

Practical Insight: Representations & Warranties Insurance

The use of representations and warranties insurance for M&A transactions has been growing rapidly internationally and is seeing increased use in Canada. Our overview of the representations and warranties insurance process offers practical insights into how to obtain it and to integrate the insurance process into your transaction.

Finding an Insurer

Transaction Due Diligence (Prior to Underwriting)



Audited or reviewed target financial statements are generally required



Buyer should conduct thorough diligence and document it with formal reports



Transactions are analyzed by insurers on a case-by-case basis

QUICK TIPS:

- Rare for insurers to proceed without legal, financial and tax DD reports
- Insurers prefer a transaction with nationally-recognized advisors
- The more written diligence, the better

Obtaining a Quote (4-7 Days)



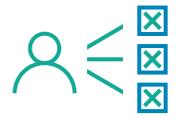
Quotes are obtained through brokers



In an auction, multiple bidders may call the same brokers



Potential insurers often review the target information memorandum, target financials and draft transaction agreement to provide a quote



Scope of coverage will affect premium and quotes will contain exclusions

QUICK TIPS:

- Using a broker familiar with the product can help navigate the process
- Ensure that primary deal risks are not excluded from policy under the quote

Due Diligence Access (4-7 Days)



Underwriting process begins following selection of an insurer and exclusivity



Insurer will review buyer's diligence (for buy-side policies) or seller's process and response to buyer's diligence requests (for sell-side policies)



Insurer will review the data room

QUICK TIPS:

- A well-organized data room, and only providing target diligence material through it, will speed the insurer's review
- The sooner you get diligence reports to the insurer, the faster it can complete underwriting and not hold up closing

Working with your Insurer

Underwriting Call & Follow-Up Questions (4-7 Days)



Underwriting call covers all areas of typical transaction diligence, focusing on quantity/quality of diligence/disclosure



Insurer will ask buyer and its advisors what issues arose during diligence, and how buyer got comfortable with associated risks

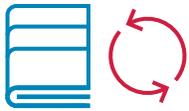


Questions may be provided in advance, and insurer will have counsel on the call

QUICK TIPS:

- Insurer comfort is often increased when seller has "skin in the game," i.e., is liable for initial losses
- Organized, concise presentation of information on underwriting call is important
- Have appropriate advisors on the call so no follow-up call is necessary
- Underwriting call can go for two or more hours, so block time appropriately
- Insurer wants buyer's diligence to go beyond "getting a rep"

Negotiating the Policy (Concurrently)



Policies have become more standardized, and consistent/compatible with transaction agreements



Draft policy often provided just before or after underwriting call

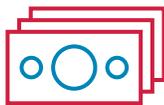


Policy will contain a lot of boilerplate and common terms and only certain items are typically negotiated

QUICK TIPS:

- A sophisticated broker and attorney can be very helpful in understanding and negotiating the policy
- Consider your deal leverage to get items excluded from the policy covered under the indemnity in the transaction agreement

Binding (At Signing or Closing)



A non-refundable portion of the premium must be paid to bind at signing (e.g., 10%)



Insured will need to sign a reps letter (confirming that there are no known undisclosed breaches)

QUICK TIPS:

- Can typically bind at signing instead of closing, even if there is an interim period between signing and closing

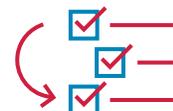
Bring-Down Call



Bring-down call with the insurer just prior to closing to confirm no new issues



A bring-down reps letter must be provided



Must report any transaction agreement amendments, updates to diligence, or material matters that arose after signing

QUICK TIPS:

- Fewer surprises mean fewer delays, so keep the insurer informed during the interim period

Claims

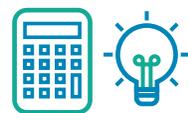
After Closing



Policy will provide the procedure to follow



Broker should walk the insured through the process



Insurer will sometimes have counsel involved to evaluate the claim

To find out more about leveraging Representations and Warranties Insurance for M&A transactions, please contact:

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