

ALPHA[®] CUTTING-EDGE MANAGEMENT LIABILITY PROTECTION FOR MARSH CLIENTS



Alpha was developed in response to the management liability concerns of Marsh's clients. As part of our continuing effort to further and better address those concerns, Marsh is releasing a third iteration of the Alpha policy, to provide an even more valuable response to the emerging risks executives face.

DEVELOPED EXCLUSIVELY BY MARSH FOR MARSH CLIENTS, ALPHA PROVIDES SIDE A DIRECTORS AND OFFICERS (D&O) DIFFERENCE IN CONDITIONS (DIC) COVER DESIGNED TO PROTECT INDIVIDUALS' PERSONAL ASSETS.

- The limit of liability is reserved for situations where the company cannot indemnify, or fails to indemnify, an individual. The policy limit cannot be eroded by corporate liabilities.
- Alpha sits in excess of the conventional D&O liability insurance programme, and responds when the underlying insurance has been exhausted.
- Alpha also drops down to protect the insured individuals where there are gaps or failures in the underlying insurance.
- When clients buy multiple layers of Side A D&O DIC cover, Alpha can serve as either the primary or excess Side A D&O DIC policy.

EMERGING RISK LANDSCAPE

Law makers, regulators, and prosecutors are seeking to hold more individuals in senior management personally accountable. At the same time, companies are now incentivised and functionally required to investigate conduct within their organisations, and report their findings to

authorities. Investigators working for the company gather evidence on the conduct of its employees, directors, and officers in cooperation with regulators and prosecutors, or in anticipation of reporting the conduct to them to head off a more formal enforcement agency inquiry. Such cooperation and reporting reduces the company's liability, but leaves the individuals exposed to criminal charges and regulatory discipline.

This dynamic has changed the risk environment for directors and officers. Questioning of the legality of their conduct now proceeds differently than it has previously. How directors and officers respond to such questioning, and finance the advice they require to properly respond, is now a central issue in executive protection.

Traditional D&O liability insurance struggles to address this new risk environment. Policies generally provide protection when a legal proceeding is served, or formal investigation commences, but provides little (or no) protection for the individual investigated by his or her own organisation. Furthermore, typical policies impose obligations that do not reflect the constraints imposed on insureds involved in criminal investigations.

In response to this new reality, Marsh has enhanced the Alpha policy to better respond to the current risk landscape faced by directors and officers.

KEY BENEFITS OF ALPHA

- **Broad investigation cover, including purely internal investigations**

Cover is for the non-indemnified loss suffered by individuals, who are asked to provide information to an investigation, including an inquiry conducted by or on behalf of the company.

- **A policy tailored to respond appropriately when an individual is potentially subject to criminal liability**

A built-in mechanism for submission and review of defence expenses to insurers without compromising the insured's legal privileges, or potentially prejudicing them in the underlying action. The insurer's prior consent is not required to enter into an agreement to resolve actual or potential criminal charges, except to the extent the insured is agreeing to make a payment for which he or she is seeking cover under the policy.

- **A broader definition of non-indemnified loss**

This includes plaintiffs' attorney fees when awarded as part of a final judgment, or in connection with a settlement, as well as insurable fines and penalties.

- **Non-licensed difference in conditions extension**

Where an underlying insurer is unable to pay a non-indemnified loss because it does not hold a licence in the relevant jurisdiction, and Alpha insurers can lawfully pay a loss by virtue of Lloyd's direct licence, the Alpha policy will drop down to protect the insured person.

- **Executive protection consultation**

Directors and officers are entitled to an initial consultation with the Holland & Knight Executive Protection Team to assess their rights, particularly in light of emerging risk trends such as the criminalisation of executive conduct, and informal and internal investigations¹.

- **Policyholder board access costs**

An additional limit of US\$1 million is available to individuals on the board of the policyholder (normally the ultimate parent company) to fend off attempts by other insured persons to challenge or restrict their use of the proceeds of the directors and officers liability insurance programme.

- **Tax extension**

Cover provided for amounts payable personally by the insured persons in respect of the company's taxes, or national insurance contributions, to the extent insurable.

