

# Directors and Officers Liability Excess and Drop Down Non- Indemnified Loss Policy



In consideration of the payment of the premium and in reliance upon the information provided and statements made in the **Application**, and subject to the other terms of this Policy, the insurance company shown in the Declarations (the "**Insurer**"), the **Insureds** and the **Company** agree as follows:

## I. INSURING CLAUSE

- A. The **Insurer** shall pay the **Non-indemnified Loss** of the **Insureds** arising from a **Claim** first made against such **Insureds** during the **Policy Period** or the **Discovery Period**, if exercised, and reported to the **Insurer** pursuant to the terms of this Policy, for a **Wrongful Act**. Coverage under this Policy shall apply:
1. excess of all **Underlying Insurance** set forth in Item 7. of the Declarations; or
  2. in the event the insurer of any of the **Underlying Insurance** fails to pay **Non-indemnified Loss** because of a **Drop Down Event**, by dropping down and paying that portion of the **Non-indemnified Loss**.
- B. Coverage under Insuring Clause I.A.1. shall apply in conformance with the provisions of the **Followed Policy** regarding **Non-Indemnified Loss** and shall attach only after the insurers under all of the **Underlying Insurance**, the **Insured(s)** or any other source have paid the full limits of all **Underlying Insurance**.
- C. If there is a **Drop Down Event**, this Policy shall drop down under Insuring Clause I.A.2. to the attachment point of such other insurer and will pay **Non-Indemnified Loss** on behalf of the **Insureds** up to the Limit of Liability set forth in Item 3. of the Declarations or up to the remaining limit of the **Underlying Insurance**, whichever is less. If any other insurance also drops down, then this Policy shall remain excess to the aggregate limits of such other insurance after the drop down except to the extent such other insurance applies specifically excess to this Policy.
- D. Coverage under this Policy shall follow the terms and conditions of the **Followed Policy** as of the inception of the policy period of the **Followed Policy** except as may otherwise be provided in this Policy. Any reference in this Policy to the terms and conditions of the **Followed Policy** shall be deemed a reference to those terms in effect on the inception of the policy period of the **Followed Policy**.
- E. No **Company** or **Outside Entity** is covered in any respect under this Policy. In no event shall this Policy be construed to provide coverage other than for **Non-indemnified Loss**.
- F. If and to the extent coverage for any **Non-Indemnifiable Loss** would not be provided under this Policy pursuant to any of its terms, conditions and exclusions but is provided under the **Underlying Insurance**, this policy is amended to follow the **Underlying Insurance**.

This subsection shall not apply to the following Sections of this Policy:

Section IV. LIMIT OF LIABILITY AND SUBROGATION  
Section VIII. NOTICE  
Section XVI AUTHORIZATION  
Section XVIII. ALTERATION

## II. DEFINITIONS

Except as regarding the definitions contained in this Section, terms appearing in bold typeface in this Policy shall adopt the definitions of the terms or equivalent terms set forth in the **Followed Policy**. The following definitions apply to this Policy irrespective of whether the **Followed Policy** defines the term or an equivalent term; any such definition in the **Followed Policy** shall not apply.

- A. **Company** means any entity that is an insured under the **Followed Policy**, including any entity named in the Declarations of the **Followed Policy** and any insured subsidiary thereof, as of the inception date of the policy period of the **Followed Policy**. **Company** also includes any entity that becomes an insured subsequent to the inception date of the policy period of the **Followed Policy** (any such entity constituting a “**New Entity**”) only if such entity qualifies as an insured entity pursuant to the terms and conditions of the **Followed Policy** and the insurer of the **Followed Policy**, pursuant to the terms and conditions of the **Followed Policy**, is not entitled to seek any additional premium or modify the **Followed Policy’s** terms and conditions in connection with such entity’s becoming an insured (any such entity constituting a “**Newly Insured Subsidiary**”).
- B. **Discovery Period** means the period set forth in accordance with the provisions of the **Followed Policy** in accordance with Section XI of this Policy.
- C. **Drop Down Event** means any of the following events listed in subparagraphs 1-4 below:
1. the insurer of any **Underlying Insurance** denies coverage in writing to any **Insureds** for any reason, including such insurer stating in writing that it is not liable pursuant to the terms and conditions of the **Underlying Insurance** for **Non-indemnified Loss**, or refuses in writing to indemnify any **Insureds** for **Non-indemnified Loss** or to pay or advance the **Non-indemnified Loss** of any **Insureds** as required by the terms and conditions of the **Underlying Insurance**;
  2. the rescission, cancellation or avoidance of any **Underlying Insurance**;
  3. the insurer of any **Underlying Insurance** is unable to indemnify any **Insureds** for **Non-indemnified Loss** or to pay or advance the **Non-indemnified Loss** of any **Insureds** due to a stay, injunction or other order in place pursuant to any bankruptcy law or similar law; or
  4. the insurer of any **Underlying Insurance** is subject to a bankruptcy, liquidation, rehabilitation, dissolution, receivership or other similar proceeding or is taken over by a regulatory agency.
  5. Notwithstanding anything to the contrary in this Definition or elsewhere in this Policy, in no event shall **Drop Down Event** include any:
    - i) coverage denial, or refusal to pay, advance or indemnify by any insurer of any **Underlying Insurance** as set forth in subsection 1 of this Definition; or
    - ii) any rescission, cancellation or avoidance of any **Underlying**

