



WOODRUFF SAWYER

Guide to D&O Insurance for De-SPAC Transactions 2022 EDITION

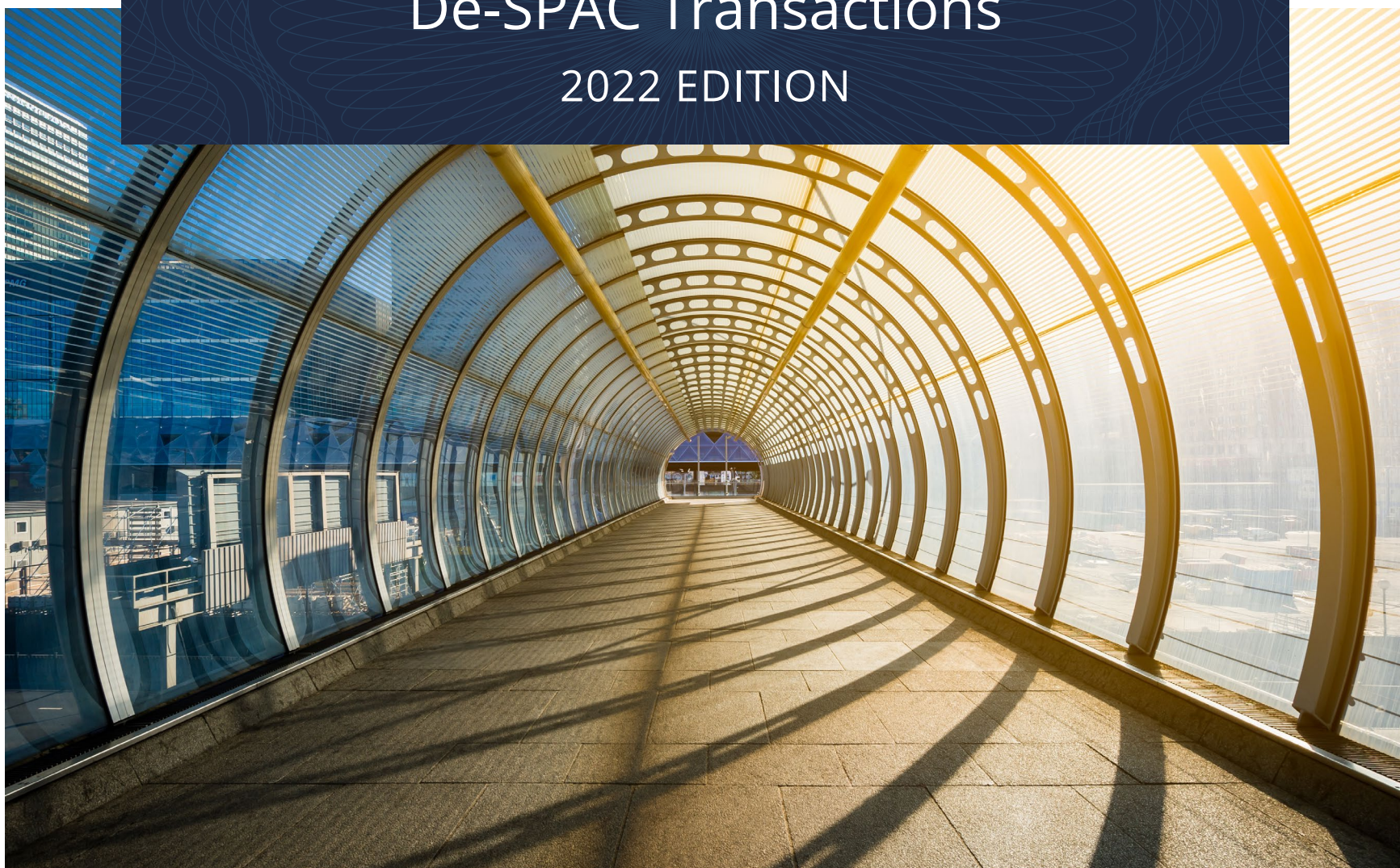




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Going Public Through a SPAC Business Combination: Leverage Our D&O Insurance Experience and Knowledge

Woodruff Sawyer is the market leader when it comes to placing D&O insurance for companies going public, be it through an IPO, direct listing, or merger with a SPAC (a “de-SPAC” transaction). Experience matters in this arena. You want a specialist on your insurance brokerage team to work through all the D&O liability insurance issues that will arise before, during, and after the process of going public, as well as during your life as a public company.

