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 DOWNNEY**
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.
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.
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

Inadequate insurer pricing for risks assumed
D&O LIABILITY – Navigating the New Realities
Corporate Issues Surrounding COVID-19

- Financial Health
- Preserve Human Assets
- Review Compensation Plans
- Regulators / Disclosure Deadlines
- Business Interruption Insurance
- Supply Chain Issues
- Strategic Threats and Opportunities
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.
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.
Has your company taken the necessary steps to limit its 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
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

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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?
Shareholder obligations don’t fundamentally change:

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

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Managing COVID-19 Risks

Visit our Pandemic Risk Hub on 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.