**Insurance** as set forth in subsection 2 of this Definition,

that arises from the failure to pay premium for such **Underlying Insurance** whether or not the **Non-indemnified Loss** may otherwise have been covered in whole or in part had the premium been paid.

In addition, notwithstanding anything to the contrary in this Definition or elsewhere in this Policy, the insurer of any **Underlying Insurance** becoming subject to a stay, injunction or other order pursuant to any bankruptcy or similar law as set forth in subsection 3 of this Definition or becoming subject to a bankruptcy, liquidation, rehabilitation, dissolution, receivership or other similar proceeding or being taken over by a regulatory agency as set forth in subsection 4 of this Definition shall not constitute a **Drop Down Event** if the premium for the **Underlying Insurance** issued by such insurer is not paid, whether or not the **Non-indemnified Loss** may otherwise have been covered in whole or in part had the premium been paid.

- D. **Followed Policy** means policy designated as such in Item 7 of the Declarations.
- E. **Insureds** means all natural persons insured under the **Followed Policy** as of the inception date of the policy period of the **Followed Policy**, but shall not include the **Company**, any **Outside Entity**. **Insureds** also includes all natural persons who become an insured pursuant to the terms and conditions of the **Followed Policy** subsequent to the inception date of the policy period of the **Followed Policy** provided that, if a natural person becomes an insured under the **Followed Policy** in his or her capacity with a **New Entity**, such **New Entity** must be a **Newly Insured Subsidiary**. Estates, heirs, legal representatives, spouses and domestic partners of **Insureds** shall be entitled to coverage to the extent provided by the terms of the **Followed Policy**.
- F. **Manager** means any one or more natural persons who were, now are or shall be:
1. Managers, members of the board of managers or functionally equivalent or comparable executives of a **Company** that is a limited liability company; or
  2. General partners, managing partners or functionally equivalent or comparable executives of a **Company** that is a partnership;
- including without limitation any such natural persons serving in a management position in such limited liability company or partnership in accordance with such organization's operating agreement or partnership agreement.
- G. **Named Entity** means the entity named in Item 1. of the Declarations of this Policy.
- H. **Non-indemnified Loss** means **Loss** for which the **Company**, or the **Outside Entity**, if applicable:
1. refuses or fails to indemnify within 60 days after the **Insureds** request such indemnification, ,
  2. is financially unable to indemnify the **Insureds**, or to pay or advance to or on their behalf. or
  3. is not permitted or required to indemnify the **Insureds**, or to pay or advance to or on their behalf,

after being requested to so indemnify, pay or advance. **Non-indemnified Loss** also includes **Loss** previously advanced by the **Company** or the **Outside Entity** which the **Insureds** become legally obligated to repay.

- I. **Policy Period** means the period beginning at the inception date and ending at the expiration date stated in Item 2. of the Declarations or any earlier Policy cancellation or termination date.
- J. **Underlying Insurance** means the policy(ies) designated as such in Item 7. of the Declarations.