There is significant complexity to the process of protecting a company and its directors and officers as they undertake the process of going public. This resource is your guide to the D&O insurance process for de-SPAC transactions.

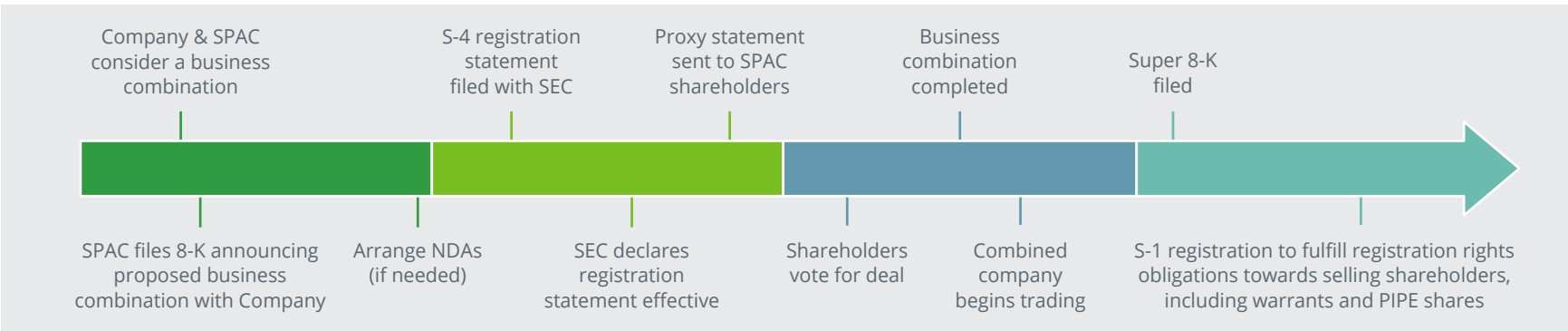


Interested in D&O insurance for a SPAC IPO? Read our [Guide to D&O Insurance for SPAC IPOs](#)

De-SPAC Going Public Milestones Timeline

Click/tap an area of the timeline to learn more about the D&O insurance process for companies going public through a de-SPAC transaction. Your public company-ready D&O insurance policy must be ready to bind before your stock starts trading on a public exchange. **The key to an optimized outcome? Working with an experienced insurance broker and starting early.**

De-SPAC Going Public Milestones Timeline



D&O Insurance Process

► **PREPARE**

- Select D&O broker
- Develop strategy
- Evaluate
 - Private company insurance
 - International insurance
 - Cyber insurance
 - Other insurance lines
- Governance counseling
 - Corporate governance policies
 - Choice of forum provisions
 - Indemnification agreements

► **LAUNCH**

- Broker sets up insurance carrier underwriting meeting
- Refine limits analysis
- Negotiate with markets
- Preliminary board presentation
- Negotiate coverage and pricing
- Negotiate warranty statements
- Present insurance program
- Schedule compliance training

► **IMPLEMENT**

- Finalize program
- Execute warranties
- Additional subjectivities
- Coordinate private to public coverage transition
- Bind program the day before the combined company begins trading

► **ONGOING SUPPORT**

- Continued carrier communications
- Counseling
- Training/education
- Market updates
- Claims support

Source: Woodruff Sawyer

1. Prepare

A. Develop Strategy

Setting the strategy involves taking a first look at a number of key questions, including the following:

- 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 in 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

If possible, consider ensuring that you have at least \$5 million to \$10 million of D&O insurance limits in place as a private company. When purchasing your private company D&O insurance, consider whether you need an endorsement to ensure that your private company policy will provide coverage should you attempt to take steps to go public but fail. This move protects Ds and Os should the process of undertaking a de-SPAC transaction lead to an unfortunate and/or unexpected outcome. Another advantage of purchasing \$5 million to \$10 million of private company D&O insurance is that this ensures that the subsequent public company D&O insurance program is not vulnerable to having warranty statements apply to this first \$5 million or \$10 million dollar layer of insurance.



