



# 40ActPLUS<sup>SM</sup>

General Terms and Conditions

**Executive Risk Indemnity Inc.**

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# 40ActPLUS<sup>SM</sup>

## GENERAL TERMS AND CONDITIONS

NOTICE: THE COVERAGES AFFORDED UNDER THIS POLICY ARE CLAIMS MADE COVERAGES, WHICH APPLY ONLY TO "CLAIMS" FIRST MADE DURING THE "POLICY PERIOD," OR, IF PURCHASED, THE EXTENDED REPORTING PERIOD. THE LIMIT OF LIABILITY AVAILABLE TO PAY DAMAGES OR SETTLEMENTS UNDER THIS POLICY WILL BE REDUCED BY THE PAYMENT OF "DEFENSE EXPENSES," AND "DEFENSE EXPENSES" WILL BE APPLIED AGAINST THE RETENTION. THE COVERAGES AFFORDED UNDER THIS POLICY DIFFER IN SOME RESPECTS FROM THOSE AFFORDED UNDER OTHER POLICIES. PLEASE READ THE ENTIRE POLICY, INCLUDING THE GENERAL TERMS AND CONDITIONS AND EACH COVERAGE PART, CAREFULLY.

Subject to the limit of liability and to all of the terms, conditions and limitations of this Policy and any endorsements to this Policy, Executive Risk Indemnity Inc. (the "Underwriter") and the Insureds agree as follows:

(A) **General Definitions:**

- (1) **"Application"** means the application attached to and forming part of this Policy and any materials submitted and statements made by or on behalf of the **Insured** in connection with such application, all of which are a part of this Policy, as if physically attached. If the **Application** uses terms or phrases that differ from terms defined in this Policy, no inconsistency between any term or phrase used in the **Application** and any term defined in this Policy will waive or change any of the terms, conditions and limitations of this Policy.
- (2) **"Claim"** means:
- (a) any civil proceeding in a court of law or equity, including any mediation or other alternative dispute resolution ordered or sponsored by such court;
  - (b) any criminal proceeding in a court of law;
  - (c) any arbitration proceeding initiated or compelled pursuant to a written arbitration agreement;
  - (d) any administrative or regulatory proceeding, commenced by the filing of a notice of charges, formal investigative order or similar document; and

- (e) a written demand or notice to an **Insured** indicating that a person or entity intends to hold an **Insured** responsible for a **Wrongful Act**.
- (3) **“Defense Expenses”** means reasonable legal fees and expenses incurred by or on behalf of any **Insured** in the defense or appeal of any **Claim**, including costs of appeal, attachment or similar bonds, provided that the Underwriter shall have no obligation to procure or furnish any bond. **Defense Expenses** will not include salaries, wages, fees, overhead or benefit expenses of any directors, officers or employees of any **Insured**.
- (4) **“Insured”** shall have the meaning ascribed to that term in each Coverage Part attached hereto.
- (5) **“Insured Entity”** means any **Company, Fund or Plan**, as each such term is defined in each Coverage Part attached hereto.
- (6) **“Insured Person”** shall have the meaning ascribed to that term in each Coverage Part attached hereto.
- (7) **“Loss”** means damages, judgments, awards, settlements and **Defense Expenses** which an **Insured** is legally obligated to pay as a result of a **Claim**. **Loss** includes punitive or exemplary damages when insurable under the law to which this Policy shall be construed. Except as may be specifically provided for in a Coverage Part, **Loss** shall not include:
- (a) fines, sanctions, taxes, penalties imposed by law or any multiplied damage award which is in excess of the damage award so multiplied;
  - (b) matters which may be deemed uninsurable under the law pursuant to which this Policy shall be construed; or
  - (c) salaries or compensation of any partner, principal, director, trustee, officer or employee of an **Insured**.
- (8) **“Named Insured”** means the entity designated in ITEM 1 of the Declarations.
- (9) **“Policy Period”** means the period from the effective date and time of this Policy to the Policy expiration date and time, stated in ITEM 2 of the Declarations.

