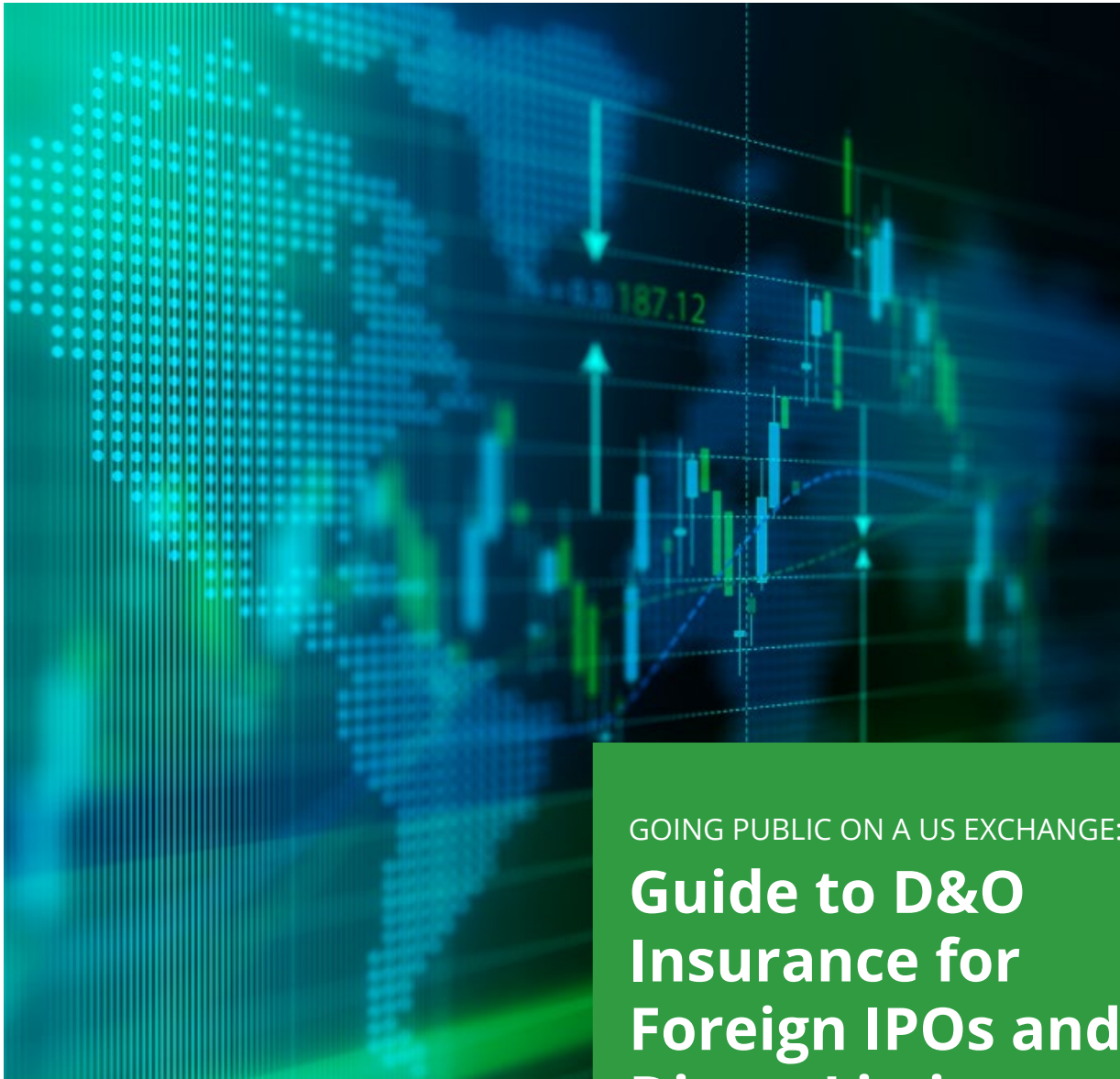




WOODRUFF
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GOING PUBLIC ON A US EXCHANGE:

Guide to D&O Insurance for Foreign IPOs and Direct Listings

2024 Edition

woodruffawyer.com

WOODRUFF-SAWYER & CO.

Insurance Services | Risk Management | Employee Benefits

Leverage Our Experience and Knowledge Working with Foreign Private Issuers

Woodruff Sawyer is a market leader when it comes to placing D&O insurance for companies going public through IPOs and direct listings. Experience matters for these types of transactions, and this is especially the case when an issuer is a foreign filer. A specialist on your insurance brokerage team will work through all the D&O insurance issues that will arise before, during, and after the process of going public, as well as during your life as a foreign private issuer on a US exchange. There is significant complexity to the process of protecting a company and its directors and officers as they undertake the process of going public. This interactive resource is your guide to the D&O insurance process for IPOs and direct listings by foreign filers.



