BAILEY | CAVALIERI

GLOSSARY

I. INSURANCE COVERAGE TERMS

Allocation refers to the process of determining the amount of defense costs and any settlement or judgment which is properly attributable or "allocated" to covered claims against insureds, on the one hand, and uninsured claims against insureds and others, on the other hand. In essence, allocation simply refers to the process of determining the amount of insured loss when that loss is commingled with uninsured loss. The need for allocation arises most frequently under D&O insurance policies which cover claims against D&Os but not claims against the company. Because D&Os and the company are often both sued in the same claim, allocating loss between the D&Os and the company can be difficult and sometime contentious. Several alternative D&O insurance policy provisions are now available to minimize allocation uncertainties and disputes. Some of those alternatives include:

A. Entity Coverage. This alternative grants coverage for Securities Claims (or perhaps employment claims) against the company whether or not D&Os are codefendants.

B. Co-Defendant Coverage. This alternative grants coverage for any claim against the company provided that the claim is also made against D&Os.

C. Pre-Determined Allocation. This alternative establishes in the insurance policy the specific allocation percentage applicable to securities claims (and perhaps other types of claims) regardless of the facts in each specific claim.

D. Methodology. This alternative identifies in the insurance policy the method by which the allocation issue will be determined in a particular case. This alternative does not eliminate the allocation issue, but identifies what criteria will be used by the parties in determining an appropriate allocation. Some of the methodologies contained in D&O policies include allocating based upon the "relative legal exposures" of the parties or "the relative legal and financial exposures of and relative benefits to" the parties. Other policies simply require that the parties commit their best efforts to agree on a fair and reasonable allocation under the circumstances of each claim.

BI/PD Exclusion refers to the exclusion eliminating coverage for claims for bodily injury or property damage, which is contained in virtually every D&O, EPL, Fiduciary and similar type of insurance policy. The purpose of this exclusion is to avoid the policy covering loss which is typically insured under a company's comprehensive general liability (CGL) insurance policy.

Broad-Form Exclusions refers to exclusions which use broad introductory or preamble language such as "based upon, arising out of or in any way related to." This type of exclusion is in contrast to the narrower form of exclusion which uses the word "for" as the introductory or preamble language. The latter type exclusion is limited to claims which seek recovery for the injury or wrongdoing described in the exclusion. The former type exclusion, which is sometimes also referred to as an "absolute" exclusion, eliminates coverage not only "for" the referenced injury or wrongful act, but also for secondary-type claims (such as shareholder class action or derivative suits) which seek recovery from directors and officers for loss sustained by the company on account of the referenced injury or wrongdoing. For example, a "for" bodily injury exclusion eliminates coverage only with respect to claims against D&Os by the persons who incur the bodily injury and who sue the D&Os seeking recovery "for" their bodily injury. A shareholder suit against the D&Os for loss to the shareholders or the company as a result of the bodily injury claim against the company would not be excluded under the narrower "for" type of exclusion because the shareholders are seeking recovery for financial loss to the company or the shareholders due to mismanagement or misrepresentations, not for bodily injury. However, the shareholder claim would be excluded under the broad form exclusion because the claim is "based upon, arising out of, or in any way related to" the bodily injury.

Insured Capacity refers to the capacity in which a person is covered under the insurance policy. Typically, directors, officers and employees are covered only for wrongdoing which they commit in their capacity as a director, officer or employee of the company. Alleged wrongdoing in any other capacity, including as a shareholder, is not covered. This insured capacity concept is set forth in the definition of Wrongful Act in most policies.

Clause A for **A-side Coverage** refers to the coverage afforded under D&O insurance policies for loss which is not indemnified by the insured company. This coverage is typically contained in Insuring Clause A or Insuring Agreement A of the policy. If loss is indemnified by the insured company, the D&O insurance policy typically affords coverage for that indemnified loss through Insuring Clause B or Insuring Agreement B.

Claim generally refers to a proceeding or demand against the insureds for monetary damages or other relief on account of alleged wrongdoing by the insureds. D&O, EPL, Fiduciary and similar insurance policies afford "claims made" coverage, which means that the policy responds only to claims which are first made during the policy period, even if the claim is for wrongful acts occurring before the policy period. Because coverage is dependent upon a claim being made during the policy period, the definition of "claim" is a very important issue. Most such insurance policies now define the term "claim." Depending on the insurance policy form, a claim may include (i) a written demand, (ii) a civil, criminal, administrative or regulatory proceeding, or (iii) a formal investigation, against insureds for a wrongful act.

Claims-Made Coverage refers to a type of insurance coverage which insures claims first made during the policy period, regardless when the alleged wrongdoing occurred. This coverage is in contrast to "occurrence coverage," which insures occurrences taking place during the policy period, regardless when the claim arising out of the occurrence is first made. D&O, EPL, Fiduciary and similar policies almost always afford claims-made coverage, not occurrence coverage.

Continuity refers to a continuation of certain representations and warranties given by the insureds in the insurance application submitted to a prior insurer. When insureds first purchase a type of claims-made insurance from an insurer, the insurance company frequently requires the insureds to disclose all known facts or circumstances which may reasonably give rise to a future claim. Under some circumstances, the insurance company may agree not to require that disclosure from the insureds, but instead rely upon the disclosure by the insureds to the insurance company which previously issued a similar type insurance policy to the insureds. Continuity merely refers to a continuation of these representations and warranties from one insurer to the other, and does not mean there is a continuation of the same scope of coverage as was afforded under the prior insurance policy.

Defense Expenses means reasonable costs, charges and fees (including attorneys fees and expert witness fees) incurred by insureds in defending or investigating covered claims, including the premium for any appeal, attachment or similar bond. D&O, EPL, Fiduciary and similar insurance policies usually define this phrase. Those definitions typically exclude coverage for compensation or benefits paid to directors, officers or employees of the insured company and other overhead expenses of the insured company.

Pay On Behalf Of is language used in the insuring agreements to require the insurance company to pay loss on behalf of the insureds once the insureds become legally obligated to pay the loss. This type of coverage, frequently referred to as "liability" coverage, protects the insureds against having to first fund the loss themselves and then seek reimbursement for that loss payment from the insurance company. Alternatively, a few D&O, EPL, Fiduciary and similar insurance policies instead require the insurance company to "indemnify" the insureds for covered loss, in which case the insureds are technically required to first pay the covered loss and then seek reimbursement from the insurance company.

Investigation Cost Coverage refers to a supplemental type of insurance coverage available from some D&O insurers pursuant to which costs incurred by the insured company in investigating a demand by shareholders that the Board of Directors bring a claim on behalf of the insured company against certain directors and officers for alleged wrongdoing. Shareholders who wish to bring a derivative lawsuit on behalf of the company against directors and officers generally must first demand the Board of Directors to bring the claim against the D&Os. Once that demand is made, the Board on behalf of the company is required to thoroughly investigate the merits of the

shareholders' allegations and determine whether it is in the best interests of the company that the proposed claim be prosecuted against those D&Os. Because that investigation is for the benefit of the company as a potential plaintiff, and not for the benefit of the target D&Os as potential defendants, costs incurred in that investigation are not covered under a standard D&O insurance policy. If the insureds purchase the supplemental investigation cost coverage, the expenses incurred in investigating this shareholder derivative demand would be covered.

Discovery Period or **Extended Reporting Period (ERP)** refers to the optional extension of coverage which may be purchased by insureds under certain circumstances following expiration of the policy. If this coverage extension is purchased, claims made against insureds during the extension period are covered if the claims are for wrongful acts occurring before the expiration of the original policy period. Depending upon the terms of the particular insurance policy, this optional extension of coverage may be available only if the insurance company cancels (other than for non-payment of premium) or refuses to renew the policy, or alternatively, may also be available if the insureds cancel or refuse to renew the policy. If the coverage extension is available under both of those situations,the extension is referred to as "bilateral" discovery or ERP. Coverage during this extension period is subject to the same limit of liability as applies to the original policy period.

