The D&O Dictionary

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In the rapidly evolving environment of executive risk, keeping up with the latest terms and technical components of a Directors' and Officers' Liability program can be challenging. This dictionary was created to provide an overview of terms that are likely to be used in describing D&O insurance and liability exposures.

The Executive Liability team at IGP Specialty is staffed with qualified specialists who offer in-depth policy analysis, litigation updates and new product offerings. We strive to offer the most comprehensive policy with the best terms and conditions available.

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ADVANCEMENT OF DEFENSE EXPENSES

This condition requires the insurer to advance the defense costs of a claim, prior to final disposition of a covered claim, after the retention has been fully paid by the insured. This clause is often triggered by the insured providing a written request to the insurer to advance the defense costs.

ALLOCATION

The process with which the insurer assesses the portion of a claim that is covered. There are three kinds of Allocation that may be made during the claims process: 1. Covered vs. Uncovered insureds [i.e. Corporate Entity vs. Directors & Officers], 2. Covered vs. Uncovered Directors & Officers for acts committed in their capacity as D's & O's of the Corporation (i.e. acts as D or O vs. acts as a Shareholder), and 3. Covered vs. uncovered claims within one lawsuit (i.e. claims with multiple allegations that involve allegations that are covered vs. specifically excluded). The Allocation of a claim will normally involve both the Defense Costs and Loss/Judgments. With regards to private and non-profit management liability policies. some carriers are agreeable to amend the allocation to provide 100% allocation of the defense costs.

ANTI-TRUST EXCLUSION

This precludes coverage for allegations of restraint of trade, unfair competition, price fixing or violations of any of federal or state Anti-Trust Laws, such as the Federal Trade Commission Act, Sherman Act, or Clayton Act. Private Company forms or Non-Profit forms with Entity Coverage provided often have some form of partial or full exclusion for Anti-Trust claims. The exclusion can either completely exclude Anti-Trust allegations or they may only exclude coverage for the Entity. (The former version would at least protect the individual insureds). This type of exposure is particularly important for Hospitals.

ARBITRATION CLAUSE

The Arbitration Clause provides the insured with an Alternative Dispute Resolution (ADR) procedure for circumstances when the insured and insurer have a dispute with regards to coverage. ADR involves an impartial third party arbitrating the matter between the two parties.

AUDIT COMMITTEE

A committee appointed by a company's board of directors to assist in the supervision of the company's internal operations, preparation of financial reports, internal audit system and implementation, and information disclosure, to ensure transparency and accuracy, to enhance the company's efficiency and to build the confidence of its investors, customers and creditors.

ACQUISITION PROVISION

Most D&O policies have a provision that address situations when the insured is going to acquire or merge another company into the parent company as a new subsidiary. The provision normally states the policy will automatically cover all newly acquired subsidiaries that do not exceed a specified asset threshold. (The asset threshold is compared with the total assets of the parent company.) The asset threshold percentage varies by carrier and normally ranges between 10% to 35%. In addition, there may also be a 30 to 90-day window of automatic coverage for acquired entities that exceed the prescribed asset threshold.

BANKRUPTCY EXCLUSION

This provision excludes any claim based upon or arising out of suits related to or brought by or on behalf of the bankruptcy or insolvency of the company, made by creditors or directly or indirectly resulting from the insured filing for bankruptcy under any Federal or State Bankruptcy Laws.

BI-LATERAL DISCOVERY

This provision allows the insured to choose to elect the extended reporting provision/discovery provision either if the insured cancels or non-renews the policy or the insurer cancels or non-renews the policy.

Definitions and coverage descriptions shown are for illustrative purposes only. How these would apply in a true loss scenario depends on the facts and circumstances of the loss, and the terms and conditions of the policy as issued. ©Innovation Growth Partners Specialty, LLC.

BI/PD EXCLUSION

Refers to the exclusion eliminating coverage for claims for bodily injury or property damage, which is contained in virtually every D&O, EPL, Fiduciary and similar type of insurance policy. The purpose of this exclusion is to avoid the policy covering loss which is typically insured under a company's comprehensive general liability (CGL) insurance policy.

"BUMP UP EXCLUSION"/INADEQUATE CONSIDERATION EXCLUSION

This exclusion precludes coverage for claims arising out of the insured's alleged payment of an inadequate price for the purchase of its own securities. Often coverage can be modified to provide coverage for the defense of the claim.

BUSINESS COMBINATION/DESPAC TRANSACTION

A special purpose acquisition company (SPAC) is required to complete an initial business combination, referred to as a "de-SPAC" transaction, typically within 18 to 24 months following the SPAC IPO date. A deSPAC transaction means a merger, acquisition or other business combination involving the issuer or any successor issuer and a SPAC.

BUSINESS JUDGMENT RULE

Refers to one of the primary defenses to a claim against directors and officers for breach of fiduciary duty. The defense generally bars judicial inquiry into conduct of disinterested D & O's who act on an informed basis, in good faith and in the honest belief that the action taken was in the best interest of the company. In essence, this defense provides that courts should not examine the quality of the directors' business decisions, but only the procedures followed in reaching that decision.

CAPTIVE INSURANCE COMPANY EXCLUSION

A common exclusion that excludes claims arising out of the insured's direct ownership, operation or maintenance of a Captive Insurance Company.

CHANGE OF CONTROL PROVISION

Certain transactions (such as the acquisition of the insured by another company or change in the ownership) will cause the policy to cease with respect to Wrongful Acts occurring after the transaction date; but will provide coverage for acts that occurred prior to the transaction up to the actual expiration of the policy. Longer periods or Extended Reporting Provisions can be negotiated for additional premium.

CLAIM

Generally refers to a proceeding or demand against the insureds for monetary damages or other relief on account of alleged wrongdoing by the insureds. D & O, EPL, Fiduciary and similar insurance policies afford "claims made" coverage, which means that the policy responds only to claims which are first made during the policy period, even if the claims is for wrongful acts occurring before the policy period. Because coverage is dependent upon a claim being made during the policy period, the definition of "claim" is a very important issue. Most such insurance policies now define the term "claim." Depending on the insurance policy form, a claim may include (i) a written demand, (ii) a civil, criminal, administrative, or regulatory proceeding, or (iii) a formal investigation, against insureds for a wrongful act.

