



CONCORD SPECIALTY RISK, INC.

Solutions for Contingent Liability

PRODUCT GUIDE

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Introduction

Concord Specialty Risk, Inc. (“Concord”) is a managing general underwriter for a line of specialty niche insurance products.

Concord’s products facilitate extraordinary transactions - such as facilitating the sale or financing of a business by providing Representations & Warranties Insurance or Pending Litigation Insurance.

Concord’s products also protect against contingent financial liabilities - such as insuring whether any money will be owed with respect to uncertain tax positions or for a predecessor’s liabilities.

These products are issued as “non-admitted” policies and may only be placed through licensed surplus lines producers.

Concord serves as an underwriter of these insurance products on behalf of one or more highly rated insurance companies.

Disclaimer: This product guide is intended to provide only an overview of the insurance that may be offered through Concord. Each policy is individually underwritten and its terms may differ from the description in this guide, in which event, the terms, conditions and exclusions of the policy shall prevail. This guide is not an offer to insure any particular risk and does not provide any legal, tax, accounting or financial advice.

Representations & Warranties Insurance

Representations & Warranties Insurance (“R &W Ins”) protects against loss arising from a breach of a seller’s representations and warranties made in a merger or acquisition. The insured may be either the seller or the buyer.

- The seller-based policy indemnifies a seller who is sued for an alleged breach.
- A buyer-based policy allows the buyer to claim proceeds directly under the policy for a breach, however, if there is also recourse against an escrow or seller such recourse must be pursued.

The Benefits Provided:

- **Collection Assured.** Even a good deal may lack certainty of collection of indemnity. Whether it’s an asset sale by a company being dissolved, a stock sale by retiring owners, a sale by foreign owners or an equity fund that is winding down, a privatization or a sale by a corporate parent that is itself preparing to be acquired, etc. , R&W Ins can backstop the representations made.
- **Avoid Suing Management.** In a management buy-out or buy-in transaction, R&W Ins provides an alternative to suing existing management in order to be fully indemnified for a breach.
- **Bridge the Deal.** Whenever an impasse is reached over a desired escrow amount, indemnity ceiling, or purchase price adjustment in light of a threatened or existing adverse condition or contingency, R &W Ins can “bridge” the deal. The “bridge” may even yield a profit to the buyer, who agrees to reduce the escrow amount and/or indemnity ceiling in exchange for a reduction in the purchase price that exceeds the premium.
- **Enhanced Bid.** In the context of an auction sale or asset sale from a bankruptcy estate, superior terms can often make the difference in a deal. Reduced escrow and indemnity ceilings (supported by R &W Ins) may enhance a bid.
- **Facilitate Acquisition Lending and Resale.** At no additional cost, R&W Ins can cover lenders and subsequent assignees.
- **Maximize ROI.** An equity fund seeking to maximize the amount and minimize the time incurred in distributing sale proceeds from a M&A transaction can use Seller-based R &W Ins to avoid internal reserves and/or can reduce escrow and indemnity obligations by insisting that a buyer obtain R&W Ins.
- **Seller’s and Buyer’s Sleep Insurance.** No post-closing budget surprises.

Capacity: - \$25 million, but can lead or participate in a larger program

Submission Requirements:

- Name of Insured (or project name), limits sought, coverage sought (e.g., buyer or seller based)
- Purchase & Sale Agreement (latest draft or signed)
- Most Recent Year-End Financial Statements

(Transactional) Tax Insurance

Tax Insurance reimburses a company for additional taxes, interest and penalties that are incurred with respect to covered tax positions. Defense costs (commencing with a lawsuit) and the “gross-up” costs (income tax on receipt of the insurance proceeds) may also be covered.

The Benefits Provided:

- **Cash Flow/Liquidity Volatility.** Insurance proceeds avoid negative cash flow.
- **Disclosure Issues.** FIN 48 requires that companies provide detailed disclosures identifying tax issues for “material” positions that are “reasonably possible” to “significantly” increase or decrease within 12 months of the reporting date – creating a potential “road map” for taxing authorities engaged in an audit. Tax insurance may be a factor considered in determining whether a position is sufficiently material to warrant disclosure.
- **Preparing To Sell.** Tax (and FIN 48) analyses are already routinely requested as part of a buyer’s due diligence – providing the buyer with arguments for higher escrows and/or indemnity ceilings and/or a lower purchase price. Tax insurance may hasten the due diligence process and reduce the scope of negotiations.
- **Loan and Lease Covenants.** If the uncertain tax position results in FIN 48 charges, the insurance may render as immaterial any “technical” violations of loan and/or lease covenants resulting from the FIN 48 charges.
- **Acquisition Planning.** If tax due diligence raises an issue, tax insurance may facilitate resolution of the issue and financing.

