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Lawyer Insights

Training for Tomorrow: 2021 Checklist for Entity Counsel Supervising the Creation or Renewal of an Executive Protection Program in the Age of "Cooperation"

By James Wing, Geoffrey Fehling and Brian T.M. Mammarella
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The corporation laws of every U.S. jurisdiction permit corporations on the "clear day" (i.e., before an adverse claim arises) to agree to advance defense costs, indemnify, and insure presumptively innocent directors and officers against risks of liability that arise out of their good faith service to the corporation. States' laws governing alternative entities generally leave the matter of "executive protection" for managers to the law of contracts. In both situations, courts justify protection programs as encouraging responsible and talented individuals to accept the weighty responsibilities these positions impose.

In 2012 and 2013, *Business Law Today* published checklists created by the Business Law Section's Director and Officer Liability Committee to assist counsel in supervising the creation or renewal of executive protection programs. Both before and after its first publication, the checklist was vetted through exposure to and comment by attendees at ABA live and webinar programs and at a webinar given to members of the Association of Corporate Counsel. Case law, commentary, and further education in this area have continued to evolve since 2013. The Committee promised that it would update the checklists periodically to reflect changes in the law and insurance markets. This is the 2021 update.

The checklist was initially created by the Committee in response to requests by corporate counsel of major U.S. entities. These counsel had communicated their practical inability to master the nuances of this ethically dangerous, highly complex, and specialized area and to keep up with new developments in the law and the insurance market. They asked for a compendium of issues that they could give their risk manager, insurance broker, and outside counsel so that entity counsel could vet the adequacy and breadth of the entity's protection program. The goal was to permit entity counsel to meet their ethical duty to advise the entity's unrepresented "constituent" board members, executives, and managers of the extent to which the program might meet their future needs or might fall short.

This need has become increasingly urgent over time. In particular, the personal exposures of corporate directors and officers and entity managers (sometimes referred to here collectively as "executives") to governmental administrative and criminal risk have expanded through the "cooperation revolution" in white-collar criminal law that formally began in 1999.[1] The Committee believes that if an executive protection plan is adequate to address the increasing criminalization of executive and managerial risk, it ought to be sufficient to protect against non-criminal legal risks as well.

The updated checklist below highlights issues and suggests alternatives intended to meet the legitimate goals of executive protection from the standpoint of the protected individuals and independent of the "stormy day" potential that the entity may "cooperate" against a protected individual with a governmental enforcement authority. The checklist attempts to do so in a commonsense and balanced manner. It is

intended to provide entity counsel with some comfort that he or she has met the "clear day" duty to both the entity and protected managers to provide protection to affected individuals to the "fullest extent permitted by law," while suggesting possible ways to scale back such protection if such is the desire of the board or other governing authority. The suggestions are designed to meet the ethical rules that govern entity counsel whom the board or other managing authority has charged with creating or supervising the renewal of a protection program for the benefit of otherwise unrepresented entity directors, officers or managers. A comprehensive article on the ethical aspects of "clear day" protection programs is being prepared for publication in *The Business Lawyer*.

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I. ENTITY AUTHORITY

A preliminary issue arises before the careful practitioner attempts to draft any protection program. Does the statute applicable to the creation of the entity require particular language in the entity's formation document before the entity's directors, officers, or managers can be protected by mere board action? Some jurisdictions characterize the issue of executive protection as one dealing with the entity's "internal affairs." They may require that the entity's formation document expressly permit its board or governing body to adopt certain resolutions in order to effectively "legislate" protection that is effective to bind otherwise non-consenting shareholders and creditors. The careful practitioner must ascertain whether the entity's jurisdiction of formation requires appropriate enabling language in the entity's formation or other governing document and, if so, whether such language in fact appears.

II. EXCULPATION, ADVANCEMENT, AND INDEMNIFICATION

Once the issue of authority has been resolved, the practitioner turns to the merits of the protection to be offered. A comprehensive directors' and officers' protection program has four elements, regardless of whether the entity is for-profit or not-for-profit:

1. statutory immunity of a corporation's directors (and in some jurisdictions, officers) from shareholders' claims for damages resulting from directors' failure to exercise "due care," and statutory protection against liability for (typically) volunteer executives of non-profits;

2. contractually mandatory advancement of defense costs and expenses to selected executives until the underlying claims are resolved and then relief from any duty to repay the amounts advanced in a proper case;

3. indemnity from the entity for any amount an executive may agree to pay to settle a claim arising from his or her service to the entity or that the executive may be compelled to pay by judgment in a proper case; and

4. a comprehensive program of D&O insurance that properly meshes with the entity's advancement and indemnity undertakings.