CLAIMS-MADE COVERAGE

Refers to a type of insurance coverage which insures claims first made during the policy period, regardless when the alleged wrongdoing occurred. This coverage is in contrast to "occurrence coverage," which ensures occurrences taking place during the policy period, regardless when the claim arising out of the occurrence is first made. D & O, EPL, Fiduciary and similar policies almost always afford claims-made coverage, not occurrence coverage.

CLASS ACTION

Means a lawsuit brought by one or more plaintiffs for the benefit of a group or "class" of persons who have a similar interest in the outcome of the litigation. The entire class shares in any recovery in the lawsuit, even though only a few members of the class were involved in prosecuting the lawsuit.

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CLAUSE A FOR A-SIDE COVERAGE

Refers to the coverage afforded under D & O insurance policies for loss which is not indemnified by the insured company. This coverage is typically contained in Insuring Clause A or Insuring Agreement A of the policy. If loss is indemnified by the insured company, the D & O insurance policy typically affords coverage for that indemnified loss through Insuring Clause B or Insuring Agreement B.

CLAWBACK

Money or benefits that were distributed and taken back later under specific circumstances. Dodd-Frank and Sarbanes-Oxley both have created situations in which compensation to Directors & Officer can be "clawed-back". Some Public D&O policies will allow some Defense Coverage for Clawback actions.

CO-DEFENDANT COVERAGE

This provision grants coverage to specific entities or individuals that would not normally be covered under a D&O policy. Coverage is conditioned upon at least one insured under the policy be named as a defendant in the same claim. Often private equity firms may request they be named as a co-defendant on D&O policies in force for the portfolio companies.

COMMISSIONS OR PAYMENTS/DISBURSEMENTS EXCLUSION

This excludes claims arising from payments of gratuities, benefits, and other favors to foreign and domestic governments, as well as political contributions. The intent of the exclusion is to eliminate coverage for payments prohibited by the Foreign Corrupt Practices Act. This exclusion may be deleted with additional underwriting information.

CONTINUITY

Refers to a continuation of certain representations and warranties given by the insureds in the insurance application submitted to a prior insurer. When insureds first purchase a type of claims-made insurance from an insurer, the insurance company frequently requires the insureds to disclose all known facts or circumstances which may reasonably give rise to a future claim. Under some circumstances, the insurance company may agree not to require that disclosure from the insureds, but instead rely upon the disclosure by the insureds to the insurance company which previously issued a similar type insurance policy to the insured. Continuity merely refers to a continuation of those representations and warranties from one insurer to the other and does not mean there is a continuation of the same scope of coverage as was afforded under the prior insurance policy.

CONTROLLING SHAREHOLDER

A Controlling Shareholder is a shareholder who owns more than half of the shares or majority of the outstanding shares in a company. A Controlling Shareholder generally controls the composition of the board of directors and influences the corporation's activities. Sometimes, a shareholder who owns a smaller percentage but a significant number of remaining shares in the company can also be considered a Controlling Shareholder.

CORPORATE REIMBURSEMENT RETENTION

This is the dollar amount of defense costs and/or damages that the insured must bear, prior to indemnity from the insurer, for actions that are indemnifiable by the insured for Claims against the Directors & Officers. There may be separate retention amounts for Claims for Securities Wrongful Acts vs. Non-Securities Wrongful Acts. The retention applies to each Claim made against the insureds.

COVERAGE TERRITORY

This provision will define the scope of the covered territory. Some policies will provide coverage for claims made anywhere in the world; but only if the suit is brought in the U.S., its Possessions or Canada. Other policies will provide coverage for claims made and brought anywhere in the world.

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CREDITOR EXCLUSION

This exclusion precludes coverage for claims brought by Creditors, such as, Banks, Finance Companies or any other person or entity that has extended credit to the insured.

DEFENSE EXPENSES

Means reasonable costs, charges and fees (including attorneys' fees and expert witness fees) incurred by insureds in defending or investigating covered claims, including the premium for any appeal, attachment or similar bond. D & O, EPL, Fiduciary and similar insurance policies usually define this phrase. Those definitions typically exclude coverage for compensation or benefits paid to directors, officers, or employees of the insured company and other overhead expenses of the insured company.

DERIVATIVE SUIT

This is a lawsuit brought by shareholders against the Directors & Officers of the Corporation; but the suit is brought on behalf of the Corporation. In many cases, Derivative Suits do not allow Directors & Officers to be indemnified by the Corporation. This type of claim normally falls under the Side A Clause in a D&O Policy or under a stand-alone Side A Policy.

DISCOVERY PERIOD OR EXTENDED REPORTING PERIOD (ERP)

Refers to the optional extension of coverage which may be purchased by insureds under certain circumstances following expiration of the policy. If this coverage extension is purchased, claims made against insureds during the extension period are covered if the claims are for wrongful acts occurring before the expiration of the original policy period. Depending upon the terms of the particular insurance policy, this optional extension of coverage may be available only if the insurance company cancels (other than for non-payment of premium) or refuses to renew the policy, or alternatively, may also be available if the insureds cancel or refuse to renew the policy. If the coverage extension is available under both of those situations, the extension is referred to as "bilateral" discovery or ERP. Coverage during this extension period is subject to the same limit of liability as applies to the original policy period.

DUTY TO DEFEND

A liability policy provision that the insurer has an obligation to defend the insured in a suit brought by a third party. For occurrences covered by the policy, a defense must be provided even if a suit is found to be groundless or false. However, there is no duty to defend a suit if the complaint or petition fails to state facts that potentially bring the case within the coverage of the policy.

EEOC

Equal Employment Opportunity Commission, the federal government agency mandated to enforce Title VII of the Civil Rights Act of 1964, as amended. The Commission has five members, each appointed to a five-year term by the President of the United States with the advice and consent of Congress. The Federal Commission on Equal Employment Opportunity has the power to bring suits, subpoena witnesses, issue guidelines which have the force of law, render decisions, provide legal assistance to complainants, etc., in regard to fair employment.

