

## End of the Fund...End of your Exposure..?

The directors of an investment fund would have arranged Directors' & Officers' ("D&O") indemnity insurance to protect their exposures during their tenure on the Board. However the potential limitations of such cover needs to be understood when a closed ended, or fixed term fund approaches the end of its investment period to ensure that any on-going exposures are also protected.

In many cases we have seen the D&O insurance discontinued once the fund reaches the end of its natural lifespan. This is potentially dangerous and can leave the directors exposed - as they can still face claims for allegations of mis-management or direction (i.e. a "wrongful act") from a wide source of claimants. Such allegations may be for decisions made during the fund's existence (often months or possibly years previously) where it may have taken a period for the claimant to realise and quantify their loss and then commence proceedings against the directors.

D&O insurance policies are written on what is known as a "claims made" basis of cover. This provides cover for claims made (and reported to insurers) during the period of insurance cover only - not when the (alleged) error or omission giving rise to the claim occurred. Once a policy has expired there will be no cover in force in respect of claims that may arise even if the claim relates to decisions made or work undertaken during the period of policy cover.

### What are the options?

For the reasons stated above, the directors should look to continue the protection afforded by the insurance coverage. This may be by means of simple renewal of the policy for a further period of time (often referred to as "run-off" cover). This would be arranged on an annual basis (on the original policy anniversary date) and should be continued for as long as the Board consider themselves at risk for claims being made against them. The premium charged for such run-off cover should reduce year on year as the risk of a claim being made for any wrongful acts reduces.

An alternative may be contained within the existing policy wording. Many D&O policies contain a Discovery Period clause (sometimes stated as an Extended Reporting Period). This provides for an extended period after the expiry of the policy, during which claims can be reported to insurers for allegations of wrongful acts committed prior to the expiry date. This clause can be exercised at a predetermined premium level (as stated within the wording).

Care needs to be taken however as this is usually only available for a fixed period - sometimes only 12 months (occasionally 24 or 36) - and the directors should consider their potential on-going exposure for longer periods. Furthermore, some policies only provide for this in the event of insurers declining to offer renewal (a unilateral version); other policies permit this extension if either the company (i.e. the directors and officers) decide not to renew the policy or if the insurers decline to offer renewal terms (a bilateral version).

The terms and conditions applicable to a D&O policy can be a complex area where advice should be sought from experienced practitioners.