This checklist addresses these elements in turn.

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A. Exculpation under Certificate/Articles of Incorporation; Statutory Protections for Volunteers of Non-Profits

The careful practitioner will investigate whether the statute governing the entity permits exculpation of its directors and officers and, if so, whether the statutory requirements for providing exculpation have been met through the inclusion of appropriate language in the entity's governing document. In most jurisdictions, exculpation for money damages for breaches of a director's or (sometimes) officer's fiduciary duty of due care (akin to simple negligence) must be included in the entity's articles or certificate of incorporation. Exculpation for damages for breach of a similar standard, if permitted, will typically be found in the operating or other base agreement for an alternative entity. Is the required language present? If not, can the governing document realistically be amended to provide for exculpation?

If an alternative entity is involved, should a provision be inserted to provide exculpation or clarify the standard of care that managers and members must meet to avoid liability to the entity and other members for both non-fiduciary and fiduciary breaches? Can fiduciary duties be otherwise limited or eliminated under the governing law of the particular entity and is doing so wise and intended by entity participants?

B. Advancement and Indemnification

Under the law applicable to the entity, may its executives and managers be given a right—whether by contract or under the entity's governing documents—to *mandatory advancement* of reasonable defense costs for all claims against them arising from their service? May the executives and managers be given a mandatory right to be relieved from repaying these advances so long as facts are not found in the underlying litigation that they breached the applicable jurisdiction's standards for breach of fiduciary duty or committed other prohibited misconduct? May the executives and managers also be *mandatorily indemnified* for any ultimate settlement or judgment against them under the same limits? Does the applicable statute governing the entity permit these rights to be expanded by agreement? Should bylaw or operating agreement provisions providing for contractually mandatory advancement and indemnification specifically provide that the provisions constitute contractual obligations intended to expand on rights otherwise merely permitted by statute?

Case law that has arisen since the beginning of the white collar "cooperation revolution" in 1999 has cast a harsh light on all of the following:

- the law of advancement and indemnification in respect of corporate internal investigations;
- the effect of Fifth Amendment assertions in internal investigations and advancement proceedings;
- the law of privilege as it relates to descriptions in billings that are the subject of advancement proceedings;
- a former executive's right of access to entity documents to assist in his or her defense where the entity is cooperating with prosecutors; and
- whether a charged executive must make at least a preliminary merits showing of innocence of breach of fiduciary duty as a condition to obtaining advancement.

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In most cases, an executive's need for advancement is urgent. This means that advancement provisions should be drafted in as airtight a manner as possible as mere litigation delay can be sufficient to moot needed relief. All these critical issues are subject to drafting by the careful practitioner. Many issues of this kind have arisen in litigation following publication of the 2013 checklist. A non-exclusive list of salient issues to address includes:

1. Are the advancement and indemnity rights provided truly contractually mandatory, or does the governing statute only permit mandatory advancement rights to be conferred by separate action of the board on a discretionary basis after a claim arises? Is the right to mandatory indemnification contractually guaranteed so long as the indemnified person is not found guilty of disabling conduct in the underlying proceeding for which defense costs are sought? If so, is indemnification automatic, or must the executive prove anew his or her compliance with the required standard of indemnification just because he or she was *charged* with misconduct that could not be in the legitimate discharge of his or her responsibilities to the entity? If so, does the executive or the entity have the burden of proof?

2. If mandatory rights are granted in corporate bylaws, is the board prohibited from amending the bylaws to eliminate protection for circumstances that accrue during the executive's tenure but before a claim is made? (Some state statutes cover this question, but many do not.)

3. As a matter of balance, does the right to advancement accrue at a sufficiently early stage to protect the executive involved in an internal investigation without causing premature "lawyering up" that is detrimental to corporate collegiality and informal communication?

4. Generally, the right to advancement covers not just third-party claims but also claims by the entity itself, derivative claims, and internal investigations not instigated by a government enforcement authority or derivative claim, such as claims and investigations precipitated by an internal whistleblower. Has the board or other managing body granting the protection been fully advised of this?

5. Is the board or other managing body clear about the meaning of protection granted "to the fullest extent permitted by law," the customary formulation of the scope of protection? Is the board or other managing body made aware before it grants "fullest extent" or other expansive protection that a promise to advance can include, unless excluded or limited, claims against an executive for embezzlement, diversion of corporate opportunity, insider trading, and other instances of unauthorized self-enrichment? Is the board informed of the increased likelihood of claims following a change-in-control when the incumbent board is no longer making decisions concerning entity litigation and may itself be the target of claims from its successor?

