

ARE YOU CONFIDENT? FINPRO COVERAGE CONSIDERATIONS: WHY SHOULD A COMPANY CONSIDER PLACING LOCALLY ADMITTED D&O POLICIES OUTSIDE THE US?



Many companies might already consider their directors' and officers' liability insurance policies to be global. After all, many policies contain a territory clause stating that it will pay claims made anywhere in the world (where legally permissible). But are you confident about **where** these claims will be paid?

What is not specified is **where** the insurer would pay these claims — where the policy was written, or, in the local jurisdiction where a local claim needs to be investigated and defended.

Note: Generally speaking, executives prefer to have their expenses advanced in the jurisdiction where they need to pay for their investigation and defense, along with covered settlements and court awards.

Here are four occasions when companies should consider supplementing their D&O program with local placements:

1. When an organization's current policy or program may not be able to pay local claims in the local country because such jurisdiction does not permit non-admitted insurance.
 - A. Where non-admitted insurance is not permitted, the "global" policy is not allowed to pay in that country where the D&O claim may have been brought.
2. When the first line of defense for corporate executives — the right to corporate indemnification — is unclear, untested or unexpected. Note: There may be a substantial overlap of jurisdictions where non-admitted insurance is not permitted and the right to corporate indemnification (and

advancement) is neither clear cut nor guaranteed. As such, there could be the risk that the personal assets of a local director or officer are exposed.

3. When compliance concerns are significant, often arising in the context of applicable local premium taxes. A number of local tax authorities have taken the position that if local persons or property are insured under a policy placed in another jurisdiction, then they, locally, are owed premium taxes on the relevant portion of the "global" insurance premium. Where permitted, the insurer issuing a local D&O policy typically assesses, collects and remits relevant premium taxes where legally permitted from and for the local insureds, addressing this compliance concern.
4. Where a company or a local board simply desires to see their local coverage in their local flavor, including their local coverage nuances.

NOT PART OF THE EQUATION

It is important to note that unlike property or bonding coverages, local D&O insurance is not compulsory, or mandatory, in jurisdictions around the world. In fact, local D&O coverage is only very rarely legally mandated by local law.



BRIEF CHECKLIST TO ASSESS THE NEED FOR LOCAL POLICIES:

- In which countries do you conduct business outside the US?
- Of those countries, which ones do not allow non-admitted insurance?
- Do you have a local subsidiary or local office, board of directors and/or officers?
- Are the directors and officers located in that country? If not, are there other local country managers that you might want to protect?
- What is the indemnification/advancement stance of that country?

Once the above factors are assessed, actions include:

- Connecting individual locally admitted policies to your primary D&O program, sharing its limits with local policies issued (“fronted”) by a local licensed insurer addressing local claims.
- Utilizing Lloyd’s special licensing arrangements to issue a single policy (primary or excess) that is locally admitted in multiple jurisdictions under a Freedom of Services (FOS) policy. Note: Once Brexit is finalized, this option may change.
- Creating a “wrap” structure where non-US risks (non-US) are covered under a separate, parallel program that allows for the ring-fencing of US exposures. The wrap policy may then have local policies written on a tie-in basis.
- Stand-alone local policies with separate limits (which may be necessary in limited jurisdictions at the current time – possibly for India or Brazil – due to reinsurance constraints).

Most clients use a combination of the above. Please note that administrative fees are also charged by the insurer per-policy, and local taxes are assessed against the premium allocated to that jurisdiction.

The evaluation process should take place at least annually and also when your company is acquiring a company that has foreign operations.

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