Capacity: - \$25 million but can lead or participate in a larger program

Submission Requirements:

- Name of insured (or project name) and limits sought
- Description of tax position(s) sought to be covered
- Loss calculation
- Opinion – but only if already obtained or if an insurance program beyond \$25 million is sought
- Chronology of key events regarding each position (if not addressed in any opinion)

FIN 48 (Tax) Insurance

FASB Interpretation No. 48 (“FIN 48”) lifts the veil on a company’s uncertain tax positions by requiring annual statements to disclose the amount of “unrecognized tax benefits” – i.e., how much would be owed to taxing authorities if they audited every tax issue, with full knowledge of all facts and law regarding each issue and without trading issues for settlement purposes. FIN 48 Insurance serves as a backstop to the amount reserved/charged as “unrecognized tax benefits.”

The Benefits Provided:

- **Coverage for Uncertain Tax Positions Not Reserved.** For example, a company may have five or ten uncertain tax positions supported by tax opinions for which all tax benefits are recognized. FIN 48 (Tax) Insurance can backstop the FIN 48 reserves by covering all such tax positions.
- **Coverage for Uncertain Tax Positions Reserved.** Conversely, a company may have a number of uncertain tax positions for which a slight percentage was charged as unrecognized tax benefits. FIN 48 (Tax) Insurance can backstop the FIN 48 reserves by covering all such tax positions.
- **Reduced Liquidity Volatility.** The insurance provides cash when needed to pay additional taxes.
- **Option to Disclose Insurance.** Some companies may wish to disclose in the annual statements that insurance backstopping their FIN 48 insurance was obtained.
- **Potentially Reduced Disclosures.** FIN 48 requires a disclosure of the particular tax issues if the reserves for such issues are likely to significantly change in the upcoming twelve months and the items are material. FIN 48 Insurance may be a factor considered in determining whether any changes are immaterial.
- **Potentially Reduced Litigation Risk.** The independent verification and risk transfer provided by FIN 48 Insurance may immunizes an Audit Committee from allegations of poor oversight or failure to address conflict of interest with auditor/ tax adviser, etc.

Policy Features

- **Annual, renewable and flexible** – Each year will cover tax positions taken for a set of tax years for aggregate limits, subject to an aggregate retention. As policy renews, limits may be extended or modified.
- **Limits of liability - \$25 million but can lead or participate in a larger program**

Submission Requirements

- Name of insured (or project name) and limits sought
- Description of tax position(s) sought to be covered
- Loss calculations
- Opinion – but only if already obtained or if an insurance program beyond \$25 million is sought
- Chronology of key events regarding each position (if not addressed in any opinion)
- FIN 48 reserves and supporting papers for the positions

Pending Litigation Insurance

Insurance for a pending litigation is available when the pending litigation jeopardizes an extraordinary transaction and is neither a class action nor a “mass tort.” Depending upon the maturity of the lawsuit, the insurance can either:

- Cover the defendant;
- Cover the acquirer;
- Buy-out the litigation; i.e., provide limits thought to equal or exceed worst feasible outcome in exchange for a premium that may be commuted if benchmark results achieved; or
- Provide limits in excess of a retention (which retention may serve as an escrow in a pending sale of the company).

The Benefits Provided:

- **Deal Facilitated.** Often the disclosure of pending litigation is first provided as a schedule to a purchase and sale agreement that is on the eve of being signed. Potentially significant litigation that is either not insured (e.g., breach of contract claims) or underinsured may jeopardize the transaction. An underwriter that can speedily quantify the risk adds immediate value to the deal proposition.
- **Risk Transferred.** A highly rated insurer stands behind an adverse judgment based on a policy tailored specifically to the pending litigation.
- **Litigation Management Services Provided.** The expertise of seasoned claims management will review the litigation strategies and tactics employed by defense counsel.

Capacity: \$10 million, but can lead or participate in larger program

Submission Requirements

- Name of insured (or project name) and limits sought
- Copy of all pleadings filed in the action and of all orders entered in the action
- If substantive motion pending, copy of motion papers (support and opposition)
- Loss calculation (statement or expert report quantifying potential damages)
- Chronology of key events
- Purchase and Sale Agreement (or term sheet or similar documents regarding the extraordinary transaction)
- Expected timetable for closing

Successor Liability Insurance

The law regarding successor liability has been shifting towards a finding of successor liability based upon either an implied assumption or a de facto merger. Moreover, liability theories based upon fraudulent transfer have been strengthened by recent economic events making asset valuations more difficult to sustain. As its name implies, successor liability insurance protects a buyer of assets from liability incurred by the seller.

Generally, Successor Liability Insurance is an alternative to Pending Litigation Insurance where the litigation is not sufficiently mature to warrant a litigation buy-out, or an asset sale is desired and the seller is not as concerned as is the buyer about the outcome of the litigation.

The Benefits Provided:

- **Deal Facilitated.** The disclosure of pending or threatened litigation, the analysis behind warranty reserves and/or an event or circumstance that may portend future liability can all potentially derail an extraordinary transaction. An underwriter that can speedily quantify the risk adds immediate value to the deal proposition.
- **Risk Transferred.** A highly rated insurer stands behind an adverse judgment based on a policy tailored specifically to the pending litigation.
- **Litigation Management Services Provided.** The expertise of seasoned claims management will review the litigation strategies and tactics employed by defense counsel when and if successor liability is asserted.

