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# WOODRUFF SAWYER

## IPO TRACK

YOUR GUIDE TO DIRECTORS AND OFFICERS INSURANCE FOR IPOs



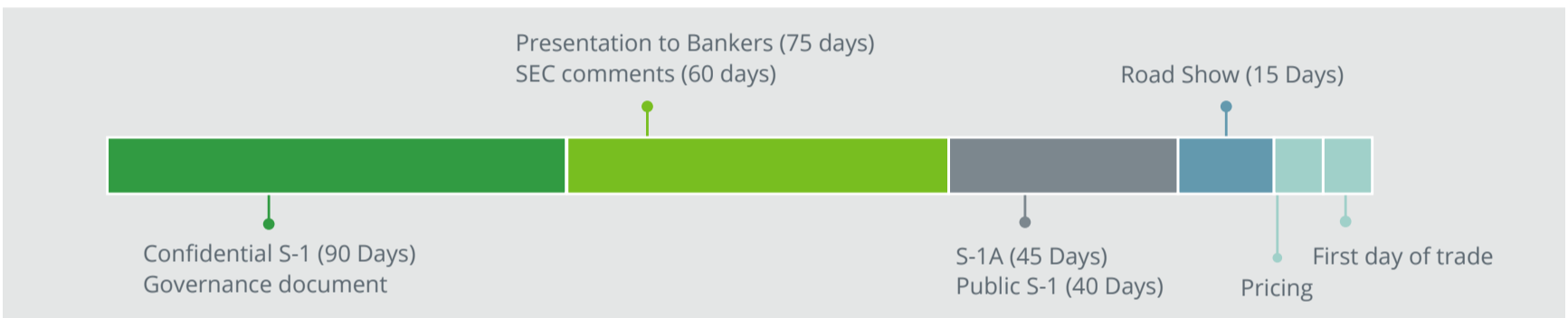
# Leverage Our IPO Experience and Knowledge

**Woodruff Sawyer is the market leader when it comes to placing D&O insurance for IPO companies.** Experience matters when it comes to IPOs. You want an IPO specialist on your insurance brokerage team to work through all the D&O insurance issues with you.

D&O insurance for an IPO is complex...and, properly handled, can be one of the more satisfyingly controllable parts of the IPO process. This interactive resource is your guide to the D&O insurance process for an IPO.

## IPO Milestones Timeline

Click/tap an area of the timeline to learn more about the D&O insurance process.



## 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 compliance training

### ► IMPLEMENT

- Finalize program
- Execute warranties
- Additional subjectivities
- Coordinate coverage transition
- Bind IPO coverage

### ► SUPPORT

- Counseling
- Training/education
- Market updates
- Claims support

# 1. Prepare

## A. Develop Strategy

Setting the strategy involves taking a first look at a number of key questions. Some of these questions include the following:

- What is the timing of our IPO and are we on a dual track?
- What is the size of our IPO and will we have selling shareholders?
- What is our philosophy on risk transfer and buying D&O insurance limits?
- Which insurance carriers are the best fit for our needs?
- Do we have any special or unusual risk exposures?
- Who are the key executives who will be involved in the insurance process?
- How involved does the board of directors want to be when it comes to making decisions about D&O insurance?

An initial strategy session can go a long way to making the overall process run smoothly and efficiently.

## B. Evaluate

### i. Private Company Insurance

Consider ensuring that you have at least \$5 million to \$10 million of D&O insurance limits in place as a private company before you start your IPO process. This move protects Ds and Os 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-\$10 million dollar layer of insurance.

## ii. International

Companies filing for an IPO can suddenly find themselves subject to intense scrutiny, including in non-US jurisdictions. Before going public make sure that you have analyzed your non-US subsidiaries and made a determination as to whether a local D&O policy might be warranted. Just because your US-issued policy says, in the text of the contract, that it is supposed to respond worldwide doesn't mean that it actually will.

