IAG
Infinity Assurance Group

SAMPLE: XL – First Layer D & O Coverage

#1 Recommendation

Amend Cancellation provision to include a Rating Endorsement or a Pro Rata Cancellation Endorsement

#1 Level of Importance (Low)

The policy language in your current contract is written in the industry standard and allows the insurance company to retain a "penalty" of around 10% of unearned premium for reasons other than non-payment. The only issue would be if (Insured) is sold and needs to transfer to a run-off policy.

#1 Additional Comments/Considerations relating to Recommendation

Of higher importance should be the provision that requires XL to provide only 60 days notice in the event they intend to non-renew**.**

- A business such as (Insured) would require at least 90 to 120 days to properly underwrite and re-market with another insurer. I would put more emphasis on that condition than the short-rate penalty. See point #9.
- On another note, the policy correctly contains language that precludes cancellation of the policy by the insurer for any reason other than non-payment. This is a very important provision and leaves (Insured) in more control over the policy continuation. The exception being at renewal as stated above.

#2 Recommendation

Amend Notice of Claim to "in no event later than 90 days after the expiration of the Policy Period" (currently 60 days)

#2 Level of Importance (High)

- The recommendation to amend the notice of claim for later than 90 days is a valid and important recommendation.
- The D & O policy for (Insured) is written on a Claims Made basis which means that the coverage is triggered when (Insured) receives notice of loss from a claimant. However, the policy requires that (Insured) provide notice to the insurance company as soon as practicable, but no later than 60 days after the end of the policy.
- The problem is that the definition of claim is fairly broad which might be interpreted as a claim being other than a summons and complaint. The concern is that it may take your legal counsel more time to determine their position and if (Insured) received a claim in the last few days of the policy period, (Insured) would want to be able to put the policy in effect on notice in a timely fashion as the renewing policy would not be available to the company as a remedy.

#3 Recommendation

Amend Section 11 & 12 Endorsement to include "defense expenses and judgments"

(currently just “any settlement”)

#3 Level of Importance (Important)

This recommendation was placed into the “important” category due to the severe language imposed under these sections of the Securities Act and the application of virtually absolute language as clarified in Herman & MacLean v. Huddleston, 459 U.S. 375, 382 (1983).

- As a publicly traded company, you are vulnerable to Securities claims. Currently your policy provides that the insurance company would not assert that alleged violations of Section 11 and/or 12 of the Securities Act of 1933 as uninsurable for settlement amounts. **However, the entire language is related to an IPO or subsequent stock offering.**
- The suggested language would also include Defense Expenses and judgments in this exception. I would agree that Defense Expenses should be included so as not to end up as an allocation item that must be repaid by you to the insurance company. I am not convinced that a judgment would be something the insurance company would or could include as covered. In my opinion, a settlement does not necessarily constitute a violation, but rather is often an economic decision made by you; your legal counsel and your insurer and Defense Expenses.
- **Any change of language as suggested for inclusion of judgments in this section would need to have clarification that Exclusion F would not apply.**

#3 Footnote: Court Related Cases

As case in point, I refer to CNL Hotels & Resorts, Inc. v. Houston Casualty Company. In that case, the court was asked to review whether the insurer(s) were obligated to pay settlement costs related to Section 11 claims. The court ruled that the monies required to be returned to investors by CNL Hotels were a disgorgement of ill-gotten gains and as such, not covered in the policy(ies). However, the CNL court did leave open the possibility that claims under certain portions of Section 11 may be insurable and left it open for coverage language to specifically address those questions. To that end, defense and settlements should be included if possible. A judgment rendered against you for violations of Section 11 and/or 12 would likely be uninsured due to Exclusion F of the policy.

#3 Additional Comments/Considerations relating to Recommendation

For clarification of this issue, it may be helpful to reference the policy as written.

Original definition of “Loss”:

“Loss” means damages, judgments, settlements or other amounts (including punitive or exemplary damages, where insurable by law) and Defense Expenses in excess of the Retention that the Insured is legally obligated to pay. Loss will not include:

(1) The multiplied portion of any damage award;

(2) Fines, penalties or taxes imposed by law; or

(3) Matters which are uninsurable under the law pursuant to which this Policy is construed

Amended by Endorsement 30 to:

"Loss" means damages, judgments, settlements, pre-judgment and post-judgment interest or other amounts (including punitive, exemplary or multiple damages, where insurable by law) and Defense Expenses in excess of the Retention that the insured is legally obligated to pay. Loss will not include:

(1) Fines, penalties or taxes imposed by law, or

(2) Matters which are uninsurable under the law pursuant to which this Policy is construed.

NOTE: With respect to judgments in which punitive damages are awarded, the law of the jurisdiction most favorable to the insurability of punitive damages shall control, provided such jurisdiction:

(i) Is where such punitive damages were awarded

(ii) Is where the Parent Company or any Subsidiary is incorporated or otherwise organized or has a place of business; or

(iii) Is where the insurer is incorporated or has its principal place of business

Endorsement No. 20 (Section 11 and 12 Endorsement) further modifies the revised definition of "loss":

(2) matters which are uninsurable under the law pursuant to which this Policy is construed; provided that the Insurer will not assert that the portion of any settlement (wants to expand this to include Defense Expenses and judgments) in a Securities Claim arising from an initial or subsequent public offering of the Company's securities constitutes uninsurable loss due to the alleged violations of Section 11 and/or 12 of the Securities Act of 1933 as amended."

#4 Recommendation

Amend Definition of Claim, criminal proceeding, to state "commenced by the return of an indictment, information, or similar document."

#4 Level of Importance (Low)

has not made clear which section should be modified with this recommendation. I feel the policy addresses this issue in at least two different definitions of "claim" relating to Criminal Proceedings:

(1) Paragraph No. 3 (which is likely the phrase they want to modify) and

(2) Paragraph No. 4 which has already been modified to include **notice of charges, formal investigative order or similar document.**

Additional Comments/Considerations relating to Recommendation #4

The language currently contained in the policy is similar in nature to the change indicated by . Your legal counsel should be able to parse the difference between the two sentences. What follows are excerpts from the policy language.

"Claim" is defined as: