

CLIENT ALERT

Coronavirus, Market Volatility & Executive Risk Policies

March 12, 2020



As a result of market uncertainty and fears that a Coronavirus related event could lead to a D&O claim, many companies are evaluating how their executive risk policies might be triggered. Generally speaking, executive risk lines of coverage do not apply to loss as a direct result of bodily injury or property damage, and most executive risk policies will exclude such loss in order to push the exposure to another line of insurance such as General Liability. Below are a few considerations for insureds:

Directors & Officers Liability

One factor to consider is when and how to publicly disclose Coronavirus (COVID-19) concerns as a “risk factor.” As of Feb. 28, 606 companies have mentioned the Coronavirus as a “risk factor” in public disclosures. The Securities and Exchange Commission (SEC) requires companies to provide investors with plausible business or legal risks that may impact operations. Failure to do so could result in falling stock price-related litigation.

To allow publicly traded companies time to evaluate whether to disclose Coronavirus-related risk factors, the SEC has recently advised companies that they will have an additional 45 days to file certain materials otherwise due March 1 and April 30. This may include year-end financials for companies with different financial calendars and 8-Ks for notable events. <https://www.sec.gov/news/press-release/2020-53>

Bodily Injury / Property Damage Exclusion

Though most traditional D&O Liability policies contain a Bodily Injury / Property Damage (BI/PD) exclusion that precludes claims for bodily injury, sickness, mental anguish, emotional distress, disease or death of any person, the specific wording matters a great deal. How the exclusion might respond depends on the lead-in language as well as what types of carve-backs may be included.

Many BI/PD exclusions have been amended in the past several years to include “for” lead-in language as well as a Securities Claim exception. These amendments allow for coverage for any claim alleging a violation in securities law related to BI/PD events.

Crisis Fund Coverage

In addition to Securities Claim coverage within the Traditional D&O coverage (and depending on how a claim might be brought), a number of sub-limited coverages could apply to certain costs incurred by the company - including a Crisis Fund coverage and Derivative Demand Investigation Costs coverage. For those companies whose share price has fallen over a certain threshold - generally 10% to 20% or \$5 per share within in 24 hours - there may be coverage for public relations, crisis management, or law firm expenses related to a crisis event.

Events that may trigger a material impact on share price include a restatement of financials, elimination or suspension of dividend, write-off of assets, bankruptcy, and others. Recent marketplace volatility has created large share price decreases and we expect more claims related to negative earnings. The determining factor as it relates to claims will be whether or not the significant drop in market share was caused by board or executive mismanagement.

Side A Difference in Conditions Coverage

In the event of a non-indemnifiable claim against a Director or Officer, there could be coverage under the "Side A Only Difference in Conditions" policies as most do not contain BI/PD exclusions. Side A claims from a Coronavirus event could include a Derivative Claim in which the entity brings suit against individual directors and officers for breaches of fiduciary duty with respect to crisis management.

Other Executive Risk Policies

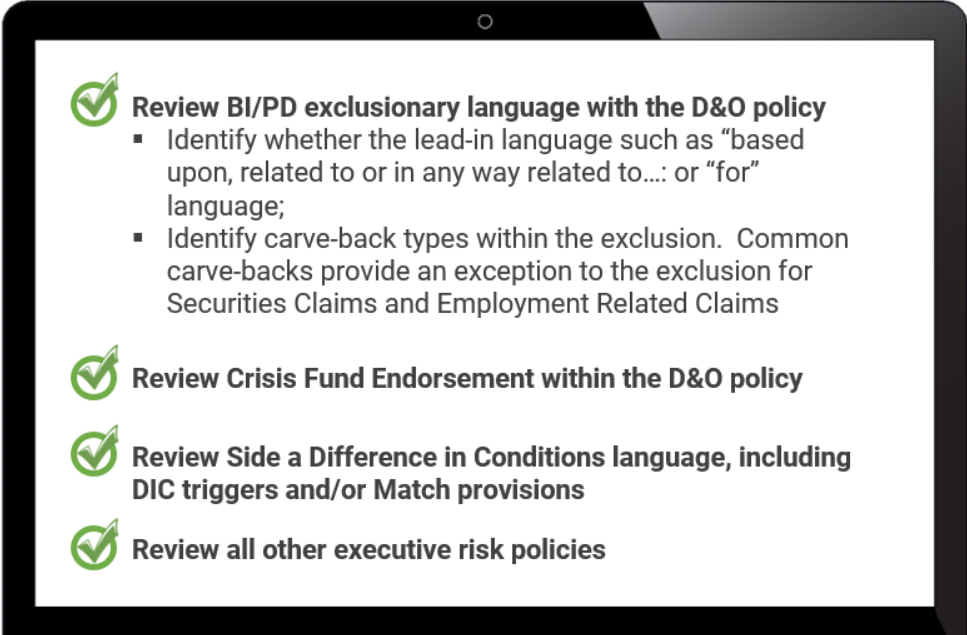
In addition to reviewing the D&O Liability policy, McGriff recommends insureds review all executive risk lines of insurance, including Special Crime, Employment Practices Liability and Cyber. Special Crime policies provide coverage for kidnap, ransom and extortion demands as well as crisis management expenses associated with an insured event. They may contain sub-limited amounts for evacuating expatriates to their resident country as well as evacuating insured persons to their resident country for security-related reasons. Though the actual threat or evacuation of insured persons as a result of a pandemic might be highly encouraged by countries and insureds alike, a pandemic-related evacuation would not trigger coverage unless it is a security-related event.

With many companies imposing travel restrictions and work-from-home policies, we also expect to see an escalation in threats to network security. Many security advisors also expect to see a rise in phishing emails as employees seek to stay informed while working remotely. Cyber security experts also warn of business interruption as a result of compromised computer systems. Companies should monitor suspicious activity within their network to ensure timely reporting to their cyber policies.

D&O Underwriting Questions

Insureds can expect an increase in Coronavirus related questions as part of the renewal process as underwriters focus on identifying operational challenges and inadequate disclosures that could lead to event driven litigation. The types of questions to expect range from whether or not the company will change earnings guidance based on the Coronavirus impact to is there a risk of loan defaults or covenant breaches stemming from Coronavirus.

Executive Risk Coverage Checklist:

- 
- ✓ **Review BI/PD exclusionary language with the D&O policy**
 - Identify whether the lead-in language such as “based upon, related to or in any way related to...: or “for” language;
 - Identify carve-back types within the exclusion. Common carve-backs provide an exception to the exclusion for Securities Claims and Employment Related Claims
 - ✓ **Review Crisis Fund Endorsement within the D&O policy**
 - ✓ **Review Side a Difference in Conditions language, including DIC triggers and/or Match provisions**
 - ✓ **Review all other executive risk policies**

For more information about how Coronavirus might impact your executive risk policies or if you have any additional questions, please [contact your McGriff Executive Risk Advisor](#).