The Key To Developing A Truly Global D&O Programme

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Goals For Today’s Presentation

• For the corporate insureds in the audience
  – Learn how to develop and implement a strategy for creating a truly global D&O insurance programme
  – Learn some new issues to address with such a strategy
  – Obtain reassurance and food for thought if you already have developed such a strategy

• For the brokers and underwriters in the audience
  – Hear the multinational corporate insureds’ perspective on D&O insurance issues
  – Consider how you might differentiate yourselves from your competition for servicing a multinational account
Why D&O Policy Wording Must Be Viewed In A Global Context

• D&O policy wording differs on myriad issues
  – Within the same country (e.g., UK)
  – Between countries (e.g., US v. UK)

• A global programme placed in the UK should be reviewed against policies available outside the UK
  – To make sure that policy wording in key jurisdictions outside the UK are not more favorable on any particular issue; and
  – If more favorable policy wording is identified, that wording should be incorporated into the global programme
What might happen if you fail to take into account the fact that policy wording differs between countries?

- A claim that could have been covered by a policy placed in a foreign jurisdiction is not covered because
  - the global programme does not cover the claim; and
  - no locally admitted D&O policy was purchased in that foreign jurisdiction
Structures That Address Global Policy Wording Differences

- One “master” global policy with locally admitted D&O policies in key jurisdictions
  - Master provides “follow form” excess coverage
  - Master provides DIC/DIL coverage

- One global policy with **no** locally admitted policies
  - Wording differences are addressed in global policy
    - on some issues, for all claims brought anywhere in the world
    - on some issues, only for claims brought in the jurisdiction where the policy wording difference was identified

- Combination of both of the above
A “How To” Guide To Negotiating Policy Wording

• Step 1: Brainstorming session between risk manager and broker
  – Risk manager and broker must “partner”
  – Discuss different programme structures, and the pros and cons of each, and then decide on a structure
  – Discuss “big picture” or “fundamental” issues and which markets would be best able to address them
  – Devise plan and agree upon timetable for milestones to minimize chances of having to “rush to the finish” to bind coverage in time
A “How To” Guide To Negotiating Policy Wording (cont’d)

• Step 2: Comparing quoted forms to what is available in the market
  – You cannot limit the review to forms in one market, but must look to forms available in key world jurisdictions
  – You have to look at all terms and conditions for possible issues to consider and enhancements to seek
  – Most D&O forms have 20 or more “deficiencies” when compared to “the best of the best” of what is available in the market on any particular issue
A “How To” Guide To Negotiating Policy Wording (cont’d)

• Step 3: Drafting the “wish list” of requested changes to make to the quoted policy form(s)
  – Where possible, or desirable, provide alternative language sought (sometimes it is better to pitch up the issue and let underwriter suggest a “fix”)
  – Provide an explanation for why you want the change
  – Provide support for the change (e.g., another policy form does it this way; courts have interpreted the requested language more favorably than the language in the quoted form; it makes common sense to do it, etc.)
A “How To” Guide To Negotiating Policy Wording (cont’d)

• Step 4: Prioritizing the issues identified on the “wish list” of requested changes
  – List the issues in the order in which they appear in the quoted policy form(s) and endorsement(s)
  – Internally (between risk manager and broker) prioritize the issues in some fashion, for example
    • category “A” issue: issue must be addressed/deal breaker
    • category “B” issue: try to get, but not a deal breaker
    • category “C” issue: don’t need to get, but use as a bargaining chip
  – Prioritization gives the broker essential guidance
A “How To” Guide To Negotiating Policy Wording (cont’d)

• Step 5: Negotiating with underwriters
  – The “wish list” letter should speak for itself, but it never does on all issues, so be prepared to negotiate
  – Sometimes, an oral “walk through” of an issue is more effective than having the underwriter read and think about the issue as explained in the “wish list” letter
  – Sometimes, the underwriter cannot address an issue in the manner requested, but
    • will agree to an alternative, if you “hear” his or her concern with the initial suggestion and address it with the alternative
    • will offer an alternative to your suggested way of addressing the issue that addresses his or her concern
A “How To” Guide To Negotiating Policy Wording (cont’d)