### III. EXCLUSIONS

Regarding the coverage provided by this Policy under Insuring Clause A.2, this Policy shall not follow any exclusions of the **Followed Policy**. The following exclusions shall apply to this Policy:

The **Insurer** shall not be liable to make any payment for that portion of any **Non-indemnified Loss**, other than **Defense Costs**, resulting from any **Claim** against any **Insureds** based upon, arising out of or attributable to:

- A. any personal profit, financial advantage or remuneration to which a final and non-appealable adjudication in the underlying proceeding establishes that any **Insured** was not legally entitled; provided, however, this exclusion shall not apply to any **Claim** alleging violations of Section 11, 12 or 15 of the Securities Act of 1933, as amended, to the extent any such **Non-indemnified Loss** is attributable to such violations and provided, further that the **Insurer** shall not assert that such **Non-indemnified Loss** is uninsurable; or
- B. any deliberate fraudulent or deliberate criminal act, if a final and non-appealable adjudication in the underlying proceeding establishes that such deliberate fraudulent or deliberate criminal act was committed by such **Insured**.

For the purpose of determining the application of Exclusions A. and B., no **Wrongful Act**, knowledge or intent of any **Insured** shall be imputed to any other **Insured**.

- C. for bodily injury, mental anguish, emotional distress, sickness, disease or death of any person or damage to or destruction of any tangible property including loss of use thereof; provided this exclusion shall not apply to the extent a **Claim** is i) a **Claim** for employment related emotional distress or mental anguish brought by or on behalf of any past, present or prospective employee of the **Company** or **Outside Entity**, or any applicant for employment with the **Company** or **Outside Entity** is ii) by or on behalf of one or more security holders of the **Company** or an **Outside Entity** in their capacity as such or is iii) based upon, arising out of or attributable to the purchase or sale of, or offer or solicitation of an offer to purchase or sell, any securities issued by the **Company** or an **Outside Entity**.

### IV. LIMIT OF LIABILITY AND SUBROGATION

- A. The amount shown in Item 3. of the Declarations shall be the maximum aggregate Limit of Liability of the **Insurer** under this Policy, subject to the following:
  - 1. In the event the Limit of Liability of this Policy is exhausted, this Policy's Limit of Liability shall be reinstated in the amount set forth in Item 3 of the Declarations as the First Reinstated Limit of Liability, solely for **Non-Indemnified Loss**

incurred by any natural person **Insureds** who were, now are or shall be duly elected or appointed directors, trustees, governors, officers, management committee members, **Managers**, in-house general counsel, or comptrollers of the **Company**. Such First Reinstated Limit of Liability shall not apply to any **Claim** for which there has been payment of **Non-Indemnified Loss** under the Limit of Liability of this Policy, nor any other **Claim** based upon, arising out of or related in any way to such **Claim**. Such First Reinstated Limit of Liability shall be excess of amounts payable under all insurance policies that are specifically excess of this Policy and all **Underlying Insurance** providing a similar reinstated limit of liability.

2. In the event the First Reinstated Limit of Liability of this Policy is exhausted, this Policy's Limit of Liability shall be reinstated in the amount set forth in Item 3 of the Declarations as the Second Reinstated Limit of Liability, solely for **Non-Indemnified Loss** incurred by any natural person **Insureds** who were, now are or shall be duly elected or appointed directors of the **Company**. Such Second Reinstated Limit of Liability shall not apply to any **Claim** for which there has been payment of **Non-Indemnified Loss** under the Limit of Liability of this Policy, nor any other **Claim** based upon, arising out of or related in any way to such **Claim**. Such Reinstated Limit of Liability shall be excess of amounts payable under all insurance policies that are specifically excess of this Policy and all **Underlying Insurance** providing a similar reinstated limit of liability.
  3. **Defense Costs** shall be part of and not in addition to the Limit of Liability, and, if applicable, the First Reinstated Limit of Liability and the Second Reinstated Limit of Liability.
  4. The limit of liability for any **Discovery Period** shall be part of and not in addition to the applicable limit of liability set forth in Item 3. of the Declarations.
- B. Payments of **Non-indemnified Loss**, including **Defense Costs**, by the **Insurer** shall reduce the applicable limit of liability as set forth in Item 3 of the Declarations..
- C. If any **Underlying Insurance** is subject to a sublimit, coverage hereunder shall not drop down excess of such sublimit. Payment of such sublimit by the insurer of any **Underlying Insurance** shall be recognized as eroding the limits of such **Underlying Insurance** to the extent of any such payment subject to the sublimit.
- D. The **Company** or **Outside Entity** agrees to indemnify the **Insureds** as required by law and to the fullest extent permitted by law and further agrees to take all steps necessary or advisable in furtherance thereof, including the making in good faith of any required application for court approval, the passing of any board or corporate resolution, the amendment of any charter, bylaws, operating agreement or similar documents of the **Company** or **Outside Entity** or the execution of any contract.
- E. In the event of any payment by the **Insurer**, in addition to any right of subrogation existing at law, in equity or otherwise, the **Insurer** shall be subrogated to the extent of such payment to all of the **Insureds'** rights of recovery, including but not limited to any rights of recovery against the **Company** or the **Outside Entity** for indemnification and any rights of recovery against any insurer of any **Underlying Insurance** or any insurer of any other insurance policy. The **Insureds** shall execute all documentation required (including all paperwork necessary for the **Insurer** to file suit or initiate other proceedings) and assist in any way necessary to pursue and secure such rights; provided, however, the **Insurer** shall not exercise any rights of subrogation against an **Insured** unless there