Are you a domestic issuer going public through an IPO or direct listing? If so, check out Woodruff Sawyer's [Guide to D&O insurance for IPOs and Direct Listings](#).

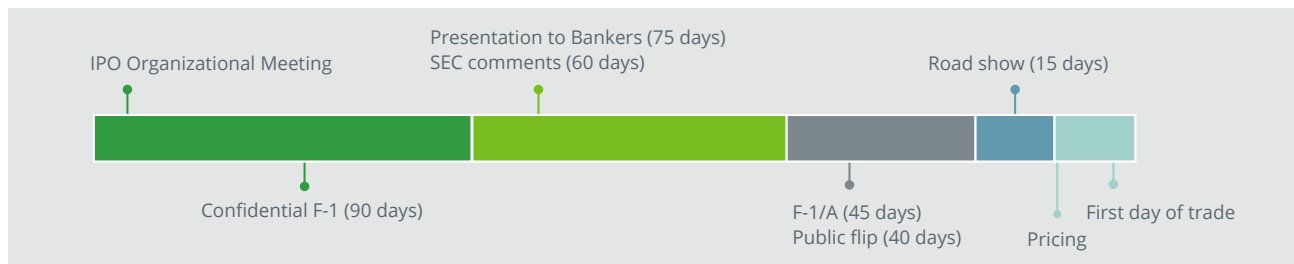


Are you going public through a de-SPAC transaction? If so, check out Woodruff Sawyer's [Guide to D&O Insurance for De-SPAC Transactions](#).

Private to Public Timeline

Click/tap an area of the timeline to learn more about the D&O insurance process for companies going public. While the timeline below is specific to IPO companies, the milestones are relevant to both IPO and direct listing companies going public on a US exchange. Both types of companies must have their public company D&O insurance program ready to be put in place before their stock starts trading on a public exchange, and both types of companies benefit from getting an early start on the process of placing their public company D&O insurance. The timeline below references F-1 registration statements; the timing is the same if you choose to use an S-1 registration statement.

IPO Milestones Timeline



D&O Insurance Process

► PREPARE

- Develop strategy
- Evaluate
 - Private company insurance
 - International
 - Cyber
 - Other insurance lines
- Governance counseling
 - Corporate governance policies
 - Choice of forum provisions

► LAUNCH

- Implement carrier NDA
- Refine limits analysis
- Negotiate with markets
- Preliminary board presentation

► BROKER

- Negotiate coverage and pricing
- Negotiate warranty statements
- Present insurance program
- Schedule executive and employee compliance training

► IMPLEMENT

- Finalize program
- Execute warranties
- Address subjectivities
- Coordinate coverage transition
- Bind IPO Coverage

► SUPPORT

- Counseling
- Training/education
- Market update
- Claims advocacy

Source: Woodruff Sawyer

1. Prepare

A. Develop Strategy

Consider these key questions when developing your strategy to optimize your D&O insurance as a foreign private issuer:

- Where is your listed entity domiciled, and what are the insurance implications of this decision (tax, insurer access points, local requirements)?
- Which key executives will be involved in the insurance process?
- Does management have experience with other US-listed companies that can be leveraged during the insurance underwriting process?
- How involved does the board of directors want to be in making decisions about D&O insurance?
- Would management and the board benefit from a briefing on the scope of risk associated with being listed on a US exchange?
- When it comes to the purchase of D&O insurance limits, what is your philosophy on risk transfer versus retaining your risk?
- What is the timing of your public listing and are you on a dual track?
- For IPOs, what is the size of your offering, and will you have selling shareholders?
- Which insurance carriers are the best fit for your needs given your risk profile and international footprint?
- Do you have any special or unusual risk exposures (including activities in sanctioned countries) that need to be addressed? An initial strategy session can go a long way to making the overall process run smoothly and efficiently.

B. Evaluate

i. Best Practices from an Insurance Perspective

Where possible, consider having at least \$5 million to \$10 million of D&O insurance limits in place as a private company. This move protects directors and officers should the company be acquired instead of going public. It also ensures that the subsequent public company D&O insurance program is not vulnerable to having warranty statements apply to this first \$5- to \$10-million layer of insurance.

Finally, consider whether you need IPO- or direct listing-specific endorsements such as “roadshow coverage” and “failed IPO coverage.”



