

# RETIRED DIRECTORS ASSURANCE UNDERWRITING SERVICES

## RETIRED DIRECTORS D&O FORM

**POLICY:** PF-22532 (08/07)  
**DEC PAGE:** PF-22531 (08/07)  
**APP FORM:** PF-22825 (08/07)  
**RENEWAL APP:** None

*The following analysis represents solely the opinion of the editorial staff of D&O MAPS™. It is not a legal opinion, and it is not necessarily concurred in by the underwriter.*

*Retired Directors Assurance is a stand-alone policy designed to protect the personal assets of retired directors who have served on the board of directors for publicly traded, private, and not-for-profit organizations and companies. Retired Directors Assurance Underwriting Services acts as the program agent for the coverage that is available through Westchester Surplus Lines Insurance Company and other ACE affiliates. The ACE Westchester Retired Directors Assurance policy offers coverage to retired directors for a period of 6 years, which covers the statute of limitations imposed under the Sarbanes-Oxley Act of 2002.*

*In the following analysis **positive features are shown in blue**, **negative features are shown in red**, and all other items worthy of mention are shown in black.*

### Application Forms

The application asks for the date the applicant first was elected to the board of directors and the date of retirement.

The application requests a list of all board committees on which the applicant has served, whether or not the applicant has served as chairman, and the dates served on these committees.

There is also a question asking about service to the company in a capacity other than as a director and, if the applicant did serve in such a capacity, a description is requested.

There is a question in the application regarding the receipt by the applicant of compensation or fees from the company other than for service as a director or officer. If the applicant received such compensation, the amount and reason for such compensation or fee are requested.

The application contains a question asking if the insured has any relationship with, or is a party to any transaction with, the company that could create a potential conflict of interest.

The application asks if during the applicant's service with the company, the independent directors had had reason to retain independent advisers or counsel.

The application contains the following questions regarding information (whether or not publicly disclosed), about which the applicant has knowledge: (1) has the company changed, or is currently considering changing, outside auditors?; (2) has the company restated any of its financial statements or is currently considering restating any of its financial statements?; (3) has the company ever waived any portion of its conflict of interest or ethics guidelines?; (4) is the company currently considering mergers, acquisitions, or consolidations?; and (5) has the board of directors ever conducted a review of the company's option granting practices?

There are boxes in the application for indicating the requested limit of liability.

A list of the company's current D&O or executive liability insurance policies is requested.

In addition to the company's Web site address the applicant is asked to provide the following, or to indicate if such information is available on the company's Web site: most recent annual report and all documents filed with the SEC or similar state or foreign agency within the last 12 months; copy of the company's corporate bylaws and a copy of any indemnity agreement between the applicant and the company; and a copy of the company's most recent proxy statement.

### **Declarations Page**

There is a space for indicating the name of the insured person and the insured person's home address.

The policy period uses "local time" instead of "standard time," which may cause some nonconcurrency if any excess policy is purchased.

### **Coverage Agreements**

The policy promises to pay the insured person, rather than reimburse the insured person, for nonindemnifiable loss caused, committed, or attempted prior to the effective date of the policy if the insurer(s) of the underlying insurance (1) wrongfully refuses to indemnify the insured person as required under the terms of the underlying insurance; (2) is financially unable to indemnify the insured person; (3) files an action to rescind, or states in writing its intent to rescind, the underlying insurance; or, (4) according to the terms of the underlying insurance, the insurer(s) of the underlying insurance is not liable for such nonindemnifiable loss.

The definition of company includes any such organization as a debtor in possession under the U.S. bankruptcy law or an equivalent status under the law of any other country.

A spousal extension, including domestic partners, is built into the policy.

No deductible or self-insured retention applies to loss incurred by the insured person.

There is no requirement to maintain any underlying D&O coverage.

### **Claim Provisions**

The definition of claim means any demand or any civil, criminal, judicial, administrative, regulatory, or arbitration proceeding or investigation. The definition of claim also includes an extradition proceeding.

Nonindemnifiable loss means loss that the company is not required or permitted to indemnify, or loss it refuses to indemnify on or pay on behalf of the insured person. Loss is deemed nonindemnifiable loss if the insured person complies with the provision of the subrogation clause.

The definition of loss includes pre-judgment and post-judgment interest.

The definition of loss with respect to an extradition proceeding includes, where permissible by law, defense costs incurred by the insured person in connection with the defense or appeal of an extradition proceeding; and the premium for a bail bond, if bail is available for an extradition proceeding in the country at issue.

The definition of loss includes punitive, exemplary, and multiple damages to the extent the insurability of such damages will be governed by the law of the applicable jurisdiction most favorable for such coverage. If the insured person presents to the insurer a written opinion from legal counsel that such damages are insurable under such applicable law, the insurer will not challenge that determination.

If the insurer(s) of the underlying insurance fails or refuses to advance defense costs, the policy provides for the advancement of defense costs on a current basis.

Notice of claim to the company is required as soon as practicable, but in no case later than 60 days after the insured learns of a claim and in such notice a request is made for indemnification from the company. Similar notice is to be provided to the insurer and the insured person is required to inform the insurer of the company's response to the request for indemnification as soon as practicable after the insured person first learns of the response and to provide copies to the insurer of any responses that are in writing. If the insured person fails to provide the required notice of claim to the insurer, the insurer is not entitled to deny coverage for the claim solely upon late notice unless the insurer can demonstrate its interests were materially prejudiced by reason of such late notice.

### **Exclusions**

The personal profit exclusion is not applicable unless there is a final adjudication adverse to the insured person.

The personal profit exclusion is not applicable to defense costs.

The gaining of illegal remuneration exclusion is not applicable unless there is a final adjudication adverse to the insured person.

The gaining of illegal remuneration is not applicable to defense costs.

The fraud exclusion is not applicable unless there is a final adjudication adverse to the insured person.

The fraud exclusion is not applicable to defense costs.

There are no ERISA, pollution, bodily injury or property damage, or insured v. insured exclusions in the policy.

There is no exclusion of the failure to maintain insurance.

### **Other Conditions**

The policy, which is written for a term of 6 years, is nonrescindable and may only be canceled by the insurer for nonpayment of premium. The policy may not be canceled by the insured person.

The insured person has the right to select counsel to investigate and defend a claim, subject to notifying the insurer of such counsel within 5 business days of his or her decision, and such counsel must be consented to in writing by the insurer.

Dispute resolution is provided for only if requested by the insured person. If the parties cannot agree on the arbitration rules and procedures, the rules of the American Arbitration Association will apply.

### **ITEMS SUBJECT TO NEGOTIATION:**

None indicated.

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