Integrated or **Basket Policy** means an insurance policy which affords coverage for several different types of liability exposure, including for example directors and officers liability, employment practices liability (EPL), ERISA fiduciary liability (Fiduciary), professional errors and omissions liability, crime, kidnap and ransom (K&R) and perhaps other lines of coverage. These types of multiple-line policies frequently have a term of several years and may have a single aggregate limit of liability applicable to all lines of coverage, combined (except the D&O Clause A coverage, which typically has its own separate limit in order to assure protection to D&Os for non-indemnified loss).

Insured v. Insured or **i vs. i** or **I v. I** refers to the exclusion in all D&O insurance policies which eliminates coverage for claims by or on behalf of one insured against another insured. Because the company is insured under D&O policies to the extent the company indemnifies loss incurred by D&Os, this exclusion not only eliminates coverage for claims by directors and officers, but also claims by or on behalf of the company. Most D&O insurance policies contain several exceptions to this exclusion (i.e. grant coverage for certain types of claims by or on behalf of insureds). Depending upon the specific policy, the following types of claims may be excepted from the exclusion (i.e. covered):

1. a shareholder derivative claim on behalf of the company if the shareholder prosecutes the claim without the assistance of any insured;

2. employment-related claims by directors or officers;

3. a claim by a D&O for contribution or indemnity if the claim directly results from another claim covered under the insurance policy;

4. a claim by a trustee or receiver in the insured company's bankruptcy or insolvency proceeding.

Limit Reinstatement refers to the reinstatement of the limit of liability under an insurance policy which is in effect for two or more years and which contains a single aggregate limit of liability for the entire policy period. Under this provision, insureds may purchase during the policy period an additional limit of liability for future claims, thus allowing additional protection for insureds who believe that prior claims during the policy period may erode the original limit of liability to an unacceptable level. A limit reinstatement provision grants to the insureds the absolute right to purchase the additional limit of liability (upon payment of a specified additional premium), and the insurer has no underwriting discretion at the time the option is exercised by the insureds. If the insureds maintain several layers of insurance coverage within their insurance program, the limit reinstatement provision frequently provides that the additional or reinstated limit of liability affords coverage excess of all other coverage in force at the time the reinstatement option is elected. This type of excess limit reinstatement provision is commonly referred to as an "around the clock" provision.

Spousal Liability or **Marital Extension** refers to coverage afforded under most D&O, EPL, Fiduciary and similar insurance policies for claims against the spouse of an insured person if the claim against the spouse is solely by reason of the spouse's legal status as a spouse of the insured person or because of the spouse's ownership interest in property which the claimant seeks as recovery for alleged wrongdoing by the insured person. This coverage extension does not apply to the extent the claim against the spouse alleges wrongdoing by the spouse.

Monitoring or **Coverage Counsel** refers to legal counsel retained by the insurance company to represent the insurer's interest in connection with a claim. Coverage or monitoring counsel are in addition to defense counsel selected by the insureds with the consent of the insurer. Among other things, coverage and monitoring counsel will assist the insurer in evaluating any coverage issues, monitoring developments in the claim, analyzing liability and damage exposures of the insureds, providing input to defense counsel where appropriate, and negotiating any settlement in the claim.

Notice of Circumstances means notice by the insureds to the insurer of facts or circumstances which may reasonably give rise to a future claim. D&O, EPL, Fiduciary and similar insurance policies typically provide that if the insureds give such notice to the insurer during the policy period with sufficient detail regarding the facts, circumstances and potential claim, then any future claim arising out of the matters described within that notice will be treated for coverage purposes as a claim made during the policy period and therefore subject to the coverage afforded by that policy.

Occurrence Coverage refers to a type of insurance coverage which insures occurrences taking place during the policy period, regardless when the claim arising out of the occurrence is first made. This coverage is in contrast to "claims made" coverage, which insures claims first made during the policy period, regardless when the alleged wrongdoing occurred.

