

Top 10 Questions Legal Departments Should Consider with respect to Insurance Risk

Legal departments serve a critical role in managing the risks that their organization faces. Insurance is an important risk transference mechanism whereby a financial institution can assume all or part of these risks. Insurance policies are important legal contracts that have some specific legal requirements and possible traps. As such, the legal department should be involved in the insurance program from inception and not just when a claim arises.

The top 10 questions that the legal department of an organization should ask when negotiating and entering into an insurance policy are:

1. What are the operational, reputational, liquidity, technology, regulatory, and reputation risks to be transferred via the insurance policy?
2. Which of the identified risks can be insured against, to what extent should they be insured (i.e., what are the policy limits) and at what cost?
3. Who should be the insureds protected by the policy? What are the implications on the policy limit?
4. Who is the best person to negotiate a policy with the insurer? Negotiations may involve requesting endorsements to deal with definitions or terms that are inappropriate to the organization, etc.
5. What mechanisms are in place to ensure that full disclosure is made during the application process in a way that is most favourable to the company (i.e., disclose facts in a way that will enhance the underwriting and maximize the coverage while minimizing the premiums)?

6. When disclosure is being made, how can the company ensure that appropriate legal safeguards are put into place to protect any proprietary, sensitive or privileged information of the company?
7. If a claim or possible claim arises, what steps need to be taken regarding notifications and consults? Where?
8. What is the best way to ensure that the board of directors understands the policies and the limitations of those policies? For instance, any shared policy limits and activities that might cannibalize those policy limits. What risks can and should be covered by additional policies (e.g., pension plan liabilities where the company is the plan sponsor)?
9. If a claim ends up before the courts, what does the policy say about who has the duty to defend - the company or the insurer? What conditions must be met before defence counsel is engaged? How is defence counsel paid? Is there a need for more than one?
10. How are disputes with or "protective" steps taken by the insurer(s) to be dealt with?

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