Capacity: \$10 million, but can lead or participate in a larger program

Submission Requirements

- Name of insured (or project name) and limits sought
- Copy of all pleadings filed in the action and of all orders entered in the action
- If substantive motion pending, copy of motion papers (support and opposition)
- Loss calculation (statement or expert report quantifying potential damages)
- Chronology of key events
- Purchase and Sale Agreement (or term sheet or similar documents regarding the extraordinary transaction)
- Expected timetable for closing

Judgment Protection Insurance & Tax Refund Insurance

As its name implies, Judgment Protection Insurance “monetizes” the judicial award that may be under appeal. Tax Refund Insurance “monetizes” the refund that is sought in a return (or amended return). Either coverage may facilitate an extraordinary transaction but no extraordinary transaction is required to obtain the coverage.

The Benefits Provided:

- **Deal Facilitated.** The expectation of collecting on a judgment or tax refund may support a capital injection or financing. Insurance that guarantees the judgment or tax refund can facilitate the underlying capital injection or financing. In fact, the lender or investor may be named as a loss payee, if appropriate.
- **Risk Transferred.** A highly rated insurer stands behind an adverse judgment based on a policy tailored specifically to the pending litigation.
- **Litigation Management Services Provided.** The expertise of seasoned claims management will review the litigation strategies and tactics employed by appellate counsel and tax counsel may be provided, at the insurer’s expense, to assist in any tax dispute.

Capacity:

- \$10 million for Judgment Protection, but can lead or participate in a larger program
- \$25 million for Tax Refund Insurance, but can lead or participate in a larger program

Submission Requirements

- Name of insured (or project name) and limits sought
- Copy of final judgment and papers filed in appellate court
- Copy of tax return seeking refund or, if refund based upon particular loss event and return not yet filed, description of the loss event and any supporting papers
- If extraordinary transaction contemplated, expected timetable for closing

Asset Protection Insurance

Asset Protection Insurance covers three distinct risks that occur in two distinct settings.

First, Asset Protection Insurance covers two types of risks associated with distressed sales, such as sales by an insolvent seller, sales as part of a bankruptcy proceeding or sales as part of other creditor rights proceedings (such as an UCC Article 9 sale or a foreclosure sale):

- Claims of fraudulent transfer
- Claims that the procedural requirements imposed upon the sale were not satisfied

Second, Asset Protection Insurance covers the risk that a sale/leaseback transaction may be re-characterized as a loan if the “seller” was or becomes insolvent or declares bankruptcy.

The Benefits Provided:

- **Deal Facilitation.** “Title Insurance” for business properties
- **Risk Transferred.** A highly rated insurer stands behind an adverse judgment based on a policy tailored specifically to the pending litigation.

Capacity: \$10 million, but can lead or participate in a larger program

Submission Requirements:

- Name of Insured (or project name) and limits sought
- Purchase & Sale Agreement or Sale/leaseback Agreement (latest draft or signed)
- Most Recent Year-End Financial Statements of Acquired Company
- Expected time frame for closing

Equity Fund Wind Up Insurance

Although private equity funds are designed to have a limited lifespan, many funds do not terminate because of concerns that the statute of limitations has not been exhausted for all possible claims. The result is that the fund continues to incur administrative, printing, accounting, tax and legal costs and its rate of return to investors is diminished.

Equity fund wind up insurance allows a private equity fund to dissolve and terminate – leaving the insurance to cover the potential claims. The coverage is expansive and includes:

- **Breach of Duty Claims** (claims alleging that an insured breached his or its duty owed in terminating the fund)
- **Contribution Claims** (claims alleging that a General Partner is required to make a contribution for liability owed to a third party other than a limited partner)
- **Distribution Claims** (claims alleging that a General Partner is required to return distributions it received for liability owed to a third party other than a limited partner)
- **Employment Practice Claims** (with respect to the fund's portfolio companies sold)
- **Limited Partner Claims** (which are covered for **Defense Costs** but not other **Loss**) and
- **Representation & Warranty Claims** (with respect to portfolio companies sold by the fund).

The Benefits Provided: The Fund can terminate and make its final distribution payment sooner.

Capacity: \$25 million, but can lead or participate in a larger program

Submission Requirements:

- Name of Insured (or project name) and limits sought
- Purchase & Sale Agreements for sales of portfolio companies with open indemnity periods
- Most Recent Year-End Financial Statements of Fund
- Expected time frame for terminating

Values, Confidentiality, Applications & Contact Information

Concord's Business Values

- Premiums and fees should be adequate but not excessive
- Terms should be fair, flexible and tailored
- Communications should be discrete, honest, responsive and respectful
- Demeanor and comporment of operations should be professional

Confidentiality

Concord will enter into non-disclosure agreements to maintain confidentiality and/or “Kovel” arrangements to maintain attorney-client privilege, prior to a submission, if desired.

Applications

Certain of the products noted above require a completed application as part of the underwriting process. Those that do not require a completed application generally have a statement of facts included as a schedule to the policy, the material accuracy of which is represented to by the insured. Concord will provide the applications or statement of facts during the underwriting process.

Concord will be happy to provide a Producers Agreement for those producers who wish to be approved producers with Concord.

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