Given the rising cost of D&O insurance premiums for private companies, here are five key questions to ask to help determine the limit for your private company.



This Guide can help large private companies navigate the complicated topic of D&O insurance.

ii. International

Newly public companies 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 make 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 does not mean that it actually will. Many foreign jurisdictions require that D&O insurance policies, if placed, need to be placed locally.

[Learn more about protecting directors and officers of foreign subsidiaries](#)

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.

[Learn more about cyber disclosure](#)

iv. Other Insurance

A newly public 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 can 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](#).

[Learn more about insider trading and the benefits of 10B5-1 Trading Plans](#)

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.

Slightly more controversial are Federal Choice of Forum provisions, but given that they are allowed under Delaware law (which can be influential for other states as well), [it is a good idea to include these provisions in your company's charter documents](#) as they may help you avoid having a suit challenging the disclosure being brought in state court in addition to federal court.

[Learn about Federal Choice of Forum provisions](#)

D. Implement Non-Disclosure Agreements (if needed)

Sometimes the SPAC's S-4 registration statement will be filed confidentially. If that is the case, you will want to have your broker ask each insurance carrier to sign an NDA before being sent the confidential S-4 filing. In addition, some companies are more comfortable speaking to insurance carriers with an NDA in place. Ask your Woodruff Sawyer account executive about how we have greatly streamlined this process.



See our [Cyber Liability Insurance Buying Guide](#)



[Cyber Looking Ahead to 2022](#)
With cyber liability insurance becoming more ubiquitous and complex, get our insights into what to expect for 2022.



[Reps & Warranties Insurance](#) is being increasingly used by some serial SPACers for their deals. Your Woodruff Sawyer account executive can tell you more about this trend.

2. Launch

A. Broker Sets up Insurance Carrier Underwriting Meeting

Your D&O insurance broker will facilitate a meeting with insurance carriers. This is an opportunity for the carriers to get to know the company, and for them to ask questions. This is a critical part of the D&O insurance underwriting process for a company that is about to go public.

B. Refine Limits Analysis

Choosing D&O insurance limits should not be limited to peer data benchmarking and referencing 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, **DATABOX™**.



*Captives: A New Option
for D&O Insurance?*

*[Delaware Approves Using
Captives for D&O Insurance](#)*

[Watch the Webinar](#)

C. Negotiate With Insurance Markets

Given the current litigation environment for companies undertaking a de-SPAC transaction, you need significant lead time and a clear strategy to optimize your insurance coverage. Management and the board will want to consider a variety of issues, including what type of D&O insurance program structure makes the most sense for the company given the current pricing environment and the company's own unique risk profile.

Coverage terms in the D&O insurance contract can be challenging, but will 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.

D. 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 may 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 carefully negotiates the language of the higher limits warranties.

E. Present Insurance Program to Management

This should not be a "big reveal." Rather, your broker should be updating you on the progress of your D&O insurance program negotiations as they happen. That way you can weigh in on certain strategic decisions such as what self-insured retention (like a deductible) to take. During this process the final pricing of your program options will come into sharper focus as well. Ultimately, you and your broker will come up with a joint recommendation for the board of directors.

F. Brief Board of Directors

Even very sophisticated boards of directors may not be familiar with all the current issues at play when it comes to protecting themselves and their companies against the types of claims that are filed against new public companies. 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. 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. Your board is likely to want to provide input on the D&O insurance program structure and how much in limits should be purchased as well.

