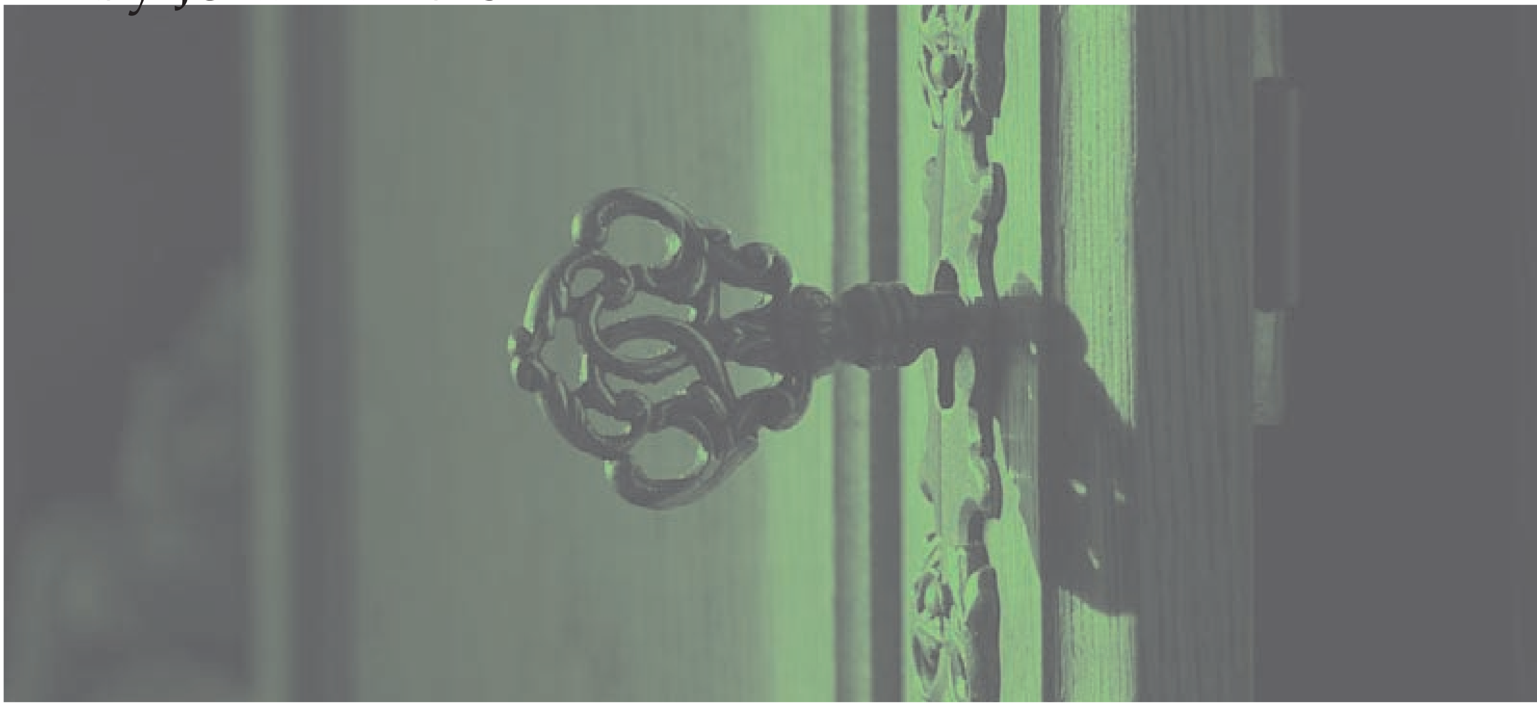
by John A. Edie



Directors and Officers
Liability Insurance and Indemnification

COUNCIL on FOUNDATIONS

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Vision

The Council's vision for the field is of

A vibrant, growing and responsible philanthropic sector that advances the common good.

We see ourselves as part of a broad philanthropic community that will contribute to this vision. We aim to be an important leader in reaching the vision.

Mission

The Council on Foundations provides the opportunity, leadership and tools needed by philanthropic organizations to expand, enhance and sustain their ability to advance the common good.

To carry out this mission, we will be a membership organization with effective and diverse leadership that helps the field be larger, more effective, more responsible and more cooperative.

By *common good* we mean the sum total of conditions that enable community members to thrive. These achievements have a shared nature that goes beyond individual benefits.

By *philanthropic organizations* we mean any vehicle that brings people together to enhance the effectiveness, impact and leverage of their philanthropy. This includes private and community foundations, corporate foundations and giving programs, operating foundations, and public foundations, as well as emerging giving and grantmaking mechanisms involving collective participation.

Statement of Inclusiveness

The Council on Foundations was formed to promote responsible and effective philanthropy. The mission requires a commitment to inclusiveness as a fundamental operating principle and calls for an active and ongoing process that affirms human diversity in its many forms, encompassing but not limited to ethnicity, race, gender, sexual orientation, economic circumstance, disability and philosophy. We seek diversity in order to ensure that a range of perspectives, opinions and experiences are recognized and acted upon in achieving the Council's mission. The Council also asks members to make a similar commitment to inclusiveness in order to better enhance their abilities to contribute to the common good of our changing society.

COUNCIL on FOUNDATIONS

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Introduction

For boards of directors, trustees and foundation managers, there are few areas of operation that cause more confusion and uncertainty than indemnification and the purchase of directors and officers (D&O) liability insurance. And it is no wonder. Mixing the often impenetrable statutory language of the Internal Revenue Code with the highly refined wording of insurance policies creates fertile ground for confusion. To make matters worse, the rules are not static. State laws change, Treasury regulations are revised and insurance policy language is frequently amended.

Over the years, members of the Council on Foundations have raised a steady stream of questions about potential liability, indemnification and the purchase of D&O insurance. These questions have taken on more urgency as the increased scrutiny of directors of for-profit corporations has led many state regulators to focus their attention on the behavior of nonprofit officials as well. Foundation managers increasingly recognize that their leadership roles come with potential risks, and they want to know how to protect themselves and the foundations they serve.

This paper seeks to address these concerns. It brings together background information on relevant state laws, the insurance industry and Treasury Department regulations, for those who are approaching these issues for the first time and for those who seek to update and deepen their knowledge.

The information is presented in a question-and-answer format with specific references to attached materials that provide more detailed discussion of the issues covered. At the outset, a few points should be emphasized:

- While this paper's intended audience is grantmaking foundations, much of the information will be useful to public charity organizations that are primarily service providers.

- Most of the information provided here does not relate to potential liability for personal injury or property damage—risks not covered by D&O insurance. Charities providing services directly to the public will need to conduct a more extensive review of their total operations to be certain that all potential risks are thoroughly covered.

- The information provided is aimed primarily at issues encountered by private and community foundations; where problems are applicable only to private foundations, they are clearly identified.

