

“

*It's difficult to predict how shareholders and financial markets will react to the ongoing COVID-19 outbreak, but taking proactive steps can help limit risks for directors and officers.*

”

**MICHELLE SARTAIN**

Financial and Professional Liability Leader, US/Canada  
Marsh



*Being prepared and well-informed when it comes to assessing the impact and liabilities associated with COVID-19 is the best way to mitigate against current and future risk.*



**JAY KASNER**

National Head of Securities Litigation  
Skadden, Arps, Slate, Meagher & Flom, LLP



*In this challenging D&O market, it is more important than ever that companies build relationships with the insurers, prepare early for the D&O renewal process and understand their obligations under their D&O policy.*

**SARAH DOWNEY**  
D&O Product Leader  
Marsh





*Directors and officers are best served by considering a range of constituencies and interests when navigating a company through the COVID-19 landscape, including shareholders, lenders, employees, vendors and counter-parties.*

**JASON HALPER**

Chair, Global Litigation Group  
Cadwalader





# D&O LIABILITY – NAVIGATING THE NEW REALITIES

APRIL 29, 2020

# D&O LIABILITY – Navigating the New Realities

## Today's Speakers



**MICHELLE SARTAIN**

Financial and Professional  
Liability Practice Leader,  
US and Canada  
**Marsh**



**SARAH DOWNEY**

Directors and Officers Liability  
Product Leader  
Financial and Professional  
Liability Practice  
**Marsh**



**JAY B. KASNER**

National Head of Securities  
Litigation  
**Skadden, Arps, Slate,  
Meagher & Flom LLP**



**JASON M. HALPER**

Chair, Global Litigation Group  
**Cadwalader**

# Q&A

Audience members can submit questions for the panel by typing them into the window at the bottom of your computer screen.

If a question is not answered during today's program, someone from Marsh will respond as soon as possible.

# D&O LIABILITY – Navigating the New Realities

## Polling Question #1



How familiar are you with the changes in the D&O rate environment?

**And the choices are:**

Very familiar.

Somewhat familiar.

Not at all familiar.