G. Schedule Executive and Employee Compliance Training

Being employed by a public company can be very different from being an employee of a private company. Schedule your “We’re public. Now what?” training to fall either right before or right after the date the company starts trading on a national exchange so that employees gain a timely understanding of things like tipper-tippee insider trading liability and the like. This training can be provided by your outside counsel, Woodruff Sawyer, or both.

3. Implement

A. Finalize Program

Things like the valuation of the company may not have been as clear earlier in the process as they are towards the end of the going public timeline. In addition, management and the board may have been mulling certain key decision points. As the SPAC shareholder vote approaches, however, all aspects of the D&O insurance program need to be finalized.

B. Execute Warranties

Each newly purchased layer of insurance may require a warranty statement that says, in effect, that the company and its directors and officers 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 D&O program is bound.

C. Additional Subjectivities

Subjectivities are carrier-imposed condition precedents to their insurance becoming effective. These conditions, be they answers to outstanding carrier questions or other items, need to be addressed at this time. A common subjectivity that will be addressed in due course is that the company start trading on an exchange. The most critical subjectivity, however, is usually the higher limit warranties.

D. Coordinate Private to Public Coverage Transition

Some brokers routinely recommend sending your private company insurance program into runoff. In most cases, this is inadvisable. If you can get it, the better coverage path—a path that is usually more cost-efficient as well—is for the public company policy to provide “look-back” coverage.



Do you need a [Tail Policy](#) for your Private Company D&O Insurance?

E. Bind the Public Company D&O Insurance Program

The SPAC shareholders have voted in favor of the business combination, and your private company will begin trading as a public company the next day—Congratulations! Before you pop the champagne, email your broker instructions to bind the D&O insurance program. Most companies choose to bind their public company D&O insurance program shortly after the SPAC shareholders vote in favor of the deal, but the timing can be different in some circumstances. In all cases, however, you want the public company D&O insurance program to be in place before the first trade of your stock as a public company on a national exchange.

4. Ongoing 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. Support for Corporate Activities

Are you opening a new subsidiary in a foreign country, planning a follow-on offering or perhaps contemplating M&A activities? These are all times to contact your D&O insurance broker to determine if these activities will impact your D&O insurance. In the case of M&A, your broker should be able to assist with things like insurance due diligence and the placement of any needed [Reps and Warranties](#) policies.

C. Board Training/Education

Congratulations on going public... now the challenge of life as a public company begins. Keeping directors, officers, 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, which includes information about a variety of resources, including Woodruff Sawyer's own customized sessions.



Our annual [Board Education Resource Guide](#) lists a variety of events for directors that are being hosted by leading organizations across the US. [Learn more.](#)

D. D&O Liability and Insurance Market Update

The insurance market is a dynamic system and the legal landscape can shift quickly. An experienced D&O insurance broker can help you stay abreast of the latest developments.



Need help planning for the upcoming year? Check out our [Looking Ahead Guide for D&O Insurance in 2022](#).