EEO-1 REPORT

As part of their efforts to regulate compliance with federal equal employment opportunity laws, the EEOC (Equal Employment Opportunity Commission) and the OFCCP (Office of Federal Contract Compliance Programs) require certain employers to submit EEO-1 reports on an annual basis. These reports contain workforce statistics regarding racial and gender diversity in various job categories. While the EEOC and OFCCP use these reports internally for, among other things, compliance investigations, the agencies and private litigants often use the data they contain in employment discrimination cases.

EMPLOYMENT PRACTICES LIABILITY COVERAGE

This extends coverage to the Directors & Officers (and sometimes the employees) for allegations related to Wrongful Termination, Harassment, Discrimination or other Employment Acts. In some circumstances, for an additional premium, the policy can be extended to include the Corporate Entity. Although the term EPL is not a commonly used phrase under employment statutes or case law, it has become an insurance term of art, referring to insurance coverage specifically designed to insure employment-related liability.

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EMTALA COVERAGE

The Emergency Medical Treatment and Active Labor Act is a statute which governs when and how a patient may be refused treatment or transferred from one hospital to another when they are in an unstable medical condition. EMTALA applies only to "participating hospitals" – i.e., to hospitals which have entered into "provider agreements" under which they will accept payment from the Department of Health and Human Services, Centers for Medicare and Medicaid Services (CMS) under the Medicare program for services provided to beneficiaries of that program. In practical terms, this means that it applies to virtually all hospitals in the U.S., with the exception of the Shriners' Hospital for Crippled Children and many military hospitals. Its provisions apply to all patients, and not just to Medicare patients. The avowed purpose of the statute is to prevent hospitals from rejecting patients, refusing to treat them, or transferring them to "charity hospitals" or "county hospitals" because they are unable to pay or are covered under the Medicare or Medicaid programs. This purpose, however, does not limit the coverage of its provisions.

ENTITY VS INSURED PERSON EXCLUSION

A variation on the insured vs. insured exclusion found in a D&O policy, it precludes coverage for claims brought by the company or insured organization against other insureds.

ENTITY COVERAGE FOR PRIVATE COMPANIES

Private Companies have coverage available for the Corporate Entity for mostly all types of D&O Claims. The Entity Coverage normally extends to traditional D&O claims, but also includes Employment Practices Liability claims. Many policies will have several exclusions for the Entity, such as Contractual Claim, Anti-Trust Claims, or Intellectual Property/Patent Infringement Claims. It is important to review policies carefully to see which exclusions apply. In some cases, these exclusions may be deleted or modified. Modifications include defense coverage carve backs, shareholder claim carve backs or management supervision carve backs.

ENTITY COVERAGE FOR SECURITIES CLAIMS

Historically, Directors & Officers Liability Insurance was written with the intent to cover only the individual Directors & Officers of the Corporation. Coverage was not provided for claims made against the Corporate Entity. During the claims process, the insured and insurer would often negotiate an Allocation of the Defense Costs and Damages to determine how much of the claim was covered under the policy. The insured and insurer would determine the proportionate liability of the insured Directors & Officers and the uninsured Entity and pay the insured that portion of the claim against the Directors & Officers. Some recent court decisions have resulted in great advances in coverage. Coverage for the Corporate Entity is now available from most insurers. For publicly traded companies, the Entity Coverage is only available for Securities Claims.

ENVIRONMENTAL, SOCIAL, AND GOVERNANCE (ESG)

ESG stands for Environmental, Social, and Governance. Investors are increasingly applying these non-financial factors as part of their analysis process to identify material risks and growth opportunities.

ERISA EXCLUSION

Means Employee Retirement Income Security Act of 1974, which is a comprehensive statutory scheme regulating virtually all aspects of employee benefit plans. A central provision of this legislation is the express fiduciary standards imposed upon and liability exposures incurred by fiduciaries of ERISA plans. The Act creates high standards of care and potentially severe exposures for fiduciaries in order to afford employees high confidence that their important benefits will be well managed for their protection.

EVENT DRIVEN LITIGATION

Securities claims relying on specific adverse events, rather than fraudulent financial disclosures or accounting issues, as the catalyst for suing companies and their officers and directors for the resulting drop in stock price. The major categories for such adverse events include #me too/sexual harassment, data privacy, money laundering, environment, opioid crisis/drug pricing, and fallout from COVID-19.

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EVENT STUDY FEES/CLASS CERTIFICATION

Event study analysis assesses whether there exists a cause and effect relationship between unexpected news regarding a company and changes in its securities price. Class certification event study expenses include the fees and expenses of an expert witness to conduct an admissible price impact study.

FAILURE TO MAINTAIN INSURANCE EXCLUSION

This exclusion intends to exclude claims based upon and arising out of the failure to effect and maintain adequate insurance by the insured. This exclusion may be deleted with a schedule of the insured's insurance or may not exist in the policy at all. Some carriers may provide defense only coverage.

FOREIGN CORRUPT PRACTICES ACT (FCPA)

The Foreign Corrupt Practices Act of 1977 (FCPA) is a U.S. federal law known for addressing account transparency under the SEC Act of 1934 and for bribery of foreign officials. The anti-bribery provisions of the FCPA make it unlawful for a U.S. citizen, and issuers of securities, to make payments or gifts to a foreign official in order to obtain or retain business with or directing business to any person or corporation. In many cases, individuals and corporations may be exposure to regulatory actions and civil litigation for violation of the FCPA. Civil and regulatory fines & penalties may also be imposed against individuals or companies that violate the FCPA.

FOREIGN EQUIVALENTS COVERAGE

This wording broadens the definition of insured person to include those individuals in foreign countries that hold positions that are the equivalent of a Director or Officer in the United States.

FORWARD-LOOKING STATEMENT SAFE HARBOR

Refers to a provision in the PSLRA which protects corporations and their D & O's when making written or oral forward-looking statements. Pursuant to this safe harbor, no liability exists with respect to a forward-looking statement that, when made, is identified as forward looking and is accompanied by meaningful cautionary statements identifying important factors that could cause actual results to differ materially from those projected in the statement. Alternatively, the statute also provides that a person making a written or oral forward-looking statement will not be liable for that statement unless a plaintiff proves that the person made the statement with actual knowledge that it was false or misleading. The safe harbors do not apply to various types of forward-looking statements, including such statements in GAAP financial statements, in an IPO registration statement, in connection with a tender offer or a partnership, in certain change-in-control disclosure statements, in a going private transaction, or by a non-SEC reporting company.

