

Goodmans^{LLP} Update

D&O Insurance Update

The D&O insurance market for private and public companies has been challenging for some time. Premiums and deductibles have been increasing sharply and businesses in some sectors have been unable to obtain adequate coverage or renew their policies at any price. COVID-19 has intensified these challenges.

D&O insurers are currently scrutinizing company financials and future prospects, leaving far less room for insureds to negotiate policy terms than in the past. At the same time, independent directors may want greater D&O protection, especially where operations are impacted by the pandemic.

How are D&O policies structured?

D&O insurance generally comprises Side A, B and C coverage:

- Side A covers individual directors and officers where they are not indemnified by the company because, for example, the company is insolvent or in financial difficulty, or it is prohibited by statute or the company's by-laws.
- Side B reimburses the company for its loss where it has indemnified its directors and officers.
- Side C protects the company itself in certain specific circumstances.

What are the current trends?

Noteworthy trends in the current D&O market include:

- *Increased Underwriting.* Insurers now require more detailed information than in the past and the underwriting process has become more time consuming, labour intensive and unpredictable.
- *Reductions in Breadth of Coverage.* Reductions in coverage may include exclusions for COVID-19-related claims, as well as comprehensive bankruptcy, creditor and cyber-related claims.
- *Reductions in Limits.* Some insurers are reducing policy limits on renewals and competitors are often unwilling to step in. Few insurers are willing to participate in increased excess limits.
- *Increased Retentions.* Increases in deductibles are common.
- *Higher Premium Rates.* Prices have increased significantly. Many insureds are accordingly reducing coverage at a time when their exposure could potentially be increasing.
- *Market Hesitancy.* D&O insurers are often not eager to quote new business, leaving insureds, particularly first-time insureds, with fewer options.

How should companies address these challenges?

We are working with clients to explore a number of structural mechanisms to address these challenges, including:

- Restricting or eliminating key areas of coverage
- Split retentions for different risks
- Higher Side A as a percentage of overall limit, or purchasing Side A only
- Coinsurance on Side B and C coverages
- Stretched aggregate limit over two-year period

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- No claim bonus (with premium credit for a future year)
- Setting aside funds to cover D&O indemnities, or specific risks (i.e., self-insurance)
- Buying run-off policies for the full amount when renewing at a lower amount
- Purchasing public offering of securities insurance (POSI) to provide specific coverage for IPOs and offerings

What immediate next steps should companies take?

It is likely future D&O policies will be less favourable than existing ones. Below are some considerations for insureds.

- *Notice of Circumstances.* D&O insurers will explicitly exclude COVID-19 claims in new and renewed policies, so that these claims might only be covered if made during the current policy period. Depending on the policy wording, it may be appropriate to give notice to D&O insurers of potential claims before expiry.
- *Renewals.* Insureds should commence renewal discussions for their D&O policies early, as insurers are less likely to provide “as is” renewal terms.
- *Extensions.* If a renewal is upcoming, insureds should consider seeking an extension of their current D&O policy. An extension could allow directors and officers time to prioritize the company’s COVID-19 response efforts and thoughtfully prepare responses to the more detailed questions their D&O insurer will ask at renewal time. An extension may also allow insureds to benefit from more favourable terms and conditions and higher excess limits for a few more months.

For more information concerning D&O policies in this new environment, please contact [Francy Kussner](#).