Lowenstein Sandler's Insurance Recovery Podcast: Don't Take No For An Answer

Episode 101:
D&O Insurance and the Regulatory Environment in Trump 2.0 Administration (Part I)

By [Lynda Bennett]

FEBRUARY 2025

Lynda Bennett: Welcome to the Lowenstein Sandler podcast series. I'm Lynda Bennett, chair of the Insurance Recovery Group at Lowenstein Sandler. Before we begin, please take a moment to subscribe to our podcast series at lowenstein.com/podcast or find us on Amazon Music, Apple Podcasts, Audible, iHeartRadio, Spotify, SoundCloud, or YouTube. Now, let's take a listen.

Welcome to Don't Take No For an Answer. I'm your host, Lynda Bennett, Chair of the Insurance Recovery Group here at Lowenstein Sandler, and today, I'm very pleased to present a two-part series that we're going to do to discuss the D&O insurance market and what that's going to look like under the Trump 2.0 administration that has just begun.

We've all seen that there have been a series of executive orders that President Trump has issued, we've seen some volatility in the stock market, and we've also seen a flurry of lawsuits already challenging a number of the administration's stated initiatives and objectives. So, I decided to put together an incredibly talented and diverse group of folks that are functioning in the D&O insurance market, as well as my partner, who is well-steeped in the regulatory environment that is somewhat up-in-the-air in light of the administration change.

So I'm very pleased today to welcome Matt Sabino and John McKenna, who are managing partners at ARC Excess and Surplus. I'm also pleased to have with me today, Justin Kudler, who is a senior vice president, senior claims counsel for ARC Excess and Surplus, and my partner, Scott Moss, who is co-chair of our investment management group here at Lowenstein. So, gentlemen, welcome to the show.

John McKenna: Thanks, Lynda.

Scott Moss: Thanks, Lynda.

John McKenna: Thanks for having us.

Matt Sabino: Yeah, thanks for having us, Lynda.

Lynda Bennett: Happy to do it, and I'm sure that our listeners are going to be incredibly impressed and well-informed after we take a look at both the risk side, what changes are coming down the pipe for policyholders in their risk profile, and then how D&O insurers are responding to that, both with respect to placement of policies and the ongoing claims activity in this space, which has been pretty active over the last couple of years. So, I want to start by throwing out the question to our group of why do companies and particularly fund managers have a reason to be optimistic now that Trump has taken office? Scott, why don't you lead us off?

Scott Moss: Yeah, I'm happy to kick it off. So, they have reason to be optimistic because the last four years saw a lot of new regulation or at least new attempts at new regulation, some of which will return, some of which went final. But there's expected to be a lot less new regulation, and there'll likely be a change in priorities and enforcement. So how optimistic you are may depend upon exactly what kind of financial institution you are, and there's some probably lessons we could gleam from Trump 1.0.

So financial institutions that thought the Securities and Exchange Commission would go away or the securities laws of the United States would go away, that didn't happen, and it's not likely to happen now. There were still prosecutors, there was still enforcement. Most of the staff at the SEC stayed the same, but the people at the top changed. So priorities can change, enforcement priorities especially can change, so they have reason to believe that the phrase rulemaking by enforcement won't happen as much, but enforcement will still happen but probably in more egregious situations where it's more clear after guidance was issued that the advisor or the broker or the financial institution otherwise was doing something wrong or should have known they were doing something wrong.

But it didn't go away in 2016 through 2020, and it probably won't totally go away now, but fund managers may not be as much of a focus. More gray areas may not be as much of a focus and there may not be as many tack on claims where something was an obvious violation of law, and then the SEC tacked on a few other claims that were less obvious violations of law, but they could because they were going to settle the first claim.

Lynda Bennett: Yeah, we're really in a strange situation because Trump was in, then he was out, and now he's coming back in. Usually not what we see. Are you seeing or hearing or feeling anything different in the messaging in the early days now of his second administration where you're going to see something quite different than what he did in his first four years? Separate and apart from what Biden did, is there anything that you're hearing in the early days here that makes you think he had some lessons learned or is going to pivot his focus in administration two?

Scott Moss: So, in my world, it's actually been pretty organized, and I'd say actually one difference is in 2016, it was more unknown and less organized. And that may seem weird to some people to say because some of the executive orders it could be argued weren't so organized or chaos-ensued, but the acting chair of the SEC now is a known quantity. It was somebody that was already a commissioner. The person that was elected to be appointed, which will probably happen over the summer, again, a known person, a known former commissioner. So, they're not appointees that have never run a government agency before, have never been in government before, so in that way, it's more organized and a little bit more, I don't want to say certain because there's plenty of uncertainty, but a more known quantity. They've been in the SEC before, we've seen them before, they've spoken publicly before. We know what their priorities are, we know where they disagreed with Gensler, the prior chair. We know where they agreed with some of the things that the SEC did.

Lynda Bennett: So, Scott, you talked about certainty. Matt or John, that's music to the ears usually of the insurance industry. Are they buying it or what's the finger on the pulse of how underwriters are feeling about this administration change and some of the things that Scott just talked about?

Matt Sabino: I'm sure from their viewpoint, they're almost viewing it almost as a certainty that there's going to be more favorable viewpoints towards corporations. And even like Scott had mentioned, you had known entities, known individuals that are going to be part of Trump 2.0 from the SEC standpoint. You have people like Hester Peirce who is a Republican commissioner. Some of his dissenting opinions that he's had in the last four years dealing with investor protections, it being outweighed by almost political agendas with regard to things like climate enforcement, things like that, the underwriters in the market is going to see that fund managers are going to see that and they're going to know what they're dealing with. Obviously, Paul Atkins and his viewpoints on being a crypto-friendly kind of individual and things like that, there is I think from the underwriting community a viewpoint that the SEC rules going forward will prioritize more investor protection, retail investor protection specifically, and so I think that's a known quality of Trump 2.0 and the SEC.