Outside Positions or **Outside Directorship** or **ODL Coverage** refers to an extension of coverage available from most D&O insurers for claims against D&Os in their capacity as a director, officer or employee of another organization if the D&O is serving in that "outside" position at the request of the insured company. Depending upon the specific provision purchased, this extension of coverage may apply to any outside position held by any insured D&O, to only outside positions in non-profit entities, or to only outside positions in specifically scheduled outside entities. Outside position coverage typically applies only to the extent the D&O's loss is in excess of any insurance and indemnification available from the outside entity (i.e. double excess). Depending upon the ODL provision, the coverage may also be in excess of any indemnification available from the insured company (i.e. triple excess).

Order of Payments refers to a provision which may be included in a D&O policy affording coverage for securities claims against the insured company. Under that type of policy, D&Os may be concerned that their coverage will be diluted or exhausted by coverage for claims against the company, thereby leaving the D&Os under-insured or uninsured. An "order of payments" provision generally states that D&Os will have first priority to the insurance policy proceeds and the insurance company will, at the request of the insured company, postpone any payment of loss incurred by the entity until after all loss incurred by D&Os has been paid.

P&P Lit. Exclusion refers to the exclusion in most D&O, EPL, Fiduciary and similar insurance policies which eliminates coverage for any claim made during the policy period which relates to any claim pending on or prior to the inception of the policy (or some other designated date) or the facts, circumstances or situations underlying or alleged in any such prior litigation. This "pending and prior" or "P&P Litigation" exclusion may, depending upon the specific policy language, apply only to prior litigation against the insureds or to prior litigation against anyone. Similarly, the exclusion may apply only to prior "litigation" or also to prior proceedings and demands.

Presumptive Indemnification refers to a provision in most D&O insurance policies which applies the deductible under Insuring Agreement B (i.e. coverage for the company to the extent the company indemnifies D&Os) to any loss for which the company is legally permitted and financially able to indemnify, regardless whether the company actually grants the indemnification. Absent this type of provision, the insured company could simply fail or refuse to indemnify D&Os (even though the company is legally permitted and financially able to provide the indemnification), thereby causing the loss to be covered under Insuring Agreement A, which typically has a zero deductible. In order to prevent the insured company from avoiding payment of the much larger deductible

applicable to Insuring Agreement B, this provision applies the larger deductible if the company can indemnify, whether or not it actually does indemnify. Thus, in order to avoid the D&Os having to personally fund the large Insuring Agreement B deductible, the insured company must indemnify the D&Os when it can. If an EPL, Fiduciary or similar policy has different deductibles for indemnifiable and non-indemnifiable loss, those policies may also have a presumptive indemnification provision.

Run-Off Policy means a claims-made insurance policy which affords coverage for claims made during the policy period only if the claims are for wrongful acts committed prior to the policy period. A run-off policy is most frequently purchased following the acquisition of the insured company. Because the D&Os of the acquired company may be replaced or removed following the acquisition, those D&Os typically purchase prior to the acquisition a pre-paid, non-cancelable multi-year run-off insurance policy which cannot be amended or affected in any way by the acquiring company or subsequent management. That policy covers future claims arising out of conduct by the D&Os prior to the acquisition.

Severability refers to the provisions in the D&O, EPL, Fiduciary or similar policy (and perhaps the Application form) which states that facts relating to or knowledge possessed by one insured person will not be imputed to any other insured person either for purposes of applying the exclusions in the policy or invoking a coverage defense based upon misrepresentations in the Application. As a result of this type of provision, the policy is treated as "severable" or a separate policy issued to each insured person and the conduct or knowledge of one insured person will not jeopardize coverage afforded to other insured persons. Typically, different severability provisions apply with respect to policy exclusions, on the one hand, and Application representations, on the other. Absent severability provisions, the knowledge or conduct of one insured person may result in loss of coverage to all other insured persons, including "innocent" insured persons who had no involvement in or knowledge of the conduct which gave rise to the Application misrepresentations or excluded conduct.

