

Client Alert

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D&O Insurance Coverage for COVID-19-Related Government Investigations

Many directors and officers liability (“D&O”) policies contain a coverage extension for expenses incurred to respond to government investigations, including subpoenas and requests for documents, among other things. In most D&O policies affording this coverage, the coverage is available only if an individual insured receives a formal request from the government or is the target of the investigation, regardless of whether the company also is named. This coverage typically is sub-limited well below the general per-claim limits of the D&O policy.

As discussed below, both entities and individual insureds may face claims and allegations arising out of the unique circumstances of the COVID-19 crisis. Among the claims that could involve related governmental investigations are:

- False Claims Act claims in connection with a company’s application for loans or other assistance under the recently enacted Coronavirus Aid, Relief, and Economic Securities (“CARES”) Act and other programs specifically designed to respond to the COVID-19 pandemic.
- Antitrust and unfair trade practice claims arising out of alleged violations of price-gouging laws, price-fixing laws, and unfair competition through coordination with competitors.
- Whistleblower claims relating to federal and state funds received from government programs.
- Investigations by the U.S. Securities and Exchange Commission (“SEC”) and its state counterparts into inadequate disclosure of a company’s financial situation and other circumstances arising out of COVID-19 stresses on a company.
- Investigations by the SEC and the U.S. Department of Justice (“DOJ”) into potential violations of the Foreign Corrupt Practices Act (“FCPA”), as certain industries become exposed to increased bribery risks resulting from the difficult economic landscape caused by COVID-19. These risks will be amplified because travel restrictions and mandatory quarantines geared towards curbing the spread of COVID-19 will result in postponed internal investigations and reduced efforts to prevent corporate misconduct and enforce compliance standards.
- Investigations by other government entities regulating financial services companies, such as the Financial Industry Regulatory Authority (“FINRA”), Office of the Comptroller of the Currency (“OCC”), and similar agencies, investigating alleged unsafe or unsound business practices, claims of public fraud, or other breach of fiduciary duties by regulated entities and licensed individuals operating in sub-optimal conditions as a result of COVID-19.

This is a good time for companies to analyze the availability of coverage under all of their D&O policies for costs associated with responding to government investigations, particularly if the company is availing itself of loans or grants under the CARES programs. Some companies are consulting with their brokers

about increasing sub-limits for government investigations. Insurance policies proposed for upcoming renewal should be carefully reviewed because insurers are now proposing to add very broad “virus” or “communicable disease exclusions” and other provisions, even on D&O and other kinds of policies, in light of COVID-19. While the D&O insurance markets are hardening, policyholders should be vigilant about reductions in coverage and whether insurers are taking those reductions into account in their pricing.

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