6. In jurisdictions that statutorily extend the scope of a promise by a corporation to indemnify "to the full[est] extent permitted by law" to include a promise to advance, is it certain in that jurisdiction that there is no requirement that the applicant for advancement make any kind of merits showing as to his or her prospective right to indemnification and/or innocence of the allegations of misconduct made in the underlying case? Is the board or managing body aware of the absolute distinction the law makes between indemnification on the one hand, and advancement (or advance indemnification) on the other? Is the requirement that an executive make a preliminary merits showing expressly eliminated in the promise of advancement in every case?

7. Accusations of misconduct against a putative advancee that go to the merits of the underlying claim can impugn the character of the executive seeking advancement and prejudice the fact-finder. Since the merits of the underlying claim have no bearing on advancement, should allegations of misconduct and bad character be expressly prohibited in the protection plan documents—both as a matter of evidence and professionalism—from any advancement proceeding?

8. Most alternative entity organizational statutes omit detailed provisions for advancement and indemnification. Indemnification and advancement, thus, must be specifically contractually included in the operating or other governing agreement if they are to exist at all. Does the operating agreement specifically provide that contractually mandatory indemnification will be given "to the fullest extent permitted by law," or is the scope of that promise limited as discussed above? Does the agreement provide a standard of conduct by which non-mandatory indemnification is to be measured analogous to standards employed in corporate contexts to avoid public policy challenges? Does the language specifically extend indemnification to match the breadth of cover granted by the Delaware cases interpreting the phrase "by reason of the fact," even if no governing statute uses the term? Does the agreement specifically provide for mandatory indemnification without any requirement to re-litigate the underlying case if the executive is "successful on the merits or otherwise" in the underlying case?

9. Do all agreements provide for "fees on fees" as a central feature of advancement and indemnification as opposed to a simple prevailing party fee provision? In jurisdictions that have statutes that make one-way fee provisions reciprocal, is such language sufficient to avoid reciprocity? If not, has a suitable and enforceable waiver of a reciprocal right been obtained from the entity?

10. If the corporation has foreign subsidiaries on whose boards executives are expected to serve, or if they are expected to otherwise supervise foreign operations, is the corporation obligated to post bonds or otherwise pay to secure the release of the executive's person from physical arrest and his or her personal assets from sequestration as a result of orders issued by a foreign court or governmental agency? May the corporation indemnify and advance defense costs, or even buy insurance for such executives, if the substantive law governing the foreign subsidiary forbids advancement, indemnification, or insurance?

11. If the executive (or former executive or manager) is in any way implicated in a matter that creates potential personal criminal exposure, does the executive:

    i. have access to (but not possession, custody or control of) all relevant corporate documents to which he or she had access during her tenure?

    ii. have the express contractual right to assert Fifth Amendment privileges (and his or her lawyer work-product privileges) without jeopardizing his or her advancement and indemnity rights or limiting the amount of defense costs for which he or she is entitled to advancement? Does any bylaw specify a mechanism for resolving privilege disputes?

    iii. have the right to receive advancement of defense costs until "final adjudication" (i.e., after appeal) of facts that forbid the corporation from indemnifying him or her under the

protection plan in the criminal or civil case for which advancement is sought? Is the corporation prohibited from instituting or continuing any civil case against the executive that requires her to waive her Fifth Amendment rights or the executive's counsel work-product privileges before final adjudication of the case that gives rise to the need for advancement?

iv. have the right to subrogate herself to the corporation's Side B coverage should the corporation refuse to advance defense costs and the executive pays such a cost directly?

v. have the right to judicially compel advancement at the corporation's expense using summary procedures, i.e., without having to make any assertions of fact, good faith, or innocence that can prompt an evidentiary hearing?

12. Does the most likely jurisdiction in which a suit to compel advancement will be heard treat advancement as a discrete, independent cause of action available for summary judgment, or must it be brought in equity to compel "advance indemnification" by way of preliminary injunction? If the latter, may a bond be required, even though the contractual right to advancement is free of any duty to give security? May the posting of a bond as a condition to advancement be waived in advance by agreement? Should compliance with other standards for awarding preliminary injunctive relief be eliminated by agreement? Will a stipulation that any advancement proceeding be treated as a "summary" proceeding be respected in the enforcing court? Should all defenses other than those going to the existence of a contract for advancement or indemnification and whether the claimant is a covered person asserting a covered claim, be denied the status of defenses to an advancement claim? Should the entity be prohibited from asserting res judicata or collateral estoppel in respect of any ruling made in an advancement case in any later case for indemnification? Should a provision be inserted in the protection plan mandating expansive interpretation of the agreement in favor of covered executives and managers?

