HUNTON& WILLIAMS

Client Alert

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Checklist for Renewing D&O Insurance Coverage

Directors & Officers (D&O) insurance policies provide corporate directors, officers and other insureds—and their companies—with important protection from the costs of shareholder suits, government investigations and other exposures. D&O policies, however, are not standard and continue to evolve. Below is a shorthand list of provisions to review carefully at your next renewal:

- ☐ **Protecting Independent and "Innocent" Directors and Officers**
  - ○ Ideally, D&O policies should not be rescindable (especially the "Side A" coverage).
  - ○ Consider "Side A-only" excess coverage.
  - ○ Obtain appropriate "tail coverage." Also, review provisions defining how and when it will apply.
  - ○ Ensure policy waives deductibles or retentions when Directors and Officers are not indemnified.
- ☐ **Definition of "Insureds"**
  - ○ Review the definition of "insured" to make sure it is broad enough to cover all of those for whom protection is sought.
- ☐ **Coverage for "Outside Directors"**
  - ○ D&O policies should provide coverage for insureds serving on other boards such as on the board of a portfolio company (if an investment company) or subsidiary.
  - ○ Consider structuring this coverage so that the subsidiary company's policy is primary to coverage afforded under the parent company or investor's D&O policy.
- ☐ **Trigger of Coverage**
  - ○ D&O policies are claims-made policies and, thus, are triggered or activated by a "claim" made during the policy period.
  - ○ Some policies are "single-anchor policies" and require one event to take place during the policy period (usually, the claim against the policyholder).
  - ○ Some policies require two events during the policy period (claim against the policyholder and notice to the insurer). Such double-anchor policies are more difficult to trigger.
  - ○ Seek D&O policies that include a single-anchor only.
- ☐ **Alternative to Entity, or "Side C," Coverage**
  - ○ With the limitations often placed on entity coverage, consider including a preset allocation formula in your policy or program.
  - ○ In "Side C" coverage, seek broad coverage to include lawsuits, investigations, regulatory actions and other claims beyond "Securities Claims" if the company faces these risks.
  - ○ Seek investigation coverage that does not require an "Insured Person" be a "Target" of the investigation.

- ☐ **Protection Against Insolvency of Policyholder Company**
  - ○ Provide that deductibles or SIRs, which may be substantial, do not apply if the company is insolvent.
  - ○ Include priority of payments provisions, which help ensure that the individual insureds obtain maximum protection and are "paid first."
- ☐ **Definition of "Loss"**
  - ○ Negotiate broad definition of "loss," including coverage for punitive, exemplary or multiplied damages (maximum extent permitted by law).
  - ○ Narrowly define any exceptions for fines, penalties or amounts "uninsurable" as a matter of law. Consider carve-outs for Sections 11 and 12 Securities Act or similar claims.
- ☐ **Definition of "Claim"**
  - ○ Ensure that coverage is broad enough to pay for administrative, regulatory, civil and criminal proceedings, subpoenas, etc.
  - ○ Seek coverage for both "formal" and "informal" investigations.
  - ○ Cover not only litigation, but also ADR proceedings and investigations, which are increasingly common.
- ☐ **Defense Cost Issues**
  - ○ Most D&O policies are "duty to indemnify," rather than "duty to defend." Seek provisions guaranteeing advancement of defense costs on a "current basis" to ensure prompt payment.
  - ○ Review insurer's list of panel counsel and negotiate alternatives.
  - ○ If application or policy incorporates insurer billing guidelines, ask to review guidelines before purchase and amend them if necessary to avoid disputes when claims arise. Resist imposition of extra-contractual billing guidelines at the point of claim.
  - ○ Avoid provisions granting the insurer the right to repayment, or "recoupment," of defense costs.
  - ○ Review "consent to settle" clauses.
  - ○ Seek coverage that ensures payment of defense costs even when indemnity may ultimately fall within an exclusion.
  - ○ Request endorsement that covers 100% of defense costs paid, without allocation, even if the claim involves uncovered parties or claims.
- ☐ **Ensure Coverage for All International Risks and Global Exposures**
- ☐ **Choice of Law**
  - ○ Scrutinize any choice of law provision; those that identify a specific jurisdiction's law are less likely to lead to disputes.
- ☐ **"Related Claims"**
  - ○ Beware of overbroad definitions of Related Claims or Single Claims, and other claim-aggregation provisions.
- ☐ **Review All Exclusions, but Especially the Following:**
  - ○ **Deliberate, Fraud or Criminal Acts Exclusions.** The most desirable form of these exclusions requires a "final adjudication" and finding of fraud or other "bad" conduct in a securities litigation. Ensure that wrongful conduct by one insured is not imputed to another.
  - ○ **Prior Acts, Prior Notice and Prior Pending Litigation Exclusions.** Narrow them or, ideally, eliminate them. Buy back the prior litigation date to the earliest date possible. Ideally, purchase full "prior acts" coverage.

- **Insured vs. Insured Exclusion.** This should not apply to preclude coverage when the company or when the (former) insureds are adverse to each other.

☐ **Severability of Exclusions:**

- Include severability provisions in conduct-related exclusions if the insurer declines to eliminate them.
- Refuse extra-contractual exclusions inserted into "warranty letters."

☐ **ADR Provisions/Arbitration/Forum Selection/Mediation Cool-Off:**

- Alternative Dispute Resolution provisions are now commonplace in D&O policies. Insureds should ensure that these provisions allow for non-binding mediation in lieu of mandatory arbitration.
- Insureds should review the process identified in the clauses to ensure it is agreeable. For example, some policies require mediation by an American Arbitration Association (AAA) mediator and pursuant to the AAA's Commercial Arbitration Rules.
- Insureds should negotiate the shortest possible "waiting period." Because coverage disputes over issues such as defense costs are possible, a 90-day waiting period between mediation impasse and when an insured may file a declaratory action is particularly prejudicial as it means an additional 90 days that the insured must cover its own costs of defense.

☐ **Application Issues**

- Limit the documents and representations in policy "warranty" provisions.
- Tie warranty letter to definitions in the policy where possible—such as defining "Claim" in the warranty so that it would apply only to suits, investigations or demands that would be covered under the policy's definition of "Claim."
- Document negotiations; preserve applications and all notes.

☐ **Emerging Risks**

- Consider exposures from emerging risks, including cyber and data privacy risks, climate change, new technologies, employment and wage-and-hour suits that may not be covered by traditional D&O policies.

☐ **Issues for Excess D&O Policies**

- Confirm that they follow form in key respects to underlying policies.
- Eliminate "actual payment provisions" which provide that excess policies do not attach unless the underlying insurers, and only they, pay 100 percent of the underlying limits.

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