

## D&O coverage tougher to get (March 20, 2009)

Industry's turmoil causes pullout by majors

...and tightening of coverage by remaining carriers. 300% premium increases common

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Remember that old saw about a banker being the guy who'd lend you an umbrella when it wasn't raining? Directors and officers insurance carriers may have inherited that description these days, because now that the banking industry is experiencing a deluge, D&O policies are looking like somewhat leaky umbrellas. That is, if your bank can get the coverage.

The umbrella analogy isn't a commentary on any particular carrier's logotype, but on the overall state of the D&O market for financial institutions, including community banks. It sums up views on the D&O market from Karen Kutger, vice-president and head of the Philadelphia branch of Professional Risk Solutions, a wholesale insurance brokerage, based in Somerset, N.J., specializing in D&O and related coverages.

### Major change in carrier attitude

Kutger says current industry conditions have so changed the atmosphere in banking D&O that her firm is calling on client banks a good four months before their existing coverage runs out to review options for coverage and pricing—and availability—for it. Some community banks have already been hearing of nonrenewals by their D&O insurers, she says. How quickly a bank gets the word hinges somewhat on state-law requirements. In Pennsylvania, for instance, notice of dropped coverage of this sort must be sent at least 60 days prior to termination of the policy by the insurer; other states require 90 days' notice. (Policies tend to run out at the change of calendar quarters, as they are written to fiscal years, Kutger explains.)

"There's been a big change from just two years ago," says Kutger. Professional Risk Services has been seeing clients' existing carriers proposing rate increases of as much as 300%, she says. The impact is even greater when one considers that at the same time, the carriers are offering policies that lack regulatory coverage and "prior act" coverage.

The trend, which began to show itself in April 2008, is most pronounced among the largest D&O carriers, according to Kutger.

"The big guys have pulled out and aren't writing any new insureds," she explains. "It is the market in general that they have soured on." Those mega carriers won't write new coverage "at any price," says Kutger. Smaller carriers that will write new clients, albeit at higher rates, may still shy away from community banks with "issues." Kutger notes that one carrier that was courting community banks fairly actively a few years back now routes every request for new coverage to its overseas headquarters for approval.

An exception to the general trend is the ABA-sponsored D&O program that is underwritten by Progressive Casualty Insurance Co. Kutger says that program, is still active.

When the D&O market was flush, and carriers vying for banks' accounts, they were adding various extras and features to their policies to entice new insureds. Kutger says the extras are falling by the wayside now.

Another vestige of the flush days has been going away, too. Some banks have enjoyed three-year policy periods—most of these were offered in 2004 and 2005. There was a pullback beginning in 2006, however. As a result, the three-year policies have been running off.

Don't lose your tail!

A significant issue for banks who, one way or another, must change their D&O carrier is their policy "tail."

D&O insurance is usually provided on a "claims made" basis, in insurance parlance. What this means, says Kutger, is that coverage is only triggered when a claim is made while the policy is in effect.

In other words, once the policy expires, even if an act is discovered or is the target of a suit, the bank can't file a claim under the policy.

It is possible to purchase a "tail," however. A tail is an extended reporting period. For the duration of the tail, a bank can file a claim—but the claim must still relate to an act occurring during the period of the original policy. The tail buys the right to report a claim that was covered; the tail does not extend the period of actual coverage.

Understand that even if there is no gap in coverage between the time one D&O carrier rolls off and another comes on, there is generally no coverage for acts occurring in the original policy period, after the first carrier rolls off, unless a tail has been purchased, or continuity has been granted, which is not likely for a bank these days. Likewise, if the existing carrier (called "the incumbent carrier") changes the terms of the policy on renewal, the coverages it drops stop, going forward, even if they were covered by the previous version of the policy, in the absence of a tail.

Kutger says that many community banks are hoping to obtain tails of three to six years duration from their old carriers, or under their previous policies from current carriers who have made changes to their new policies. She explains that the statute of limitations for most acts that would fall under D&O coverage is six years.

Dark side of "Side A"

One element of many D&O policies is "Side A" coverage. Side A covers directors and officers in situations where they are not indemnified by their company. However, typically, Side A coverage and other aspects of the D&O policy all draw on the same policy limit. So if other coverages draw down on the limit, that much is not available for Side A claims.

Individual directors who want more coverage for claims they can't be indemnified against have had the option of obtaining standalone Side A coverage. However, Kutger says that while such standalone policies continue to be available, they are very, very expensive in the current market.

&ldquo;It&rsquo;s getting very scary,&rdquo; Kutger says. BJ

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