## iii. Cyber

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

## iv. Other Insurance

An IPO company has to be ready for public-company scrutiny, and having a buttoned-up insurance risk management program across all lines of insurance (not just D&O insurance) is critical. This is something the Board will care about at least by proxy season given the required disclosures concerning a Board's role in enterprise risk management.

# C. Governance Counseling

## i. Corporate Governance Policies

D&O Insurance is important—and consideration should also be given to implementing corporate governance policies that tend to 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**.

## ii. Choice of Forum Provisions

Your bylaws are a place where you can make strategic choices about where you will be sued in the future. **State choice of forum provisions** are a must.

More controversial are **Federal Choice of Forum provisions**, but after the Supreme Court Decision in Cyan these provisions are the last hope to avoiding having a suit challenging the disclosure in your S-1 registration statement being brought in state instead of federal court.

## 2. Launch

### A. Implement Carrier NDA

Companies that choose to file confidentially may consider having their broker ask each insurance carrier to sign an NDA before being sent the confidential S-1 filing.

### B. Refine Limits Analysis

Choosing D&O insurance limits shouldn't be limited to peer data benchmarking and reference to overly broad cuts of settlement data that may not be directly relevant to you. Consider a customized approach, the type of approach that Woodruff Sawyer is able to offer clients through its proprietary database.

### C. Negotiate With Markets

Given the current litigation environment for IPO 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 company D&O insurance.

### D. Brief Board of Directors

Even very sophisticated boards of directors of IPO companies may not be familiar with all the current issues at play when it comes to protecting themselves and their companies against post-IPO litigation. 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.

### E. Schedule Executive and Employee Training

Being employed by a post-IPO company is an entirely new ball game. Schedule your "We're public. Now what?" training to fall either right before or right after the IPO date so that employees have immediate traction into things like tipper-tippee insider trading liability and the like. This training can be provided by your outside counsel, Woodruff Sawyer, or both.

## 3. Broker

### A. Negotiate Coverage and Pricing

Pricing is challenging, but coverage terms remain broad if negotiated upfront by a skilled broker. 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 than later.

### B. Negotiate Higher Limits Warranties

Higher limit 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 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's 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 negotiates the language of the higher limits warranties carefully.

### C. Present Insurance Program

D&O insurance is personal to board members. In our experience, most boards like 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 the proposed D&O insurance program.



## 4. Implement

### A. Finalize Program

### B. Execute Warranties

Each newly purchased layer of insurance requires a warranty statement that says, in effect, that the company and its Ds and Os 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 an IPO include the stock offering price, the offering's registration statement being declared effective by the SEC for trading to begin, and higher limits warranties. The first three are normally very simple—and 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 for an IPO is the higher limit warranties.**

### D. Coordinate Coverage Transition

Some brokers recommend sending your private company insurance program into run-off. In all but the rarest cases, this is inadvisable.

### E. Bind IPO Coverage

The SEC has declared your registration statement effective and you've priced your deal—congratulations! Before you pop the champagne, call your broker to convey the price and your authorization to bind the D&O insurance program. You want the insurance to be in place before your first trade the next morning. 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

One of the reasons companies hire Woodruff Sawyer is the ongoing support we are able to offer 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

Congratulations on your IPO... now the challenge of life as a public company begins. Keeping Ds, Os and the company on track includes 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. Among the most popular offerings are Woodruff Sawyer's own customized sessions. The guide is organized into five categories: (I) Board Level Multi-Day Events, (II) Committee Level/Chairman-Only Events, (III) Short Shot Events, (IV) Webinars/Webcasts/Podcasts/Blog and (V) Woodruff Sawyer customized Programs.

Need help planning for the upcoming year?

### C. Market Update

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

### D. Claims Advocacy

All companies hope that paying for D&O insurance will turn out to have been 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. In the midst of everything else, you don't want to find out that you had a foot fault when it comes to your 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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