claims. As outlined below and on the second page, our SwissGuard® product offers protection for those claims as well.

Swiss Re Corporate Solutions Product Offering

SwissGuard® for Private Companies is a comprehensive policy designed to grant protection for Directors and Officers Liability, Employment Practices Liability and Fiduciary Liability for U.S. domiciled companies. Our policy addresses the above exposures and provides protection to the directors, officers, employees, volunteers and third parties.

Types of Lawsuits

- Shareholder Suits alleging inadequate or inaccurate disclosure in financial statements or private placement materials
- Negligent action or inaction by the board and/or their oversight
- Customer, creditors, competitor and vendor suits
- Regulatory actions or investigations
- Employment-related suits
- Breach of fiduciary duties

SwissGuard® is underwritten by Swiss Re Corporate Solutions America Insurance Corporation and benefits from the exceptional financial strength of Swiss Re Group. This translates to dependability and sustainability as evidenced by 150+ years of operating history. We apply our coverage expertise to the risk transfer needs of our clients by delivering quality insurance protection.

Private Company Claim Scenarios

Claims against directors and officers are often complex and are brought by shareholders, creditors, governmental bodies, employees and others. The following claim examples demonstrate why the purchase of directors and officers insurance, including employment practices liability coverage, is so important.

Shareholder Suits

- A common allegation is that majority shareholders took an action that benefitted them, but at the expense of minority shareholders. Closely-held companies or family-owned entities often experience suits related to succession planning.
- Shareholders of private companies also may sue for inadequate or inaccurate disclosure in private placement materials, information that they relied upon to invest.
- Shareholder suits are frequent when companies engage in mergers and acquisitions, often relating to the purchase price of the target company being under or overvalued.

Creditor/Customer/Competitor Suits

- Creditors allege inaccuracies in financial information that they relied upon when they extended credit. They sue companies alleging the board allowed a company's assets to be squandered.
- Customer lawsuits stem from disputes regarding debt collection, the costs or quality of products or services, and refusal to extend credit.
- Competitors often allege anti-trust or unfair competition. Lawsuits by competitors include misrepresentation of a competitor's products, infringement of a competitor's trade dress, and enticing employees to leave a competitor.

Regulatory enforcement

- Like publicly-traded companies, private firms fall under the regulatory oversight of a variety of federal/state agencies. The agencies often initiate investigations of the company to evaluate compliance of laws.
- Claims can come from both state and federal governmental agencies (DOL, FDA, FTC, SEC, etc.). A newer area of scrutiny and enforcement relates to the Department of Justice and the Foreign Corrupt Practices Act and the False Claims Act.

Other Claims, Including Employment Practices Liability:

- Discrimination Suits – Plaintiffs sue companies for acts of discrimination based on age, disability, gender, race, religion, and other categories that violate laws enforced by the EEOC.
- Wrongful Termination – Employees allege their firing or layoff was illegal and in violation of federal and/or state anti-discrimination laws, employment agreements or labor laws. An example would be a firing in retaliation for the employee having filed a complaint or claim against the employer.
- Sexual Harassment – Claimants allege violations of Title VII of the Civil Rights Act of 1964 and can involve unwelcome sexual advances, inappropriate promises/rewards in exchange for sexual favors and other verbal or physical harassment of a sexual nature.

Contact

Diane Gardner
Team Lead Private Management Liability
Office: +1 312 821 3907
Mobile: +1 312 383 9045
Diane_Gardner@swissre.com

Mark Giamalva
East-Central Team Leader
Office: +1 312 821 3853
Mark_Giamalva@swissre.com

David Simon
West-Central Team Leader
Office: +1 312 821 3944
David_Simon@swissre.com