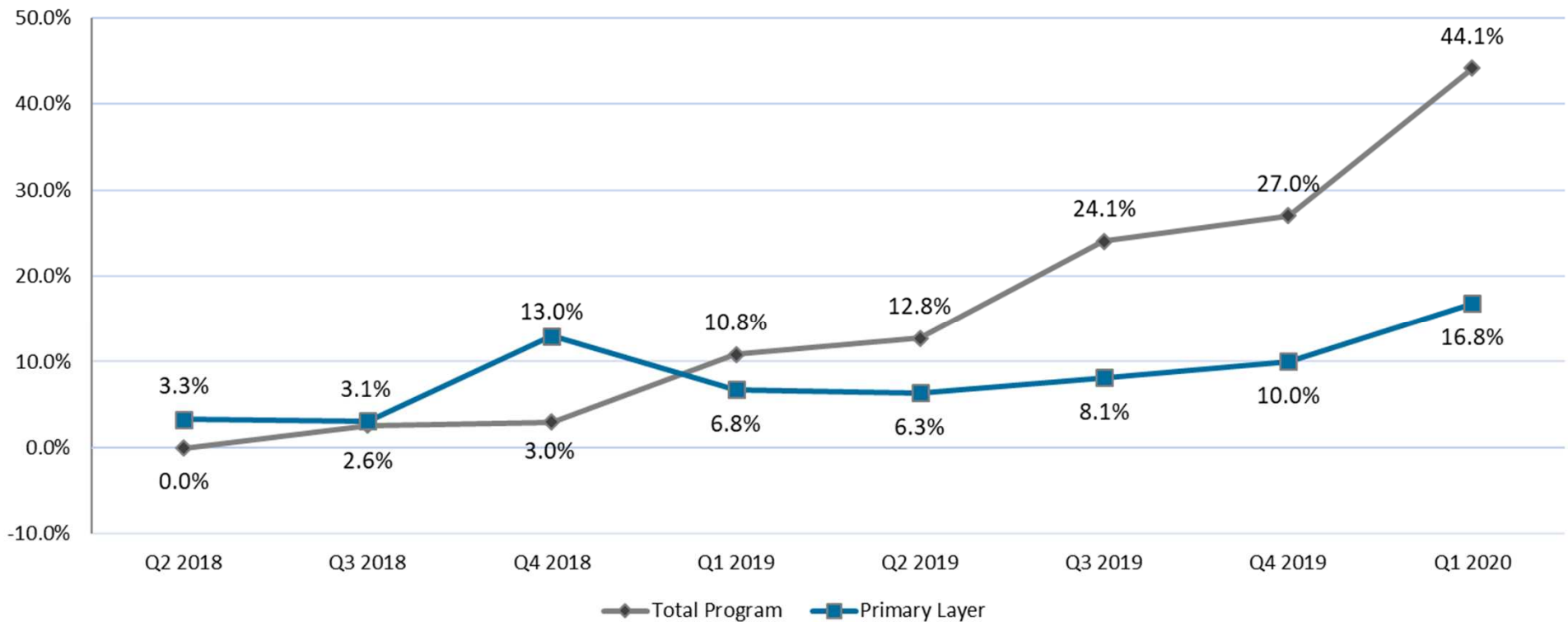


# D&O LIABILITY – Navigating the New Realities

## Overview Traditional Rate Analysis Changes at Renewal

### US PUBLICLY TRADED CLIENTS AVERAGE HISTORICAL RATE (PRICE PER MILLION) CHANGES

D&O and Side A-Only programs



# D&O LIABILITY – Navigating the New Realities

## Public Company D&O Market Conditions

### LITIGATION AT AN ALL TIME HIGH

- Traditional securities suits.
- Merger objection.
- Derivative actions.
- Event-driven litigation.
- Plaintiffs Bar.
- Cyan Supreme Court decision.
- 862 SEC enforcement actions.
- Whistleblower reports.



YEARS OF  
WIDESPREAD  
PREMIUM  
REDUCTIONS AND  
BROADENING  
COVERAGE  
“Soft market  
conditions”



DECLINING  
NEW CUSTOMERS



# D&O LIABILITY – Navigating the New Realities

## Corporate Issues Surrounding COVID-19



Financial Health



Business Interruption Insurance



Preserve Human Assets



Supply Chain Issues



Review Compensation Plans



Strategic Threats and Opportunities



Regulators / Disclosure Deadlines

# D&O LIABILITY – Navigating the New Realities

## SEC Advice for Public Companies

- Carefully consider their activities.
- Refrain from security transactions with the public until the COVID-19 risk is fully disclosed.
- Take necessary steps to avoid selective disclosures and to disseminate information concerning COVID-19-related risks broadly.
- Not overstate their preparedness to handle the crisis or downplay the material impact of the pandemic on their business.
- Carefully craft their forward-looking statements to minimize their risk of liability.



# D&O LIABILITY – Navigating the New Realities

## Recently Filed COVID-19 Securities Litigation



### Litigation Case Study #1

- Plaintiffs allege that a cruise line failed to disclose the potential impact of COVID-19 on its business, operations, and prospects.
- Alleged company failed to disclose questionable sales tactics, motivated by the desire to hit sales quotas and designed to conceal the risks of COVID-19 to customers.



### Litigation Case Study #2

- Company providing videoconferencing services is already facing shareholder litigation.
- Allegations around overstated privacy protections caused stock price to drop.



### Litigation Case Study #3

- Plaintiffs allege that management made misleading public statements indicating that the company had created a vaccine for the COVID-19 virus, leading to a jump in the company's stock price.
- Stock price plummeted following reports that company had not developed a COVID-19 vaccine.
- There has also been a derivative suit.

# D&O LIABILITY – Navigating the New Realities

## Polling Question #2



**Has your company taken the necessary steps to limit it's exposure to potential shareholder or regulatory actions?**

**And the choices are:**

Yes.

No.

Maybe.

# D&O LIABILITY – Navigating the New Realities

## Key Questions for Consideration

“

*How has COVID-19 impacted your financial condition and results of operations?*

”

“

*In light of changing trends and the overall economic outlook, how do you expect COVID-19 to impact your future operating results and near-and-long-term financial condition?*

”

“

*Do you expect that COVID-19 will impact future operations differently than how it affected the current period?*

”

“

*Do you expect COVID-19 to materially affect the demand for your products or services?*

”

“

*Do you anticipate a material adverse impact of COVID-19 on your supply chain or the methods used to distribute your products or services?*

”

“

*Will your operations be materially impacted by any constraints or other impacts on your human capital resources and productivity?*

”

Source: SEC Division of Corporate Finance Key Questions to Consider

# D&O LIABILITY – Navigating the New Realities

## Polling Question #3



**What are the pricing expectations within your organization for your D&O renewal?**

**And the choices are:**

Premium decreases.

Flat pricing.

Modest premium increases.

Significant premium increases.

