



28 January 2014

FREQUENTLY ASKED QUESTIONS (FAQs)
ON DIRECTORS' AND OFFICERS' LIABILITY INSURANCE (DOLI) AND THE
DIRECTORS' AND OFFICERS' LIABILITY FUND (DOLF)

Note: The answers provided herein are intended merely for the guidance of the general public and are not intended as a ruling or opinion since actual controversies would necessarily involve additional facts and circumstances which may change the application of the answers below.

Q: On the GCG MC on DOLI, there is a statement on Item IV, 10 (Proper Structuring of Reimbursement Mechanism) which we quote as follows:

"If final judgment exonerates the Directors/Trustees and/or Officers from allegation of fraud or breach of fiduciary duties, the advances are closed on the DOLI account. Whereas, if final judgment indicates clearly that the Directors/Trustee and/or Officers were guilty of fraud or were in breach of his fiduciary duties, then the advances shall remain a personal loan which they must pay-off."

May it be stated that when the Directors/Trustees/Officers are not exonerated, the advances shall remain a personal loan which must be paid off? Does the use of the term "clearly" meant that even if the final judgment is a finding of guilt but the dispositive portion does not indicate that there was fraud or breach of fiduciary duties, then the advances are closed on the DOLI account? What if the case against the director or officer was dismissed based on a technicality?

A: The queries are being raised under the premise that there are pending suits or litigation involving the GOCC, its directors/trustees or officers, who are being sued for alleged breach of duties, fraud or perhaps corruption (criminal offence). It means therefore that it is the final decision of the court or tribunal that is the basis for determining the guilt or innocence of the respondents:

- (a) If the final judgment is a finding of guilt on the part of the director/trustee or officer, but the dispositive portion does not indicate that there was fraud or breach of fiduciary duties (which is difficult to imagine with a finding of guilt), nonetheless, the advances shall remain a personal loan which must be paid off because essentially the director/trustee or officer has been adjudged personally guilty of an offence, and public funds cannot be used to support the litigation costs of a public officer who is guilty of a public offence.
- (b) If the final judgment finds the director/trustee or officer not guilty, whether based on the merits or based on technicality, then legally speaking there has been an exoneration by the courts that would allow the expenses incurred to be closed to the DOLI account. This is further supported by the constitutional precept that every accused is presumed guilty unless proven otherwise. Therefore, if the State (prosecutor) failed to prove the guilt, whether on the merits or because they botched up their job (technicality), it means that the accused director/trustee or officer remains innocent.

- (c) There may be cases where a director/trustee/officer is acquitted in a criminal case based on a technicality, or even for failure to prove guilt beyond reasonable doubt, but the court in its decision states that the director/trustee/officer is clearly guilty of fraud or of the crime and would have been convicted had the prosecution done its job. In such cases, I am of the opinion that notwithstanding the acquittal, the advances should remain a personal loan of the concerned director/trustee/officer. Because of the finding of fraud, the director/trustee/officer may still be held civilly liable for damages notwithstanding the acquittal in the criminal case because the requisite quantum of evidence in the civil cases (preponderance of evidence) is less difficult than in criminal cases (proof beyond reasonable doubt).

Q: Some agencies are of the opinion that Management could best ascertain whether their director/officer has acted in good faith and with extraordinary diligence in the performance of fiduciary duties. Is this allowed?

A: The opinion that "[M]anagement could best ascertain whether their director/officer has acted in good faith and with extraordinary diligence in the performance of fiduciary duties" is utterly without merit for the following reasons:

- (a) A case is pending before the courts of law or proper tribunal against directors/trustees or officers accused of committing an offence. It is the court or tribunal, governed by the rules of evidence and due process, who are given jurisdiction to determine the guilt or innocence of the accused/respondents. Management cannot be the source of determining the guilt or innocence of the accused because it is not a court of law.
- (b) For management to officially determine the guilt or innocence of an accused director/trustee or officer would be a violation of the constitutional right to due process, since obviously Management will conduct a hearing over issues that it has no *quasi-judicial* powers.
- (c) If the courts rule innocence, do we take it that under the proposition management's best determination of guilt should prevail, and *vice versa*. The proposition would amount to a travesty of justice in our country.
- (d) If the accused is a director/trustee, why would management stand in judgment over his guilt or innocence since it is the Board that has supervision over Management, and not *vice-versa*.

Q: Directors/Trustees/Officers of policyholder GOCC A sits as director of GOCC B, where GOCC B's functions/mandate are completely different from those of GOCC A. Will the DOLI cover of the D/T/O in GOCC A cover him for acts done as director of GOCC B? Note that GOCC A has no shares/interests in GOCC B.

