

**CAPTIVE**  
**INNOVATIONS**

*Thinking Differently*

**2023**

**Paradigm Shifting**  
**Side A Directors & Officers Liability**

Speakers:

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Deputy Insurance Commissioner & Captive Insurance Administrator  
State of Hawaii Insurance Division

Moderator:

**Denys Kazama**

Associate Director, Willis Towers Watson Management (Hawaii)

## What led to Meta's interest in writing Side A Directors and Officers in your captive?

- Control our own destiny
- Manage a strategic risk
- Efficiency

# How did you work with Delaware to change their corporate statute to allow captives to write Side A D&O?

- Formed a coalition of Delaware companies and worked through the Delaware State Bar Association process for changes to the Corporations Code
- How did coalition get bill sponsored/introduced to DE Legislature?
- Hurdles or Obstacles? How did these get resolved?
- How long did it take?
- Lessons or advice?

## How did you introduce this to management and the Meta Board/stakeholders?

- Early & Often
- “Equivalent Coverage”

# What changes were made to the Delaware law to allow Side A D&O in a captive?

- Delaware General Corporation Law Section 145(g)
  - Senate Bill 203 passed on January 27, 2022
- Authorizes captive insurance companies to write Side A Directors and Officers Liability with some exclusions:
  - Claim arising out of, based upon or attributable to a knowing violations of law established by final non-appealable adjudication.
  - Any personal profit to which the covered person was not legally entitled
  - Any criminal or deliberate fraudulent act
    - Difference in Conditions policy
- Captive insurance company does not need to be organized under laws of Delaware
- Determination of claim payment must be made by either an independent claims administrator or by a majority of directors not party to the claim

## How Was it Determined that Side A D&O Could be Written by a Hawaii Captive?

- Analyzed/gained understanding of the risk itself and what the captive would be insuring
  - Side A D&O coverage is not typically provided in most D&O policies (akin to punitive damages for public policy reasons)
- Researched & analyzed HI law regarding:
  - punitive damages (allowed in HI if specifically included in policy)
  - allowable coverages for captives (e.g., casualty risk broadly defined)
- Provided blended legal position to HID

# What should captive owners consider if they are planning to place Side A D&O or other unique coverage in their captive?

- Start early
  - Investigate/evaluate desired coverage
    - Anticipate questions from Insurance Division
  - Consult with counsel
    - determine if what you want done can be done legally and in accordance with laws/regulations; anticipate regulator's legal and regulatory concerns –clearly address up front in request
    - review program documents, policies, agreements, etc.
  - Plan for corporate approvals
- Involve Captive Manager + client Finance and Accounting teams for financial impact analysis
- Develop and document the claims handling process



## How was approving Side A D&O in a captive different from other lines?

- Side A D&O is rare to be insured in a captive
  - Discussions within Insurance Division to identify areas of regulatory focus
  - Funding and capital considerations
  - “Worst case scenario” considerations
- Different regulatory considerations since Side A covers something that is insurable but not indemnifiable (e.g. derivative suit claims)
- Flexible but maintain regulatory oversight responsibility

# What is your general philosophy when evaluating business plans and what is different when the proposed coverage is unique?

- Review proposed coverage and limits in relation to the following:
  - Captive objectives and future plans
  - Funding calculation method
  - Capital contribution and how quickly surplus is expected to grow
  - Financial stability illustrated by proforma expected and adverse scenarios
  - Financial stability of the Parent company

# What advice would you give to captive owners who are considering putting unique or innovative coverage into their captive?

- “Do your homework”
- Initiate discussions with the Insurance Division early in the process before business plan is submitted
  - Allows Insurance Division time to research and ask questions
  - Identify any specific requests for the business plan
    - Example: Meta captive converted to Class 4 to meet requirement that Side A coverage be separate from any other coverage
  - Revise plan, if necessary

# Mahalo. This concludes our presentation.

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