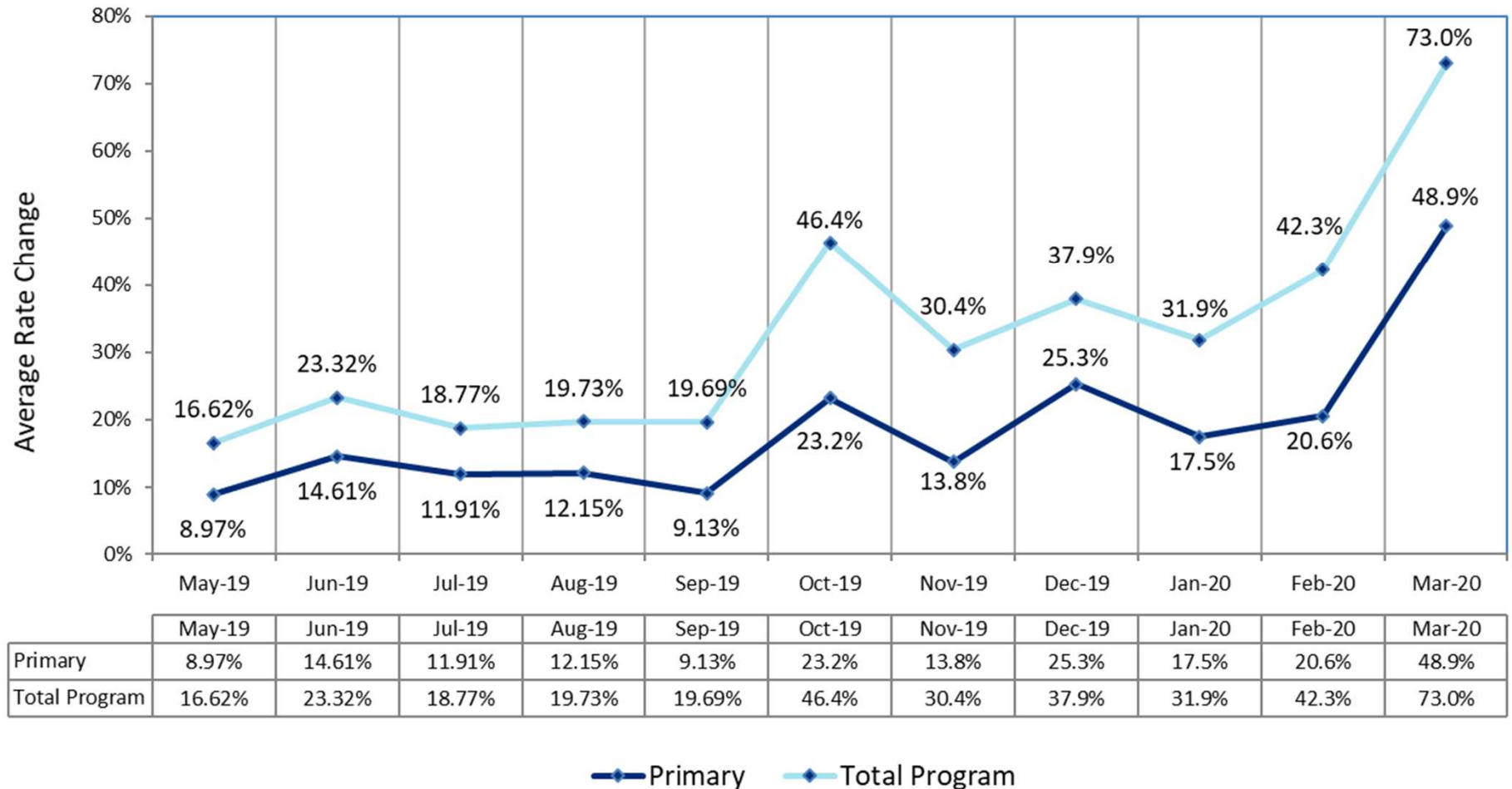


# D&O LIABILITY – Navigating the New Realities

## Public Company D&O Rate Trends

### US PUBLIC CO. MONTHLY D&O RATE TRENDS

Through March 2020



# D&O LIABILITY – Navigating the New Realities

## Coverage and Renewal Recommendations

- Know what your company is doing to assess their COVID-19 exposures and what contingency plans they are implementing.
- Know your policy.
  - ✦ Understand the coverage triggers and reporting requirements.
- Be ready for renewal discussions and questions from underwriters.

### Potential Questions From Underwriters

- In light of the current environment, discuss your company's business continuity plan and any changes made due to the COVID-19 event.
- Discuss the overall enterprise risk management (ERM) structure within your organization- participants, reporting chain to the board of directors, frequency of reporting, crisis management teams, etc.?
- What is your company doing to evaluate its direct and indirect exposure to COVID-19?
- Regarding the company's disclosure obligations, what is the possible impact of COVID-19?

# D&O LIABILITY – Navigating the New Realities Distressed Companies

Shareholder obligations don't fundamentally change:

- Delaware courts have rejected the “zone of insolvency” concept.
- Creditors can sue directors post-bankruptcy on fiduciary claims.



# D&O LIABILITY – Navigating the New Realities

## Salzberg v. Blue Apron Holdings, Inc.

*Salzberg v. Blue Apron Holdings, Inc.*, et al., No. 346,2019 (Del. Mar. 18, 2020), the court held that “federal forum provisions” in corporate charters are facially valid under Delaware law.