13. Should the entity leave its advancement and indemnity exposure unlimited in amount in respect of third-party claims in which the corporation and executive cooperate in the defense? In cases where the interests of the entity and its executives are adverse so as to prohibit a joint defense, should the entity limit its advancement and indemnity duty to the sum of insurance cover and the corporation's insurance retention, particularly if the entity is not-for-profit?

14. Are executives permitted to be advanced and indemnified against all legal costs in any matter that includes non-indemnifiable claims or parties so long as the facts or issues relevant to the covered and uncovered claims overlap? Where cover is excluded by the agreement and the exclusion is found to apply, must defense costs be allocated, and, if so, by what standard?

III. D&O INSURANCE

A corporation may obtain Side B insurance to cover its advancement and indemnity obligations to its executives. Such cover "protects its own balance sheet," as the saying goes. A corporation also typically purchases Side A cover to protect its executives directly from claims for matters in which the corporation and executives are joint defendants and are united in the defense. This cover is principally intended to protect the executive where the entity is insolvent or where the law prohibits the entity from advancing or indemnifying the executive as a matter of law (so called "non-indemnifiable loss"), but does not prohibit

insurance from doing so. Finally, Side C or "entity" coverage provides protection for claims against the company. The company's Side ABC policies, thus, are written to cover claims where the interests of the executive and the corporation are not in conflict.

A corporation may also purchase separate standalone Side A-only/difference-in-conditions (DIC) insurance for its executives. This insurance gives executives a separate limit of cover that the entity may not invade. It may "drop down" to cover defense costs and settlements where the ABC insurers become insolvent; where the underlying Side ABC limits are exhausted; where the entity refuses to advance (sometimes forcing the executive into extensive litigation as to his or her right to advancement or indemnification); or where any underlying insurer fails or refuses to pay or attempts to rescind coverage. DIC insurance is particularly valuable to executives because, among other reasons, it often lacks certain exclusions, such as the "insured vs. insured" exclusion or "pollution" exclusion, typically found in traditional Side ABC D&O policies.

Of course, the appropriate structure, scope, and amount of D&O coverage for both entities and executives varies greatly between industries, entity sizes, exposures, and a multitude of other factors impacting risk profiles and likely claims arising from those risks that could be mitigated through insurance. Checklist items to consider when evaluating D&O coverage include:

1. Are all individuals that the board wishes to insure in fact covered? Are those it does not wish to cover excluded from the policy definition of "Insured" so as not to prematurely exhaust policy limits?

2. As a practical matter, will executives—particularly former executives or those whose interests diverge from those of the company—have access to the D&O policies purchased to protect them when a claim arises? What information may or must a risk manager or in-house attorney provide to its former executives in the event of a claim or potential claim implicating the company's D&O policies? Is the company or its independent broker the authorized representative of all insureds, even individual insureds, for all purposes, including the receipt of policies and the giving of notice? Do individual insureds have the right to notice claims or instruct the entity to do so?

3. Has the board made a reasoned and appropriate decision on policy limits, particularly given that under its Side B coverage, it seeks to cover its complete advancement and indemnity exposure to all covered executives beyond an agreed retention? Are all parties cognizant of the phenomenon of competition among insureds for access to policy limits and the accepted means for reducing such competition? Does the Side ABC policy have a priority of payments provision contemplating such a situation? Are executives' Side A coverage limits provided exclusively through the Side ABC policy, or has the company also purchased dedicated, standalone Side A-only coverage to mitigate the risk of competition for scarce insurance resources in the event of insolvency or large exposures? Are litigation costs covered when they are incurred in board members' efforts to preserve policy limits for themselves?

4. Does the policy cover defense costs within overall limits or through sublimits for matters such as derivative investigations (both those that arise immediately after demand and those that arise after the creation of a special litigation committee) and corporate internal investigations?

5. Where advancement coverage incepts before a defined "claim" arises, does the policy give each insured the separate option of not treating the event as a reportable claim or mandatorily reportable circumstance? May individual insureds give a "notice of circumstance" to cement cover under the policy in effect for that year over the objection of the entity?