Split Exclusions refers to an exclusion format in some D&O insurance policies pursuant to which some exclusions apply to both Insuring Agreement A (i.e. coverage for non-indemnified loss) and Insuring Agreement B (i.e. coverage for indemnified loss), and other exclusions apply only to Insuring Agreement A. The exclusions which typically apply only to Insuring Agreement A under a split exclusion format are the fraud/willful violation of statute, illegal personal profit and the Section 16(b) exclusions. Unlike other standard exclusions in the D&O insurance policy, these exclusions are generally included within the policy because the conduct described in the exclusions is generally considered to be conduct for which the D&Os should not be protected by insurance. However, if the company is permitted to indemnify the D&Os for such conduct, then the D&O insurer arguably should reimburse the company for that indemnification obligation and thus the exclusions arguably should not apply to Insuring Agreement B, but only Insuring Agreement A. Only some D&O insurance policies contain this split exclusion format. The remaining policies apply all exclusions to both Insuring Agreements and

therefore all exclusions apply regardless whether the company is permitted to indemnify for the loss.

Stretched Aggregate refers to extending an insurance policy's aggregate limit of liability over two or more policy periods. A stretched aggregate is typically used in one of two different contexts. First, a multi-year policy may be subject to a single aggregate limit of liability for the entire multi-year policy period (perhaps subject to a limit of liability reinstatement provision). Second, if upon expiration of a single year policy period the insurer is uncomfortable for underwriting reasons with renewing the policy with a new "fresh" limit of liability, the insurer may agree to renew the policy without a new aggregate limit of liability and merely extend or "stretch" the preexisting aggregate limit of liability to the new policy period as well. In either case, the stretched aggregate constitutes the insurer's maximum liability for all loss on account of all claims first made during the extended or multi-year policy period.

Warranty generally refers to a question typically contained in an original claims-made insurance Application which requires the insureds to disclose any known fact or circumstance which could reasonably give rise to a claim in the future. By signing the Application, the insureds "warrant" or represent that they have disclosed all such known facts or circumstances. This warranty is typically not included in a renewal Application since the insurer is already at risk for such potential claims if the insureds elect to give a notice of circumstances or notice of potential claim to the insurer as provided in the policy.

Wrongful Act is typically defined in D&O insurance policies to mean any act, error, omission, misstatement, misleading statement, neglect or breach of duty actually or allegedly committed or attempted by insured D&Os in their capacity as such, or any other matter claimed against insured D&Os solely by reason of their serving in such capacity. D&O policies only cover claims against D&Os for such a wrongful act. In EPL policies, Wrongful Act is defined to include numerous types of wrongful employment practices, such as wrongful termination, discrimination, sexual harassment, etc. In Fiduciary policies, Wrongful Act is typically defined as breach of a fiduciary duty imposed by ERISA or negligent administration of an employee benefit plan.

II. D&O LIABILITY TERMS

Section 10(b) and **Rule 10b-5** refer to the catchall antifraud provisions under the Securities Exchange Act of 1934. The vast majority of private class action securities lawsuits brought against directors and officers for open market misrepresentations are brought under these provisions, which prohibit any person from using an instrumentality of interstate commerce to engage in any manipulative, deceptive or fraudulent conduct in connection with the purchase or sale of any security (including not only publicly traded securities, but also securities in a privately-held company). "Securities" are defined broadly to include not only shares of stock, but certain notes, bonds, debentures, investment contracts and other investment instruments.

Sections 11 and 12 are provisions of the Securities Act of 1933 which prohibit persons from making false or misleading statements in either a registration statement filed with the SEC or in a prospectus used in the offer or sale of securities. These statutes are the general bases for securities class action lawsuits against directors and officers in connection with a company's offer or sale of its own securities.

Section 16(b) imposes liability on a director or officer who personally purchases and sells, or sells and purchases, the company's securities within a six month period. The statute, which is intended to prevent the misuse of inside information by company insiders, requires the insider to disgorge to the company any profit realized from the "short swing transactions," regardless of whether the insider in fact knew of any material, nonpublic information at the time of the transactions.

