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Session 303

Going Out to Bid with your Insurance Program

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Ellen R. Dunkin, Senior V.P./Associate General Counsel - Crump Group
David Gilmartin, Associate General Counsel - The Joint Commission
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Overview

- Current market conditions
- Why go out to market?
- What are you putting out to market?
- When/how often to go out to market?
- Who can help in the marketing process?
- Evaluating your broker
- Risks in the application process



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Current Market Conditions

- Is the market hard or soft – or somewhere in between?
- Hard market underwriting is selective
 - Most hardening is in CAT property exposures in coastal areas that are prone to wind and earthquake losses
- Volatility in markets—moving toward a hardening cycle
- Markets tend to harden in a poor economy; however:
 - Contraction
 - Surplus replenishment in reinsurance sector
- Spring/Summer Midwest storms could be a tipping point to hardening markets in the U.S., but not globally



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Why Go Out To Market?

- Considerations
 - Financial
 - Service
 - Coverage
 - Changes in the insurance market
 - Changes in the law
 - Changes in risk
- Other reasons for change
 - New management
 - Restructuring/acquisitions/divestitures



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What is Up For Marketing?

- All programs?
 - P&C
 - D&O/Management Liability
 - Benefits
- Broker selection at the same time?



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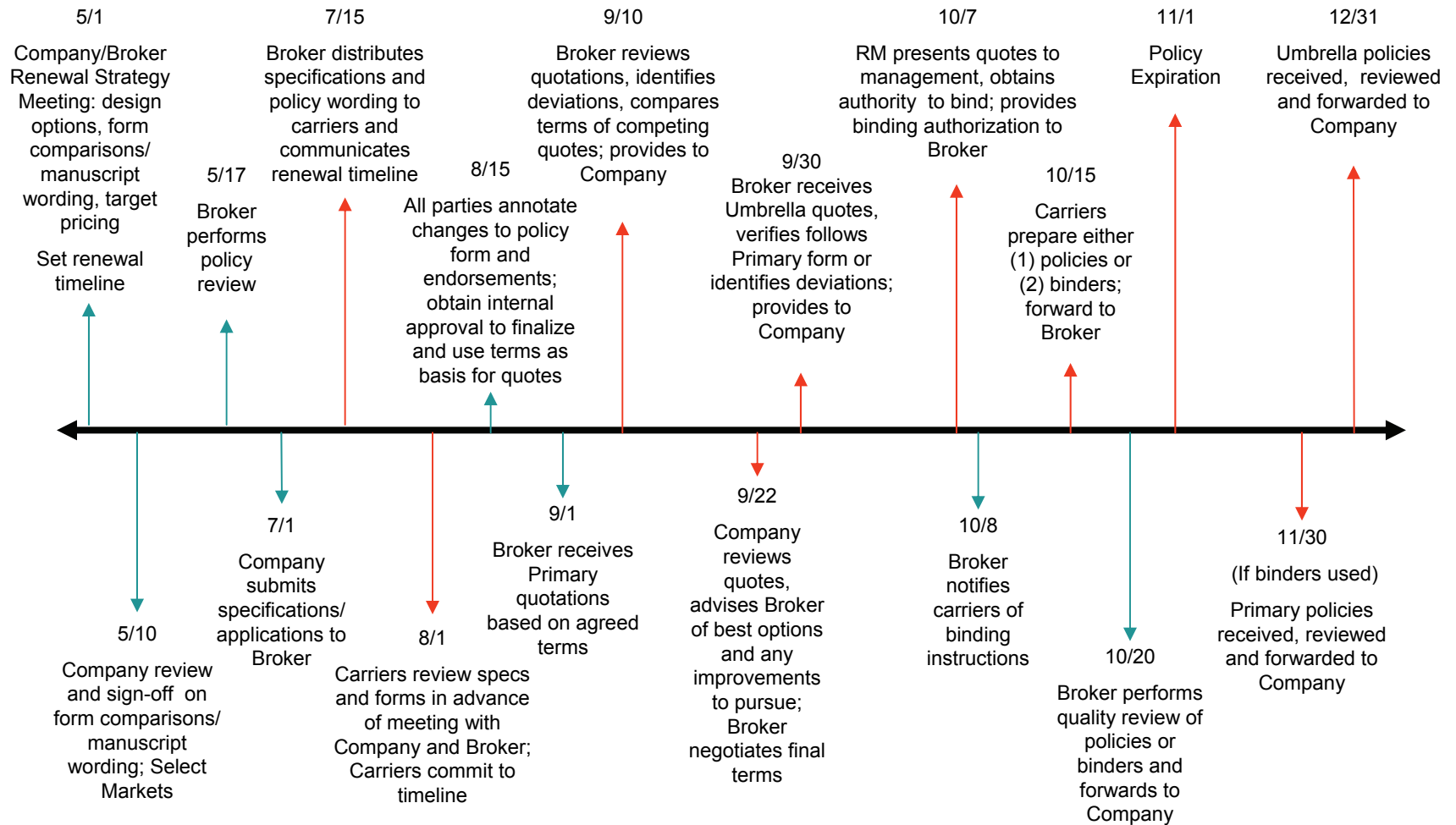
Timing: When/How Often To Go To Market?