[LEARN MORE ABOUT PRIVATE COMPANY D&O INSURANCE](#)

ii. International Local Policies

Newly public companies can suddenly find themselves subject to intense scrutiny across many jurisdictions. Before going public, analyze your global subsidiaries and decide whether you want to implement any (or any additional) local D&O insurance policies. No doubt your policy says in the text of the contract that it is supposed to respond worldwide; that does not mean it actually will. Many jurisdictions require that D&O insurance policies, if placed, be placed locally.



[LEARN MORE ABOUT PROTECTING DIRECTORS AND OFFICERS OF FOREIGN SUBSIDIARIES](#)

iii. Cyber

Cyber is an exploding area of concern for many companies. In some cases, effectively managing this exposure is fundamental to the success of a company. This can be a board-level issue that needs to be addressed in a timely and comprehensive way.



[READ ABOUT HACKERS WEAPONIZING THE NEW CYBER DISCLOSURE RULES](#)

[READ ABOUT THE SEC'S NEW CYBER DISCLOSURE RULES](#)

[SEE OUR CYBER INSURANCE LOOKING AHEAD 2024 GUIDE](#)

iv. Other Insurance

A newly public company must be ready for public-company scrutiny. Having a buttoned-up insurance risk management program across all lines of insurance—not just D&O insurance—is critical. Your board will need to report on its risk oversight efforts, at least by proxy season, especially given the SEC's disclosure requirements concerning a board's role in enterprise risk management.



[LEARN MORE ABOUT ENTERPRISE RISK MANAGEMENT](#)

C. Develop Strategy

i. Corporate Governance Policies

Part of the process of going public should be implementing corporate governance policies that help mitigate D&O risk. Examples include: insider trading policies (including the correct implementation of [10b5-1 trading plans](#)), corporate communications policies, and appropriate [indemnification agreements](#). Demonstrating strong corporate governance will also be a key part of the meeting with insurance underwriters.



[LEARN MORE ABOUT INSIDER TRADING AND THE BENEFITS OF 10B5-1 TRADING PLANS](#)

ii. Choice of Forum Provisions

While mostly used by US companies, [federal choice of forum provisions](#) are becoming popular with foreign filers as well. These provisions help companies avoid being sued in state court for disclosure issues in their registration statements.



[LEARN ABOUT FEDERAL CHOICE OF FORUM PROVISIONS](#)

Work with your corporate counsel to determine if it is possible to include these provisions in the charter documents that will govern your company after you are listed on a US exchange. If the answer is yes, you will want to describe these provisions in your F-1 registration statement to ensure that you get credit for them with your D&O insurance underwriters.



[LEARN MORE ABOUT HOW FEDERAL FORUM PROVISIONS HAVE HELPED IPO COMPANIES AVOID STATE COURT LITIGATION](#)

2. Launch

A. Implement Carrier NDA

Companies that choose to file confidentially will want their broker to ask each insurance carrier to sign a non-disclosure agreement (NDA) before being sent the confidential F-1 filing. Ask your Woodruff Sawyer account executive how we have greatly streamlined this process.

B. Refine Limits Analysis

Choosing D&O insurance limits should not be limited to peer data benchmarking—nor should this exercise merely reference broad cuts of settlement data that may not be directly relevant to you. Consider a customized approach, the type of approach that Woodruff Sawyer offers clients through its proprietary database, **DATABOX™**.

C. Negotiate With Insurance Markets

Given the current litigation environment for IPO and direct listing companies, you need significant lead time and a clear strategy to optimize your insurance coverage. Management and the board will want to consider issues like what level of self-insured retention (like a deductible) makes sense given current market pricing for IPO and direct listing company D&O insurance. The good news is that market conditions are much more favorable than they have been in the recent past. With a good process, a company can expect a range of options customized to their appetite for risk.

D. Brief Board of Directors

Even very sophisticated boards of directors may not be familiar with all the current issues at play when it comes to protecting themselves and their companies against the types of claims that are filed against newly public companies. A good practice is to have your broker brief your board on the current litigation environment as well as D&O insurance carrier market dynamics.

3. Broker

A. Negotiate Coverage and Pricing

Pricing is challenging, as is obtaining policy coverage terms that are as broad as possible. You need an experienced broker to avoid overpaying for a lackluster insurance program. There are also traps for the unwary to consider. For example, if you are working with a carrier that has panel counsel, you will want to vet this list before finalizing your carrier decision. If you are asking outside counsel to review the terms and conditions of your D&O insurance policies, you will want to loop outside counsel into your broker's process sooner rather than later.