- The focus is primarily on potential areas of liability for the individual foundation director or trustee. However, this paper treats potential liability of the organization as well. In many cases both the individual and the foundation may be liable.

- The information in this publication is not intended as legal advice. Nothing in this work is a substitute for the opinion of a knowledgeable legal counsel who is familiar with the specific situation of a particular foundation. You should not make any decision regarding self-indemnification or the purchase of D&O insurance without consulting your lawyer and other risk assessment professionals.

- There is enough complexity in this field to confuse everyone. So that we may make this document as useful and relevant as possible, your comments and suggestions for improvements are encouraged.

Jane C. Nober
August 2006

PART I

What Are the Real Risks?

Question 1: **What is general liability insurance?**

Most nonprofit organizations would not think of doing business without some form of comprehensive general liability insurance to cover fire, theft and accidental loss. While such a policy is usually very broad in its coverage, there is always one very important limitation: general liability insurance covers only losses that arise as the result of bodily injury or loss of physical property (including damage).

There are two other kinds of insurance that are fairly common: workers' compensation and fidelity insurance. Workers' compensation covers injuries (or illness) and lost wages of employees who are injured in the course of their employment. The coverage is normally required by law and covered by a separate policy.

Fidelity insurance protects the organization from acts of theft or embezzlement committed by dishonest employees or volunteers. Many packageype policies will include fidelity insurance so that the organization will be reimbursed for any such losses resulting from dishonesty or embezzlement; if they do not, separate coverage is easily obtained. It is important to note that D&O insurance policies will specifically exclude coverage for workers' compensation and losses resulting from acts of dishonesty.

Question 2: **What potential risks are not covered by general liability insurance?**

Liability that is not related to bodily injury or property damage can develop from three sources: general common law, federal law and state/local statutes. Common law generally means that rules have developed over time as the result of court decisions (precedent). A lawsuit or administrative action against a foundation may result in the foundation being found liable under common law for libel, slander, false imprisonment, breach of contract, breach of fiduciary duty, conflict of interest, mismanagement of funds, failure of supervision or imprudent investments (most states have incorporated many of these violations into statute as well).

There are a number of penalties under federal laws that could be imposed upon a foundation or its officers/directors even though no personal injury or property damage has occurred. These include penalties for:

- Failure to withhold or pay social security tax (includes penalty on the manager)
- Failure to withhold or pay federal income taxes of employees (includes penalty on the manager)
- Violation of the Securities Exchange Act
- Violation of the Occupational Safety and Health Act
- Violation of an environmental protection act
- Violation of the Employee Retirement Income Security Act
- Violation of the Internal Revenue Code
- Violation of the Equal Employment Opportunity Act.

At the state and local level, similar laws may be in place. For example, states usually require withholding of state income taxes and may also have a state equal employment opportunity statute. Failure to pay state sales tax may also result in liability (not all states permit all nonprofits to be exempt from sales tax). States, cities and counties may also have building codes, fire codes or other health and safety codes (for example, to cover food service or the operation of a child care center), violations of which can subject the organization to penalty.

For the average grantmaking organization, some of these statutes are not relevant. However, some laws are specifically aimed at the nonprofit community and we will consider them more closely (see questions four and five). Foundations and other nonprofits should also be keenly aware that most states empower the state attorney general to protect the public interest when assets have been contributed to charity (on the theory that the general public has a right to benefit from the assets contributed). In other words, not every action against the organization will be a lawsuit claiming damages. The attorney general may bring an administrative action to force the organization (or its board) to perform (or not perform) a specific act. Examples might include paying back excessive fees or compensation, or forbidding the continued use of the foundation's offices for personal business.

Question 3: **When it comes to liability, is there any difference between being a trustee and being a director?**

While most nonprofit organizations today are formed under the state's not for profit corporation statute, it certainly is possible to form a private foundation or community foundation under state trust laws. The nonprofit corporation will have a board of directors and the trust will have trustees. Does this make any difference in liability? It can.

Historically, trust law holds trustees to a higher standard. Trustees cannot participate in any actions where a conflict of interest arises, whereas corporatedirectors can do so as long as the conflict is disclosed and the transaction is approved by a majority of disinterested board members or by a disinterested third party.* Trustees are sometimes more limited in the duties that they may delegate to others (such as responsibility for investment decisions). Also, trustees are often held to a stricter standard regarding negligence. Corporate directors can usually rely on a standard called the "business judgment rule" which simply requires the director to employ the care that "an ordinarily prudent person would exercise in a like position and under similar circumstances."

In more recent years, the degree of liability and responsibility for trustees has become less and less distinguishable from that applied to corporate directors, as more and more courts adopt the corporate standards. However, in some states important differences may still remain for certain kinds of actions. Consequently, if your organization is a trust, it is prudent for your board to clarify with legal counsel what stricter standards may apply in your case. However, for purposes of this paper the term "director" will include the term "trustee." For many of the taxes and penalties that can be levied and for many of the lawsuits that can be filed, there is no measurable difference.

Question 4: **What are Chapter 42 taxes and penalties?**

The Internal Revenue Code (IRC or tax code) contains several potential penalties that are not covered by general liability insurance (see question two). Private foundations are the only type of organization subject to Chapter 42 penalties. Since 1969, the IRC has strictly regulated the management and administration of private foundations. The bulk of these requirements are found in Chapter 42 of the IRC (they do not apply to community foundations or public charities, but see question five).

Chapter 42 not only introduced specific legal requirements for private foundations, but provided a new enforcement tool: penalty taxes for violations. Under this chapter, penalty taxes may be applied for acts of self dealing (Section 4941), failure to distribute income (Section 4942), excess business holdings (Section 4943), jeopardy investments (Section 4944) and taxable expenditures (Section 4945) such as grants for lobbying or for voter registration or to noncharitable organizations. Except for the rules against self dealing, each of these IRC sec-

* For private foundations in either the trust or corporate form, such actions may violate the rules against self dealing despite full disclosure and board approval.

tions levies a penalty against the private foundation. A similar tax can be imposed on the individual foundation manager (director, officer, employee) for violation of three of the sections: self dealing, jeopardy investments and taxable expenditures. In each case, the penalty is a percentage of the amount of money involved; the initial penalty applied ranges from 10 to 30 percent against the foundation and 5 percent against the individual; if the prohibited acts are not corrected, the penalties may rise to 200% of the amount involved.

Question 5: **How many foundations are audited each year and how much do foundations pay in penalty taxes?**

Each year the Internal Revenue Service (IRS) reports the total collections for penalty taxes under Chapter 42. For 2003, the latest year for which totals are available, the amount collected was just over $5 million; this total is fairly small considering that there are over 73,000 private foundations giving away billions of dollars each year.

For fiscal year 2005, the IRS has reported that it audited just under 350 returns filed by private foundations (and by some other types of organizations). Again, this is a fairly small number in comparison to the total number of returns filed by private foundations.

