Representations & Warranties Insurance

Frequently asked questions

Who can be the insured under a *DisclosureGap®* policy?

When a *DisclosureGap®* policy is purchased in the context of a M&A transaction, the insured can be either the seller or the buyer (or where there are multiple sellers or buyers, a sub-set of the sellers or buyers). For example, one of the sellers in a transaction may be unable to retain any trailing liabilities associated with a transaction because it will liquidate following the close of the transaction. In other situations, the risk appetite of one of the sellers or buyers may differ from that of its co-sellers or buyers. When a *DisclosureGap®* policy is purchased in the context of a licensing transaction, the insured can be either the licensee or the licensor. In addition, sometimes financiers or lenders to a transaction are the driving force behind coverage. In such situations, these parties can be named as loss-payees under the insurance.

Can a *DisclosureGap®* policy be purchased in connection with the acquisition of a publicly-traded company?

Yes. As the representations and warranties given to the buyer of a publicly-traded company do not survive closing of the transaction and the proceeds are distributed to the shareholders, *DisclosureGap®* is an ideal risk-mitigation solution for the buyer of a publicly traded company.

Is *DisclosureGap®* Warranties & Indemnities Insurance designed to be a substitute for doing due diligence in connection with a transaction?

No. *DisclosureGap®* Warranties & Indemnities Insurance is designed to cover an insured for unknown breaches of representations and warranties after due diligence has been conducted. While not designed to be a substitute for due diligence, it can be used when the buyer has conducted due diligence but nevertheless requires additional protection. An example of this may be where the target company is a foreign jurisdiction and while thorough due diligence has been conducted, the buyer has a concern that there are risks of doing business in that jurisdiction that may not have been identified.

Can a *DisclosureGap®* policy cover representations and warranties relating to intellectual property?

Yes. The accuracy of the intellectual property representations and warranties can be critical to the value of the asset being licensed or purchased and is a perfect example of the type of representations and warranties covered by Ambridge.

Can a *DisclosureGap®* policy be tailored to cover only certain identified representations and warranties?
Yes. Tailoring coverage to respond to only a limited number of representations and warranties is often a more cost-efficient way of providing the insurance for those areas where the insured requires additional security.

Can a *DisclosureGap®* policy cover breaches of representations and warranties that are known at the time coverage is purchased?
No. While a *DisclosureGap®* policy is not designed to provide coverage for inaccuracies of breaches of representations and warranties that are known to the insured(s) at the time the policy is purchased, Ambridge's contingency insurance products can be endorsed to our *DisclosureGap®* policy to provide you with coverage for many identified exposures. Please bring these actual or potential exposures to our attention during the underwriting process so that we can advise you if coverage can be provided.

Why is a *DisclosureGap®* policy needed if the target company in the transaction intends to purchase "run-off" management and fiduciary liability insurance?
Although there is some over-lap between coverage under a *DisclosureGap®* policy and "run-off" policies, there are significant differences. Without enumerating all of these differences (and given that the scope of "run-off" coverage can vary widely based upon the policy wording used), some common differences between a *DisclosureGap®* policy and "run-off" are:

1) The identity of the insureds. Insureds (or insured capacity) under a Run-Off policy do not include shareholders of the target that ultimately have the responsibility for the indemnification obligation that responds in the event of the breach of or inaccuracy in a warranty. In fact, the directors and officers of the target are rarely signatories to, or parties to, a transaction agreement. A *DisclosureGap®* policy is more accurately tailored to include the relevant buyer or seller parties as insureds;

2) While under a Run-Off policy, liability of the relevant insured must be demonstrated before there can be a financial recovery from that insured. Damages under a transaction agreement are, with a few exceptions, generally contractually determined under the terms of the indemnification obligation. Many Run-Off policies contain contractual exclusions; and

3) Some exclusions, such as the bodily injury/property damage exclusion and the contractual exclusion mentioned in (2) above, eliminate coverage for loss incurred by an insured as a result of the breach of or inaccuracy in many representations and warranties.

How long does it take Ambridge to perform a preliminary review of a *DisclosureGap®* policy submission?
Generally we can provide preliminary terms within 24 hours. Completion of full underwriting is dependent on how quickly detailed information is provided to Ambridge. Ambridge frequently can offer bindable terms within several days after receipt of the initial submission.

What type of underwriting submission does Ambridge require to perform a preliminary review of a *DisclosureGap®* policy submission?
Please provide the following information to receive preliminary terms:

1) Copy of latest Purchase and Sale Agreement together with all available Schedules and Exhibits;

2) If available, a copy of the offering memorandum or circular distributed to potential bidders, which describes the company and its operations together for potential bidders;

3) A list of shareholders of the target company together with percentage of shares held; and

4) Copy of most recent audited financial statements for the target company.

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