A: The queries are raised on the presumption that GOCC A has DOLI coverage, while GOCC B has no DOLI coverage, and a director/trustee or officer occupies such position in both GOCCs which are unrelated.

The answer ultimately depends on the wordings of the DOLI policy obtained by GOCC A, which normally would cover only claims arising from acts of covered directors/trustees or officers as such in GOCC A. The premiums charged by the

insurance company for the DOLI coverage always depends on the extent of the coverage; and the resulting policy issued carefully limits the claims that may be made based on the final premium rate charged.

Therefore, we cannot imagine a situation where the insurance company would reimburse a claim forwarded to it by GOCC A on litigation costs incurred by its director/trustee or officer for acts done in GOCC B (not within the coverage of the DOLI). For that matter, we cannot imagine a situation where GOCC A would process a claim of its director/trustee or officer for litigation costs incurred for acts or transactions done with GOCC B.

Finally, if the accused director/trustee or officer himself were the one to go directly to the insurance company to claim reimbursement of litigation costs incurred for matters arising from his acts pertaining to GOCC B, we cannot imagine the insurance company processing such claim which is outside the coverage of the DOLI policy issued to GOCC A.

The short answer is that there is no moral, legal or procedural basis by which the DOLI coverage of GOCC A can include claims for acts done by a director/trustee or officer acting as such in GOCC B.

Q: The Director/Trustee/Officer of policyholder GOCC A sits as director of GOCC B, an affiliate or subsidiary of GOCC A. Will the DOLI cover the Director/Trustee/Officer in GOCC A cover the acts done as director of GOCC B, a Subsidiary/Affiliate of GOCC A?

A: Again, the answer depends on the type of coverage obtained by GOCC A, and the coverage clause provided in the DOLI policy issued to GOCC A, thus:

- (a) In the usual situation where the DOLI policy issued to GOCC A covers only acts of directors/trustees or officers acting as such for GOCC A, it is unlikely that the insurance company would pay for claims (even when applied for by GOCC A) arising from the acts of covered directors/trustees or officers with a fully-owned (100%) Subsidiary GOCC B. GOCC A and GOCC B are different companies, even though related, and each possess separate juridical personalities.
- (b) If the DOLI policy obtained by GOCC A expressly includes within its coverage the acts done by its directors/trustees or officers within its Subsidiary GOCC B, and for which it therefore must pay higher premiums for the increase in the DOLI coverage, then it goes without saying that claims for litigation costs arising from acts done by directors/trustee or officers in GOCC B may be the subject of coverage and claims for reimbursements, since this is so specifically provided for in the DOLI policy.
- (c) If the DOLI policy obtained by GOCC A expressly includes within its coverage the acts done by its directors/trustees or officers within AFFILIATE GOCC B, and again for which it therefore must pay a higher premium rate for the increase in the DOLI coverage, then claims for litigations costs arising from acts done by covered directors/trustees or officers in AFFLIATE GOCC B may properly made against the insurance company, for such is the coverage of the DOLI policy issued and for which GOCC A has actually paid higher premiums.




The issue that remains is whether there was proper disbursement of public funds to include within the DOLI coverage those acts done with a private corporation—AFFILIATE GOCC B. This issue is particularly answered in the query immediately below.

Q: The Director/Trustee/Officer of policyholder GOCC A sits as director of a private corporation where GOCC A has shares or interests. Will the DOLI cover in GOCC A cover the acts done as director of the private corporation?

A: Technically speaking, when a GOCC has equity shares in a private corporation to qualify a representative in the Board but is not majority (51%), it falls under the definition of "Affiliate". It means therefore, that any director/trustee or officer of the GOCC that is nominated to and becomes a director/trustee of the private corporation acts in such private corporation as the GOCC's representative.

It is the position of the GCG, that it is proper for a GOCC to include in the DOLI coverage they obtain situations when their directors/trustees or officers are sued in performing their functions as representatives in Affiliates. That comes about only when such coverage is clearly provided for in the DOLI policy to be issued to the GOCC, and for which it pays a higher premium as in the practice in the insurance industry.

We however note that the DOLI coverage would only cover litigations costs incurred by GOCC directors/trustees or officers acting as representatives in the Affiliate. It would be against COA rules to include within the DOLI coverage of GOCC A the costs incurred by the Affiliate itself, for public funds (i.e., premiums paid by GOCC A) cannot be expended for private individuals or private companies.

If nothing of sorts is provided for in the DOLI policy of the GOCC, then we do not see how the insurance company would favorably process a claim forwarded by GOCC A for litigations costs arising from acts of its director/trustee or officer within the Affiliate.

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