



DIRECTORS & OFFICERS LIABILITY INSURANCE POLICY

ERIS is proud to offer its updated D&O policy. The policy provides an easy to read product, which incorporates into the base form many of the ERIS coverage enhancements previously provided through endorsement as well as new, innovative and leading coverage in today's market.

Coverage Highlights¹

- ▶ Broadened definition of Subsidiary
- ▶ Severability of exclusions and application
- ▶ No formal requirement of civil, criminal, judicial, administrative or regulatory proceeding
- ▶ Derivative demand coverage not just limited to shareholder actions against Insured Persons
- ▶ New 'notice of potential claim' trigger for regulatory investigation of Insured Persons
- ▶ Past subsidiaries coverage for prior acts (does not terminate on policy renewal like some carriers)
- ▶ Broad Insured vs. Insured exclusion carve backs

Overview of Coverage²

4 Insuring Clauses

1. **Directors and Officers Liability** – covers Loss for which an Insured Person is not indemnified as a result of a Wrongful Act.
2. **Corporate Indemnification** – covers Loss which the Company pays as indemnification to the Insured Person.
3. **Corporate Liability** – covers Loss the Company is obligated to pay as a result of a Securities Claim.
4. **Investigation Costs** – *covers Investigation Costs the Company pays for a Derivative Demand (new coverage).*

General Terms and Conditions:

- ▶ **Severability of Exclusions:** full for all Insured Persons for all exclusions under Insuring Clauses 1A or 1B.
- ▶ **Severability of Application:** full for all Insured Persons. Imputation of top 3 or signor of Application to Company *for Side C claims (newly enhanced from top 7).*
- ▶ **Defence** – duty of the Assureds.

¹ Italics indicate newly enhanced coverage.

² Please note that the summary provided is for illustrative and general purposes only. The summary is not a complete or exhaustive analysis of coverage or legal advice. The availability of insurance coverage depends on the particular facts and circumstances of any claim and the language of the policy issued.



- ▶ **Allocation** – where Claim involves either covered and uncovered parties or matters, 80% allocated to defence costs (or higher if mutually agreed), all other Loss allocated based on relative legal exposure.
- ▶ **Notification** – claims reporting as soon as reasonably practicable, but no more than 60 days after policy expiration (*changed from 45 days*), *once named position becomes aware (new)*.
- ▶ **Cancellation** – non-cancellable by Insurer except for non-payment of premium.
- ▶ **Optional Extension Period** – bi-lateral (ie. insured or insurer can choose to exercise) at a pre-determined premium.
- ▶ **Side-A non-rescindable (new)**
- ▶ **Priority of Payments**

Definitions

- ▶ Claim definition includes:
 - Written demands (*new – oral demands removed – avoiding difficulties with reporting obligations*)
 - Monetary and non-monetary damages, injunctive relief
 - Civil or criminal, judicial, administrative or regulatory proceeding or arbitration commenced by service of a complaint/similar pleading, notice of charges, hearing or proceeding or return of indictment or laying of information (*no formal requirement*)
 - *Written notice of circumstances of an investigation by a securities regulatory authority that may be expected to give rise to a Claim (as above) against an Insured person (new – triggers claim definition at early investigation stage)*
 - Proceeding against Insured Person for Company's statutory tax, UIC, CPP and wage liabilities
 - *Extradition requests pursuant to Canadian laws (new coverage)*
- ▶ Company – includes Parent Company and subsidiaries (removed Joint Venture Entity as incorporated into Subsidiary definition)
- ▶ *Derivative Demand* – means written notice by a complainant (not limited to a shareholder) of intention to commence a derivative action against an Insured Person (*new coverage*)
- ▶ Insured Person (definition replaces Directors and Officers definition) extended to include:
 - Insured Capacity component (moved from Individual Acts definition)
 - Past, present and future director, officer, trustee, governor, chairman, advisory board member, committee member, natural person general partner or partnership manager, or function or *foreign equivalent (new coverage)*, general counsel, risk manager
 - Employees for:
 - Employment Practices Violation or Securities Claim
 - As co-defendant with a director or officer
 - ODL:
 - not-for-profit, with prior board approval (*new – knowledge & prior written consent no longer required*)
 - for-profit when listed
- ▶ *Investigation Costs (new coverage)* means costs in connection with investigation or evaluation of a Derivative Demand