FRAUD/DISHONESTY EXCLUSION

This exclusion intends to exclude claims based upon or arising out of the Dishonest or Fraudulent Acts and/or Willful Violations of the Law by an insured Person. There are several variations of the exclusion. Some exclusions will defend the insured up until there is factual information (in fact wording) proving the dishonest/fraudulent act and other policies will defend until a court adjudicates (final adjudication wording) the dishonest/fraudulent act to have occurred. Expanded wording may also include (final, non-appealable adjudication wording) in the exclusion; this wording is more advantageous for the insured.

GREENMAIL EXCLUSION

Excludes claims arising from the purchase of the organization's own stock at above-market prices. Greenmail situations are an attempt to resist a corporate takeover. Many claims arise from mergers and acquisitions.

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"HAMMER CLAUSE"/ SETTLEMENT PROVISION

This section of the policy explains that the insurer may settle claims; but with the written consent of the insured. However, the Settlement Provision usually stipulates that if the insured does not consent to the insurer's settlement that the insurer does not have to pay for any Loss or Defense Expense that exceeds the amount of the insurer's original settlement. The remaining Loss and Defense Expenses are to be borne by the insured. In some cases, insurers will agree to a modified Settlement Provision that allows for a Co-Insurance Provision. The Co-Insurance amount can range from a 50%/50% split to the insurer agreeing to waive the provision in entirety. Other versions may include a 50%/50%, 70%/30%, 75%/25%, 80%/20% or Deletion of the Hammer Clause.

HIPAA

Health Insurance Portability and Accountability Act (HIPAA) of 1996, Public Law 104-191. A regulation that gives patients greater access to their own medical records and more control over how their personally identifiable health information is used. The regulation also addresses the obligations of healthcare providers and health plans to protect health information. In general, covered entities such as health plans, healthcare clearinghouses, and healthcare providers which conduct certain financial and administrative transactions electronically had until April 14, 2003, to comply.

INITIAL PUBLIC OFFERING (IPO)

The first time a company sells stock to the public. The federal and state securities laws govern IPO's. Means the initial public offering of securities by a company. For a variety of reasons, an IPO transaction presents increased liability exposure to the company's directors and officers.

INITIAL PUBLIC OFFERING EXCLUSION (IPO EXCLUSION)

Excludes claims based upon or arising out of the Initial Public Offering of Securities. This exclusion is often placed on policies for privately held companies.

INSIDER TRADING

Refers to directors, officers and other corporate insiders trading in the company's stock while in possession of material, nonpublic information about the company. Insiders may be personally liable for insider trading under a variety of statutes and judicial theories.

INSURED CAPACITY

Refers to the capacity in which a person is covered under the insurance policy. Typically, directors, officers, and employees are covered only for wrongdoing which they commit in their capacity as a director, officer, or employee of the company. Alleged wrongdoing in any other capacity, including as a shareholder, is not covered. This insured capacity is set forth in the definition of Wrongful Act in most policies.

INSURED V. INSURED

Refers to the exclusion in all D & O insurance policies which eliminates coverage for claims by or on behalf of one insured against another insured. Because the company is insured under D & O policies to the extent the company indemnifies loss incurred by D & O's, this exclusion not only eliminates coverage for claims by directors and officers, but also claims by or on behalf of the company. Most D & O insurance policies contain several exceptions to this exclusion, such as:

- Defense Costs
- Cross Claims
- Derivative Actions
- Bankruptcy Actions by bankruptcy trustees, creditor committees, bankruptcy estate, etc.
- Former Directors & Officers (subject to a specified timeline)
- Employees for shareholder related claims
- Employment Practices Claims
- Whistleblower Claims
- Non-Common Law Jurisdiction Claims

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INSURING AGREEMENT A: (INDIVIDUAL COVERAGE)

This Insuring Agreement provides coverage to the individual Directors & Officers for claims that are not indemnified by the insured Company pursuant to the by-laws, statute or due to financial inability. Typically, there will be no Retention for this Insuring Agreement, unless otherwise required by state law.

INSURING AGREEMENT B: (CORPORATE REIMBURSEMENT COVERAGE)

This Insuring Agreement provides coverage to the insured Company when it has indemnified its Directors & Officers. This coverage part usually carries a significant Retention.

INSURING AGREEMENT C: (ENTITY COVERAGE)

This Insuring Agreement provides coverage for the Company as an insured under the policy. In private and non-profit policies, the coverage is offered on a blanket basis, while public companies the entity coverage is limited to Securities Related Claims.

INVESTMENT ADVISORS ACT OF 1940

The Investment Advisers Act of 1940, codified at 15 U.S.C. § 80b-1 through 15 U.S.C. § 80b-21, is a United States federal law that was created to regulate the actions of investment advisers as defined by the law.

INVESTIGATIVE COSTS COVERAGE

Refers to a supplemental type of insurance coverage available from some D & O insurers pursuant to which costs incurred by the insured company in investigating a demand by shareholders that the Board of Directors being a claim on behalf of the insured company against certain directors and officers for alleged wrongdoing. Shareholders who wish to bring a derivative lawsuit on behalf of the company against directors and officers generally must first demand the Board of Directors to bring the claim against the D & O's. Once that demand is made, the Board on behalf of the company is required to thoroughly investigate the merits of the shareholders' allegations and determine whether it is in the best interests of the company that the proposed claim be prosecuted against those D & O's. Because that investigation is for the benefit of the company as a potential plaintiff, and not for the benefit of the target D & O's as potential defendants, costs incurred in that investigation are not covered under a standard D & O insurance policy. If the insureds purchase the supplemental investigation cost coverage, the expenses incurred in investigating this shareholder derivative demand would be covered.

INVESTMENT COMPANY ACT OF 1940

The Investment Company Act of 1940 ("1940 Act") regulates companies, that engage primarily in investing in securities of other companies. The 1940 Act seeks to prevent abuses through mandating disclosure regarding the investment company's structure, operations, financial condition, and investment policies when shares of the investment company are initially offered to the public and, thereafter, on a regular periodic basis. Investment companies register with the SEC under the 1940 Act and typically register their securities under the 1933 Act.