Question 6: **Are there fines or penalty taxes that can apply to public charities such as community foundations?**

Yes. Intermediate Sanctions are fines imposed under Section 4958 of the Tax Code on certain individuals (“disqualified persons”) associated with a public charity (or other tax-exempt organization) who receive compensation in excess of reasonable compensation for the services provided. An initial tax of 25 percent of the excess benefit may be imposed on the disqualified person, and the tax will rise to 200% if the violation is not corrected. An additional penalty of 10% of the amount involved may be imposed on organization managers who knowingly participate in the transaction.

Intermediate Sanctions were added to the Tax Code in 1996 to provide the IRS with the authority to penalize persons improperly benefiting from transactions with public charities and civic organizations. Prior to 1996, the IRS’s only weapon against organization insiders who took excess benefits was the revocation of the organization’s exempt status.

Question 7: **Are there other IRC violations that can subject a grantmaker to penalties?**

In addition to Chapter 42 violations, a private foundation or a private foundation manager can be fined for failure to file an annual return in a timely manner or for failure to provide public inspection of the return as required (see Sections 6652 and 6685). Filing an incomplete return on time is the same as filing a late return. Section 6684 can double the penalty tax found under Chapter 42 if the violation is found to be "willful and flagrant." The 1986 Tax Reform Act changed the IRC to require private foundations to make estimated quarterly payments of their tax on investment income (Section 6154). Failure to make the minimum estimated payments can result in penalty against the foundation manager (Section 6656).

Community foundations and other public charities can also be subject to IRC penalties. Both the organization and the person responsible can be penalized for failure to file a timely return (Section 6652). If any unrelated business income tax is due (from either a private foundation or a public charity), estimated quarterly tax payments must be made to avoid penalty.

Also, private foundations and public charities (and in some cases their managers) may be fined for:

- Failure to make the organization's annual tax return (Form 990 or 990-PF) available for public inspection or to provide a copy of the return as required (Section 6104(d)). An organization must make its three most recent annual filings available or face penalty taxes.

- Failure to make the organization's application for tax status determination (and all related documents) available for public inspection or to provide a copy of the application materials (Section 6104(d). This requirement applies to organizations that filed their applications for exempt status on or after July 15, 1987, and to organizations that had a copy of their applications on hand on this date.

- Illegal use of funds for political campaigns (Section 4955).

- Excessive use of funds for lobbying purposes (Section 4912).

Question 8: **What are some examples of actual lawsuits or other actions against foundations and/or foundation managers?**

In addition to the actions by the IRS noted above, there are occasional lawsuits brought against foundations. However, lawsuits for personal injury or damage to property are very rare since foundations normally provide no direct services. They generally do not run hospitals, supervise swimming pools or maintain motor vehicles to provide transportation. Public charities that are direct service providers are much more vulnerable to this kind of suit.

According to insurance industry sources, most lawsuits filed against private foundations and public charities are employment-related. Employees—or, more frequently, former employees—may contend that they have been unfairly fired or that they did not receive promotions to which they were entitled. They may claim that they were discriminated against on the basis of their sex, race or age. Generally, the more employees that an organization has, the more it is at risk for such a lawsuit.

The following is a typical employment-related lawsuit and its outcome:

A former employee filed a claim against a private foundation for discrimination because she was terminated while she was on maternity leave. Although she was terminated during a reduction in force (RIF) that affected other employees, the foundation did not have any documentation as to why she was being terminated instead of other employees who were not terminated during the RIF—and who were not out on maternity leave. In the absence of any documentation or explicit reason as to why this particular employee was terminated, the insurance company opted to settle the case by paying the former employee $26,000. Claim expenses for this matter were approximately $22,000.

Another source of lawsuits is state attorneys general. Acting in their roles as protectors of charitable funds and beneficiaries, attorneys general may file suits that allege mismanagement of assets or other derelictions of fiduciary duties. While there is no statistical evidence of any recent increase in the frequency of lawsuits filed against foundations, attorneys general in many states are becoming more aggressive in overseeing the charitable community.

Finally, some foundations become embroiled in litigation as a result of internal disputes. Disagreements among board members and family feuds that spill over into foundation management conflicts can turn into lawsuits.

The following are examples of actual cases or actions against foundations:

- A private foundation in California awarded a one-year, $1 million grant to a health clinic. The grant agreement noted that funding would be renewed at the sole discretion of the foundation. At the end of the year, just over half of the funding was disbursed and the foundation had decided that its funding priorities would not include projects like the grantee's. The parties executed an agreement under which the grantee would receive the balance of the grant, and the money was paid out. After receiving the funds, the grantee sued the foundation and claimed that discussions that preceded the first grant agreement entitled it to $4.5 million over three years. A jury agreed and awarded the grantee $2 million. In 1999, the California Court of Appeal reversed the verdict.

- A donor established a designated fund for a particular organization by a bequest to a community trust. Over the years, societal changes led to changes in the operations of the organization. The community foundation exercised its variance power and ended the annual distributions to the organization. Many years later, the organization sued the community foundation and the individual members of the foundation's board, claiming that it was entitled to distributions from the designated fund. The appeals court found in favor of the community foundation.

- In 2000, some directors of a foundation that operated an art museum in Chicago sued the foundation and some of its directors. They alleged mismanagement as well as a plot by some directors to move the foundation's art collection from Chicago to Washington, DC. The Illinois attorney general intervened and, after lengthy litigation and mediation, the foundation underwent a change of management and made a long-term commitment to Illinois.

- In 2002, residents of a community sued a foundation that had explored the possibility of setting up a grant program to reduce poverty in the area. The plaintiffs claimed that in the process of involving the community in the planning process the foundation had made binding promises to provide funding. The U.S. District Court dismissed the claim. In 2005, a federal appeals court reinstated part of the claim. It found that the foundation had made no binding promise to the community regarding the grant funding but had possibly committed itself to paying the expenses of those who participated in the planning process.

- In Texas, the sister of a foundation executive (who, like the executive, was a grandchild of the foundation's donors) became suspicious about the organization's operations. Her investigation led to a suit by the attorney general and the removal of the foundation's executive, some of his colleagues and members of the board. In 2004 a jury ordered two of the foundation's executives to repay over $20 million to the foundation.

- In 1972, a man in Buffalo, New York, brought suit against 14 Buffalo foundations (private and community) alleging that his children had been denied scholarship assistance, that he had been denied employment because of his race and that the foundations had refused to grant money to his foundation on racial grounds. Four years later the case was dismissed, with defense costs estimated to have exceeded $100,000.

- One trustee of a midwestern private foundation sued several fellow trustees on charges including mismanagement and excessive payment of fees. The suits were eventually dismissed.

- The attorney general in New York brought action against a private foundation for allegedly selling an undervalued asset in order to produce greater income for grantmaking. The asset was sold at a price much higher than its value on the foundation's books.

- The attorney general in California brought action against the trustees of a private foundation requiring that excessive trustee fees be repaid to the foundation. The fees were repaid.