1933 Act means the Securities Act of 1933, which focuses on the initial offering and sale of securities by companies. The Act, among other things, requires registration of the securities and full, honest disclosure of all material information about the securities before the securities can be offered or sold. Violators may be subject to civil liability and criminal penalties.

1934 Act means the Securities Exchange Act of 1934, which focuses on the secondary trading of securities after the securities have been sold by the issuing company. Among other things, the statute creates the Securities and Exchange Commission (SEC) and establishes a system of minimum standards governing open market transactions in securities. Violators may be subject to civil liability and criminal penalties.

Business Judgment Rule refers to one of the primary defenses to a claim against directors and officers for breach of fiduciary duty. The defense generally bars judicial inquiry into conduct of disinterested D&Os who act on an informed basis, in good faith and in the honest belief that the action taken was in the best interest of the company. In essence, this defense provides that courts should not examine the quality of the directors' business decisions, but only the procedures followed in reaching that decision.

Class Action means a lawsuit brought by one or more plaintiffs for the benefit of a group or "class" of persons who have a similar interest in the outcome of the litigation. The entire class shares in any recovery in the lawsuit, even though only a few members of the class were involved in prosecuting the lawsuit.

Derivative Suit means a lawsuit brought by one or more shareholders on behalf of the corporation and seeks to enforce a right of action belonging to the corporation. Any recovery in a derivative suit is paid to the corporation and the individual shareholders who prosecute the derivative suit are benefited only indirectly by reason of the corporation benefiting. The claims asserted by the plaintiff and the defenses available to the defendants in a derivative suit are generally the same as if the corporation itself was prosecuting the claim.

EPL means employment practices liability. Although that term is not a commonly used phrase under employment statutes or case law, it has become an insurance term of art, referring to insurance coverage specifically designed to insure employment-related liability.

ERISA means the Employee Retirement Income Security Act of 1974, which is a comprehensive statutory scheme regulating virtually all aspects of employee benefit plans. A central provision of this legislation is the express fiduciary standards imposed upon and liability exposures incurred by fiduciaries of ERISA plans. The Act creates high standards of care and potentially severe exposures for fiduciaries in order to afford employees high confidence that their important benefits will be well managed for their protection.

Insider Trading refers to directors, officers and other corporate insiders trading in the company's stock while in possession of material, nonpublic information about the company. Insiders may be personally liable for insider trading under a variety of statutes and judicial theories.

IPO means the initial public offering of securities by a company. For a variety of reasons, an IPO transaction presents increased liability exposure to the company's directors and officers.

Joint and Several Liability means that a party who is jointly and severally liable with another party may be liable for the entire amount of the judgment to the plaintiff. In other words, a plaintiff may collect 100% of the judgment from any one of the defendants who are jointly and severally liable and need not collect a proportionate share of the judgment from each of the liable defendants. If a defendant who is jointly and severally liable pays more than his/her proportionate share to the plaintiff, that defendant may collect from the other jointly liable defendants their respective proportionate shares of the judgment. Many theories of D&O liability impose joint and several liability upon the D&O defendants, although liability under the federal securities laws is now proportionate rather than joint and several (at least with respect to defendants who are liable for reckless wrongdoing). Under this proportionate liability theory, defendants are liable only for that portion of a judgment which is based upon their percentage of responsibility, measured as a percentage of the total fault of all persons who caused or contributed to the loss.

M&A means mergers and acquisitions. Because directors are intimately involved in decisions relating to merger and acquisition transactions and because directors have to some extent an inherent conflict of interest in these transactions since their continuing position with the company may be jeopardized in the event the company is taken over, courts have imposed higher standards of care upon directors in M&A transactions than in other corporate contexts.

Market Capitalization or **Market Cap** means the value of all outstanding securities issued by a company, as measured by the current market price for the securities. One method by which plaintiffs seek to calculate damages in a federal securities class action lawsuit is to measure the amount by which the market cap decreases as a result of a disclosure of material adverse information. As a result, the amount of a company's market cap is a factor used by some advisors in evaluating the appropriate amount of D&O insurance limits of liability for a particular company.

