

D&O Insurance Renewals: What Corporate Policyholders Need to Know in the “New Normal”

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Many companies are focused on their business interruption coverage in the face of coronavirus disease 2019 (COVID-19). But they must not let management liability insurance be a blind spot. Companies that are renewing their management liability insurance program (directors' and officers' (D&O), employment practices, and fiduciary liability) must be prepared for a hard look by underwriters as they react to COVID-19 and consider its effects going forward. Therefore, policyholders must understand what the upcoming renewal process will entail, must be prepared to carefully navigate the uncharted challenges it will present, and must consider how to best represent themselves to insurers as an attractive risk.

Beware of More Restrictive Terms. The hardening D&O insurance market was already going to create renewal challenges, and those challenges have only been compounded by COVID-19. As an initial matter, policyholders should not ignore the standard “nonrenewal” notice that insurers typically send 60 days before the policy’s expiration; the insurance program must be aggressively marketed if the company’s existing carrier ultimately refuses to provide a firm or competitive quote.

Whether renewing with the existing insurers or placing a new insurance tower, policyholders will encounter a more robust underwriting process (more on that below). They must also be prepared for new and broader exclusions, some of which will undoubtedly seek to bar coverage for COVID-19 risks and possibly include more generalized exclusions. Insurers may also try to pull back on “best in class” terms and conditions that they had been willing to include in prior policies. Lower excess limit capacity may be

available to policyholders going forward. Insurers are also planning to make significant changes to pricing and attachment points.

Consider an Extension. Companies that have an upcoming renewal may be best served to secure an extension of their current management liability insurance program, particularly if they have not yet submitted a claim during the policy period. D&O insurers are asking detailed and time-consuming questions about how COVID-19 is affecting insureds’ business operations, performance, contingency planning, and ability to recover from the current crisis. Some of these questions may be premature, as the full impact of COVID-19 is unknown. An extension allows directors and officers to prioritize companies’ COVID-19 response efforts, gives them the necessary time to fully and thoughtfully address the insurers’ questions, and allows insureds to respond at a time when their answers have more certainty. There is another key benefit to an extension: Companies can keep any “best in class” terms and conditions and higher excess limits in their current insurance program for a few more months, when these may not be available once the program renews.

Submit a Notice of Circumstances? Management liability policies allow policyholders to notify insurers of facts and circumstances that might lead to a formal claim (e.g., written demand for monetary relief; a lawsuit) at a later date. If a notice of circumstances (NOC) is submitted to the insurer and a claim is later asserted against the insured—even if after the expiration of the policy period—that claim can “relate back” to the NOC and be covered under the policy that received the NOC.

Corporate policyholders need to consider whether to submit a NOC under their current policies to lock in better terms and conditions that may not be available in the future. In doing so, policyholders must comply with NOC requirements in their policies. Management liability policies often identify specific types of information that must be provided with a NOC, such as the identity of potential claimants, a detailed description of the alleged specific wrongful acts, the amount of loss, and how the insured became aware of such wrongful acts. Thus, while a NOC that details, for instance, shareholder complaints about the company's preparedness to handle COVID-19 responses and its impact on the value of the company may be a sufficient NOC, companies can expect insurers to reject NOCs that merely convey a generalized concern about being sued.

Trusted Advisors. Now more than ever, in the face of multiple challenges that will arise during renewal, policyholders need experienced brokers and coverage counsel to navigate them through these uncharted waters.

On the front lines, policyholders need experienced brokers that specialize in management liability insurance and have strong relationships with underwriters. Insurers are counting on their competitors' reluctance to write new business in the current environment, and will use that

expectation to extract concessions from insureds in the form of less coverage and higher premiums. Experienced brokers can use their relationships with underwriters to try to rebuff some of the unreasonable demands that are made by insurers. Brokers can also utilize their relationships to, if necessary, market the insurance program to new insurers and give those insurers confidence that the policyholder is a worthy risk.

Coverage counsel, working hand in hand with the broker, is also crucial to this process, particularly in the current environment. As insurers scale back the beneficial terms and conditions that they had previously been willing to offer, an audit of the proposed policies' terms and conditions is vital for policyholder-clients to understand the limitations that insurers propose. Equally important, coverage counsel can help policyholders prioritize the key provisions that are worth fighting for during the renewal process. Ultimately, at the end of this process, policyholders may not get every "ask," but they can still improve the policies' terms beyond what the insurers propose and gain a clear understanding of the scope of coverage.

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