6. Does the policy cover employment practice claims, crisis management costs, searches, and raids by enforcement authorities, and claims against employed lawyers? If the latter have separate professional liability cover, is it clear which cover is primary?

7. How does the policy respond to government investigations by enforcement authorities prior to the institution of formal enforcement action (e.g., obtaining documents or testimony through subpoenas or informal requests)?

8. Is the policy definition of "wrongful act" sufficiently expansive so that "all risk" coverage is obtained, assuming such is the desire? Does the insurer agree that such cover includes claims by opposing parties for attorney's fees? Does the policy cover claims for personal injury and property damage arising from a wrongful act as defined? Does the policy cover Section 11 and 12 securities law liability? Is there coverage for all insurable fines and penalties and punitive, moral, and multiple damages to the extent permitted by law—and where there is a dispute as to which law may apply, as determined by the law most favorable to the insured? Does the policy allow for recovery of amounts paid to mitigate or reduce the likelihood of a claim? Does coverage exist for personal liability for corporate taxes and statutory insurance contributions?

9. Does advancement coverage expressly continue until there has been a final adjudication of facts in the underlying proceeding adverse to the insured for which advancement is given that permits the application of the "willful or intentional act" policy exception? Is the insurer prohibited from bringing a suit to accelerate that process? Are the "deliberate and intentional act" or "improper personal benefit" exclusions limited to cases where the act or gain was the result of deliberate misconduct? Is the insurer prohibited from recovering its advances should the executive's conduct fall within the "willful or intentional act" exclusion?

10. Is the insurer's obligation to advance defense costs prior to a final judgment or settlement subject to a right to recoupment or repayment in the event it is later determined that the policy did not provide coverage? Does the insurer get the benefit of hindsight to try to recoup legal fees and expenses advanced based on the potential for coverage based on a later-discovered fact not known at the time the insurer determined that advancement was appropriate under the circumstances or from a criminal admission made after the policy limits have been paid out? Can the policy be negotiated so that the insurer has a right of recoupment against the entity but not individuals?

11. Is the definition of "loss" sufficiently expansive? Does it exclude the types of claims against which the board may not wish to insure such as insider trading, embezzlement, diversion of corporate opportunity, and other claims in which the executive is accused of receiving an improper personal gain or benefit?

12. Does the policy contain an exclusion for claims against executives that seek to recover amounts that the corporation should have paid in addition to amounts it did pay in a merger, share

exchange, or sale transaction? If so, are executives entitled to advancement and indemnity if personally sued in such a case without being required to allocate their defense costs between other covered claims and the claims seeking an increase in consideration? Generally, are executives permitted to be advanced and indemnified against all legal costs in any matter that also includes uncovered claims or parties so long as the facts or issues relevant to the covered and uncovered claims overlap?

13. Are the exclusions for illegal conduct, "other insurance," and timing of claims (including the provisions relating to giving of notice of claim or circumstance), reasonable and readily understandable? Are the "notice of circumstance" provisions objective, subjective, or both; and are such provisions mandatory or permissive? Does the policy provide for an extended notice period should the corporation become insolvent?

14. Is there an "insured-versus-insured" exclusion and, if so, is it phrased narrowly to exclude only truly collusive claims?

15. Does the policy contain a clause that conditions or otherwise bases the executive's Side A cover on the corporation's fulfillment of an obligation to advance and indemnify "to the fullest extent permitted by law" or comparable language? Is this provision limited to prohibit the insurer from placing on the insured executive the duty to assume the corporation's Side B retention or deductible in a case where the corporation breaches its statutory or by-law advancement or indemnity obligations?

16. Does the insured corporation have reporting mechanisms in place to ensure that the risk manager is kept fully informed of any potential claim or circumstance requiring notice to the insurer? Does the insurer bear the burden of establishing prejudice from late notice, and is its remedy for late notice limited to the actual damage it sustains as a result? Do the executives have the ability to notice claims or circumstances directly to the insurer under their Side A cover and are executives entitled to receive notices of cancellation or changes in coverage?

17. Does the policy permit an executive subject to potential or actual criminal charges to assert Fifth Amendment privileges against the insurer, and the executive's counsel work-product privileges, without violating the policy or limiting the executive's recovery of defense costs due to a claim by the insurer that the executive's counsel has provided insufficient billing detail or breached a duty to cooperate? Is there an agreed mechanism for resolving privilege disputes by a court (not an arbitration) that requires advancement while any dispute is being resolved? Is there a severability clause that protects "cooperating" executives should "non-cooperating" executives be held to violate the policy's cooperation clause?