- (10) “**Related Claims**” means all **Claims** for **Wrongful Acts** based on, arising out of, directly or indirectly resulting from, in consequence of, or in any way involving the same or related facts, circumstances, situations, transactions or events or the same or related series of facts, circumstances, situations, transactions or events.
- (11) “**Subsidiary**” means any entity during any time in which the **Named Insured** owns or controls, directly or through one or more **Subsidiaries**, the right to elect or appoint more than fifty percent (50%) of such entity’s directors, trustees, members or board of management.
- (12) “**Wrongful Act**” shall have the meaning ascribed to that term in each Coverage Part attached hereto.

(B) **Notice; Timing and Interrelationship of Claims:**

- (1) As a condition precedent to any right to payment in respect of any **Claim**, including any **Claim** for a **Wrongful Act** of which notice was previously given under GENERAL TERMS AND CONDITIONS (B)(2), the **Insured** must give the Underwriter written notice of such **Claim**, with full details, as soon as practicable after the **Claim** is first made but in no event later than ninety (90) days after the end of the **Policy Period**. A **Claim** is first made when an **Insured** first receives notice of the filing of a complaint, notice of charges, formal investigative order or similar document, or by the return of an indictment, against an **Insured**, or when an **Insured** first receives the written demand or notice that constitutes a **Claim** under GENERAL TERMS AND CONDITIONS (A)(2)(e).
- (2) If, during the **Policy Period**, the **Insured** first becomes aware of a **Wrongful Act** which may subsequently give rise to a **Claim** and, as soon as practicable thereafter, but before the expiration or cancelation of the Policy:
- (a) gives the Underwriter written notice of the **Wrongful Act**, including a description of the **Wrongful Act** in question, the identities of the potential claimants, the consequences which have resulted or may result from the **Wrongful Act**, the damages which may result from the **Wrongful Act** and the circumstances by which the **Insured** first became aware of the **Wrongful Act**, and
- (b) requests coverage under this Policy for any subsequently resulting **Claim** for the **Wrongful Act**;

then any such subsequently resulting **Claim** will be deemed made when the notice was provided.

- (3) All notices under GENERAL TERMS AND CONDITIONS (B)(1) and (B)(2) must be sent by certified mail to the address set forth in ITEM 8 of the Declarations.
- (4) All **Related Claims** will be treated as a single **Claim** made when the earliest of such **Related Claims** was first made, or when the earliest of such **Related Claims** is treated as having been made in accordance with GENERAL TERMS AND CONDITIONS (B)(2), whichever is earlier.

(C) **Limit of Liability; Retention:**

- (1) The amount stated in ITEM 3 of the Declarations as the maximum aggregate limit of liability with respect to each Coverage Part shall be the maximum aggregate limit of liability of the Underwriter under such Coverage Part for all **Loss**, including **Defense Expenses**, from all **Claims** made or deemed made under such Coverage Part during the **Policy Period**. Each such amount shall be part of, and not in addition to, the amount stated in ITEM 3 of the Declarations as the maximum aggregate limit of liability for all **Loss** from all **Claims** for which this Policy provides coverage.
- (2) **Defense Expenses** will be part of and not in addition to the Underwriter's limit of liability, and payment of **Defense Expenses** by the Underwriter will reduce and may exhaust its limit of liability.
- (3) With respect to a **Claim** under any Coverage Part of this Policy, the Underwriter shall only pay **Loss** which is in excess of the amount stated in ITEM 4 of the Declarations as the retention applicable to each **Claim** under that Coverage Part. If different retentions are applicable to different parts of any **Loss** under this Policy, the applicable retentions will be applied separately to each part of such **Loss**, and the sum of such retentions will not exceed the largest applicable retention as set forth in ITEM 4 of the Declarations.