- The attorney general in Texas brought action to compel changes in the composition of the board of a private foundation following the revelation of millions of dollars having been spent on developing a theme park that had never been opened to the public. It had been used to house horses belonging to members of the board. The board members were replaced.
- The original founding documents of a private foundation in the midwest specified that a portion of the income from the endowment go to a particular charitable organization. The named charity brought suit against the foundation claiming mismanagement of foundation assets.

In many cases, including some of those just described, a foundation may be successful in its defense or may not be required to take action necessitating a financial outlay. An employee's claim of discrimination may be dismissed, the attorney general's charges may turn out to be baseless, or the management conflict may be resolved. However, in making the successful defense or negotiating the final resolution, considerable legal expenses may be incurred. Can the foundation manager afford to pay his or her defense costs? Can the foundation afford to pay its defense costs? Can the foundation afford to reimburse the director or officer for his or her defense costs? The goal of this paper is to design a system in which the foundation and the director will be adequately protected should such a defense become necessary.

Part II

Indemnification

Question 9: **What is indemnification?**

"Indemnification" and "to indemnify" are legal terms meaning to pay the costs of another, or to reimburse another person for costs incurred. In the nonprofit context, the purpose of indemnification is specifically to provide financial protection to an officer or director in case actual or threatened legal proceedings arise from the action or omission of the director or officer in the course of his or her service to the organization.

In short, the organization pays the legal costs, expenses, judgments and settlements of the director. The obvious rationale for providing indemnification protection is to persuade responsible persons to serve on the board of the organization with less fear that they will personally have to bear the costs to defend their actions. These costs can be high. Reportedly, the average cost of defending a discrimination in employment action is $116,000. It is certainly not unrealistic to expect a serious lawsuit to cost well over that amount.

However, this promise of indemnification is not very comforting if the organization has very few assets and, therefore, could not cover such costs. For smaller charities, indemnification may not solve any problems. For foundations and other organizations with sizable endowments or reserves, indemnification will provide a much more realistic form of protection.

Question 10: **What risks can be covered by indemnification and what risks cannot?**

The answer to this question is not straightforward; it depends on state law. Because the precise extent of permissible coverage will vary from state to state, this question is best directed to the organization's legal counsel. Moreover, several states (Delaware and Pennsylvania, for example) have amended their indemnification statutes to provide a broader scope for what may be indemnified. The liberalization of these statutes is a direct response to past liability crises.

Not all states have modernized their indemnification laws. For example, several states have statutes still based on the 1964 Model Nonprofit Corporation Act, which has serious shortcomings. For example, these statutes: 1) exclude coverage for threatened litigation; 2) only permit (do not require) the nonprofit to reimburse the director (even if he or she successfully defends the lawsuit); 3) cover only the costs of defense and not the costs of judgments, fines or settlements; and 4) are unclear about coverage of investigative or administrative proceedings.

Fortunately, most states have taken a more contemporary approach where the director has a right to indemnification when he or she is successful in his or her defense of the lawsuit. This right may be enforced in court and is sometimes referred to as *mandatory indemnification*.

However, when the case is lost or settled, the right to reimbursement is not absolute. This is called *permissive indemnification*. Under these circumstances, the organization must make a decision whether or not to indemnify in accordance with the procedures set out in the state law. A plan to indemnify may be spelled out ahead of time in the charter, the bylaws, or the board policy. Similarly, after the costs are incurred, the board may vote to reimburse. In some circumstances, even if the board has not made such a decision, the director may go to court seeking an order requiring reimbursement.

Generally speaking, indemnification—whether mandatory or permissive—covers the legal expenses in any suit brought against a director, so long as the director was acting in good faith and in the best interests of the corporation. The precise standard of care required for eligibility will vary from state to state depending on the type of suit. But if the standard is met, virtually all the risks noted in questions one and two will be covered, subject to whatever limitations may be spelled out in the applicable state statute.

For example, most state indemnification laws are more generous to directors in "third party" suits, and much more restrictive in "derivative type" suits. A third party suit is normally brought by someone who is not a director, officer or member of the corporation; these actions involve efforts to assert that the foundation has violated the third party's rights. Examples would be a citizen suing for libel, an exemployee suing for wrongful termination or a vendor suing for breach of contract. Derivative type suits involve efforts to assert that someone has violated the rights of the corporation itself. Typically, one board member, on behalf of the corporation, sues another board member based on a violation of one of the fiduciary duties owed by the board member to the corporation. Most actions brought by the state attorney general relating to the fiduciary duties owed to the corporation by the directors are considered derivative-type actions.

Under most state statutes, indemnification in derivative type actions is permitted only for defense costs where the director is successful. In third party actions, the costs of judgments, settlements and expenses of defense may also be covered even if the director is not successful. This limitation on derivative type actions is only sensible. It would not make sense to compel a director to pay back an unlawful loan (self dealing) only to have the corporation, once reimbursed, turn around and indemnify the director by returning the money.

In some states indemnification may not be permissible even when the director is successful in his or her defense. For example, some states require court approval of any expenses involving any kind of derivativetype suit.

In summary, indemnification does not protect the foundation at all. In fact, it obligates the foundation to reimburse its officers and directors for legal expenses incurred. Depending on the state, the degree of indemnification permitted will vary. Whether or not the directors of the foundation will feel adequately comfortable with indemnification alone will depend on the extent of coverage permitted and the size of the reserves or endowment available to make the payments.

Question 11: **How does a foundation provide for indemnification?**

Again, because state laws differ with respect to indemnification, no single answer is universally accurate here, and each organization should consult its legal counsel for guidance, especially because some states have recently revised their statutes.

Even in those states where mandatory indemnification allows the director to sue in court for reimbursement, it is strongly advisable for the foundation to document in writing its commitment to indemnifying its directors. Usually, this commitment is spelled out in the bylaws, but, depending on state requirements, it could be stated in the articles of incorporation or in a board resolution (some organizations even enter into individual written contracts with each director). Because statutes change and the law evolves, it is often wise to state clearly that the foundation intends to indemnify its directors to the fullest extent permitted by law.

Usually, these written commitments are fairly long, spelling out the standards that must be met for a director to be eligible for indemnification. Where indemnification is permissive, the statement will usually provide a procedure whereby the disinterested members of the board can make an independent judgment approving indemnification. If too many members of the board are involved, the procedure may call for a decision by a specially appointed legal counsel. Where the state statute permits the corporation to advance the costs of litigation as they occur, it is wise to include such permission in the written statement. When advancing costs is permitted, the statute usually requires the director to promise to repay the advances if he or she is determined ultimately to be ineligible.

Question 12: **Don't state laws make directors of nonprofit organizations immune from liability?**

Many states have laws that provide immunity from liability for nonprofit directors under certain circumstances. However, directors of nonprofits who believe they are free from all potential obligations are mistaken. There are several reasons to be wary:

- The statutes often apply only to volunteer directors; for foundation directors who are compensated, there is no immunity.