Lynda Bennett: John, are you seeing the same thing? And also, if you can comment on if there's a more positive feeling about certainty and less regulation, what's that going to translate into for policyholders as they're coming up particularly in their renewals this year?

John McKenna: Yeah, I do agree with Matt. The flip side of that is you still have a number of regulatory claims in the pipeline that these markets are still dealing with from the past, not even the past four years, sometimes going back five or six years on some of these matters, whether it was an FTC matter, antitrust, DOJ matter. And to Scott's earlier point, to shifting of priorities, while the underwriters may not be as focused on, let's say for example, in the ESG type matter, I think there are other matters that they may be focused on now going forward. I think no matter who's in office, there is regulatory risks. I think part of that, the nature of our government, you have a lot of people who are being paid to ultimately protect the consumer, to Matt's point. But I think no matter who's in office or what the priorities are, it's something that the underwriters are going to be concerned about.

Lynda Bennett: Yeah, well said. One of the things, I've mentioned it before, it's a very odd dynamic to have Trump in, Biden in, Trump back in, and John, you mentioned ESG, we're also already seeing some early legal actions on DEI, right? So, in some ways, companies are getting caught coming and going. They implemented all of these policies to comply with what the Biden administration was putting out there both on ESG and DEI, they scrambled to get all of those policies in place, and now Trump has come back in and potentially is going to have all kinds of legal actions being taken saying, "Why are you doing all of these things?" And so how are the underwriters thinking about just the flux nature of those very important risks that seem to be shifting with the sands?

John McKenna: It does seem to be an interesting discussion, at least on the use of corporate assets towards some of these policies, doesn't it? I think that Matt had something to say as an owner.

Matt Sabino: And I was going to say, you're seeing larger fund managers and asset managers, like Northern Trust Asset Management just the other day said that they were going to be withdrawing from an investor group that dealt with climate associated measures. I think from the underwriting community standpoint, honestly, you'll probably just see less questions related to ESG and DEI in underwriting meetings, but there's still historical worries because how to deal with that historical investment approach. You can't just exit a market and just withdraw all capital from DEI or climate focused types of initiatives because you obviously need to ultimately worry about investor returns. So, the quick change and the jumping back and forth is something that underwriters are going to pay attention to. So, it still comes down to an underwriting exposure because we deal with claims-made policy like John had referenced before, but it's going to be interesting to see how much of a mentality there is going to be going forward.

Lynda Bennett: And Scott, what are the funds to do when they were told, "Do this," and now are being told, "Don't do this."

Scott Moss: Adjust. It's an ever-changing world, so funds adjust. They adjust to market demand, they adjust to client and investor demands, they adjust to regulatory demands, so they adjust. And sometimes, a great investment today is not a great investment tomorrow, so they change, they adjust.

Lynda Bennett: And so, we've got just a couple of minutes left here on part one of our series, and I'd like to kick it back to John or Matt to talk about the thing that my clients care most about. With all this less regulation coming in, am I going to see lower premiums and lower self-insured retentions and perhaps elimination of some of the sublimits that were starting to creep in on some of the regulatory specific risk exposures?

Matt Sabino: So, I'll jump in real quick. I think at the end of the day, we're still dealing with the market and the insurance market that has a lot of excess capacity. We've seen the software market for the last couple of years now being driven by excess capacity and carriers willing to hook more capacity up and on a primary basis, and perhaps with the drawback in regulatory type of restrictions, more and more carriers are going to be willing to offer primary limits, right? Higher limits from a regulatory standpoint, pre-claim, look back coverage, things like that, which to be honest, looking at it from a microeconomic standpoint, supply-demand, you have more supply, prices go down. So, I just don't know how much further they can go, because the claims are still there. That's the interesting thing about this whole life cycle that we're dealing with in terms of the D&O market, is that litigation is there. So, it's going to be interesting-

Lynda Bennett: Well, we lawyers have to make money some way, Matt. We've got to eat. We've Got to eat. Come on, Matt. Go ahead, John.

John McKenna: The interesting part about the regulatory coverage is it's so different for industry and for a public versus a private company. So, for asset managers, it's pretty straightforward. An asset manager is a fund, it's a blended policy. I would argue probably some of the broadest coverage is found in those policies. For a broker dealer or a bank, very different in terms of E&O versus D&O and the availability of the coverage. A public company, more limited in regulatory coverage, at least to the entity. But I would say one thing that seems to come up every six or seven years is the topic of entity coverage for regulatory matters sometimes, and can you get that on a look back basis? So, if you do have a subsequent securities class action or a derivative matter, can you get some of those costs covered? For a private company, I think it's something that is readily available and really should always be looked at. To me, it's the major exposure for the private company, especially one that's closely held.

Lynda Bennett: Great point, and Justin and I are chomping at the bit, and next time when we come back to continue our conversation, we'll get into the claims. And I also want to just touch on, Matt, you mentioned it before, crypto. Let's talk a little bit about trade, some of the trade policies that Trump has put out there, and also the re-emergence of SPAC deals again, we'll touch on that, but thank you all very much for joining us. As I mentioned at the top, we've got lots of juicy topics to cover. I think we've hit on some really important risks and some of the changes that we may see coming, and when we come on back next time, we'll talk about those couple of topics, and then Justin is going to tell us how to get the carriers to show me the money to get coverage from all these claims that are already out there and those that are going to be coming down the chute again. So, thank you for joining me, and we'll have you come on back for part two of this.

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