LIMIT REINSTATEMENT

Refers to the reinstatement of the limit of liability under an insurance policy which is in effect for two or more years and which contains a single aggregate limit of liability for the entire policy period. Under this provision, insureds may purchase during the policy period an additional limit of liability for future claims, this allowing additional protection for insureds who believe that prior claims during the policy period may erode the original limit of liability to any unacceptable level. A limit reinstatement provision grants to the insureds the absolute right to purchase the additional limit of liability (upon payment of a specified additional premium), and the insurer has no underwriting discretion at the time the option is exercised by the insureds. If the insureds maintain several layers of insurance coverage within their insurance program, the limit reinstatement provision frequently provides that the additional or reinstated limit of liability affords coverage excess of all other coverage in force at the time the reinstatement option is elected. This type of excess limit reinstatement provision is commonly referred to as an "around the clock" provision.

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M&A

Means mergers and acquisitions. Because directors are intimately involved in decisions relating to merger and acquisition transactions and because directors have to some extent and inherent conflict of interest in these transactions since their continuing position with the company may be jeopardized in the event the company is taken over, courts have imposed higher standards of care upon directors in M&A transactions than in other corporate contexts.

MAJOR SHAREHOLDER EXCLUSION

This exclusion may be added to a policy by endorsement to the policy. This exclusion precludes coverage for claims brought by shareholders that own a certain prescribed percentage of the company's stock (normally 5% or 10% or more). This exclusion may often be deleted by request or with additional underwriting information.

MANAGEMENT BUYOUT EXCLUSION

This precludes coverage for claims based upon or arising out of the sale of the company to any of its Directors, Officers or Employees of the Company.

MARKET CAPITALIZATION OR MARKET CAP

Means the value of all outstanding securities issued by a company, as measured by the current market price for the securities. One method by which plaintiffs seek to calculate damages in a federal securities class action lawsuit is to measure the amount by which the market cap decreases as a result of a disclosure of material adverse information. As a result, the amount of a company's market cap is a factor used by some advisors in evaluating the appropriate amount of D & O insurance limits of liability for a particular company.

MERGER OBJECTION CLAIM/LITIGATION

Merger objection suits typically assert that the acquisition process was conducted in an unfair manner and that directors and officers may have had conflicts of interest that negatively impacted the structure of the acquisition, all of which operated to the financial detriment of shareholders.

NON-CANCELABLE POLICY

Some policies will have a clause that states the policy cannot be canceled mid-term, except for circumstances when the insured has not paid the premium.

NOTICE OF CIRCUMSTANCE/POTENTIAL CLAIMS

Most policies have a provision for reporting to the insurer any circumstances that may give rise to a claim under the policy. This allows the insured to report events that they think may reasonably give rise to a future claim. The notice requirement may differ between policy forms. Notice of Circumstances means notice by the insureds to the insurer of facts or circumstances which may reasonably give rise to a future claim. D & O, EPL, Fiduciary and similar insurance policies typically provides that if the insureds gives such notice to the insurer during the policy periods with sufficient detail regarding the facts, circumstances and potential claim, then any future claim arising out of the matters described within that notice will be treated for coverage purposes as a claim made during the policy period and therefore subject to the coverage afforded by that policy.

NOTICE OF CLAIM

This provision of the policy states the required time to report claims to the insurer. Some policies require reporting of claims with a time period of 30, 60 or 90 days from the date the claim was made against the insured and must be reported within the policy period. Other policies will allow for the claim to be reported 30, 60 or 90 days after the policy has expired. Several policies allow for the claim to be reported "as soon as practicable" with no prescribed time limit to report the claim.

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ORDER OF PAYMENTS/PRIORITY OF PAYMENTS WORDING

This provision states that the Directors & Officers are provided with priority for payment of claims when the Directors, Officers & the Corporation are all named in the suit and there are not enough insurance proceeds to cover the total amount of damages. Order of Payments refers to a provision which may be included in a D & O policy affording coverage for securities against the insured company. Under that type of policy, D & O's may be concerned that their coverage will be diluted or exhausted by coverage for claims against the company, thereby leaving the D & O's under-insured or uninsured. An "order of payments" provision generally states that D & O's will have first priority to the insurance policy proceeds and the insurance company will, at the request of the insured company, postpone any payment of loss incurred by the entity until after all loss incurred by D & O's has been paid.

OUTSIDE DIRECTORSHIP LIABILITY COVERAGE (ODL)

This extension provides coverage for situations in which the Company and its Board has specifically requested that a Director or Officer sit on the board of another Outside Entity. Coverage is normally extended to non-profit organizations, [traditionally only 501 (c) (3) tax exempt organizations], but can also be extended to include, on a limited basis, for-profit boards. The coverage normally only applies to that individual and only excess of any indemnity and insurance available from the Outside Entity. ODL coverage refers to an extension of coverage available from most D & O insurers for claims against D & O's in their capacity as a director, officer or employee of another organization if the D & O is serving in that "outside" position at the request of the insured company. Depending upon the specific provision purchased, this extension of coverage may apply to any outside position held by any insured D & O, to only outside positions in non-profit entities, or to only outside positions in specifically scheduled outside entities. Outside position coverage typically applies only to the extent the D&O's loss is in excess of any insurance and indemnification available from the outside entity (i.e. double excess). Depending upon the ODL provision, the coverage may also be in excess of any indemnification available from the insured company (i.e. triple excess).

OUTSIDE ENTITY

An organization, as defined in the policy form [normally a non-profit entity] on which a Director or Officer of the Company has a board seat. The Director or Officer must be specifically requested by the Company to sit on this board.

PANEL COUNSEL

A panel of law firms established by the insurer to defend claims on behalf of the policy holder. The panel is usually comprised of law firms with special skills in a particular area of law, such as Securities Law.

PAY ON BEHALF OF

Is language used in the insuring agreements to requite the insurance company to pay loss on behalf of the insureds once the insureds become legally obligated to pay the loss. This type of coverage, frequently referred to as "liability" coverage, protects the insureds against having to first fund the loss themselves and then seek reimbursement for that loss payment from the insurance company. Alternatively, a few D & O, EPL, Fiduciary and similar insurance policies instead require the insurance company to "indemnify" the insured for covered loss, in which case the insureds are technically required to first pay the covered loss and then seek reimbursement from the insurance company.