has been a final and non-appealable adjudication in an underlying matter against such **Insured** triggering Exclusion A. or B. under Section **IV. EXCLUSIONS**.

#### **V. MAINTENANCE OF UNDERLYING INSURANCE**

- A. The **Insureds** shall be obligated to maintain the **Underlying Insurance** as set forth in Item 8. of the Declarations for the duration of the **Policy Period**, except for any reduction or exhaustion of the limits by reason of payment of **Loss**. If the **Underlying Insurance** is not so maintained, for any reason other than a **Drop Down Event**, the **Insurer** shall not be liable under this Policy to any greater extent than it would have been had such **Underlying Insurance** been so maintained.
- B. In the event of a change of any kind to any **Underlying Insurance**, the coverage under this Policy will become subject to such change only if and to the extent that the **Insurer** consents to such change in writing.

#### **VI. CLAIM PARTICIPATION AND COOPERATION**

- A. The **Insurer** does not assume any duty to defend. The **Insurer** shall have the right and shall be given the opportunity to associate with the **Insureds**, the **Company** and the insurer of any **Underlying Insurance** in the investigation, settlement or defense of any **Claim** against any **Insureds** even if the **Underlying Insurance** has not been exhausted or there has not been any **Drop Down Event**.
- B. The **Insureds** shall not admit or assume any liability, offer to settle, enter into any settlement agreement or settlement negotiation, incur **Defense Costs** or stipulate to any judgment without the prior written consent of the **Insurer**, which consent shall not be unreasonably withheld.
- C. The **Insureds** and the **Company** agree to provide such information and cooperation as reasonably requested by the **Insurer**, including, without limitation, complying with Section **VIII. NOTICE** and subsection D. of Section **IV. LIMIT OF LIABILITY AND SUBROGATION**.
- D. The failure of any **Insured** or the **Company** to comply with their obligations under this Section shall not impair the rights of any other **Insured** under this Policy.

#### **VII. ADVANCEMENT OF DEFENSE COSTS**

- A. The **Insurer** shall advance that part of **Non-Indemnified Loss** that are **Defense Costs** of any **Insured** up to the Limit of Liability set forth in Item 3. of the Declarations on a current basis, but no later than sixty (60) days after the receipt by the **Insurer** of properly documented **Defense Costs** invoices.
- B. Any such advancement of **Defense Costs** shall be repaid by the **Insureds** severally in accordance with their respective interests in the event and to the extent that any such **Insureds** shall not be entitled to payment of such **Defense Costs** under this Policy, as determined by a final and non-appealable adjudication in the underlying matter.
- C. Any such advancement of **Defense Costs** by the **Insurer** is without prejudice to the **Insurer's** position as excess of all **Underlying Insurance** or other insurance and as excess of indemnification, payment or advancement of **Loss** from the **Company**, any **Outside Entity** or other sources.

