



New England Fishery Management Council

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John F. Quinn, J.D., Ph.D., *Chairman* | Thomas A. Nies, *Executive Director*

MEMORANDUM

DATE: January 8, 2020
TO: Executive Committee
FROM: Tom Nies, Executive Director
SUBJECT: **Directors and Officers Liability Insurance**

At the November 2019 CCC meeting, the Councils, NMFS, NOAA GC, and Department of Commerce General Counsel (DOC GC) discussed a number of administrative and management issues. During the course of that discussion both NOAA GC and DOC GC indicated that Council Executive Directors and other key personnel should consider liability insurance for protection from challenges on personnel actions. Several Councils indicated they already do have such coverage.

Subsequent to this meeting, Margaret looked into the issue and obtained an insurance quote. The attached memorandum provides a detailed overview of the issue. In addition, I've included brochures from the insurance company that describe the benefits. I should point out that before using legal advice provided by the insurer we will need to consult with the DOC Labor law Division.

I recommend we adopt Margaret's suggestion to procure this insurance for the Executive Director and Executive Committee members. While some other Councils only provide the coverage to the Executive Director and Chair, our Executive Committee is charged with resolving employee grievances (if necessary). The cost is reasonable for the protection provided.

Date: January 6, 2020
To: Tom Nies, Executive Director
From: Margaret Bernier
RE: D&O Policy Coverage

Coverage provided by the Chubb Director's and Officer's Liability policy includes the following

Directors and officers (D&O) liability insurance

Directors and officers (D&O) liability insurance protects the personal assets of corporate directors and officers, and their spouses, in the event they are personally sued by employees, vendors, competitors, investors, customers, or other parties, for actual or alleged wrongful acts in managing a company. It also covers the organization financial resources in the event of a covered claim.

Directors' and officers' coverage provides insurance for Damages and Claims Expenses (up to the policy limit of \$1,000,000) for wrongful acts, errors or omissions committed by directors and officers in executing their duties in running their organizations. Liability could be associated with violations of the law, or negligence in the decision making of a director or officer:

- Breach of fiduciary duty resulting in financial losses or bankruptcy
- Misrepresentation of company assets
- Misuse of company funds
- Wrongful acts or omissions
- Failure to comply with workplace laws
- Chubb further offers a separate limit for crisis management – A separate \$25,000 limit covers expenses incurred by the public institution to hire a crisis management firm and to disseminate information regarding a specific crisis

A D&O policy does not cover an officer or directors fraudulent, criminal or deliberately unjust actions, although an innocent director will remain fully covered if the acts of their colleagues were intentional or fraudulent without their knowledge. D&O will not cover cases where an officer or director of a company acted for personal profit or gained illegal remuneration.

Additionally, **Employment Practices Liability (EPL)** insurance coverage can be added to the Standard D&O coverages, which address employment-related claim for acts including:

- Discrimination, Harassment, Retaliation
- Violation of the Family and Medical Leave Act
- Wrongful discipline
- Wrongful failure to promote
- Wrongful termination

D&O does NOT cover claims arising from Insured's activities as a trustee or fiduciary for any type of Employee benefit plan, including, actual or alleged violation of the responsibilities, obligations or duties imposed by the Employee Retirement Income Security Act of 1974, any similar state or local laws. (The Executive Director and the Administrative Officer are fiduciaries for our Health, Dental and Disability

Insurance plans, but only Plan Administrators for our 403b and SEP-Simple. Fidelity, USAA, et al are fiduciaries.)

Specific to the Chubb Policy (which is Municipal Advantage Public Entity Liability), this policy provides the following related to employment practices liability (EPL)

- Broad coverage, including Coverage for Third Party Claims
 - Wrongful termination, discrimination, harassment and employment-related misrepresentation – Mental distress, pain and suffering arising out of a wrongful employment practice
 - Employment-related libel, slander or defamation
 - Third party claims arising out of discrimination or harassment of nonemployees by Insured Persons
- Broad Definition of “Claim” – Includes proceedings by or in association with the Equal Employment Opportunity Commission or similar federal, state or local governmental authorities

Attached is a short 2-page brochure on the policy and a “specimen” policy document from Chubb.

Discussion and Integration with DOC GC Legal Opinions

With respect to the Council, a D&O policy would primarily cover the Council for employment related acts, since the Council is already covered by the NOAA General Council Legal Opinion No. 2: Personal Tort Liability of the Regional Fishery Management Council Members and Staff in Civil Litigation (13 January 1977).

The second area of potential intersection with existing NOAA GC Legal Opinions, is No. 63: Council Authority to Obtain Independent Legal Services. (5 May 1978)

In the case of a covered claim, the Council would most likely rely on the Insurer’s legal services to defend against the claim. A D&O policy typically provides legal defense, and/or pay for defense and damages to the extent of the policy limits if the Council hires Independent legal services to defend itself.

If the Council needed to hire a private attorney, Opinion 63 permits the Council to do so, but subject to determination by the Secretary: “Yes, section 302(f) of the FCMA gives each Council the authority to hire its own staff attorney or contract with a private attorney when the Secretary determines those services are necessary to the performance of the Council’s functions.” One would hope the Secretary would expeditiously determine that the Council could hire outside legal services.

Whether utilizing the Insurer’s legal resources constitutes “engaging outside legal services” envisioned under Opinion 63 is unknown. To my knowledge, this has not come up, even though the Council has purchased General Liability and Auto insurance coverage integrated with its property insurance coverage (standard business practice) that implicitly includes legal services.