(D) **Defense and Settlement of Claims; Payment and Allocation of Loss:**

- (1) The Underwriter will have no duty under this Policy to defend any **Claim**. Except as set forth in clause (2) below, no **Defense Expenses** may be incurred and no settlement of any **Claim** may be made without the Underwriter's consent, such consent not to be unreasonably withheld. The Underwriter shall have the right to consent to the **Insured's** selection of counsel, such consent not to be unreasonably withheld. If more than one **Insured** is involved in a **Claim**, it shall not be unreasonable for the Underwriter to withhold its consent to separate counsel for one or more of such **Insureds** unless there is an actual or potential material conflict of interest between or among such **Insureds**. Subject to clause (2) below, no **Insured** shall admit any liability or consent to entry of judgment against any **Insured** without the Underwriter's prior written consent.
- (2) Notwithstanding clause (1) above, the **Insured** may settle any **Claim** without the Underwriter's prior written consent if the total **Loss** resulting from such **Claim** does not exceed fifty percent (50%) of the amount of the applicable retention set forth in ITEM 4 of the Declarations; provided, however, the **Insured** must promptly advise the Underwriter of any such settlement and provide any information in connection therewith that the Underwriter may request. If the **Insured** reasonably expects that the total **Loss** resulting from any **Claim** will exceed fifty percent (50%) of the applicable retention, the Underwriter shall have the right to participate in any settlement negotiations, and the **Insured** agrees to obtain the written consent of the Underwriter prior to making any settlement offer or responding to any settlement demand.
- (3) After any applicable retention(s) under ITEM 4 of the Declarations have been met, the Underwriter will, upon written request, pay on a current basis **Defense Expenses** for which this Policy provides coverage. Otherwise, the Underwriter will pay **Loss** only on the final disposition of a **Claim**.
- (4) As a condition of any payment of **Defense Expenses** under GENERAL TERMS AND CONDITIONS (D)(3), the Underwriter may, at its sole option, require a written undertaking on terms and conditions satisfactory to the Underwriter guaranteeing the repayment of any **Defense Expenses** paid to or on behalf of any **Insured** if it is finally determined that **Loss** incurred by such **Insured** would not be covered.

- (5) If both **Loss** covered by this Policy and loss not covered by this Policy are incurred, either because a **Claim** made against the **Insured** includes both covered and uncovered matters, or because a **Claim** is made against both the **Insured** and others not included within the applicable definition of **Insured** set forth in the applicable Coverage Part attached hereto, the **Insured** and the Underwriter agree to use their best efforts to determine a fair and proper allocation of all such amounts. The determination of a fair and proper allocation shall take into account the relative legal and financial exposures of, and relative benefits obtained in connection with the defense and/or settlement of the **Claim** by, the **Insureds**. In the event that an allocation cannot be agreed to, then the Underwriter will make an interim payment of the amount of **Loss**, including **Defense Expenses**, which the parties agree is not in dispute until a final amount is agreed upon or determined pursuant to the provisions of this Policy and applicable law.

(E) **Spouses of Insured Persons:**

- (1) The coverage afforded under this Policy will, subject to all of its terms, conditions, limitations and exclusions, be extended to apply to **Loss** resulting from a **Claim** made against a person who, at the time the **Claim** is made, is a lawful spouse of an **Insured Person**, but only if:
- (a) the **Claim** against such spouse results from a **Wrongful Act** actually or allegedly committed by the **Insured Person** to whom the spouse is married, and
  - (b) such **Insured Person** and his or her spouse are represented by the same counsel in connection with such **Claim**.
- (2) No spouse of an **Insured Person** will, by reason of this GENERAL TERMS AND CONDITIONS (E), have any greater right to coverage under this Policy than the **Insured Person** to whom such spouse is married.
- (3) The Underwriter will not be liable under this GENERAL TERMS AND CONDITIONS (E) to make any payment of **Loss** in connection with any **Claim** against a spouse of an **Insured Person** for any actual or alleged act, error, omission, misstatement, misleading statement, neglect or breach of duty by such spouse.

(F) **Cancellation; No Obligation to Renew:**

- (1) The Underwriter may not cancel this Policy except for failure to pay a premium when due, in which case twenty (20) days' written notice will be given.
- (2) The **Named Insured** may cancel this Policy by mailing the Underwriter written notice stating when, not later than the Expiration Date set forth in ITEM 2(b) of the Declarations, such cancellation will be effective. In such event, the earned premium will be computed in accordance with the customary short rate table and procedure. Premium adjustment may be made either at the time cancellation is effective or as soon as practicable after cancellation becomes effective, but payment or tender of unearned premium is not a condition of cancellation.
- (3) The Underwriter shall not be required to renew this Policy upon its expiration. If the Underwriter elects not to renew this Policy, the Underwriter will deliver or mail to the **Named Insured** written notice to that effect at least sixty (60) days before the Expiration Date set forth in ITEM 2(b) of the Declarations.