18. Is the policy's definition of "application" reasonably narrow and understandable? Are the covenants and representations made by the corporation and any insureds in either the application or the policy reasonable and understandable?

19. Is there a broad severability provision that insulates innocent executives from a claim of application fraud due to the guilty knowledge of less than all of their number?

20. Is there an incontestability or similar clause that limits the insurer's right to rescind a policy? Is the insurer's right to cancel the policy appropriately limited? Must it notify all affected insureds, or at least all current insureds?

21. Is there a settlement "hammer" clause and has it been appropriately drafted to avoid unfair and unintended results?

22. Does the policy sufficiently define the parameters of the consent-to-settlement clause and the clause permitting the insurer to associate counsel to eliminate micro-management of the defense? Do these clauses specifically exclude criminal matters and matters where the insurer pays defense costs while reserving its right to deny coverage?

23. Does the policy contain an "order of payments" provision sufficient to reasonably mitigate the effects of a corporate insolvency?

24. Are the claim reporting requirements reasonable? Does a broad definition of "claim" result in an undesirable expansion of the insureds' duties to give notice of claims or circumstance? Does the right to advancement of defense costs arise within a period of less than 60 days after demand is made on the underlying insurer or corporation? How does the policy address "related" or "interrelated" acts for the purposes of giving notice, and how should the company approach notice of "circumstances" likely to give rise to a claim in light of those related-claim provisions?

25. Have the implications of DIC or "dedicated limits" coverage been explored to provide advancement and indemnity coverage:

    i. for risks that the corporation and the underlying Side ABC policy do not cover;

    ii. where the corporation refuses or is unable to advance defense costs and indemnify;

    iii. to mitigate the risk of program failure due to competition among competing insureds for policy limits;

    iv. to avoid loss of coverage in respect of criminal matters in which the executive (or his or her counsel) asserts Fifth Amendment or work-product privileges;

    v. to cover cases where an underlying carrier may not a pay a claim arising in a foreign country due to its unlicensed status; and

    vi. to provide reinstated limits or separate limits for boards?

26. Does the policy insure executives for the costs of obtaining release from incarceration and release of sequestered personal assets if they act as directors or agents of a foreign subsidiary or for the parent corporation in a foreign country? Does the policy contain coverage for reputation restoration and cover crisis management public relations services?

27. Does the policy contain appropriate cover for the costs of resisting Dodd-Frank/SOX claw-back claims?

28. Does the carrier selected have a reasonable financial rating and a good reputation for claims handling and payment? If the D&O program has excess insurers, how is excess coverage impacted by insolvency of the primary insurer?

29. Do the insureds have the right to recover their attorneys' fees under applicable law should they be required to litigate coverage with the insurer?

30. If a DIC policy contains a choice of law clause, does it choose as the applicable law the law of the underlying Side ABC policy? What law is chosen in the Side ABC policy? If the policy contains an arbitration clause, is the legal seat of the arbitration (not just the hearing locale) a venue that understands American plea-bargaining practices?

31. Are there to be one or more excess policies above the negotiated first-tier policy that do not "follow the form" of the first-tier policy? If so, have all questions above been asked in respect of each of the excess policies? Do these policies have appropriate provisions relating to when each layer of excess coverage attaches to avoid gaps in protection, including provisions requiring that upper tiers "drop down" should insureds reach a settlement with the lower tier carrier below its policy limits?

32. Have the appropriate locally issued D&O policies been obtained in respect of foreign subsidiaries and operations and will all applicable foreign taxes be paid?

CONCLUSION

The time has long passed when executive protection programs could be evaluated by boards based simply on an inquiry into the limits of Side ABC insurance cover and the amount of the premium. The number and complexity of the issues listed above, together with the potentially catastrophic results that can obtain when criminal charges are threatened against companies and individual executives, prove that this is no longer an issue that can safely be treated cavalierly (if it ever was). The amelioration of these risks can only be left to professionals. The boards and executives that such insurance policies are intended to protect have a vested interest in maintaining a D&O program that is both robust and tailored to the company's current business operations and exposures. The Committee hopes that both corporate counsel and practitioners will find the Checklist a useful resource to guide their professional advice in this age of "cooperation."

Notes

1. *See* Bennett, LoCicero & Hanner, "From Regulation to Prosecution to Cooperation: Trends in Corporate White Collar Crime Enforcement and the Evolving Role of the White Collar Criminal Defense Attorney," *The Business Lawyer*, Vol. 68, p. 411 (Feb. 2013).

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