"PAY ON BEHALF OF" WORDING

Most current D&O policies state in the Insuring Agreement that the insurer will pay the claims, for covered losses, directly to the insured. Older policy forms used to Reimburse the insured for the claim.

P&P LITIGATION EXCLUSION

Refers to the exclusion in most D & O, EPL, Fiduciary and similar insurance policies which eliminates coverage for any claim made during the policy period which relates to any claim pending on or prior to the inception of the policy (or some other designated date) or the facts, circumstance or situations underlying or alleged in any such prior litigation. This "pending and prior" or "P&P Litigation" exclusion may, depending upon the specific policy language apply only to prior litigation against the insureds or to prior litigation against anyone. Similarly, the exclusion may apply only to prior "litigation" or also to prior proceedings and demands.

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PRE-DETERMINED ALLOCATION (FOR SECURITIES RELATED CLAIMS)

This provides a pre-established Allocation or apportionment of coverage between the insured Directors & Officers and the un-insured Corporation in Securities Related Claims. The Allocation is a pre-determined percentage of loss that will automatically be paid regardless of the actual liability of the covered and uncovered defendants. Without Entity Coverage, this is necessary for insureds so they will not have to dispute coverage with the insurer. The percentage allocation may be anywhere from 60% to 100%. This option is not normally offered in today's environment with Entity Coverage so commonly available.

PRE-DETERMINED ALLOCATION OF DEFENSE COSTS

This policy language provides the insured with 100% allocation of Defense Expenses when there are both covered and noncovered matters. In essence, the insurer agrees to pay 100% of the Defense Costs without allocating the Defense Costs between covered and non-covered matters.

PRESUMPTIVE INDEMNIFICATION

Refers to a provision in most D & O insurance policies which applies the deductible under Insuring Agreement B (i.e. coverage for the company to the extent the company indemnities D & O's) to any loss for which the company is legally permitted and financially able to indemnify, regardless whether the company actually grants indemnification. Absent this type of provision, the insured company could simply fail or refuse to indemnify D & O's (even though the company is legally permitted and financially able to provide the indemnification), thereby causing the loss to be covered under Insuring Agreement A, which typically has a zero deductible. In order to prevent the insured company from avoiding payment of the much larger deductible applicable to Insuring Agreement B, this provision applies the larger deductible if the company can indemnify, whether or not it actually does indemnify. Thus, in order to avoid the D & O's having to personally fund the large Insuring Agreement B deductible, the insured company must indemnify the D & O's when it can. If an EPL, Fiduciary or similar policy has different deductibles for indemnifiable and non-indemnifiable loss, those prices may also have a presumptive indemnification provision.

PRIOR ACTS EXCLUSION

This exclusion precludes coverage for Wrongful Acts that have occurred prior to the Retroactive Date quoted or in some cases the Inception Date of the Policy.

PRIOR & PENDING LITIGATION EXCLUSION

This exclusion precludes coverage for claims arising from litigation of any nature that existed prior to the inception of the policy period. Renewal policies will often have an endorsement that backdates coverage back to the inception date of the first policy written with the current insurer. It is desirable, if possible, to get any new carriers quoting to agree to backdate the prior & pending litigation date to provide Continuity of Coverage.

PRIVATE SECURITIES LITIGATION REFORM ACT OF 1995

The statute, which applies to securities class actions filed after December 22, 1995, sought to reduce abusive litigation practices by plaintiff lawyers, creates a defensive "safe harbor" for forward-looking statements, and seeks to encourage early dismissal by courts of meritless lawsuits by standardizing the pleading requirements and staying discovery until after a ruling on a motion to dismiss. Initial experiences since enactment of the legislation ironically suggests that the frequency and severity of federal securities class action lawsuits have increased under the PSLRA.

PROFESSIONAL LIABILITY/E & O EXCLUSION

This exclusion precludes coverage for claims arising from any rendering or failure to render professional services for others for a fee. It is possible to have a carrier modify the exclusion to provide a Management Carveback wording to provide coverage for claims alleging mismanagement and failure to supervise.

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PROSPECTUS

Means the disclosure document prepared and distributed by a company in connection with its offer to sell securities. The 1933 Act broadly defines the term to include any notice, circular, advertisement, letter or communication, whether written or by radio or television, which offers any security for sale. The prospectus may not contain any false or misleading information regarding the securities or the offering. In private placements of securities (i.e. securities offerings which are exempt from registration with the SEC), this disclosure document is frequently referred to as an "offering memorandum" or "offering circular."

PUNITIVE DAMAGES

Directors & Officers policies will either be silent on coverage, specifically exclude coverage or specifically provide coverage for Punitive Damages. Many policies today will provide some form of coverage for Punitive Damages. Coverage can come in many forms. Some policies will only cover Punitive Damages for Securities Claims. Others will provide coverage only where it is legally insurable. Still others will provide a recently developed "most favorable venue" or "most favorable jurisdiction" version of coverage. Every policy varies with respect to the extent of coverage for Punitive Damages.

REGISTRATION STATEMENT

Means the requisite filing by a company with the SEC of information in connection with the registration of securities prior to a company publicly offering those securities for sale. The registration statement includes a copy of the draft prospectus which will be used by the company in offering securities for sale. In approving a registration, the SEC focuses on the adequacy of the disclosures, and does not rule upon the fairness or quality of the securities as an investment.

REGULATORY EXCLUSION

Excludes coverage for suits brought by regulatory agencies, such as the FDIC, OTS or other regulatory authority. In the late 1980's it was common to see the banking authorities file suits against the Directors & Officers for mismanagement of the Financial Institution. This exclusion normally applies to Financial Institution accounts [Banks, Insurance Companies, etc.].

RESCISSION

An equitable remedy under which the insurer seeks to void a policy, or have it declared void. Rescissions usually occur when there has been material misrepresentation in the insurance application.