#### **VIII. NOTICE**

- A. The **Insureds** or the **Company** shall give notice to the **Insurer** of any **Claim**, or circumstances that could give rise to a **Claim**, in conformance with the notice provisions of the **Followed Policy**, except that such notice shall be delivered to the respective address set forth in Item 5 of the Declarations. Notice of any **Claim** or circumstances that could give rise to a **Claim** to any insurers of the **Underlying Insurance** shall not be deemed notice to the **Insurer**.
- B. In the event of a **Claim**, the **Insureds** shall promptly seek indemnification payment or advancement of **Loss** from the **Company** or **Outside Entity** and shall provide notice and request coverage pursuant to the provisions of the **Underlying Insurance**. The **Insureds** shall do everything necessary to secure coverage under all applicable **Underlying Insurance** and indemnification payment or advancement of **Loss** from all relevant sources.
- C. The **Insureds** or the **Company** shall give to the **Insurer** at the address set forth in Item 5. of the Declarations as soon as practicable written notice with full particulars of:
  - 1. the reduction or exhaustion of the limits of any **Underlying Insurance**; or
  - 2. any **Drop Down Event**.

#### IX. INTERRELATED CLAIMS

All **Claims** arising from, based upon or attributable to the same **Wrongful Act** or all **Wrongful Acts** that have as a common nexus any fact, circumstance, situation, event, transaction, cause or series of logically or causally connected facts, circumstances, situations, events transactions or causes (all such **Wrongful Acts** constituting **Interrelated Wrongful Acts**) shall be deemed to be a single **Claim** first made on the earliest date that:

- 1. any of such **Claims** was first made, or deemed to have been made pursuant to Section **VIII. NOTICE**, even if such date is before the **Policy Period**;
- 2. proper notice of such **Wrongful Act** or any **Interrelated Wrongful Acts** was given to the **Insurer** pursuant to Section **VIII. NOTICE**; or
- 3. notice of such **Wrongful Act** or any **Interrelated Wrongful Acts** was given under any prior directors and officers liability, management liability, employment practices liability, fiduciary liability policy or any insurance policy similar to any of the foregoing.

In the event that the coverage pursuant to this Section IX. is less favorable to the **Insureds** than would be available pursuant to the terms of the **Followed Policy**, then the terms of the **Followed Policy** shall apply.

#### X. CANCELLATION AND RESCISSION

- A. This **Policy** may be cancelled in accordance with the **Followed Policy**. If not otherwise provided, this **Policy** may be cancelled by the **Insurer** for non-payment of premium only. If this **Policy** is so cancelled by the **Insurer**, the **Policy** shall be deemed terminated as of the inception date of the **Policy Period**. If this **Policy** is cancelled by the **Insureds**, the **Insurer** shall retain the customary short rate proportion of the premium.
- B. This **Policy** may not be rescinded or voided, in whole or in part, on any grounds.

## XI. DISCOVERY PERIOD

The **Insureds** shall be entitled to a **Discovery Period** pursuant to the terms and conditions of the **Followed Policy**, except with respect to the actual premium to be charged. The additional premium percentage and the extension of coverage period for the **Discovery Period** shall be in conformance with the provisions of the **Followed Policy**. In no event, however, shall the **Discovery Period** under this **Policy** be longer than the discovery period (or extended reporting period) purchased under any of the **Underlying Insurance**. The **Discovery Period** is not available under this **Policy** unless purchased under all **Underlying Insurance**.

## XII. ALTERNATE DISPUTE RESOLUTION

The **Insureds**, the **Company** and the **Insurer** shall submit any dispute or controversy under this **Policy** to either non-binding mediation or binding arbitration as described in this Section (the "ADR process"). Either the **Insureds**, the **Company**, or the **Insurer** may initiate the ADR process by sending written notice to the other party(ies) designating which type of ADR process is being elected. If within fourteen (14) days after such notice is given the parties disagree on the type of ADR process, the **Insureds'** or the **Company's** preference shall control.

Unless otherwise agreed by the parties, any non-binding mediation or binding arbitration shall be administered by the American Arbitration Association in accordance with its then-prevailing Commercial Mediation Rules or Commercial Arbitration Rules, respectively. The **Insureds** and the **Insurer** shall each select a disinterested arbitrator, and those two arbitrators shall select a third disinterested arbitrator. A decision by a majority of those three (3) arbitrators shall be final and binding upon the **Insureds**, the **Company** and the **Insurer** but the arbitrators' award shall not include attorneys' fees or other costs incurred in connection with the arbitration.