- Each statute includes exceptions. For example, the law may provide immunity from liability so long as the director did not act "wantonly" or "with gross negligence." *Remember, immunity from liability is not immunity from being sued.* The director may never be found liable, but the lawsuit must still be defended. It is relatively easy for the injured party's lawyer simply to amend the lawsuit and allege "gross negligence" rather than simple negligence. The burden of proof may be higher for the plaintiff, but the cost of defending the suit may still be staggering.

- Many of these statutes apply only to claims involving personal injury or property damage. For all other claims (see question two), these immunity provisions would not apply.

- None of these statutes has been tested in the courts, and the insurance industry—while optimistic—is adopting a "wait and see" attitude.

Part III

Directors and Officers Liability Insurance

Question 13: **What is D&O insurance?**

Unlike general liability insurance (see question one), D&O insurance excludes claims arising from bodily injury or property damage. As noted earlier, each of these types of insurance (general liability and D&O) usually excludes what the other covers. It is also a fair generalization to say that D&O insurance is essentially mismanagement coverage, designed to pay the associated attorney fees and court costs arising from covered perils. When one excludes actions for bodily injury and property damage, the number of cases brought against nonprofits is very limited. Moreover, nonprofits usually win or reach a settlement. But in the process of winning, settling or defending, legal costs can become very heavy.

The typical D&O policy protects against damages resulting from a "wrongful act," which is normally defined as "any breach of duty, neglect, error, misstatement, misleading statement, omission, or other act(s) done or wrongfully attempted." For a review of the types of actions not involving bodily injury or property damage which may be brought against an organization, see question two.

Question 14: **Who is covered by D&O insurance?**

Different types of D&O policies cover different people. The most limited type of D&O policy covers only the directors and officers, not the foundation. An "association-type" policy offers the broadest coverage. It will generally cover officers and directors, the foundation itself (i.e. entity coverage), employees, trustees, volunteers and committee members. Association-type coverage can sometimes protect the foundation's assets by paying legal expenses upfront (see question 20). It also obligates the insurer to appoint qualified legal counsel if the foundation is sued. This type of policy provides protection to people who are not officers and directors and may help encourage volunteers to aid the foundation.

A note of caution: some policies will appear to cover the directors, officers and the foundation itself. However, when read more closely, the section covering the foundation will simply state that the policy will reimburse the foundation only for any payments the foundation is obligated to make to indemnify its officers and directors. Therefore, such a policy does not cover the foundation, and the legal expenses of a lawsuit against the foundation would not be reimbursed. It is important to verify that a particular policy offers association-type coverage, as insurance brokers and agents may not make this point clear.

Question 15: **Which areas are covered by D&O insurance and which are not? How does D&O insurance differ from indemnification?**

While D&O insurance excludes coverage for bodily injury and property damage, directors could possibly be indemnified for such claims depending upon the particular circumstances and how the suit is worded. In these cases, however, the foundation's general liability insurance policy normally covers claims against the foundation and against the foundation manager. The important differences between D&O insurance and indemnification relate to claims other than those involving bodily injury and property damage.

Again, it is hard to generalize here since state indemnification laws are different and D&O insurance policies vary. Nevertheless, unlike a typical D&O policy, indemnification will cover the following areas: 1) criminal charges, so long as the director had no reasonable cause to believe his or her conduct was unlawful; 2) fines and penalties in direct, third party actions (but see question 19); 3) punitive damages in third party actions; and 4) the expenses for defense in investigative matters.

Barring the exceptions just noted, D&O insurance will normally cover everything that indemnification covers (but see the list of exclusions below). However, if the foundation can obtain a broad "association type" D&O policy, coverage will not be limited just to directors and officers, but will include the foundation itself, employees, committee members and volunteers. In this case, D&O insurance is much broader because of whom it covers, not what it covers.

Some actions are excluded by all D&O policies; exclusion of others depends upon the particular policy.

Always Excluded:

- bodily injury and property damage
- intentional and dishonest acts
- criminal acts
- violations of state laws resulting in fines or penalties
- pollution and nuclear waste.

Frequently Excluded:

- libel, slander and false imprisonment
- employment discrimination or wrongful termination
- cases involving insured-against-insured actions (i.e., one director suing another)
- failure to maintain proper insurance
- punitive damages.

Question 16: **If actual lawsuits are so rare, is D&O insurance really necessary?**

While it is true that very few claims have been successfully tried against foundations, the likelihood of a lawsuit continues to increase. Even the most frivolous, spurious suit must be defended, and the legal and court costs of defense can be very high. In addition, state regulators (attorneys general) are beginning to take a more serious look at their duties to protect the public and to insist on the proper exercise of fiduciary responsibilities by directors.

While offices rarely burn down and visitors do not often slip on banana peels, most organizations would not think of doing business without general liability and fire insurance. Similarly, D&O insurance is purchased to protect against the unlikely but costly possibility of a claim. It is also worth noting that there is a growing tendency on the part of individuals contemplating service on the board of directors of a foundation to request such insurance as a condition of service.

Question 17: **How should a foundation decide whether to obtain D&O insurance?**

It is very hard to draw the line between the foundations that really should have D&O coverage and those that should not. Obviously, the larger your organization—the more staff members you have, the more grants you make, the more controversial your grants, the more investments you have, the more contracts you enter into—the greater your exposure to potential claims. Foundations with no office, no staff, no contracts, few grants and limited investments may feel the chance of a claim to be so remote that the cost of D&O insurance may not be warranted.

The cost of insurance is also an important factor. If a $1 million policy were to cost $10 per year, everyone would buy it; but, if the cost were $150,000 per year, one could well argue that it would be cheaper in the long run simply to provide indemnification.

Any foundation or other charity with a large endowment has “deep pockets” and is automatically an attractive target for an injured party’s lawyer to pursue. The foundation may have enough assets available to protect the director through indemnification, but the prudent director should be interested in protecting the endowment as well. If an association-type policy is available at a reasonable price, it may well be worth obtaining.

Each foundation, in consultation with its legal advisors and others who may help in assessing risks, must examine its own circumstances, assess its potential for liability, research the availability of D&O insurance and carefully examine the costs of coverage in light of the risks.

The eleventh edition of the Council’s Foundation Management Series (2001 data) indicates that for non corporate foundations with over $10 million in assets, 86 percent of respondents now carry D&O insurance, a substantial increase from 62 percent in the 1990 survey.

Question 18: **Why not simply provide for each director to be covered by his or her personal umbrella policy?**

Most individuals can purchase a broad umbrella policy on top of their general home insurance policy. In some cases, it is possible to include in such a policy coverage for liabilities arising from actions involving service on boards of directors. Unfortunately, these policies are generally limited to actions involving bodily injury and property damage and, therefore, can in no way substitute for a D&O policy. Moreover, this option offers no protection for the organization, and since the vast majority of suits name the foundation this is a potentially significant gap. In addition, foundation board members and volunteers may be reluctant to put their own insurance policies at risk in connection with their foundation work. Finally, salaried employees and board members receiving any compensation for their service would most likely not be afforded coverage.