RETROACTIVE DATE (RETRO-DATE)

This is a date in which any Wrongful Act occurs prior to this date is not covered under the policy. Any claim made for a Wrongful Act that occurs after this date is covered under the policy.

ROAD SHOW

When a company files a registration statement with the SEC to do an Initial Public Offering, they will prepare a tour to explain their business plan and attract interest in the offering. This tour is called a "road show". The company and its executives will prepare an investor presentation and Q&A to institutional investors, investment bankers and investment managers in order to attract capital to be invested in the offering.

RUN-OFF POLICY

Means a claims-made insurance policy which affords coverage for claims made during the policy period only if the claims are for wrongful acts committed prior to the policy period. A run-off policy is most frequently purchased following the acquisition of the insured company. Because the D & O's typically purchase prior to the acquisition a pre-paid, non-cancelable multi-year run-off insurance policy which cannot be amended or affected in any way by the acquiring company or subsequent management. That policy covers future claims arising out of conduct by the D & O's prior to the acquisition.

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SARBANES-OXLEY ACT OF 2002

The Sarbanes-Oxley Act of 2002 (Pub. L. No. 107-204, 116 Stat. 745, also known as the Public Company Accounting Reform and Investor Protection Act of 2002 and commonly called SOX or SarbOx; is a United States federal law passed in response to a number of major corporate and accounting scandals including those affecting Enron, Tyco International, and WorldCom (now MCI). The Sarbanes-Oxley Act of 2002 requires publicly held companies to implement internal controls over their financial reporting, operations and assets, to evaluate the strengths and weaknesses of these internal controls in official documents filed with the SEC and to make regular disclosures concerning the viability of these controls and potential fraud or losses that may affect the company's financial position. Because most companies' financial reporting and operations depend heavily on information technology, and because many corporate assets now exist in the form of critical data, SOX has significant information security implications for companies governed by the law.

The first and most important part of the Act establishes a new quasi-public agency, the Public Company Accounting Oversight Board, which is charged with overseeing, regulating, inspecting, and disciplining accounting firms in their roles as auditors of public companies. The Act also covers issues such as auditor independence, corporate governance and enhanced financial disclosure.

SCIENTER

Means the requisite state of mind or degree of culpability which must exist for a defendant to be liable under various statutes. Most notably, for purposes of Section 10(b) of the Securities Exchange Act of 1934, most courts have ruled that the requisite scienter is established if plaintiffs prove the defendants acted either with intent to defraud or with recklessness.

SEC

Means the Securities and Exchange Commission which is the primary federal regulatory agency overseeing enforcement of the federal securities laws.

SECURITIES ACT OF 1933

Focuses on the initial offering and sale of securities by companies. The Act, among other things, requires registration of the securities and full, honest disclosure of all material information about the securities before the securities can be offered or sold. Violators may be subject to civil liability and criminal penalties.

SECURITIES ACT OF 1934

This act was created to provide governance of securities transactions on the secondary market (after issue) and regulate the exchanges and broker-dealers to protect the investing public. It provides the SEC the powers to enforce the securities laws. The Act prohibits certain types of transactions, such as, Insider Trading and allows for certain regulatory and civil actions for violations of the Act.

SECONDARY OFFERING EXCLUSION

This exclusion precludes coverage for claims based upon or arising out of additional public offerings made after the Initial Public Offering (IPO). Normally, the exclusion will allow for a prescribed window of 30 or 60 days to report the Secondary Offering to the underwriter. The underwriter also has the right to charge an additional premium and/or modify the terms & conditions.

SECTION 10(B) AND RULE 10B-5

Refers to the catchall antifraud provisions under the Securities Exchange Act of 1934. The vast majority of private class action securities lawsuits brought against directors and officers for open market misrepresentations are brought under these provisions, which prohibit any person from using an instrumentality of interstate commerce to engage in any manipulative, deceptive or fraudulent conduct in connection with the purchase or sale of any security (including not only publicly traded securities, but also securities in a privately-held company). "Securities" are defined broadly to include not only shares of stock, but certain notes, bonds, debentures, investment contacts and other investment instruments.

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SECTIONS 11 AND 12

Are provisions of the Securities Act of 1933 which prohibit persons from making false or misleading statements in either a regulation statement filed with the SEC or in a prospectus used in the offer or sale of securities. These statues are the general bases for securities class action lawsuits against directors and officers in connection with a company's offer or sale of its own securities.

SECTIONS 16(B)

Imposes liability on a director or officer who personally purchases and sells, or sells and purchases, the company's securities within a six-month period. The statue, which is intended to prevent the misuse of inside information by company insiders, requires the insider to disgorge to the company any profit realized from the "short swing transactions," regardless of whether the insider in fact knew of any material, nonpublic information at the time of the transactions.

SECURITIES CLASS ACTION

A securities class action is a case brought pursuant to Federal Rule of Civil Procedure 23 on behalf of a group of persons who purchased the securities of a particular company during a specified period of time [the class period]. The complaint normally contains allegations that the company and/or its Directors & Officers violated one or more of the federal or state securities laws.

SECURITIES CLAIM

A definition in the policy that describes what types of claims are covered related the company's publicly traded shares. The definition comes in many forms; but generally states that it covers violations of the Securities Acts of 1933 and 1934, any federal or state statute [including "Blue Sky Laws"] and any acts, errors or omissions in connection with the purchase or sale of any securities issued by the Company.

SEVERABILITY

Refers to the provisions in the D & O, EPL, Fiduciary or similar policy (and perhaps the Application form) which states that facts relating to or knowledge possessed by one insured person will not be imputed to any other insured person either for purposes of applying the exclusions in the policy or invoking a coverage defense based upon misinterpretations in the Application. As a result of this type of provision, the policy is treated as "severable" or a separate policy issued to each insured person and the conduct or knowledge of one insured person will not jeopardize coverage afforded to other insured persons. Typically, different severability provisions apply with respect to policy exclusions, on the one hand, and Application representations, on the other. Absent severability provisions, the knowledge or conduct of one insured person may result in loss of coverage to all other insured persons, including "innocent" insured persons who had no involvement in or knowledge of the conduct which gave rise to the Application misrepresentations or excluded conduct.

