



BLACKMORE BORLEY LIMITED

COMPARISON BETWEEN REGULATORY INSURANCE AND DIRECTORS' AND OFFICERS' LIABILITY INSURANCE

52 Lime Street
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Outlined below are some of the reasons why a *Regulatory Insurance Policy* should be considered in addition to the standard Directors' & Officers' Liability policy (D&O) already purchased.

(Please note that the comments provided below are general in nature based upon a standard D&O policy wording. If more detailed explanation is required please do not hesitate to contact us.)

Assuming that the company purchases a D&O policy, then an element of cover should be available if you are investigated by the FSA. However, such coverage may be restricted for the following reasons:

1. A D&O policy has a single aggregate limit to cover for all reasonable legal costs and liabilities incurred by all directors and officers of the named company and its subsidiaries. It can be impaired by the company itself if such loss incurred by the director and/or officer is reimbursable by the company. If a director, officer or Company make a claim then the coverage available for the remaining directors, officers or the company will be eroded and possibly exhausted.
2. The *Regulatory Insurance Policy* offers a separate aggregate limit of up to GBP 1,000,000 per approved person in each Policy Period irrespective as to whether they are a director, an officer or an employee. (This *Regulatory Insurance Policy* does not cover the reimbursement of legal costs or liability to the company.)
3. A standard D&O policy typically only provides legal costs for an investigation at "the insurer's sole discretion and only upon receipt of a written request". Assuming that the Insurer agrees to fund the legal costs such an agreement takes time to discuss and secure.

The *Regulatory Insurance Policy* is specifically designed to respond in a timely fashion as soon as the approved person becomes aware or anticipates an investigation.

4. The standard D&O policy only insures the directors and officers of the company but employees may be endorsed onto the policy at the insurer's sole discretion.

The *Regulatory Insurance Policy* insures each approved person irrespective of their position within the company.

5. Importantly, the ability to make a claim under a standard D&O policy purchased by a previous employer may prove difficult to negotiate or collect upon, depending upon the circumstance of the employee's departure and/or whether or not D&O insurance is still maintained by the previous employer.

The difficulty in negotiating and collecting payment of a claim does not occur with *Regulatory Insurance Policy*, because the policy is in the name of the individual who also controls whether or not the policy is renewed.

(Please note that cover only applies to acts committed after the retroactive date and subsequently investigated during the Policy Period or subsequent policies purchased.)

6. The *Regulatory Insurance Policy* is a "first dollar" defence policy with no self insured retention/deductible. Whilst this policy does not cover the company this policy can save the company the cost of funding a self insured retention for itself, if it is a reimbursable loss to its directors or officers.
7. A standard D&O policy excludes any losses arising from a breach of professional duty, market fluctuations or more recently "Market Abuse", as defined by the FSA. In the knowledge that almost all FSA investigations will include some form of alleged breach of professional duty, "Market Abuse" and be related to some form of market fluctuation this exclusion will no doubt complicate the settlement of any claim.

The *Regulatory Insurance Policy* does not have these exclusions or conditions and therefore the limitation.

8. If the company merges with another firm coverage under a standard D&O policy is automatically limited to events that occurred prior to the merger or may indeed be cancelled.

The *Regulatory Insurance Policy* does not have this limitation.



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9. Under a standard D&O policy if after an investigated person is found "guilty" the legal expense funded by the insurer will have to be returned! Effectively a standard D&O policy acts as a loan facility rather than as an insurance policy.

The *Regulatory Insurance Policy* pays all reasonable legal costs for a valid claim irrespective of the outcome of the investigation and does not require any repayments by the insured person if they are found "guilty".

10. Some D&O policies are based upon an "indemnification" of the insured rather than on a "pay on behalf" basis. This means that the corporate entity and/or the individual have to pay the legal costs and then seek reimbursement from the insurer. In the case of the individual the ability to finance such large legal costs over several years may prove to be very difficult, if not impossible!

The *Regulatory Insurance Policy* pays all reasonable legal costs "on behalf" of the individual.

11. To secure expert legal advice the individual may have to demonstrate their ability to fund the prolonged and expensive costs incurred before a lawyer agrees to represent them.

The *Regulatory Insurance Policy* overcomes this problem and acts as the "deep pocket" on behalf of the individual.

12. Both the company and the approved person are obliged to make available all information to the FSA. This obligation may sometimes lead to a conflict between the company and its employees as a result of the terms of the contract of employment and the Financial Services and Markets Act. To minimise this difficult situation all parties should receive independent legal assistance from the beginning of an investigation. (In our opinion, if there is more than one claimant under a D&O policy it is very difficult to administer each claimant independently unless each claimant receives legal guidance.)

The *Regulatory Insurance Policy* enables the immediate appointment of a legal adviser as soon as an investigation is anticipated or commenced and all claims are independently administered.

Although not detailed above, the Professional Indemnity policy may also provide a limited source of protection to the individual, but only at the company's discretion. In addition, the policy wording may also have certain policy condition and/or restrictions that may result in similar practical disadvantages outlined in 6) above.

It is for the above reasons and others that **BLACKMORE BORLEY LIMITED** specifically designed the *Regulatory Insurance Policy* to protect each FSA approved person, be they a director, officer or employee. Even if the employer does not "sponsor" the cost of this insurance it still represents extremely good value when compared to the enormous financial and emotional costs incurred by each individual when he or she is investigated.

The *Regulatory Insurance Policy* is intended to provide the approved person with comprehensive legal protection and the peace of mind if the unthinkable happens.

For more information please contact our website at www.reginsurance.com or telephone us on 020 7929 4616.