Question 19: **How much D&O coverage is needed?**

Simple rules of thumb are almost impossible to provide. There is such an enormous variety in the type of foundation (even among those that are the same size) that generalizing here is not particularly useful. However, it may help you to compare your foundation with others. Data from the Council's Foundation Management Series can be helpful in giving you and your advisors a sense of what other similarly situated foundations have chosen.

Most foundations who purchase D&O insurance obtain coverage for between $1 million and $5 million. Note that these amounts are typically a factor of how much coverage insurance companies will offer and of the premium cost. If higher limits were available at reasonable prices, foundations might purchase greater coverage.

Question 20: **What are the important provisions to look for in a good D&O policy? What are some of the pitfalls to avoid?**

While most D&O policies follow a similar format, there are certain features that are well worth looking for and understanding before you choose a company. Obviously, the price of insurance and reputation of the company are important. Also, as noted in question 12, a broad associatio type policy is preferable to a straight D&O policy where coverage is limited just to directors and officers. Here are some other issues to keep in mind:

"Claims made" v. "occurrence" policy method

Virtually all D&O policies today are "claims made" policies, which is a relatively new, innovative insurance method covering losses from claims asserted against the insured during the policy period, regardless of whether the liability imposing causes occurred during or prior to the policy period. The traditional "occurrence" liability insurance method, on the other hand, provides coverage for losses from liability imposing causes which occurred during the policy period regardless of when the claim is asserted. With an occurrence liability policy, once the policy period is over, the extent of the underwriter's liability is not known, and the underwriter may not discover for years the extent of liability from losses claimed to have occurred within the policy period. On the contrary, with a claims made policy, the extent of the underwriter's liability is clear when the policy ends.

"Duty to defend" v. "legally obligated"

Some policies state that the company will pay on behalf of the insured all losses which the insured "shall become legally obligated to pay." Technically, this could mean that the company does not have to pay until the manager or the foundation has lost or settled the case. The case could continue for years and require a heavy outlay by the foundation or the manager before reimbursement by the company.

Other companies use the phrase "duty to defend" which suggests that they have a responsibility to pay the expenses as they occur. In fact, this comparison may be a distinction without a difference, because companies that use the phrase "shall become legally obligated to pay" are not likely to sit by and watch legal costs rise which they may have to pay later. It is crucial that the foundation obtain a clear understanding (preferably in writing) of the company's policy once a claim arises (i.e., when does reimbursement of costs begin?). In general, use of the term "duty to defend" in the policy is preferable.

Control over choice of counsel

Some policies give the company the sole right to appoint or choose counsel. Others provide that choice of counsel shall be "mutually agreed upon by the insured and the company." Having a voice and control over counsel can be helpful, especially if the foundation has a longstanding relationship with an attorney or firm that could handle the foundation's defense. Remember that it is in the insurance company's interest to have a lawyer who will effectively defend the insured foundation and minimize both legal fees and payouts to plaintiffs.

Protection of managers from false statements made by other managers

In applying for D&O insurance, a written application must be completed, with certain declarations and statements upon which the company relies to issue the policy (including statements about knowledge of circumstances that might give rise to liability). Your policy should have a "severability" or "warranty and severability" clause, which assures that in case one or more managers make false statements on the application, the policy would only be void for those managers but still hold for managers who did not make any false statements. Without such a clause, if one manager makes a false statement on the application, the insurance could be void for all managers.

“Discovery period” in case of cancellation

If for any reason your D&O policy is cancelled or not renewed, it may take time to arrange for new coverage. That time gap may leave you vulnerable, so it is important to have a “discovery period” clause in your policy to extend your protection. A discovery period is a length of time after cancellation of an insurance contract that allows the insured to discover any losses that would have been covered if the contract had remained in force. Usually, this additional period is 12 months from the date of cancellation. If a wrongful act occurring prior to cancellation is discovered during that time, the clause will cover your liability. The additional cost for this 12 month discovery period is usually 25 percent of the premium, but it could be higher.

“Definition of loss” and“exclusions”

At the heart of every D&O policy are two sections: the “definition of loss” and the “exclusions” from that definition. Often the standard language of the policy will be amended by endorsements that are added at the end of the policy. These are sometimes called riders. To determine exactly what a policy does and does not cover, examine the definition of loss, the list of exclusions and any endorsements or riders that are added. Generally speaking, unless you have received a direct price quote for the policy, you are probably not looking at the complete contract. Therefore, it is wise to obtain quotes and complete contracts before comparing companies in detail.

Question 21: **Do D&O policies cover the Chapter 42 penalties that private foundation managers can be subject to?**

There are only three cases under Chapter 42, (see question four), where individual foundation managers may be subject to a penalty tax: self dealing, jeopardy investments and taxable expenditures. In each case, there is no violation unless the manager acted knowingly, willfully and without reasonable cause. State laws, however, do not permit insurance companies to insure persons for knowingly and willfully violating the law. Therefore, the insurance company *cannot* pay the tax. However, the insurance company *can* pay the costs of defense, whether successful or unsuccessful. Since many claims are successfully defended and most claims are settled, insurance coverage to pay the costs of defense and settlement is very valuable.

Because of the complexity of Chapter 42 and other tax code violations, many insurance companies do not fully understand it. Normally a company will provide a standard D&O policy and add a special rider to cover these violations. You must examine such a rider carefully to make sure it provides the coverage you need. On occasion, such a rider will limit protection for Chapter 42 violations to actions where the manager relied upon the written opinion of counsel.

Unfortunately, this makes the rider virtually useless. If a manager relies on the written opinion of counsel, Treasury regulations conclude that there is reasonable cause for his or her actions. Therefore, there can be no violation and thus no penalty tax. In short, this kind of rider insures you only for cases where there can be no liability.

Part IV

Correct Tax Treatment of Insurance Premiums

Question 22; **If a private foundation or public charity purchases D&O insurance for a manager, does the manager have to include the amount of the premium in his or her taxable income?**

No. Under regulations instated in 1992, D&O premiums that a foundation pays on behalf of its managers are not taxable income. Instead, they are considered "working condition fringe benefits" under IRC Section 132. Private foundations and other tax-exempt organizations "need not allocate portions of D&O insurance premiums to individual directors and officers or include such allocable amounts in Form 1099 or W2." This favorable treatment is available regardless of whether the foundation manager receives any compensation for his or her services.

Question 23: **If a private foundation or public charity makes an indemnification payment to a manager, must the manager include the payment in his or her taxable income?**

No. Under the 1992 regulations, indemnification payments are to be treated in the same way as D&O insurance premiums—as "working condition fringe" benefits under IRC Section 132. Accordingly, they are not taxable income to the manager.