B. Negotiate Higher Limits Warranties

Higher limits warranties are conditions precedent (“subjectivities”) to a new layer of D&O insurance being placed for a company. When a company buys an additional, new layer of insurance (a higher limit) that it did not purchase the previous year, the insurance carriers typically require that the buyer affirm the following with respect to that new layer or layers: the buyer's directors and officers know of nothing that is likely to give rise to a claim. Exceptions must be disclosed, and coverage for the disclosed exceptions will normally be excluded from the new layer or layers of insurance being placed.

Should a claim arise, the warranties will be tested. In some circumstances, carriers may assert that no coverage is available because the warranty was inaccurate (i.e., something that should have been disclosed was not). The stakes are high and insurance carrier warranty language can vary dramatically. Woodruff Sawyer carefully negotiates the higher limits warranties language in policies for clients.

C. Present Insurance Program

D&O insurance is personal to board members. In our experience, most boards want to hear about the proposed insurance program directly from their insurance broker. This allows the board to have a robust discussion about personal liability and how the proposed D&O insurance program can protect them and the company they are serving.

D. Schedule Executive and Employee Compliance Training

Being employed by a public company can be very different from being an employee of a private company. Schedule your “We're public. Now what?” training to fall either right before or right after the date the company starts trading in the stock market, so employees gain a timely understanding of things like tipper-tippee insider trading liability and the like. This training can be provided by your outside counsel, Woodruff Sawyer, or both.

4. Implement

A. Finalize Program

Now is the time to ensure that all involved stakeholders have agreed to the final form of the D&O insurance program that will be implemented. For many companies, this includes a sign-off from the full board of directors or at least a committee of the board of directors.

B. Execute Warranties

Each newly purchased layer of insurance requires a warranty statement saying, in effect, that the company and its directors and officers know of nothing that is likely to give rise to a claim. Companies have a duty to update any material changes in risk before the program is bound.

C. Address Subjectivities

Subjectivities are carrier-imposed condition precedents to their insurance becoming effective. Common subjectivities for a company first going public include the initial offering or reference price, the offering's registration statement being declared effective by the SEC for trading to begin, revenue or headcount breakdown by country for tax purposes, and higher limits warranties.

Even these sorts of housekeeping items can have complications. For example, sometimes insurers attempt to impose a restriction on the final offering size to give themselves the opportunity to increase their premium if the offering size increases dramatically in the final hours. The most critical subjectivity, however, is usually the higher limits warranties.

D. Coordinate Coverage Transition

Some brokers recommend sending your private company insurance program into run-off. This may or may not be the right choice in your case. If you can get it, the better coverage path is almost always for the public company policy to provide "look-back" coverage. This path is also more cost-efficient because it lets you avoid purchasing private company runoff.



[DO YOU NEED A TAIL POLICY FOR YOUR PRIVATE COMPANY D&O INSURANCE?](#)

E. Bind the Public Company D&O Insurance Program

The SEC has declared your registration statement effective, and you have priced your IPO—congratulations! Before you pop the champagne, call your broker to authorize the binding of your D&O insurance program. You want the insurance to be in place no later than your first trade on a public exchange.

Now you are “done” with the insurance process. But if anything changes—for example, if the company is unexpectedly sued immediately after pricing (it has happened)—call your broker right away with this update.

5.Support

A. Counseling

Woodruff Sawyer offers ongoing support on topics ranging from insurance and claims to corporate governance as it impacts D&O risk. Talk to your Woodruff Sawyer account executive to find out more.

B. Training/Education

As a newly public company, keeping directors, officers, and the company on track requires training and education. To help our friends and clients, Woodruff Sawyer provides [a variety of resources](#), including webinars and white papers. You can also [sign up to receive our weekly blog](#) on topics related to D&O risk and corporate governance, the [D&O Notebook](#). In addition, your Woodruff Sawyer account executive can send you our latest [Board Education Resource Guide](#), which includes information about a variety of resources, including Woodruff Sawyer’s own customized sessions.

C. Market Update

The insurance market is a dynamic system, and the IPO and direct listing D&O insurance market can be very different from the market for more mature public companies.



Need help planning for the upcoming year?

[CHECK OUT OUR D&O LOOKING AHEAD GUIDE](#)

D. Claims Advocacy

All companies hope that paying for D&O insurance will turn out to seem like a waste of money—but sometimes claims arise and the policy is triggered. Claims, and even the possibility of a claim, should be reported to your broker as soon as possible. Amid everything else, you don’t want to find out that you had a misstep when it comes to compliance with the terms of your D&O policy.

Questions About This Guide? Comments? Compliments?



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Additional Resources

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[Cyber Notebook](#)

[M&A Notebook](#)

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