Motion for Summary Judgment means a motion filed by defendants which seeks a judgment in favor of the defendants based upon undisputed facts in the lawsuit. Motions for summary judgment are typically filed after the close of fact discovery. Because plaintiffs frequently can identify material facts which are in dispute, courts infrequently grant motions for summary judgment.

Motion to Dismiss means a motion filed by defendants in a lawsuit which seeks dismissal of the lawsuit because the allegations in the complaint, even if true, would not support a claim upon which relief may be granted. A motion to dismiss is filed shortly after the lawsuit commences and the court looks only at the allegations in the complaint, not extraneous facts, to determine if a proper cause of action has been stated.

Prospectus means the disclosure document prepared and distributed by a company in connection with its offer to sell securities. The 1933 Act broadly defines the term to include any notice, circular, advertisement, letter or communication, whether written or by radio or television, which offers any security for sale. The prospectus may not contain any false or misleading information regarding the securities or the offering. In private placements of securities (i.e. securities offerings which are exempt from registration with the SEC), this disclosure document is frequently referred to as an "offering memorandum" or "offering circular."

PSLRA means the Private Securities Litigation Reform Act of 1995. The statute, which applies to securities class actions filed after December 22, 1995, sought to reduce abusive litigation practices by plaintiff lawyers, creates a defensive "safeharbor" for forward-looking statements, and seeks to encourage early dismissal by courts of meritless lawsuits by standardizing the pleading requirements and staying discovery until after a ruling on a motion to dismiss. Initial experiences since enactment of the legislation ironically suggests that the frequency and severity of federal securities class action lawsuits have increased under the PSLRA.

Registration Statement means the requisite filing by a company with the SEC of information in connection with the registration of securities prior to a company publicly offering those securities for sale. The registration statement includes a copy of the draft prospectus which will be used by the company in offering securities for sale. In approving a registration, the SEC focuses on the adequacy of the disclosures, and does not rule upon the fairness or quality of the securities as an investment.

Forward-Looking Statement Safeharbor refers to a provision in the PSLRA which protects corporations and their D&Os when making written or oral forward-looking statements. Pursuant to this safeharbor, no liability exists with respect to a forward-looking statement that, when made, is identified as forward-looking and is accompanied by meaningful cautionary statements identifying important factors that could cause actual results to differ materially from those projected in the statement. Alternatively, the statute also provides that a person making a written or oral forward-looking statement will not be liable for that statement unless a plaintiff proves that the person made the statement with actual knowledge that it was false or misleading. The safeharbors do not apply to various types of forward-looking statements, including such statements in GAAP financial statements, in an IPO registration statement, in connection with a tender offer or a partnership, in certain change-in-control disclosure statements, in a going private transaction, or by a non-SEC reporting company.

Scienter means the requisite state of mind or degree of culpability which must exist for a defendant to be liable under various statutes. Most notably, for purposes of Section 10(b) of the Securities Exchange Act of 1934, most courts have ruled that the requisite scienter is established if plaintiffs prove the defendants acted either with intent to defraud or with recklessness.

SEC means the Securities and Exchange Commission which is the primary federal regulatory agency overseeing enforcement of the federal securities laws.

Strike Lawyers refers to a relatively small group of plaintiff lawyers who specialize in prosecuting shareholder class action and derivative lawsuits. These lawyers have become extremely competent and effective in creating the potential for potentially catastrophic liability exposure to the defendant corporation and their D&Os, thus resulting in large settlement payments by the defendants.

About the Author:

Dan A. Bailey is the Chair of the Firm's Directors & Officers Liability Practice Group and represents and consults with directors and officers, corporations, insurance companies, and law firms across the country. In addition to advising Boards and drafting most of the D&O insurance policies in the market, he has represented clients or served as an expert witness in many of the largest D&O claims for more than 30 years. He is co-author of Liability of Corporate Officers and Directors, a leading treatise on the topic, has published dozens of articles and speaks at more than 20 seminars a year on the subject.

He can be reached at (614) 229-3213, or dbailey@baileycav.com.