(G) **Adjustments for Acquisitions, Mergers, and Other Changes in Control:**

(1) Automatic Coverage

If, after the effective date of this Policy, an **Insured Entity** acquires another entity or merges with another entity such that the **Insured Entity** is the surviving entity, and (a) the gross annual fees, assets under management and assets of the acquired or merged entity each do not exceed twenty-five percent (25%) of the gross annual fees, assets under management and assets, respectively, of the **Insured Entity** prior to such acquisition or merger, and (b) the **Named Insured** gives written notice of such acquisition or merger to the Underwriter within thirty (30) days after the effective date of such acquisition or merger, then such acquired or merged entity and the members, partners, principals, directors, officers, trustees and employees of such entity who join the **Insured Entity** as a result of such acquisition or merger shall be deemed to be **Insureds** as of the effective date of such acquisition or merger, but only if and to the extent they otherwise are within the definition of **Insured** under each applicable Coverage Part of this Policy. No coverage will be available under this Policy for **Loss** from any **Claim** against any such acquired or merged entity, or the members, partners, principals, directors, officers, trustees and employees of such entity, for any **Wrongful Act** committed or allegedly committed before the date of such acquisition or merger.



(2) Optional Coverage - Acquired Entity

If, after the effective date of this Policy, an **Insured Entity** acquires another entity or merges with another entity such that the **Insured Entity** is the surviving entity, and (a) any of the gross annual fees, assets under management, or assets of the acquired or merged entity exceed twenty-five percent (25%) of the gross annual fees, assets under management or assets, respectively, of the **Insured Entity** prior to such acquisition or merger, and (b) the **Named Insured** gives written notice of the acquisition or merger within thirty (30) days after the effective date of such acquisition or merger, then the Underwriter may require such additional information, impose such additional coverage terms, and/or charge such additional premium in connection with the acquisition or merger as the Underwriter, in its sole discretion, deems appropriate; provided, however, that the acquired or merged entity and the members, partners, principals, directors, officers, trustees and employees of such entity who join the **Insured Entity** as a result of such acquisition or merger shall be deemed to be **Insureds** if and to the extent they otherwise are within the definition of **Insured** under each applicable Coverage Part of this Policy, for the period from the effective date of the acquisition or merger until the later of (i) sixty (60) days after the effective date of the acquisition or merger, or (ii) thirty (30) days after the Underwriter has notified the **Named Insured** of any additional coverage terms imposed or additional premium charged in connection with the acquisition or merger. No coverage will be available under this Policy for **Loss** from any **Claim** against any such acquired or merged entity, or the members, partners, principals, directors, officers, trustees and employees of such entity, for any **Wrongful Act** committed or allegedly committed before the date of such acquisition or merger.

(3) Optional Coverage - New Subsidiary

If, after the effective date of this Policy, an **Insured Entity** acquires another entity or merges with another entity such that the acquired or merged entity becomes a **Subsidiary**, and the **Named Insured** gives written notice of the acquisition or merger within thirty (30) days after the effective date of such acquisition or merger, then the Underwriter may require such additional information, impose such additional coverage terms, and/or charge such additional premium in connection with the acquisition or merger as the Underwriter, in its sole discretion, deems appropriate; provided, however, that the new **Subsidiary** and the members, partners, principals, directors, officers, trustees and employees of such new **Subsidiary** shall be deemed to be **Insureds** if and to the extent they otherwise are within the definition of **Insured** under each applicable Coverage Part of this Policy, for the period from the

effective date of the acquisition or merger until the later of (i) sixty (60) days after the effective date of the acquisition or merger, or (ii) thirty (30) days after the Underwriter has notified the **Named Insured** of any additional coverage terms imposed or additional premium charged in connection with the merger. No coverage will be available under this Policy for **Loss** from any **Claim** against any such acquired or merged entity, or the members, partners, principals, directors, officers, trustees and employees of such entity, for any **Wrongful Act** committed or allegedly committed before the effective date of such acquisition or merger.