- Broker advice for the “ideal”:
 - Three to five years
 - Process should start 6 months before the next renewal
 - When you renew also impacts the timing and your expectations
- Exceptions



INSURANCE PLACEMENT CYCLE
Based on November 1 Effective Date

█ Milestone
█ Key Activity



- 150 to -60 Days **-45 to -30 Days** **-15 to 0 Days** **0 - 30 Days**



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Preparing for the Marketing Process

- Different methods and levels of difficulty
- Setting company expectations



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What Do You Need to Supply to Your Broker?

First need to ask:
“What type of coverage is being
placed?”

(see Exhibit 1)



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Key Questions

- Is this a new placement?
- Is this a renewal?
- Is your company the same as last year?
Have you had any acquisitions/divestitures?
- Are you public or privately held?
- What business are you in?
- What is the state of the market? Hard or soft?



Pricing Strategies

- Be thorough when providing underwriting information
- Commit to a culture of safety and be able to demonstrate
- Proactive claim management
- Review limits of coverage?
- Take on more of the risk?
 - Higher retentions
 - Loss sensitive plans
 - Alternate risk placements (captives, retention plans, etc)
- Creative Solutions for Reducing Costs
 - Self-Insurance
 - Captives or Rent-A-Captive
 - Group Retention Program
 - Understand your risks and loss history
 - Total cost of risk



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Who Can Help with the Bid Process?

Use of Broker or
Risk Management Consultant



Broker: Insurance Placement Services

- Evaluating exposures and coverage specifications
- Advice on changes in your business and impact on your program
- Identification and selection of insurers
- Develop and structure specifications to insurers
- Access to special coverage or programs
- Analysis of claim history and potential impact on renewal
- Negotiation with underwriters – coverage and cost
- Benchmarking on renewal costs, retentions and limits for similar organizations
- Advice on trends in coverage/exclusions wording
- Maintaining relationships with insurers
- Servicing insurance policies:
 - Rates/premiums confirmation
 - Policy language review
 - Coverage questions
 - Claims reporting
 - Claim negotiations and settlements
 - Certificates of insurance

(see Exhibits 2 & 3)



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Broker: Risk Management Services

- Risk analysis, assessment and evaluation
- Identification of new and emerging exposures
- Assessment of insurer financial stability
- Loss control advice and recommendations
- Claims handling assistance and auditing
- Guidance on insurance and indemnity contract clauses
- Customized policy language development
- Financial risk modeling / actuarial studies
- Property valuation assistance
- Educational seminars



Third-Party Consultants

- Using third-party consultants to conduct a market assessment or RFP for broker services
- Can be helpful if you do not have the resources to dedicate/expertise in evaluating carrier proposals or searching for/evaluating a broker
- Make sure if you use a third-party:
 - Their selection criteria are aligned with your risk management goals
 - You help define your selection criteria
 - They do not have a bias toward a certain broker that would beget decisions that do not align with your company's best interests
- www.srmcsociety.org



Use of Broker/Risk Management Consultant

Advantages

- Comprehensive risk management program & services
- Improved scope of coverage
- Restructure/consolidate coverage
- Competitive insurance premium rates
- Improved financial stability of insurers
- Improved claims administration
- Provides support when there is a need for additional resources

Disadvantages & Challenges

- Additional cost
- Conflicts of interest (insurer/insured)
- Clarifying relationship (fiduciary or otherwise)

(see Exhibit 4)



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Evaluating Your Broker



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Why Would You Change Brokers?

- Commitments consistently not being met
- Lack of proactive service
- Unusual amounts of key account service personnel turnover
- Uncovered claims for unaddressed exposures occur
- Problems do not go away
- Corporate vendor standards for review frequency



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Top 10 List

What to look for in an Insurance Broker



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1. Knowledge/experience of the account executive and service team
2. Availability of specialty practices
3. Accessibility to broad resources
4. Ability to syndicate large exposures (for larger accounts)
5. Communication
6. Responsiveness
7. Negotiating leverage
8. Pricing
9. Knowledge of customer's business
10. Claims experience



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Requests for Proposal for Broker Services

- What should you include in your RFP?
- Pricing strategies

(see Exhibit 5)



