a few things you should know ...

Insurance and M&A Transactions

This edition of *A Few Things You Should Know* concerns Insurance and M&A Transactions. It addresses some key issues in the way M&A transactions can impact the insurance coverage of the parties involved in the transaction.

- **M&A TRANSACTIONS CAN AFFECT EXISTING INSURANCE COVERAGE**
  Many insurance policies require notification to the insurance company if the policyholder under an existing policy undergoes a change in control, or acquires another company above a certain size. These events can have other effects as well, including the obligation to pay additional premiums to cover the new acquisition, or the conversion of Directors & Officers coverage to "run-off" at a change of control.

- **A CHANGE OF CONTROL MAY REQUIRE THE PURCHASE OF DIRECTORS & OFFICERS "TAIL" COVERAGE**
  Directors & Officers insurance policies typically have a "change of control" provision that converts coverage to "run-off" if the policyholder is acquired, or otherwise undergoes a change of control. That is, there is no coverage for any claims arising from conduct taking place after the change of control, and claims based on conduct from before the change are only covered if they come in before the end of the current policy period. The company can purchase "tail" coverage, often as an endorsement to its existing policy, extending coverage for pre-transaction conduct to claims coming in for several years. The company also would need to purchase new coverage (or be integrated into the policies of its new parent) for claims based on post-transaction conduct.

- **PURCHASERS SHOULD CONSIDER HOW A TARGET'S INSURANCE MAY RESPOND TO ITS PARTICULAR EXPOSURES**
  Transaction documents often disclose, and make representations about, a target's current insurance policies, as well as the policies in effect in the last few years. Whether a target has adequate current insurance is an important consideration, but, depending on the target's particular exposures, the purchaser also should consider whether there is additional insurance coverage that should be reviewed, as well as how the transaction may affect that insurance. For example, is the target involved in long-running litigation that has been noticed under liability policies in effect many years ago, and will the transaction affect the right to access that insurance? Even if there is no present litigation, long-term latent injuries can trigger "occurrence"-based liability policies dating back many years, through the entire injury process. If the target may face this kind of liability exposure, the purchaser should determine whether it has historic liability insurance policies that may provide coverage, and whether the transaction will affect the rights to access that coverage.

- **TRANSACTIONS MAY AFFECT THE RIGHTS TO ACCESS HISTORIC INSURANCE POLICIES**
  "Occurrence"-based general liability policies respond to liabilities arising out of harm during their policies periods, even if the claim for that harm was not made against the policyholder until a later policy period. This is a particular issue with latent injury claims, but even for abrupt accidents, claimants often have multi-year statutes of limitations before they must bring their claims. Thus, a claim may come in after a transaction alleging pre-transaction harm that would trigger a pre-transaction liability policy. A frequent question that arises is whether rights to the proceeds of pre-transaction liability insurance for such claims have transferred in the deal. The answer can depend on the language and structure of the deal, as well as how the state law applicable to the insurance policies interprets the "anti-assignment" clause found in many policies.

- **AN ACQUIRER PLACING ITS OWN PERSONNEL AS DIRECTORS OR OFFICES OF A NEW ACQUISITION SHOULD EXAMINE THE INTERPLAY OF THE MULTIPLE LINES OF INSURANCE AND INDEMNITY**
  While many purchasers will integrate a new acquisition into the acquirer's own insurance program, this is not always the case. Private equity firms, for example, typically maintain separate insurance programs from their portfolio companies. As a result, if such a firm places its own personnel as a director or officer of an acquisition, that individual may be covered under two separate sets of Directors & Officers insurance policies--that of the acquirer and that of the acquired company. In addition, there may be multiple indemnifications available if that individual is sued. Which line of insurance or indemnity responds to a given claim against such a director or officer may depend on how the claimant characterizes the individual's role and alleged misconduct, as well as any language of policies setting out an order in which they respond. Companies should examine the interplay of the multiple sources of insurance and indemnity that may apply in such situations before a claim comes in, to make sure the arrangements reflect the parties' intent, and that there are no gaps in coverage.

- **PARTIES CAN PURCHASE INSURANCE POLICIES FOR ASPECTS OF THE TRANSACTION ITSELF**
  In addition to the effects of a deal on present and historic insurance coverage rights, parties to a transaction can also purchase various types of insurance policies for aspects of the deal itself. Representation & Warranty insurance covers breaches of representations and warranties made by the seller, and can provide flexibility in addressing the indemnification obligations in a transaction. *See A Few Things You Should Know: Representation & Warranty Insurance*. Certain types of transactions may call for specific other types of insurance, including environmental impairment liability policies, political risk policies, and policies that cover the failure to qualify for expected tax or regulatory treatment.

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A FEW THINGS YOU SHOULD KNOW is a periodic publication of the Mergers & Acquisitions practice group of Perkins Coie LLP. Each edition covers a discrete topic related to M&A, including identifying key issues to be addressed and related market trends. We also share our experience-based insight into current approaches to resolving common deal issues. *A Few Things You Should Know* is intended as a high-level issue-spotting guide and quick-reference resource for buyers, sellers and their professional advisors. Please contact the Perkins Coie LLP attorney listed above for more information.