Question 24: **Must indemnification payments and/or payments for D&O insurance be included in total compensation for the purpose of determining whether a private foundation manager's compensation is reasonable?**

Only certain, small portions of a foundation's insurance premiums—and only certain indemnification payments—need to be included in a foundation manager's compensation package for the purposes of determining whether his or her compensation is reasonable or excessive. The portion of a foundation's D&O premium payment that must be treated as compensation may in many cases be so small that it does not need to be accounted for.

The private foundation rules bar as self-dealing certain financial transactions between foundations and certain foundation insiders, including trustees, directors, major donors and certain members of these individuals' families. One of the barred financial transactions is the transfer of income or assets of the foundation to or for the benefit of one of these disqualified persons. In theory, paying a premium for a D&O policy or making an indemnification payment to a disqualified person could be considered an act of self-dealing.

However, an exception to the self-dealing rules and clarifying regulations issued by the Treasury makes this outcome unlikely. This exception stipulates that a foundation may pay compensation to a disqualified person so long as the compensation is for personal services that are necessary to the foundation's mission and so long as the compensation is reasonable in amount. To determine whether the compensation is reasonable, it must be calculated in total and compared to what others are receiving for similar work at similarly situated organizations.

In most cases, it seems unlikely that adding the value of a D&O premium to any individual's compensation package would push him or her over the line between reasonable and excessive compensation. In the 1990s, the Council's concern was that private foundations would run up accounting and legal bills allocating these relatively tiny sums to the relevant officers and directors. Accordingly, the Council sought and secured a set of 1995 regulations distinguishing between coverages that had to be included in compensation and those that did not, and minimized the portion that might have to be included.

The regulations aim to discourage foundations from relieving managers of liability for penalties by allowing, for the purpose of the self-dealing rules, inclusion in compensation the part of any insurance premiums or indemnification payments that cover penalties and expenses not reasonably incurred as compensatory. On the other hand, any parts of a premium or indemnification for expenses that are "reasonably incurred in proceedings that do not result from a willful act or omission of the foundation manager undertaken without reasonable cause" are considered non-compensatory; these expenses are viewed as expenses of foundation administration and not subject to the self-dealing rules.

The regulations treat the following as compensatory: coverages (or indemnification payments); payments for taxes (including foundation penalty taxes); penalties; expenses of correction; any expenses not reasonably incurred by the foundation manager in connection with a civil judicial or civil administrative proceeding arising out of the manager's performance of services on behalf of the foundation; and any expenses resulting from an act or failure to act with respect to which the manager has acted willfully and without reasonable cause.

In follow-up discussion, Treasury staff suggested that, depending on the amount involved, the compensatory portion of an allocated premium payment might be considered de minimis—so small as to make accounting for it unreasonable or administratively impractical.

It may be helpful to secure a letter from the insurance provider confirming that the total value of the "compensatory" coverages is indeed de minimis.

Note that the regulations classify indemnification payments to foundation managers as compensatory or non-compensatory payments in the same way they do premium payments, whether they are payments of expenses already incurred or payments in anticipation of future expenses. Furthermore, direct payments of such expenses that a foundation makes on behalf of managers will also be subject to this classification system.

Question 25: **The Intermediate Sanctions (Tax Code Section 4958) that apply to public charities also prohibit excessive compensation for charity managers. Must managers include the allocable portion of D&O premiums or indemnification payments made to or for them as part of their compensation package?**

Yes. The regulations that accompany the Intermediate Sanctions provide that a public charity must include in its calculation of an individual's total compensation any payment of "liability insurance premiums for, or the payment or reimbursement by the organization of: (i) any penalty, tax, or expenses of correction owed under section 4958; (ii) any expense not reasonably incurred by the person in connection with a civil judicial or civil administrative proceeding arising out of the person's performance of services on behalf of the applicable tax-exempt organization; or (iii) any expense resulting from an act or failure to act with respect to which the person has acted willfully and without reasonable cause," unless the amount is a de minimis fringe benefit (Treas. Reg. §53.4958-4(b)(1)(ii)(B)(2).

Like the private foundation rules, this provision seeks to discourage public charities from covering expenses when a person breaks the rules; any premiums or indemnification payments that a public charity makes that would pay for penalties or expenses incurred because the relevant person has acted willfully and without reasonable cause will be treated as compensation. On the other hand, any parts of a premium or indemnifications for expenses that are reasonably incurred in proceedings that do not result from a willful act or omission of the manager undertaken without reasonable cause should generally be considered non-compensatory; these expenses are viewed as expenses of foundation administration.

Part V

How to Minimize Your Risks

Question 26: **What steps can a foundation take to reduce the potential liability of its board members?**

The best way for board members to protect themselves from potential liability is to make sure that they carry out their responsibilities to the foundation and take the time to ensure that the foundation has strong management systems in place. Good risk management includes education of board members and staff and development of procedures for handling situations in which liabilities may arise.

We have mentioned fiduciary duties in various parts of this pamphlet and it is important that all board members understand what it means to be a fiduciary of a charitable organization. The word fiduciary comes from the Latin word for "faith", and indeed a fiduciary is someone in whom faith is placed and from whom good faith is expected. Defined most broadly, a fiduciary is someone (or some institution) that bears a special responsibility or trust for someone else. Under the laws that govern charitable organizations throughout the country, fiduciaries generally have two major duties: *a duty of care*, which requires them to discharge their duties for the benefit of the organization in good faith and with the degree of care that a prudent person would bring to such tasks; and a *duty of loyalty*, which requires them to deal fairly with the charity, especially where a potential conflict of interest may exist. These duties and other responsibilities of board members are discussed in the attached [Herman and White article], along with strategies designed to minimize liability exposure.

Board decisionmaking is an area of critical importance. Governmental investigators and factfinders (the IRS, attorneys general and judges) may seek to impose liability on board members for decisions that have gone awry. They will necessarily examine the decisionmaking process of the board to determine whether the board members met fiduciary standards. Did the directors possess sufficient information concerning the decision? Did the directors critically examine the information that was available to them? Did the directors take enough time to make an informed decision? To make sure that these questions can be answered positively in these and other situations, board members should:

- Attend all (or most) of the board meetings and meetings of committees on which they sit. If they cannot attend meetings, they should not become board members.

- Review the bylaws to ensure they are in compliance with the state statute governing nonprofit corporations; include legal counsel in this review.

- Make certain that bylaws are enforced; actions taken in violation of state laws or established bylaws may be successfully challenged in court.

- Insist on advance notice to directors of any major item of business to be acted upon at the next meeting.

- Request written materials of directors in advance of the board meeting at which the action is to be taken.

- Read financial statements, budget proposals and other reports.

- Question such reports when obvious inconsistencies or problems appear.

- Take steps to investigate and rectify problems.

- Use expert advice to supplement their understanding and experience when dealing with complex matters.