(4) Optional Coverage - Failure to Provide Notice

If, after the effective date of this Policy, an **Insured Entity** acquires another entity or merges with another entity such that either the **Insured Entity** is the surviving entity or the acquired or merged entity becomes a **Subsidiary**, and the **Named Insured** fails to give written notice of such acquisition or merger to the Underwriter within thirty (30) days after the effective date of such acquisition or merger, then the acquired or merged entity and the members, partners, principals, directors, officers, trustees and employees of such entity who join the **Insured Entity** or the new **Subsidiary** as a result of such acquisition or merger shall not be entitled to any coverage under this Policy, unless the Underwriter, in its sole discretion, agrees to provide such coverage, and then only to the extent agreed to by the Underwriter and on such terms as the Underwriter, in its sole discretion, may impose.

(5) Conversion of Coverage Under Certain Circumstances

If, after the effective date of this Policy, any of the following events occurs:

- (a) the acquisition of an **Insured Entity**, or of all or substantially all of its assets, by another entity, or the merger or consolidation of an **Insured Entity** into or with another entity such that the **Insured Entity** is not the surviving entity;
- (b) the appointment of a receiver, conservator, trustee, liquidator or rehabilitator, or any similar official, for or with respect to an **Insured Entity**; or
- (c) the obtaining by any person, entity or affiliated group of persons or entities of the right to elect, appoint or designate at least fifty percent (50%) of the directors or trustees of an **Insured Entity**;

then, with respect to that **Insured Entity**, coverage under this Policy will continue in full force and effect with respect to **Claims** for **Wrongful Acts** committed before such event, but coverage will cease with respect to **Claims** for **Wrongful Acts** committed after such event. After any such event, this Policy may not be canceled, regardless of GENERAL TERMS AND CONDITIONS (F), and the entire premium for the Policy will be deemed fully earned.

(6) Continuation of Coverage

The provisions of GENERAL TERMS AND CONDITIONS (G)(1), (G)(2), (G)(3), (G)(4) and (G)(5) shall not apply to any merger or acquisition involving only **Insured Entities**. If, after the effective date of this Policy, any such acquisition or merger involving only **Insured Entities** occurs, the **Named Insured** shall provide notice thereof as soon as practicable, but coverage under this Policy shall remain in full force and effect with respect to the surviving **Insured Entity** and all members, partners, principals, directors, officers, trustees and employees, as applicable, of the surviving **Insured Entity** after the effective date of the acquisition or merger.

(H) **Extended Reporting Period:**

- (1) If the **Named Insured** or the Underwriter decides not to renew this Policy, the **Named Insured** will have the right to purchase an extension of the coverage otherwise afforded by this Policy for **Loss** from **Claims** first made during the period of one (1) year after the Expiration Date set forth in ITEM 2 of the Declarations (the "Extended Reporting Period"), but only if such **Claims** are for **Wrongful Acts** committed before the end of the **Policy Period** or the date of any conversion of coverage under GENERAL TERMS AND CONDITIONS (G)(5), whichever is earlier. The additional premium for the Extended Reporting Period is set forth in ITEM 6 of the Declarations. The election of, and the payment of the premium for, the Extended Reporting Period must be made within thirty (30) days after the Expiration Date set forth in ITEM 2(b) of the Declarations. If such election and payment are not made within thirty (30) days after the Expiration Date set forth in ITEM 2(b) of the Declarations, the **Named Insured** will have no right to purchase the Extended Reporting Period at any later date.