If the ADR process is non-binding mediation, and if the dispute is not resolved during the mediation process, then either party to the mediation may thereafter commence a judicial proceeding against the other party with respect to such dispute, provided that no party may commence such a judicial proceeding prior to ninety (90) days following termination of the mediation.

The parties to the ADR process shall share equally the fees and expenses of the mediator or the third-appointed arbitrator as well as other common expenses of the ADR process, although each party shall pay the fees and expenses of that party's appointed arbitrator.

## XIII. BANKRUPTCY

- A. It is agreed that the coverage provided under this **Policy** is intended to protect and benefit the **Insureds** and not the **Company** or **Outside Entity**. In the event a liquidation or reorganization proceeding is commenced by or against the **Company** pursuant to the United States Bankruptcy Code or any similar state, local or foreign law, the **Company** and the **Insureds** hereby agree to (i) waive and release any automatic stay or injunction which may apply in such proceeding to this policy, and (ii) cooperate in any efforts by the **Insurer**, the **Company** or any **Insured** to obtain relief from any stay or injunction that may prohibit or delay the **Insurer's** payment of **Non-indemnified Loss**.
- B. In the event the **Company** becomes a debtor-in-possession or equivalent status under the United States Bankruptcy Code or the law of any other country and the aggregate **Non-indemnified Loss** due under this Policy exceeds the remaining available Limit of Liability, the **Insurer** shall:



- (a) first pay such **Non-indemnified Loss** allocable to **Wrongful Acts** that are actually or allegedly caused, committed, or attempted prior to the **Company** becoming a debtor-in-possession or such equivalent status; then,
- (b) with respect to whatever remaining amount of the Limit of Liability is available after payment under (a) above, pay such **Non-indemnified Loss** allocable to **Wrongful Acts** that are actually or allegedly caused, committed, or attempted after the **Company** became a debtor-in-possession or equivalent status under the United States Bankruptcy Code or the law of any other country.

#### **XIV. CURRENCY AND TERRITORY**

- A. All premiums, limits, retentions, **Loss**, **Non-indemnifiable Loss** and other amounts under this **Policy** are expressed and payable in the currency of the United States of America. If judgment is rendered, settlement is denominated or other type of **Loss** is stated in a currency other than United States dollars payment under this **Policy** shall be made in United States dollars at the rate of exchange published in the *Wall Street Journal* on the date the judgment becomes final, the amount of the settlement is agreed upon in writing or other type of **Loss** is due, respectively.
- B. Where legally permissible, this **Policy** shall apply to **Claims** made against the **Insureds** anywhere in the world.

#### **XV. OTHER INSURANCE AND INDEMNIFICATION**

- A. In addition to being excess of **Underlying Insurance** as set forth in Insuring Clause I.A.1., any insurance provided by this **Policy** shall apply only as excess over any other: i) valid and collectible insurance, primary, contributory, excess, contingent or otherwise, unless such insurance is written only as specific excess insurance over the Limits of Liability provided in this **Policy**; and ii) any right of indemnification, payment or advancement from any other source. This **Policy** shall be specifically excess over any other valid and collectible insurance pursuant to which any other insurer has a duty to defend a **Claim** for which this **Policy** may be obligated to pay **Non-indemnified Loss**. This **Policy** shall not be subject to the terms and conditions of any other insurance policy.
- B. Nothing in this Section **XV.** shall limit the **Insurer's** obligation to advance **Defense Costs** pursuant to Section **VII.**

#### **XVI. AUTHORIZATION**

The **Named Entity** shall act on behalf of the **Insureds** with respect to the giving and receiving of notice of cancellation or nonrenewal, the payment of premium or the receipt of return premium that may become due and agreeing to any changes to the **Policy**.

#### **XVII. ASSIGNMENT**

This **Policy** and any and all rights hereunder are not assignable without the prior written consent of the **Insurer**.

#### **XVIII. ALTERATION**

No alteration, change or modification to this **Policy** shall be effective unless consented to in writing by an authorized representative of the **Insurer**.

**XIX. HEADINGS**

The descriptions in the headings and sub-headings of this **Policy**, and the titles of the endorsements, are inserted solely for convenience and do not constitute any part of the terms or conditions of the **Policy**.

By:

\_\_\_\_\_  
President

\_\_\_\_\_  
Secretary