



Directors' Liability Survey 2022

Use of alternatives to the commercial insurance market for D&O liabilities

Angus Duncan, Lawrence Fine and John Orr, WTW

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.



Disclaimer

Willis Towers Watson offers insurance-related services through its appropriately licensed and authorised companies in each country in which Willis Towers Watson operates. For further authorisation and regulatory details about our Willis Towers Watson legal entities, operating in your country, please refer to our Willis Towers Watson [website](#).

It is a regulatory requirement for us to consider our local licensing requirements. The information given in this publication is believed to be accurate at the date of publication shown at the top of this document. This information may have subsequently changed or have been superseded and should not be relied upon to be accurate or suitable after this date.

This publication offers a general overview of its subject matter. It does not necessarily address every aspect of its subject or every product available in the market and we disclaim all liability to the fullest extent permitted by law. It is not intended to be, and should not be, used to replace specific advice relating to individual situations and we do not offer, and this should not be seen as, legal, accounting or tax advice. If you intend to take any action or make any decision on the basis of the content of this publication you should first seek specific advice from an appropriate professional. Some of the information in this video may be compiled from third party sources we consider to be reliable, however we do not guarantee and are not responsible for the accuracy of such. The views expressed are not necessarily those of Willis Towers Watson. Copyright Willis Towers Watson 2022. All rights reserved.

Each applicable policy of insurance must be reviewed to determine the extent, if any, of coverage for losses relating to the Ukraine crisis. Coverage may vary depending on the jurisdiction and circumstances. For global client programs it is critical to consider all local operations and how policies may or may not include coverage relating to the Ukraine crisis. The information contained herein is not intended to constitute legal or other professional advice and should not be relied upon in lieu of consultation with your own legal and/or other professional advisors. Some of the information in this publication may be compiled by third-party sources we consider reliable; however, we do not guarantee and are not responsible for the accuracy of such information. We assume no duty in contract, tort or otherwise in connection with this publication and expressly disclaim, to the fullest extent permitted by law, any liability in connection with this publication. Willis Towers Watson offers insurance-related services through its appropriately licensed entities in each jurisdiction in which it operates. The Ukraine crisis is a rapidly evolving situation and changes are occurring frequently. Willis Towers Watson does not undertake to update the information included herein after the date of publication. Accordingly, readers should be aware that certain content may have changed since the date of this publication. Please reach out to the author or your Willis Towers Watson contact for more information.

About WTW

At WTW (NASDAQ: WTW), we provide data-driven, insight-led solutions in the areas of people, risk and capital. Leveraging the global view and local expertise of our colleagues serving 140 countries and markets, we help you sharpen your strategy, enhance organizational resilience, motivate your workforce and maximize performance. Working shoulder to shoulder with you, we uncover opportunities for sustainable success – and provide perspective that moves you. Learn more at [wtwco.com](#).



[wtwco.com/social-media](#)

Copyright © 2022 Willis Towers Watson. All rights reserved.
WTW-FINEX 515101/05/22

[wtwco.com](#)

