Executive Protection

PRIVATE MANAGEMENT LIABILITY

Avoiding Friction

We have evidenced a number of issues that repeatedly arise that cause unnecessary friction. As your insurance broker, in addition to negotiating and procuring the most competitive insurance program on your behalf, we strive to ensure that you are aware of these issues. Understanding the following coverage terms and conditions, including policy mechanics, will assist you in avoiding unnecessary pitfalls.

The below list of items is not intended to be an exhaustive list, but rather, provides policy highlights that are important for insureds to bear in mind so that the policies can be utilized as effectively as possible.

DUTY TO DEFEND

Your policy contains provisions that govern the defense of covered claims. These provisions detail which party retains the responsibility to defend and direct the defense of a given claim. For the majority of management liability policies, the policy will be written on a "duty to defend" basis.

Under a duty to defend policy, the insurance company retains the right and duty to defend a covered claim once it is tendered to the insurer, regardless of whether the claim is groundless, fraudulent or lacks merit. Moreover, in most cases, the carrier will be obligated to defend the entire matter, even if certain allegations are not covered under the policy.

When the insurer retains the duty to defend, the insurer will select defense counsel from its list of panel firms to defend the insured. Again, the insurance company will select counsel, not you, the insured. If this causes an issue for you, we will need to discuss with you and the insurer prior to binding.

NOTIFICATION OF CLAIMS AND POTENTIAL CLAIMS

This is a claims-made policy specifying that you, the insured, must provide prompt notice of a claim. Swift reporting of claims is the best way to ensure that you are in compliance with the policy's notice requirements.

When to notify the insurance company? It is imperative that you notify your insurance broker and the insurance company as soon as you receive notice that an individual, entity or enforcement or regulatory agency intends to make a claim or has made, filed or commenced a complaint, charge, subpoena, investigation, demand, or request for alternative dispute resolution. These are some, but not all examples, of matters that could trigger a claim. When in doubt, notify your insurance broker and insurance company of any communication against your organization, its executives, or its employees. Of particular concern are administrative charges. For instance, if you have purchased employment practices liability insurance (EPLI), be advised that administrative charges are claims as defined in most EPLI policies. Such charges are issued by the U.S. Equal Employment Opportunity Commission or similar state or local agencies. We strongly recommend that you report such charges to your insurance broker as soon as you receive them so that they may be forwarded to the insurance company to comply with their notice provisions.

Even if you are not sure whether the matter triggers coverage, it is best to provide your insurance broker with the information so that they may submit to the insurance company for their evaluation.

Management liability policies also have strict provisions concerning the notice of potential claims. Providing accurate notice of a potential claim can preserve important rights for you under the policy.

Please consult with your legal counsel or insurance professional to review the insurer notice provisions in your policy.

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In association with:

RT ProExec

SUBSIDIARIES

The policy typically covers any entity that meets the policy definition of Subsidiary. Covered Subsidiaries do not need to be listed on the Declarations Page or scheduled by endorsement. Also note that attaching a schedule of "Named Insureds" to an application will not result in coverage for any entity that does not meet the policy definition of Subsidiary.

Many privately held organizations have affiliated entities that share common ownership (for example, ownership by the founder of the company); however, unless specifically added by endorsement, there is no coverage for an affiliated entity nor any of its directors, officers, managers or employees. Further, certain organizations create entities pursuant to contractual obligations that do not fall under the organizational ownership structure and are not covered Subsidiaries as defined in the policy. Upon request and receipt of additional information on affiliates, insurers have historically been willing to extend coverage to such affiliates via an endorsement. Depending on the provided information and review by the insurer, a premium may or may not be associated with the endorsement granting coverage for the affiliates.

ORGANIZATIONAL CHANGES

An organizational change should be promptly reported to your insurance broker and insurer to ascertain whether it triggers certain provisions within your policy.

The typical policy has "organizational change" provisions specifying how the policy will respond if the company is sold or it sells the majority of its assets. Under this example, subject to the terms and conditions of the policy, ongoing acts coverage will cease as of the close of the transaction and the premium becomes fully earned. There is also the potential to purchase a tail policy (also known as "runoff").

Other provisions in the policy also specify how the policy will respond if you acquire another entity with an asset or employee count greater than a specified threshold. If the acquisition exceeds the threshold, provisions require you to notify the insurance company in writing of the "full particulars of the new subsidiary," for their evaluation and in order for the policy's coverage to extend to the new subsidiary as of the date of the acquisition. A premium may be associated with granting the necessary coverage.

Further, there are notice requirements if you conduct certain securities offerings, including an offering under Title III or IV of the JOBS ACT or an Initial Public Offering. These scenarios will likely require a more extensive discussion with your insurance broker to evaluate the proper course of action.

It is important for you, the insured, to provide your insurance broker with details of an organizational change so that we may provide guidance and engage insurers as needed to comply with the terms and conditions of your insurance program.

There is no standard D&O insurance policy. Each D&O insurance carrier has forms that differ from their competitors and most policies are generally the subject of extensive negotiations. In order for D&O insurance buyers to be assured that they have the broadest available terms and conditions and appropriate insurance structure, it is critically important that they elect a knowledgeable and experienced broker in their acquisition of insurance. The best brokers also have skilled and experienced claims advocates available to protect their clients' interests in the event of a claim.