• Step 6: Documenting agreed upon changes
  – Redline changes to a policy form; shoot back and forth by e-mail as you negotiate; attach finalized policy form to binder
  – Use underwriter’s written responses to “wish list” letter; attach letter and all responses to the binder
  – Create agreed-upon “list of changes” and attach that list to the binder
  – Any combination of the foregoing
A “How To” Guide To Negotiating Policy Wording (cont’d)

• Step 7: Reviewing the policy for accuracy
  – Assume that mistakes have been made (I have never seen a 100% accurate policy upon first issuance)
  – Compare issued policy to agreed upon changes
  – Identify incorrect issues for underwriter
  – You must be diligent in reviewing for accuracy and following up on corrections required (it is too easy to put off and put off the review for accuracy)
Negotiating Policy Wording, Summary And Caveat

• Each of the foregoing steps must be followed; failure to follow any one step can lead to problems

  – What good is all the up-front work if nobody reviews the policy for accuracy?

  – If you follow steps 2 – 7, but never brainstormed on fundamental issues, you might have placed something fundamentally different than what the insured wanted

  – Time and again I review a programme that has one or more major flaws because one of the foregoing steps was not followed
Examples Of Policy Wording
Issues To Consider

• Insuring agreement issues
  – Duty to pay on behalf vs. indemnify/reimburse
  – Duty to pay excess of self-insured retention vs. pay excess of amounts recoverable from other sources
Examples Of Policy Wording
Issues To Consider (cont’d)

• Defense provisions
  – Insurer has no right or duty to defend, just duty to associate in the defense
  – Insurer has right, but not duty, to defend
  – Insurer has duty to defend

• Consent to settlement provisions and “hammer clauses”
  – Full “hammer clause”
  – Co-insurance hammer clause
  – No hammer clause
Examples Of Policy Wording

Issues To Consider (cont’d)

• Definition of “Claim”
  – Are oral demands considered a claim?; do you want that broad of language (notice obligations)?
  – Are written demands covered, even if not a judicial proceeding?
  – Are criminal proceedings covered?
  – Are investigations covered?; what about investigations against the “entity” if you purchased “entity” coverage?; do you want that broad of language (notice obligations)?
Examples Of Policy Wording
Issues To Consider (cont’d)

• Definition of “Loss”
  – Coverage for punitive, exemplary and multiplied damages, where insurable by “any applicable law”
  – Most favored venue wording – “any applicable law” means any of the following: (a) where the wrongful act actually or alleged took place, (b) where the claim was made or lawsuit/proceeding brought, (c) where the insured resides, is incorporated or has its principal place of business, and (d) where the insurer is incorporated or has its principal place of business
Examples Of Policy Wording

Issues To Consider (cont’d)

• Definition of “Wrongful Act”
  – Is the phrase “actual or alleged” used in the definition?; if not, is the concept of coverage for “alleged” wrongful acts addressed elsewhere in the policy?; it needs to be somewhere in the policy
  – Is the word “solely” used (“act committed solely in the person’s capacity as a director or officer”)?; if so, delete it
  – Does the language encompass a claim brought against a person solely due to the person’s status as a director or officer?; if not, add the concept
Examples Of Policy Wording

Issues To Consider (cont’d)

• Definition of “Securities Claims”
  – Limited to violation of defined securities laws arising out of sale or purchase or offer to sell or purchase securities?
  – Extended to any claim by a shareholder, whether directly, by class action or derivatively on behalf of the company?
Examples Of Policy Wording
Issues To Consider (cont’d)

• Secondary offering exclusion
  – Is the policy subject to one?; if so, it should be deleted
    (came out of many U.S. policies years ago)

• Short-swing profits exclusion (Section 16(b) of
  U.S. SEA)
  – Is the policy subject to one?; if so, it should be deleted
    (came out of many U.S. policies years ago)
Examples Of Policy Wording
Issues To Consider (cont’d)

• Fraud/dishonesty/criminal act exclusion
  – Is the word “deliberate” or “deliberately” used to modify fraudulent, dishonest or criminal act?; if not, consider adding as a matter of clarification
  – Does the exclusion apply only if the excluded activity is adjudicated in the underlying claim by judgment or other final adjudication, with insurer obligated to fund a defense in the interim?; if not, consider amending it to make it so
Examples Of Policy Wording
Issues To Consider (cont’d)