- (2) If the **Named Insured** purchases the Extended Reporting Period in accordance with GENERAL TERMS AND CONDITIONS (H)(1) above, any **Claim** made during the Extended Reporting Period shall be deemed to have been made during the **Policy Period**. The Underwriter's limit of liability in respect of **Claims** made during the Extended Reporting Period under any Coverage Part shall be part of, and not in addition to, the limit of liability applicable to such Coverage Part and the maximum aggregate limit of liability for all **Claims** under this Policy, all as set forth in ITEM 3 of the Declarations.
- (3) As a condition precedent to the right to purchase the Extended Reporting Period, the total premium for this Policy must have been paid. If a **Named Insured** cancels this Policy under GENERAL TERMS AND CONDITIONS (F)(2), it shall not have the right to purchase the Extended Reporting Period.
- (4) In the event that the Extended Reporting Period is purchased, the entire premium for the Extended Reporting Period will be deemed to have been fully earned at its commencement.

(I) **Other Insurance; Other Indemnification:**

All **Loss** payable under this Policy will be specifically excess of and will not contribute with other valid insurance (whether collectible or not), including but not limited to any insurance under which there is a duty to defend, unless such other insurance is specifically in excess of this Policy. This Policy will not be subject to the terms of any other insurance.

(J) **Exhaustion:**

If the Underwriter's limit of liability is exhausted by the payment of **Loss**, the premium will be fully earned, all obligations of the Underwriter under this Policy will be completely fulfilled and exhausted, and the Underwriter will have no further obligations of any kind or nature whatsoever under this Policy.

(K) **Cooperation; Subrogation:**

The **Insureds** will provide the Underwriter with all information, assistance and cooperation that the Underwriter reasonably requests, and will do nothing that may prejudice the Underwriter's position or potential or actual rights of recovery. The Underwriter will be subrogated to the extent of any payment to all of the rights of recovery of the **Insureds**. The **Insureds** will execute all papers and do everything necessary to secure such rights, including the execution of any documents necessary to enable the Underwriter effectively to bring suit in their name. The obligations of the **Insureds** under this GENERAL TERMS AND CONDITIONS (K) will survive the cancelation or other termination of this Policy.

(L) **Representations; Severability:**

The **Insureds** represent that the particulars and statements contained in the **Application** are true, accurate and complete, and agree that this Policy is issued in reliance on the truth of that representation, and that such particulars and statements, which are deemed to be incorporated into and to constitute a part of this Policy, are the basis of this Policy. No knowledge or information possessed by any **Insured** will be imputed to any other **Insured** except for material facts or information known to the person or persons who signed the **Application**. In the event that any of the particulars or statements in the **Application** is untrue, this Policy will be void with respect to any **Insured** who knew of such untruth or to whom such knowledge is imputed.

(M) **No Action Against the Underwriter:**

- (1) No action may be taken against the Underwriter unless, as conditions precedent thereto, there has been full compliance with all of the terms of this Policy and the amount of the obligation of the **Insureds** to pay is established in fact, or by written agreement of the **Insureds**, the claimant and the Underwriter.
- (2) No person or entity will have any right under this Policy to join the Underwriter as a party to any **Claim** to determine the liability of any **Insured**; nor may the Underwriter be impleaded by an **Insured** or his or her or its legal representative in any such **Claim**. The Underwriter will not be relieved of any of its obligations under the Policy by the bankruptcy or insolvency of any of the **Insureds** or, in the case of the **Insured Persons**, their estates.

(N) **Authorization and Notices:**

The **Named Insured** will act on behalf of the **Insureds** with respect to the giving and receiving of any notices and the payment and return of premiums from the Underwriter.

(O) **Changes:**

Notice to any agent or knowledge possessed by any agent or other person acting on behalf of the Underwriter will not effect a waiver or change in any part of this Policy or estop the Underwriter from asserting any right under the terms, conditions and limitations of this Policy. The terms, conditions and limitations of this Policy can be waived or changed only by written endorsement.

(P) **Assignment:**

No assignment of interest under this Policy will bind the Underwriter without its consent.

(Q) **Entire Agreement:**

The **Insureds** agree that this Policy, including the **Application** and any endorsements, constitutes the entire agreement between them and the Underwriter or any of its agents relating to this insurance.

(R) **Headings:**

The descriptions in the headings and sub-headings of this Policy are solely for convenience, and form no part of the terms and conditions of coverage.

**In witness whereof, the Underwriter has caused this Policy to be executed on the Declarations Page.**

*W. Andrew Mason*

Secretary

*BACA*

President