# D&O LIABILITY – Navigating the New Realities

## Shareholder Activism Considerations for Public Companies

- Review corporate documents.
- Have a shareholder rights plan on the shelf.
- Focus on cultivating institutional shareholder relationships.
- Consider board process, improvements, diversity.
- Financial and operational aspects of the business.



# D&O LIABILITY – Navigating the New Realities

## Preparing for a More Challenging D&O Market

1



Build relationships with the markets.

2



Establish coverage/renewal priorities.

3



Prepare for your underwriter meetings in advance.

4



Review your policy wording.

5



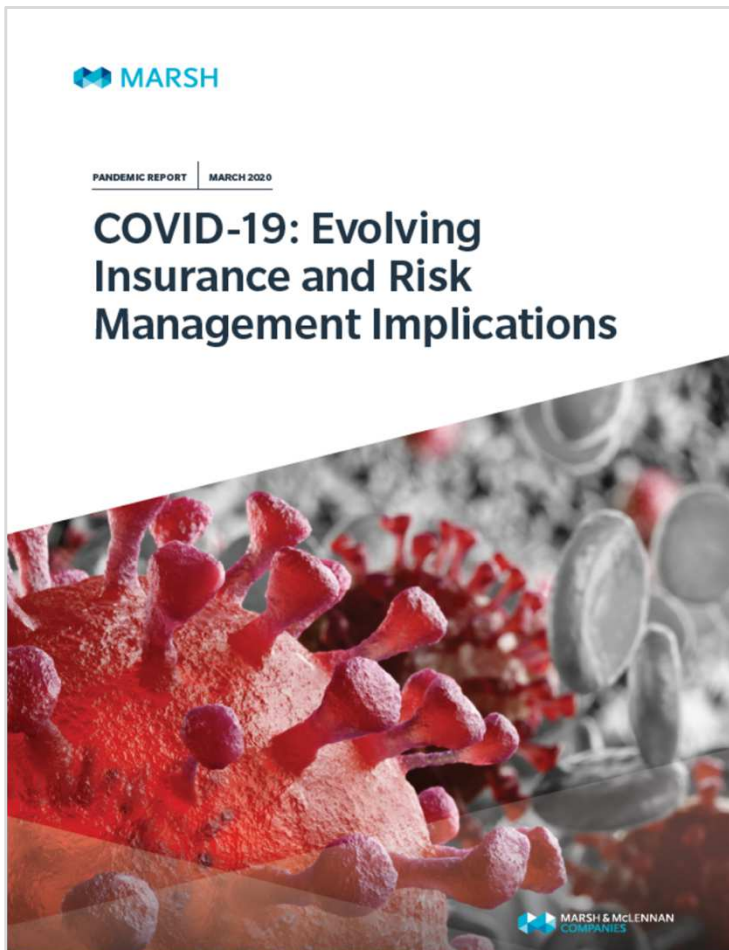
Be prepared to answer COVID-19 related questions.

# Q&A

Audience members can submit questions for the panel by typing them into the window at the bottom of your computer screen.

If a question is not answered during today's program, someone from Marsh will respond as soon as possible.

# Managing COVID-19 Risks



**Visit our Pandemic Risk Hub on [marsh.com](https://marsh.com) for the latest from Marsh and other Marsh & McLennan businesses, including our new report on COVID-19 insurance coverage, claims, and risk management considerations.**





This document and any recommendations, analysis, or advice provided by Marsh (collectively, the “Marsh Analysis”) are intended solely for the entity identified as the recipient herein (“you”). This document contains proprietary, confidential information of Marsh and may not be shared with any third party, including other insurance producers, without Marsh’s prior written consent. Any statements concerning actuarial, tax, accounting, or legal matters are based solely on our experience as insurance brokers and risk consultants and are not to be relied upon as actuarial, accounting, tax, or legal advice, for which you should consult your own professional advisors. Any modeling, analytics, or projections are subject to inherent uncertainty, and the Marsh Analysis could be materially affected if any underlying assumptions, conditions, information, or factors are inaccurate or incomplete or should change. The information contained herein is based on sources we believe reliable, but we make no representation or warranty as to its accuracy. Marsh shall have no obligation to update the Marsh Analysis and shall have no liability to you or any other party with regard to the Marsh Analysis or to any services provided by a third party to you or Marsh. Marsh makes no representation or warranty concerning the application of policy wordings or the financial condition or solvency of insurers or reinsurers. Marsh makes no assurances regarding the availability, cost, or terms of insurance coverage. All decisions regarding the amount, type or terms of coverage shall be your ultimate responsibility. While Marsh may provide advice and recommendations, you must decide on the specific coverage that is appropriate for your particular circumstances and financial position. By accepting this report, you acknowledge and agree to the terms, conditions, and disclaimers set forth above.