- ▶ Loss: provides express coverage for damages, judgements, settlements and defence costs with enhanced *new coverage* for:
 - *punitive or exemplary damages* except for Employment Violations (*according to most favourable law*)
 - *pre and post judgement interest*
 - *Section 11 or 12 US Securities Act* (and foreign equivalent) *claims* (*ie – will not assert uninsurable by reason of disgorgement, restitution or ill-gotten gain*)
- Loss does not include:
 - multiplied damages
 - penalties, civil or criminal fines
 - benefits, salary, wages or stock options *if Claim is for an Employment Practices Violation (new)*
 - uninsurable matters (*with new S. 11 or 12 US Securities Act carve out as above*)
- ▶ Securities Claim (replaces Corporate Act definition):
 - violation of securities laws (*not limited to listed legislation*); or
 - *claim brought by a shareholder of the Company acting in that capacity (new coverage)*
- ▶ Subsidiary:
 - includes all organizations, including those unique to Canada (eg. income trusts, unlimited liability organizations)
 - *includes triggers other than ownership of voting securities* (eg. *right to appoint majority of board, or exercises management control – new coverage*)
 - includes past subsidiaries for past acts
- ▶ Wrongful Act – replaces previous Individual act, and Corporate Act definitions and incorporates Insured Capacity for greater clarity of coverage

Exclusions

- ▶ *New headings and layout for easier reading*
- ▶ Bodily Injury/property damage – *new narrower scope including removal of false arrest, false imprisonment, intellectual property, defamation and privacy invasion*
- ▶ Prior notice of circumstance under another policy (*restricted to where other policy provides coverage – new carve out*)
- ▶ Pending and prior litigation – restricted to demands, suits, proceedings pending, order, or judgement prior to PPL date, *or substantially same facts (new removal of PPL definition and its broader exclusions of any facts, circumstances, etc. alleged therein)*
- ▶ Other insurance – removed from exclusions and inserted into new Other Insurance Clause
- ▶ Pollution – carve out from exclusion for:
 - Security holder claims under Side A or B (*Side B carve out is new coverage*)
 - Side A non-indemnifiable claims (*newly expanded to all Loss, not just defence costs, including prior noticed circumstances, with full limits - \$5M sublimit removed*)
- ▶ Fiduciary
- ▶ Employment, health & safety, labour violations – *exclusions newly removed*



- ▶ Insured versus Insured – does not include shareholder who is not otherwise an Insured. *Does not apply to defence costs coverage (new), or Side A claims (new)*. Carve outs for:
 - Derivative claims (*restriction narrowed to voluntary solicitation or assistance of any Insured – new expansion of carve out*)
 - Cross-claim for contribution and indemnity
 - Employment Violations
 - Bankruptcy trustee
 - *Employee who is not an officer of the Company (new)*
 - *Removed from position for at least 4 years (new)*
 - *Whistleblower (new)*
- ▶ Prior Wrongful Acts of Subsidiary – *removed* and incorporated into General Conditions
- ▶ Outside Capacity – *removed* – ODL capacity incorporated into Extensions
- ▶ Breach of contract – *removed*
- ▶ Personal Conduct (Side A):
 - *All final adjudication (new)*
 - Requires deliberate fraud
 - *Return of wrongful remuneration (removed)*
- ▶ Company Conduct (Side C):
 - *Contractual exclusion removed*
 - *All final adjudication (new)*
 - Fraud imputation – *imputation removed from COO and Chief Information Officer*
 - Personal Profit
 - Inadequate consideration – exclusion does not apply to defence costs

Extensions

- ▶ Estates, Legal Representatives, Spouses
- ▶ Outside Directors:
 - Not-for-profit – with prior approval of Board (*new – knowledge & prior written consent no longer required*)
 - For-profit – listed entities
 - Coverage is excess of indemnification and D&O insurance available from outside entity
- ▶ Mergers & Acquisitions
 - Automatic coverage from acquisition for subsequent acts for acquisition with assets equal to or less than 20% of Parent Company assets
 - If greater than 20%, 90 day automatic coverage from acquisition for subsequent acts
 - Past subsidiary coverage for prior acts

David Price
dprice@exeurisk.com
416-979-7365

Jon Ashall
jashall@exeurisk.com
416-979-0086

Murn Meyrick
mmeyrick@exeurisk.com
416-979-0062

Chris Jansma
cjansma@exeurisk.com
416-979-7741