Article
For the fund sector

Vantage

Is too much D&O insurance a bad thing..?
The perils of the "Other Insurance" clause.

Care must be taken when placing your Directors' & Officers' ("D&O") insurance that duplication of cover does not exist - as this can be a cause of huge problems should a claim materialise.

This situation can arise where two (or more) insurance covers exist which, theoretically at least, can provide indemnity to the directors. This may be where the directors elect to purchase a D&O insurance for a client company (say, an investment fund), and where the individuals also have the benefit of an "Outside" Directorships Liability extension ("ODL") under their firm's PII programme (ie, D&O cover for the positions that employees of the service provider will hold as directors of client companies).

The general assumption is that a Board should purchase specific D&O for a fund (or perhaps the GP or fund manager) to protect their exposures for their directors' duties. In such circumstances care needs to be exercised to ensure a potential conflict between insurers does not arise. The vast majority of D&O policy wordings contain an "Other Insurance" clause which states that in the event there is any other potential coverage available to a Director or Officer, such other policy will take precedence over the policy in question. The same exists under Professional Indemnity policies.

In many cases the directors will also have ODL cover available to them, via their employer's PII policy. Problems can arise when both policies contain such clauses, and a danger exists that a claim will be bounced back and forth between the respective insurers before accepting indemnification. The problem is exacerbated with the different wordings used by different insurers, as some provide no coverage when other insurance is in place, some pay a pro rata share, and others apply only in excess of the limit of indemnity of the other. The latter being more common. Matters really become complicated when Policy A has a "pro-rata" application and Policy B has an "in excess" wording, but this is probably too much to go into here!

It is generally accepted that where an investment fund purchases specific D&O coverage for its Board of Directors that the policy is designed to be the primary policy cover, and any other insurance (typically ODL cover) is there to provide additional cover in excess of the specific policy.

The important point however is to identify this and clarify that the fund's policy is the primary insurance. This can be achieved either by (i) the **removal** of the Other Insurance provision in the fund's cover or (ii) **amending** the Other Insurance clause to specifically note that the policy is the primary cover and should there be any other insurance coverage available then that can be accepted **in excess** of the primary policy. This would then provide a greater degree of protection to the directors as they will have an overall higher (aggregate) limit of indemnity.

One other important point to note is that some Other Insurance clauses widen the scope of seeking protection elsewhere, in that, as well as commenting about any other insurance cover being available, some also make reference to any "other indemnity" being available. It should be stressed that this should be avoided as, in theory, a company's Articles of Association would permit indemnification of the directors (subject to Jersey law). In such circumstances, you could be arguing with your insurers on this matter – which is not an ideal situation.

Vantage Insurance are a specialist broker to offshore services providers and have a great deal of experience in providing Professional Indemnity and Directors' & Officers' Insurance solutions to a wide range of clients. We have the necessary expertise and experience to identify punitive policy exclusions and work hard to ensure that Directors fully understand the risks, to ensure that the policy cover provided suits the needs for the risks and the reason that it is purchased.

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Version: 4 (September 2020)