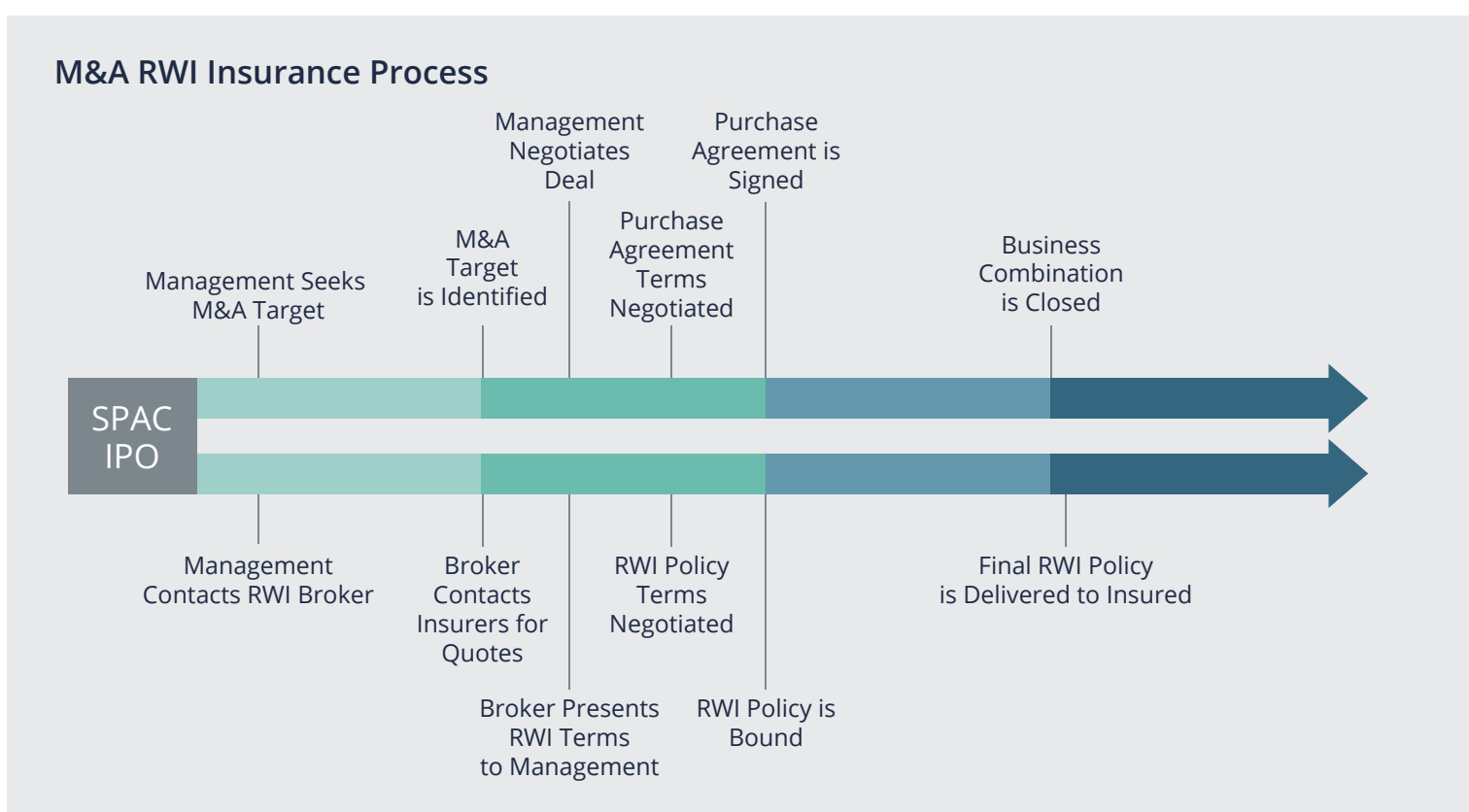
E. Claims Advocacy

All companies hope that they will never need to use their D&O insurance—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 do not want to find out that you had a misstep when it comes to your compliance with the terms of your D&O policy.

What about M&A Reps and Warranties Insurance (RWI)?

More and more SPACs are folding RWI into their acquisition strategies. Since RWI is now used in about 98% of transactions done by private equity (PE) firms and is considered the market standard in the PE world, with more PE-backed SPACs coming to market, SPAC use of reps and warranties insurance continued in 2021. The good news is that while in early 2020 most RWI insurers were not familiar with SPACs, in 2021 insurers became increasingly more comfortable with SPAC structures and were more willing to offer coverage. They also typically do not differentiate between a SPAC and a non-SPAC acquisition for a plain vanilla policy and a straight-forward merger. With over 20 insurers competing against each other in the RWI market, a good broker who specializes in SPAC RWI will be able to find several attractive options for coverage.

