

The steep increase in the price of insurance over the last two-three years has led to a lot of discussions about potential alternatives which might be available for D&O liabilities other than purchasing a D&O insurance policy from the commercial insurance market.

Potential solutions include using a captive insurance vehicle for some or all of the corporate reimbursement cover ("Side B") or company securities claims cover ("Side C"), using a captive insurance vehicle (in the form of a Protected Cell Company ("PCC") or a Segregated Account Company ("SAC")) for some or all of the non-indemnified loss cover ("Side A"); establishment of an indemnification trust; a personal guarantee of director liabilities from the CEO or a major shareholder; and other more bespoke solutions.

While the use of captives for Side B or Side C has been done in a number of situations, in our experience, the Side A solution has tended to be more expensive than simply purchasing insurance from the commercial D&O market. However, in our survey, marginally more respondents indicated their organisation had used a captive insurance vehicle for Side A (6%) than for Sides B/C (5%). A further 18% and 20% (respectively) were considering doing so in the future.

The use of a personal guarantee from the CEO or other major shareholder saw some fairly high-profile examples between 2020-21 and, in fact, more of the respondents indicated this was in place (7%) than for either type of captive solutions.

Overall, by far, the majority of respondents indicated none of these alternative risk transfer solutions were in place nor under consideration, and this matches our experience in practice. Nonetheless, it is interesting that a fairly significant number are still considering implementation in the future.

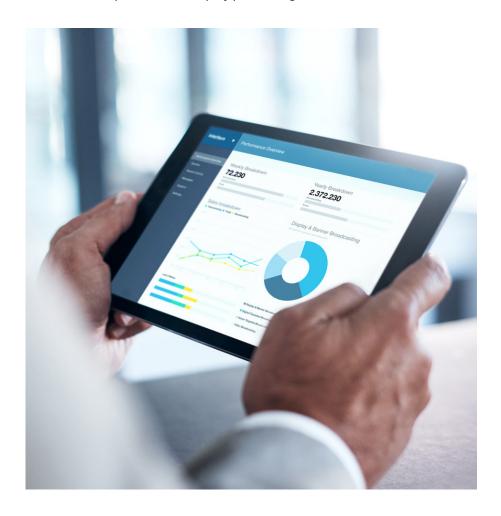


Since the survey was conducted, there has been a material development in the U.S. and in particular in Delaware, where the state has recently passed a law making it clear a standard captive, that is, a normal group company rather than a PCC or SAC, can insure directors for side A losses.

The usefulness of this law is, for now, confined to companies registered in Delaware and it remains to be seen whether any other U.S. states or indeed any other jurisdictions will adopt similar legislation.

Furthermore, while this new legislation says that non-indemnifiable claims can be paid by a captive as a matter of Delaware corporate law, it is untested in relation to claims that may be legally and practically non-indemnifiable by virtue of federal insolvency and bankruptcy laws.

It also remains unclear as to whether or not a federal court could seize the assets of the captive in a bankruptcy proceeding as an asset of the estate.



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