



## New Justice Department Memo Highlights Need For Review Of Side "A" D&O Coverage

September 10, 2015 | [Insurance, Policyholder Protection, D&O](#)



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## Heightened Liability Concerns for Individuals

On Sept. 9, 2015, the U.S. Department of Justice (DOJ) issued a memo to all U.S. attorneys and other enforcement bureaus (such as the FBI) providing guidance on the pursuit of individuals responsible for corporate wrongdoing. In essence, the memo says that the government is no longer going after only corporations; it will now also be focusing on those individuals within corporations responsible for corporate wrongdoing. The memo provides specific guidance for taking on these individuals. For example, it states that in order to qualify for cooperation credit, corporations must now provide all relevant facts relating to the individuals responsible for the misconduct and it states that absent extraordinary circumstances or approved departmental policy, the DOJ will not release culpable individuals from civil or criminal liability when resolving a matter with a corporation.

## Can Insurance Help?

The new DOJ memo and the increased government enforcement activity that it reflects should cause companies and their directors and officers to take a close look at their directors and officers/management liability (D&O) insurance policies. In particular, directors, officers and other management level employees should consider the scope of their so-called “Side A” coverage; or, if they do not have this coverage, they should consider purchasing it.

Side A refers to the first of what generally are three coverage grants in a D&O policy: (1) Side A – providing coverage for claims against individuals; (2) Side B – providing coverage for the corporation’s indemnity obligation to individuals; and (3) Side C – providing coverage for claims against the corporation.

In light of the new focus on individuals, Side A coverage could be crucial. The total limits available for, and the terms and conditions specific to, Side A coverage are important because there are circumstances where insurance coverage may not otherwise be available to individual insureds or where Side B or Side C coverage may exhaust the policy’s limits of liability, leaving no coverage, or inadequate coverage, for individuals. The insurance marketplace offers insurance policies that could help with this potential need for increased Side A coverage, or coverage enhancements to protect individual insureds. Different forms of Side A coverage are available, from standalone coverage to Side A coverage enhancements; and different language is available within D&O policies to protect and preserve coverage for individual insureds.

## Conclusion

What is right for any particular company – or its directors, officers and other covered employees – will depend on the circumstances of that company, its industry and its potential liabilities. But in the face of increased enforcement focused on individuals, all companies and their directors and officers should give thought to reviewing their D&O policies with this potential for enforcement in mind.