- Insure that accurate, thorough records are kept of the decisions made by the board and of the process for reaching those decisions (NEED TO ADD LETTERS TO BULLETS ABOVE see D through I above); record discussions and votes, particularly on controversial or divisive topics.

- Adopt a written conflict of interest policy that conforms with state statutes.

- Be certain that the purpose of the organization as established in the founding documents is clear and followed

Here are some additional resources that may be helpful for educating board members about their responsibilities and in implementing systems that reduce exposure to liability.

M. Herman and L. White, D&O: What You Need to Know (Washington, D.C.: Nonprofit Risk Management Center), 1998. Available for purchase at www.nonprofitRISK.org.

http://cof.npo-ins.com/riskman.jsp?subd=cof This section of the Council's website discusses the endorsed D&O insurance program and offers a variety of risk management tools, including an article on employee handbooks and a glossary of risk management terms.

http://www.boardsource.org BoardSource is an organization committed to building effective nonprofit boards. Their resources include publications on all aspects of governance.

http://www.cof.org/files/Documents/Building%20Strong%20Ethical%20Foundations/Conflicts_of_Interest_Safeguarding_Your_Foundation.pdf This information packet contains articles on conflicts of interest as well as sample policies for different types of grantmakers.

Appendix

Insurance, by Grantmaker Type and Asset Group, 2004

Table 4.1. Percentage and Number of Grantmakers That Provide Directors and Officers Liability

Grantmaker Type and Asset Group (in millions)	Percent that Provide Directors and Officers Insurance	Number that Provide Directors and Officers Insurance	Number of Respondents
Community			
$500 or more	100.0	8	8
$250 to $499.9	94.1	16	17
$100 to $249.9	100.0	25	25
$50 to $99.9	89.7	26	29
$25 to $49.9	97.8	44	45
$10 to $24.9	87.9	51	58
$5 to $9.9	86.1	31	36
Less than $5	64.5	20	31
All	88.8	221	249
Family			
$500 or more	100.0	6	6
$250 to $499.9	85.7	6	7
$100 to $249.9	86.4	19	22
$50 to $99.9	84.2	16	19
$25 to $49.9	65.2	15	23
$10 to $24.9	43.6	17	39
$5 to $9.9	46.7	7	15
Less than $5	20.0	5	25
All	58.3	91	156
Independent			
$500 or more	93.3	28	30
$250 to $499.9	100.0	18	18
$100 to $249.9	95.0	38	40
$50 to $99.9	93.3	28	30
$25 to $49.9	90.5	19	21
$10 to $24.9	89.5	17	19
$5 to $9.9	70.0	7	10
Less than $5	75.0	6	8
All	91.5	161	176
Public			
$250 or more	100.0	3	3
$100 to $249.9	100.0	11	11
$50 to $99.9	100.0	10	10
$25 to $49.9	100.0	9	9
$10 to $24.9	100.0	7	7
$5 to $9.9	80.0	4	5
Less than $5	100.0	7	7
All	98.1	51	52
All			
$500 or more	95.7	44	46
$250 to $499.9	95.3	41	43
$100 to $249.9	94.9	93	98
$50 to $99.9	90.9	80	88
$25 to $49.9	88.8	87	98
$10 to $24.9	74.8	92	123
$5 to $9.9	74.2	49	66
Less than $5	53.5	38	71
All	82.8	524	633

Table 4.2. Of Those Grantmakers That Provide Directors and Officers Liability Insurance, the Percentage and Number for Which There Is a Deductible, by Grantmaker Type, 2004

Grantmaker Type	Percent with a Deductible	Number with a Deductible	Number of Respondents
Community	73.1	128	175
Family	82.2	60	73
Independent	81.6	115	141
Public	78.9	30	38
All	78.0	333	427

Table 4.3. Annual Deductible on Directors and Officers Liability Insurance, by Asset Group, 2004

Asset Group (in millions)	Median	Mean	Range	Number of Respondents
$500 or more	25,000	60,294	5,000 to 250,000	34
$250 to $499.9	10,000	29,569	2,500 to 200,000	29
$100 to $249.9	5,000	12,341	1,000 to 100,000	63
$50 to $99.9	4,250	8,370	500 to 50,000	50
$25 to $49.9	2,500	7,971	500 to 50,000	52
$10 to $24.9	2,500	3,051	500 to 10,000	40
$5 to $9.9	1,125	3,102	500 to 25,000	22
Less than $5	2,500	4,413	500 to 50,000	23
All	5,000	15,367	500 to 250,000	313

Table 4.4. Liability Limit on Directors and Officers Liability Insurance, by Asset Group, 2004

Asset Group (in millions)	Median	Mean	Range	Number of Respondents
$500 or more	10,000,000	10,571,429	1,000,000 to 25,000,000	42
$250 to $499.9	5,000,000	5,666,667	1,000,000 to 15,000,000	39
$100 to $249.9	5,000,000	4,081,395	1,000,000 to 10,000,000	86
$50 to $99.9	3,000,000	3,618,056	500,000 to 15,000,000	72
$25 to $49.9	2,000,000	2,400,000	1,000,000 to 10,000,000	70
$10 to $24.9	1,000,000	2,156,338	100,000 to 10,000,000	71
$5 to $9.9	1,000,000	1,813,953	1,000,000 to 10,000,000	43
Less than $5	1,000,000	1,400,000	100,000 to 10,000,000	29
All	2,000,000	3,796,903	100,000 to 25,000,000	452

Table 4.5. Annual Premium on Directors and Officers Liability Insurance, by Asset Group, 2004

Asset Group (in millions)	Median	Mean	Range	Number of Respondents
$500 or more	27,300	41,407	9,375 to 125,000	33
$250 to $499.9	12,689	19,334	3,308 to 74,437	30
$100 to $249.9	7,455	9,324	1,484 to 57,337	67
$50 to $99.9	6,077	7,273	750 to 47,629	60
$25 to $49.9	3,282	3,908	609 to 16,695	58
$10 to $24.9	2,095	2,696	76 to 25,000	55
$5 to $9.9	1,500	1,692	350 to 4,130	32
Less than $5	1,100	2,482	340 to 27,800	19
All	4,410	9,841	76 to 125,000	354

Table 4.6. Median, Mean and Range of the Annual Premium on Directors and Officers Liability Insurance, for Selected Liability Limits, 2004

Liability Limit		Annual Premium			
Amount	Number	Median	Mean	Range	Number of Respondents
$1,000,000	157	2,042	2,676	340 to 16,000	125
$2,000,000	71	2,900	3,945	740 to 16,000	53
$3,000,000	44	4,919	7,012	1,250 to 57,337	40
$5,000,000	115	8,823	10,877	2,100 to 44,791	85
$10,000,000	44	23,988	30,827	5,000 to 125,000	32

Note: 452 respondents provided data on liability limits (Table 4.4), 431 of those had a liability limit in one of the five amounts listed above. Of the 431, 335 provided data on the annual premium.

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