[Read more in our Representations and Warranties Insurance Buying Guide](#)



Ongoing D&O Coverage

The operating company must establish a process around its annual D&O insurance renewal. Starting the renewal process with an expert D&O insurance broker early saves time, averts potential frustration, and can save on costs. Companies are able to optimize the renewal process by being prepared and taking a focused approach to their D&O insurance renewal. Getting up to speed on the litigation environment and the current state of the insurance market is a key step. A great resource for this can be found in the Woodruff Sawyer 2022 [D&O Looking Ahead Guide](#). Having trusted advisors on your side helps ensure your success.

Choosing the Right Insurance Broker: Questions to Ask

Given the rapidly changing nature of the D&O insurance market and the peculiarities of D&O insurance for private companies on a track to going public, your choice of insurance broker is consequential.

A quirk of the insurance market is that, to optimize your result, you must choose one insurance broker to approach all the viable insurance markets on your behalf. Sending multiple insurance brokers into the market will lead insurance carriers to conclude that you don't know what you are doing and that you are not a serious candidate for their insurance capacity. For this reason, if you are interviewing D&O insurance brokers, be sure to instruct them to refrain from sending your name into the market until you have actually informed them that you have chosen them to be your broker.

Not unlike bankers, lawyers and accountants, different insurance brokers bring with them varying levels of experience and resources. You want to be sure to work with a brokerage firm—and individual brokers—who place a significant amount of premium with the major insurance carriers.

To get the optimal D&O insurance coverage at the best possible price, here are some questions to ask potential D&O insurance brokers before you choose one.

- 1 What level of experience does the particular brokerage team you are talking to (not just the brokerage firm, but your particular team) have when it comes to placing D&O coverage for companies going public through a de-SPAC transaction?

It is critical that your D&O insurance broker has extensive and current experience working with companies going public through a de-SPAC transaction. The D&O insurance market for companies going public changes rapidly. Unless your broker is in the market every day, you will miss out on the latest developments in the terms and conditions of your policy, which are critical elements of your negotiated, customized D&O insurance program.

- 2 What reach does the brokerage team have in the D&O insurance markets?

Ask whether the brokers on your team have extensive and long-term relationships with public company D&O insurance underwriters. Having a broker with years of experience and rapport built into their underwriter relationships can make a significant difference in the terms and pricing of your policies and the speed with which they can be placed.

3 Will the broker be using a wholesaler, or making a direct placement?

Many brokers only do a limited amount of public company D&O insurance business, particularly for companies becoming publicly traded for the first time. These brokers may be excellent in other areas but will inevitably have to use a “wholesale” broker to work on your going-public D&O insurance if they do not transact a large volume of this business routinely. That can be a big negative for you, especially if there is a claim, because the person you are talking to will have no relationship with the insurance carrier that will be deciding whether to pay or deny your claim.

4 Can your broker clearly articulate the business and legal risks you face?

There is little chance your D&O insurance broker will do a good job of ensuring you have insurance coverage for critical risks if your broker cannot clearly articulate them. If your broker is not an expert in understanding the risks you face, you are talking to the wrong person.

5 What experience does your broker have in terms of advocating for coverage payments with carriers on behalf of clients with complex claims?

Many brokers have an anemic claims function at best, and often the same claims person who handles client auto or workers’ compensation claims is also being asked to handle your difficult D&O insurance claims. Given the complexity of D&O insurance claims, this is a mistake. Find out if your broker has specialists who can swing into action on your behalf.

It is in your best interest to choose a broker that has the experience and expertise to be able to recommend the most strategic insurance program placement options, as well as one with extensive experience managing the types of claims brought against public companies, including in connection with de-SPAC transactions.

Questions about this Guide? Comments? Compliments?

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INSIGHTS: D&O NOTEBOOK



About Woodruff Sawyer

As one of the largest insurance brokerage and consulting firms in the US, Woodruff Sawyer protects the people and assets of more than 4,000 companies. We provide expert counsel and fierce advocacy to protect clients against their most critical risks in property & casualty, management liability, cyber liability, employee benefits, and personal wealth management. An active partner of Assurex Global and International Benefits Network, we provide expertise and customized solutions to insure innovation where clients need it, with headquarters in San Francisco, offices throughout the US, and global reach on six continents.

For more information

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