SEVERABILITY OF THE APPLICATION

This provision states that statements and particulars contained in the application for insurance will not be imputed to one insured Person if another insured Person made a false, misleading or untrue statement in the application. This will prevent the policy from being voided by the carrier for those individuals that did not make the false, misleading or untrue statement(s) in cases where the insured misrepresented information contained in the application. Normally, the policy will be voided as respects the individual that made the false, misleading or untrue statement in the application. In some cases, the whole policy can be voided if the person that signed the application made a false, misleading or untrue statement.

SEVERABILITY OF EXCLUSIONS

This provision states that the policy will not impute the conduct of any insured Person to any other insured person with respect to the application of the Exclusions. [either certain exclusions or all of the exclusions] This means that the exclusions will not be applied to any insured Person that did not commit the Wrongful Act. Some policies only provide severability for the Fraud, Personal Profit and Insider Trading Exclusions. While other policies will provide severability with respects to all of the exclusions in the policy.

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SHADOW DIRECTOR

Is a holder of controlling or majority stock of a private company who is not technically a director and does not openly participate in the firm's governance; but whose directions or instructions are routinely complied with by the management or other members of the board. According to law, a shadow director is a "de facto" director and is held equally liable for the obligations of the company with the other officers and directors.

SIDE A COVERAGE/SIDE A DIC COVERAGE

Excess Side A policies provide direct coverage for individual directors and officers when the corporation is legally unable or unwilling to indemnify them. As a Side A policy generally sits on top of a traditional D&O ABC tower, it provides broader insurance coverage and can potentially fill-in some gaps in a variety of claim situations. With difference-in-condition wording, the Side A policy acts as an excess insurance policy and "drops down" to primary, where there are gaps between the Side A broad form and the more restrictive ABC coverage. The Side A policy may also provide excess limits when the limits under the primary form are exhausted or when the ABC tower carriers don't pay the claim.

SPAC (SPECIAL PURPOSE ACQUISITION COMPANY)

Commonly referred to as blank check companies, a SPAC is a special purpose acquisition company that raises a pool of cash in an initial public offering, or IPO, and deposits the cash proceeds from the IPO into a trust account. These funds are used solely to acquire an operating company, referred to as a target, in a business combination transaction. The SPAC is required to complete an initial business combination, referred to as a "de-SPAC" transaction, typically within 18 to 24 months following the SPAC IPO date. If the SPAC fails to complete a business combination within that period, the SPAC liquidates and the funds in the trust account are returned to the public shareholders.

SPECIFIC ENTITY OR PARENT COMPANY EXCLUSION

This exclusion precludes coverage for Claims made by a specific corporate entity due to a special relationship, such as major shareholder or parent company.

SPOUSAL/DOMESTIC PARTNER/MARITAL ESTATES COVERAGE EXTENSION

This provision provides coverage for claims made against the Spouse/Domestic Partner or Estate of an insured Director or Officer due to the wrongful act of the Director or Officer. Coverage is not provided for wrongful act made by the spouse.

STOCK OPTIONS

There are two definitions of stock options: 1) The right to purchase or sell a stock at a specified price within a stated period. Options are a popular investment medium, offering an opportunity to hedge positions in other securities, to speculate on stocks with relatively little investment, and to capitalize on changes in the market value of options contracts themselves through a variety of options strategies; and 2) A widely used form of employee incentive and compensation. The employee is given an option to purchase its shares at a certain price (at or below the market price at the time the option is granted) for a specified period of years.

STRADDLE CLAIMS

When a claim includes a series of alleged acts, some occurring before and some after the transaction, it may cause confusion about how directors and officers are covered. These are called straddle claims. Specific policy language within the wrongful acts section can address these claims.

UK CORPORATE MANSLAUGHTER

The Corporate Manslaughter and Corporate Homicide Act 2007 was a landmark in law. For the first time, companies and organizations can be found guilty of corporate manslaughter as a result of serious management failures resulting in a gross breach of a duty of care. It came into effect in response to a number of large-scale disasters and acts to impose criminal responsibility on organizations where gross negligence has led to the death of an employee.

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WAIVER & RELEASE OF AUTOMATIC STAY PROVISION

In bankruptcy proceedings there is often an "automatic stay" provision that triggers an injunction or a freezing of all of the bankrupt company's assets, debts or liabilities upon the filing of bankruptcy. In the context of D&O Insurance, it can become an area of concern for Directors & Officers. In these circumstances the concern is whether the D&O Insurance or proceeds becomes property of the bankruptcy estate and is frozen and subject to the automatic stay. D&O policies can be endorsed to "waiver" the automatic stay provision up front so that the D&O policy is not frozen from providing legal defense costs or proceeds to the Directors & Officers.

WAIVER OF RETENTIONS/RETENTION ENHANCEMENTS PROVISION

This is an enhancement that states the Retention will not apply to Securities Claims for Loss. Often the policy will state that Defense Expenses will be applied to the Retention; but they will be reimbursed upon the determination of No Liability.

WARRANTY

Warranty generally refers to a question typically contained in an original claims-made insurance Application which requires the insureds to disclose any known fact or circumstance which could reasonably give rise to a claim in the figure. By signing the application, the insureds "warrant" or represent that they have disclosed all such known facts or circumstances. This warranty is typically not included in a renewal application since the insurer is already at risk for such potential claims if the insureds elect to give a notice of circumstances or notice of potential claim to the insurer as provided in the policy.

WELLS NOTICE

This is a letter that the SEC sends to individuals or firms when it intends to bring an enforcement action against them. The notice states that the SEC's staff may bring a civil action against them and allows them an opportunity to provide information as to why the action should not be brought against the targeted parties.

WRONGFUL ACT

Is typically defined in D & O insurance policies to mean any act, error, omission, misstatement, misleading statement, neglect or breach of duty actually or allegedly committed or attempted by insured D & O's in their capacity as such, or any other matter claimed against insured D & O's solely by reason of their serving in such capacity. D & O policies only cover claims against D & Os for such a wrongful act. In EPL policies, Wrongful Act is defined to include numerous types of wrongful employment practices, such as wrongful termination, discrimination, sexual harassment, etc. In Fiduciary policies, Wrongful Act is typically defined as breach of a fiduciary duty imposed by ERISA or negligent administration of an employee benefit plan.

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