- **Mitigation costs**

Insurers will pay costs that are reasonably expected to mitigate or reduce the likelihood of a potential claim under the policy, so long as the costs are incurred with their prior written consent.

- **Narrow conduct exclusion**

- Only excludes loss in connection with that portion of a claim which relates to deliberate dishonesty or improper gain.
- Exclusion only applies where it is established by final adjudication in the action against the individual that the relevant conduct was committed with actual dishonest purpose and intent and the excluded acts were material to the matter reported to the insurer.

- **Does not contain exclusions typically found in D&O policiesⁱⁱ**

For otherwise covered claims, there are no exclusions for loss arising from:

- Property damage or bodily injury.
- Claims brought by one insured against another insured, or claims brought by the insured company against an insurer.
- Claims notified to prior policies.

- **Ten-year discovery period following insolvency, at no additional premium**

An automatic ten-year discovery period, for no additional premium, where the policy is not renewed, or is cancelled following insolvency of the policyholder.

- **Pre-agreed maximum additional premiums for "run-off" cover**

The option to purchase a discovery period of up to ten years in the event of a change of control in the group.

- **Favourable reporting provisions**

- The policy requires the notification of demands or proceedings for wrongful acts. The policy does not require (but does permit) the notification of other types of claims such as investigations, internal investigations, and requests to toll statutes of limitations.
- Failure to notify must actually, substantially, and materially prejudice the insurer for that failure to prejudice cover available under the Alpha policy.
- Both the company and insured persons can notify.

- **Severability of all policy obligations (except the obligation to pay premium)**

Policy obligations are all severable so that one person's failure to comply with his or her obligation will not prejudice the other individuals' rights under the policyⁱⁱⁱ.

- **Short response times**

The policy drops down to protect individuals if an underlying insurer fails to respond within 45 days.

DIFFERENT LIMIT OPTIONS FOR DIFFERENT RISK PROFILES

There are different bases of policy limit available dependent on your risk profile:

1. Aggregate limit with multiple limit reinstatements available for no additional premium

- In the event that the limit of the Alpha policy is exhausted, the limit will reinstate. In the event that the reinstated limit is exhausted, the limit will reinstate again. Insurers will not pay more than the original policy limit for any one claim, but in the event of multiple unrelated claims – up to three times the original limit is potentially recoverable.
- The reinstated limits apply on an around-the-clock basis, meaning that the reinstated limits apply excess of amounts available from policies in excess of the Alpha policy, and any available limits in the underlying policies.
- As compared to other side A DIC policies that offer around-the-clock reinstatements, the reinstatement provisions allow greater potential recovery when there are multiple unrelated claims notified to the policy.
- On a case-by-case basis, insurers may offer a smaller additional “each single claim limit,” available only to the board of the policyholder.

2. “Each single claim limit”

- One policy limit is available for all non-indemnified loss arising from one “single claim,” meaning all claims that arise out of one, or a series of, acts that are related^{iv}.

KEY FACTS

Who is Alpha intended for?

Marsh Alpha is exclusively for Marsh clients. It is available for both public and private companies, including financial institutions.

Capacity

Capacity of over 100 million GBP/USD/EUR/CAD/AUD is available.

Financial stability of insurers

Alpha is underwritten by a panel of insurers at Lloyd’s of London. As such, these insurers are authorised to write direct insurance in over 60 countries^v.

Lloyd’s is regulated by the United Kingdom’s Financial Conduct Authority and Prudential Regulatory Authority. As of June 2015, Lloyd’s financial strength is rated as follows:

- A (Excellent) from AM Best.
- A+ (Strong) from Standard & Poor’s.

Contract certainty/policy documentation

Alpha is bound on a London market reform contract in accordance with the contract certainty initiative. The contract conforms with market requirements to have wordings agreed and underwriters’ participation understood prior to the inception of cover.

i. Please note that the right to a consultation is subject to confirmation that there are no conflicts of interest between the Holland & Knight Executive Protection Team and the relevant director or officer that would preclude the team from advising him or her.

ii. As of June 2015.

iii. As of June 2015.

iv. See policy language for full details.

v. The source for this information is the Lloyd’s of London Crystal database and is as of May 2015. Real-time information regarding Lloyd’s authorisations is available online at www.lloyds.com.

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