

What Questions Executives Should Be Asking About Their D&O Insurance Following The New DOJ Policies Issued Last Week

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As was recently reported in the *New York Times* and elsewhere, the **Justice Department** issued new policies last week that place individual executives as the focus of their prosecution efforts, and encourage companies to cooperate in building a case against those individuals. The *New York Times* specifically noted that: (1) allegedly responsible individuals will be the focus of investigations at the outset; and (2) in settlement negotiations, companies will not be able to obtain credit for cooperating with the government unless they identify employees and turn over evidence against them. This announcement appears to be the start of a larger agenda hinted at by newly minted Attorney General Loretta Lynch, who has promised to focus on white-collar crime. The *Times* article can be found [here](#).

Of course, the scope and impact of this initiative will become clearer as it is implemented. However, it should serve as a stark reminder to executives that their interests are not always aligned with those of their company, and that they should closely examine the insurance coverage dedicated to their defense and indemnity of government investigations and other lawsuits.

Directors and officers insurance is a well-known insurance product. Coverage under a directors and officers insurance policy is typically described as having three major coverage parts. Side A covers the director or officer in circumstances when the company is not legally permitted to provide indemnification. Side B covers the company for indemnifying the relevant director or officer when the company is legally permitted to provide indemnification. Side C coverage provides some limited coverage for the company itself.

But what if there is a government investigation underway and the company refuses to indemnify certain directors or officers — perhaps due to a concern that there could have been wrongdoing? Or what if the company exhausts the entire directors and officers policy and then refuses to continue to cover a director or officer's attorney fees because the costs are just getting too high? An excess "Side A Difference in Conditions" policy is a specific kind of excess directors and officers insurance policy that will step in and advance defense costs for the directors and officers in the event the company doesn't pay an otherwise covered claim for any reason. With fewer exclusions than the typical directors and officers insurance policy, a Side A Difference in Conditions policy can often be triggered even when the underlying directors and officers insurance is not due to an exclusion. A Side A Difference in Conditions policy usually does not have a retention, so from dollar one, the

executive's costs are covered.

With dozens of directors and insurance policies and Side A policies to choose from, there is no time like the present for people in corporate leadership roles to re-examine their insurance coverage, including a legal review of their directors and officers policy to make sure that these government investigations are covered, and a review of any proposed Side A Difference in Conditions policy. Directors and officers would also be very wise to consider insisting on a separate indemnification agreement. See our previous blog devoted entirely to that topic [here](#).

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