• Wilful or reckless violation of statute, regulation or other law exclusion
  – This type of exclusion makes coverage illusory for securities claims brought in the U.S., because the “scienter” requirement for liability requires a showing of at least reckless conduct
  – Delete the exclusion and put the wilful violation language in your fraud/dishonesty/criminal act exclusion, properly worded
• Profit or advantage exclusion
  – Does the exclusion apply only if the excluded activity is adjudicated in the underlying claim by judgment or other final adjudication with insurer obligated to fund a defense in the interim?; if not, consider amending it to make it so
Examples Of Policy Wording
Issues To Consider (cont’d)

• Insider trading exclusion (actual trades and aiding/abetting)
  – This exclusion simply is not used in U.S. D&O policies; it should be removed from any U.K. programme purporting to provide global coverage
Examples Of Policy Wording
Issues To Consider (cont’d)

• Insured v. insured exclusion
  – Can you limit it only to claims brought in the U.S.?
  – Does it except claims brought on behalf of company by trustee in bankruptcy, liquidator, etc. or by the company as debtor in possession?
  – Does it except claims brought by, on behalf of, or instigated by or with the assistance of employees who are insureds (e.g., employees who hold managerial or supervisory positions – typical U.K. policy excepts claims for EPL coverage, but not otherwise)
Examples Of Policy Wording
Issues To Consider (cont’d)

• Severability as to exclusions
  – Is severability given as to some exclusions or all exclusions?
  – Does the policy expressly explain how to impute acts of a natural person to a corporate insured for purposes of “entity” coverage?
    • Some U.S. forms are silent on this issue
    • Many U.S. forms expressly address the issue, by imputing only the acts and knowledge of “executive officers” (as defined) to the insured entity
Examples Of Policy Wording

Issues To Consider (cont’d)

• Allocation issues
  – Standards to be applied
    • “Best efforts”
    • “Relative legal exposure” “relative financial exposure” and “relative benefits obtained”
  – Under what circumstances must you use pre-agreed allocation standards?
    • Claim against directors and officers alleging covered and non-covered matters (if coupled with unfavorable allocation standard, should not be accepted under any circumstances)
    • Claim against directors, officers and the company or other non-insured party (not good, but acceptable)
Examples Of Policy Wording
Issues To Consider (cont’d)

• Allocation issues (cont’d)
  – Provisions regarding funding defense costs when allocation issues are in play
    • Insurer *may* advance costs in its *sole discretion* (worst language)
    • Insurer *shall* advance costs it believes are allocable to covered claims (acceptable language)
    • In event allocation dispute cannot be resolved, it shall be submitted to Queens Counsel, whose decision is binding (not favorable language)
Examples Of Policy Wording
Issues To Consider (cont’d)

• Notice of circumstances provisions
  - Is the insured obligated to give notice of circumstances?; if so, amend so that the insured has the right, but not the obligation, to give notice of circumstances
  - If the insured has the right to give notice of circumstances, can that right be exercised during the extended reporting period/discovery period if purchased?; some policy forms provide such a right
Examples Of Policy Wording
Issues To Consider (cont’d)

- Prior acts exclusions and warranty statements in renewal applications
  - Prior acts exclusion should be tied to inception date of first policy purchased from insurer; otherwise you subject yourself to the functional equivalent of a warranty statement at each renewal
  - The renewal application, if you have to sign one, should not have a warranty statement
Examples Of Policy Wording
Issues To Consider (cont’d)

• Runoff provisions
  – Runoff provisions should be triggered only if the Parent Company is not the surviving entity
Examples Of Policy Wording

Issues To Consider (cont’d)

• Severability as to the application for insurance (aka proposal form)
  – Is severability given as to all insureds?
  – Does the policy expressly explain how to impute a misstatement or omission of a natural person to a corporate insured for purposes of “entity” coverage?
  • Some U.S. forms are silent on this issue
  • Many U.S. forms expressly address the issue, by imputing only the knowledge of “executive officers” or only the knowledge of the person who signed the application
Questions?