In the not-too-distant past many banks gave scant attention to the details of their directors and officers liability coverage insurance. Many financial institutions simply accepted whatever policy was offered by their blanket bond carriers. For most, D&O coverage was a subject little discussed at board meetings, except for confirmation that the institution did indeed have coverage.

In the wake of the financial downturn and the closure of hundreds of banks, insurance companies have reduced limits of coverage, increased premiums and broadened exclusions from coverage. Thus, at the very time directors and officers are looking to their D&O coverage to protect their personal financial well-being, many are finding the insurance they have is not nearly as generous in its protection as they thought.

When evaluating a D&O policy, a bank board should consider:

**Claims made vs. occurrence.** Most D&O policies are written as "claims made," meaning that coverage is provided for claims asserted during the policy term, regardless of when the actions that underlie the claim took place. Conversely, an "occurrence" policy insures against liability for actions that took place during the policy term, regardless of when a claim is asserted against the insured.

Not all policies are entirely one form or the other. Some claims-made policies include certain provisions closer in nature to that of an occurrence policy. For instance, some insuring clauses within an otherwise claims-made policy may not provide coverage for acts occurring prior to a retroactive date. That retroactive date is often the date the policy first went into effect. For policies with a retroactive date, coverage is limited as to both when a claim is made and when the offending act occurred.

**Severability.** Most policies allow the insurer to decline coverage if the application for insurance contained incomplete or incorrect information. Often, denial of coverage will only be made with respect to individuals with knowledge of the false statements on the application, allowing innocent individuals to remain covered. The language providing for severing of an insured from the party who made the false statements varies from policy to policy and should be carefully reviewed.

**Duty of insurer to provide defense.** Policies often state that it is the duty of the insurer to provide the defense for the insured. While that language sounds beneficial to the insured, the result may not be to the insured’s liking. When the insurance company provides the defense, it also selects counsel and determines how the defense will be prosecuted. From the insured’s point of view, a more favorable provision is for the insured to be indemnified for the cost of defense, allowing the insured to select counsel and determine the course of its defense.

**Regulatory action.** Many policies contain “insured vs. insured” or similar exclusions that eliminate coverage for claims brought by insureds. Some policies apply this exclusion to actions by the FDIC as receiver for a failed bank against directors and officers of the bank.

**Separate and aggregate limits.** Policies typically limit coverage provided by the policy, per individual claim and in total amount (aggregate). Because the policy insures a group of directors and officers, it is possible that claims against several insureds will exhaust the aggregate policy limits, leaving some directors and officers without coverage. In addition, if the policy provides multiple insurance coverages (such as employment liability or entity coverage for the bank), claims under those sections of the policy may also exhaust coverage. Evaluate whether the policy limits are adequate.

**Retentions.** Retentions are similar to deductibles in other types of insurance. The insured institution or directors and officers are required to expend the retention amount for a D&O policy prior to the insurer paying any amounts.

**Extended reporting period.** Generally speaking, for a claim to be covered by a claims-made policy the claim must be asserted and reported to the insurer during the period the policy is in effect. When terminating a policy, the insured often may purchase an extended reporting period for the terminated policy. Under an extended reporting...
period, the insured retains cover-
age for claims asserted through the
extended reporting period, but only
if the actions giving rise to the claim
occurred during the period prior to
the termination of the policy. For
instance, if a policy expires on Dec.
31, 2011, and a one-year extended
reporting period is purchased, the
insured will have coverage for any
claim asserted and reported to the
insurer no later than Dec. 31, 2012,
but only if the actions underlying the
claim took place no later than Dec.
31, 2011.

Exclusions from coverage. Insurance policies limit the liability
of insurers using several different methods. Often the definition of a
covered liability will exclude certain acts or persons from coverage. Other
definitions may also have the same effect. Sometimes a policy has an
extensive list of exclusions from cov-
erage. In addition, through the use
of riders and endorsements, coverage
may be limited (or, for an additional
premium, expanded). It is important
when reviewing a policy to not just
examine the insuring clauses, but all
parts of the policy, including defi ni-
tions, riders and endorsements.

Directors and officers have a strong
interest in accomplishing an effective
review of liability insurance cover-
age. Often no one in-house has the
knowledge or training to conduct
such a review. In such cases, the insti-
tution should seek the assistance of
its insurance broker or legal counsel
to review coverage. If the current
policy is found to be wanting, obtain
not just quotes for coverage from
other insurers, but complete copies
of the proposed policies, including
all riders and endorsements. Finally,
when unacceptable provisions are
in a policy, request changes through
an endorsement. These can often
be obtained (typically for an addi-
tional premium).