RFP Materials

- What you should have on hand is determined by what type of RFP you are submitting for response:
 - Capabilities presentation
 - Full program review
 - Conceptual program review
 - Marketing exercise
- The more information you would like/the more you want to test the broker, the more information you'll have to relinquish



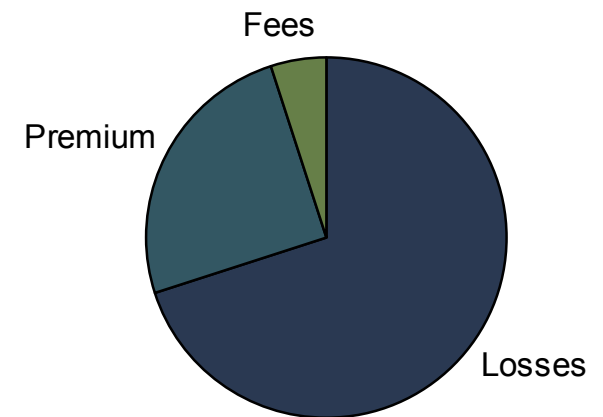
RFP Materials (continued)

- Generally, you should make the following items available for review:
 - Policy information, including carriers
 - Policy summary
 - 5-year loss history
 - Property locations and values, especially for those in CAT areas
 - Loss control measures
 - Current broker/fee (most companies do not provide this information)



Broker Compensation Strategies

- Fee
- Commission
- Contingent Commissions
- “Enhanced Commissions”





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Risks in the Application Process

Coverage Denials



Coverage Denials



- Breach of Warranty = Voids policy
- Misrepresentation = Policy “voidable” if it is fraudulently made and material to the risk
- Warranties are not favored

(see Exhibit 6)



Warranties

- A statement, description or undertaking by an insured of a **FACT** appearing on or incorporated in the policy
- Two Requirements:
 - Be within the policy
 - Intend the insured's rights to depend on the truth of the representation



Warranties

- *Steptore v. Masco Constr. Co.*, 619 So. 2d 1183 (La.App. 1 Cir. 1993)
- *Brynildsen v. Ambassador Ins. Co.*, 274 A.2d 327 (N.J. Sup. Ct. Law Div. 1971)
- *Physicians Ins. Co. v. Morehead*, 623 N.E.2d 154, 157 (Ohio Ct. App. 1993)





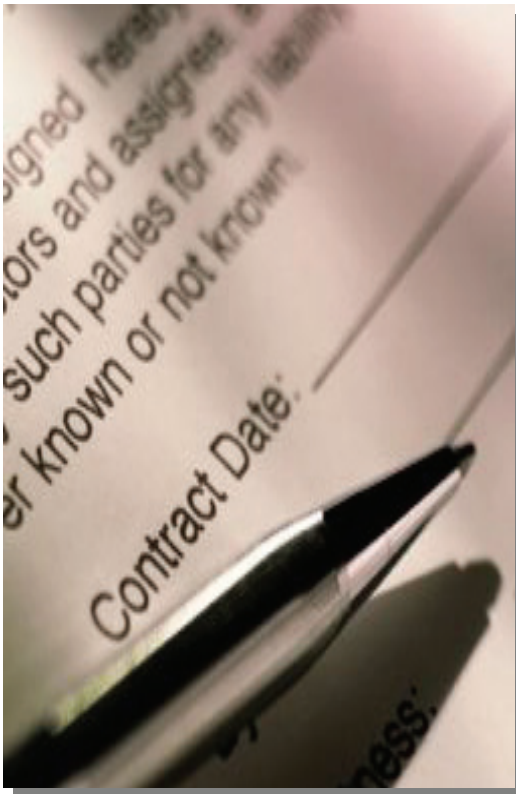
Warranties

- Breach of Warranty = No coverage because policy is void *ab initio*
- Judicial Intervention:
 - Affirmative v. Promissory Warranties
 - Warranty v. Representation
 - “Temporary Suspension”
 - Narrow Construction





Misrepresentations



- An oral or written statement that forms part of the basis on which coverage is issued.
- Materiality is very relevant.
- Policy can be voided only if a representation is:
 - Untrue or misleading
 - Material to the Risk
 - Relied upon in issuing policy or determining premium amount.



Misrepresentations

- Courts generally avoid finding a representation is untrue or misleading.
- A “material” representation is one that “reasonably” would affecting the insurer’s decision to accept the risk based on the charged premium.
- Reliance is tied to materiality.
 - No reliance if insurer knows of the misrepresentation
 - Reliance may not exist if insurer has reason to know of misrepresentation
- Insured’s duty to correct a representation

(see Exhibit 7)



Misrepresentations

- *Commonwealth Land Title Ins. Co. v. IDC Props.*, 547 F.3d 15 (1st Cir. 2008)
- *Home Ins. Co. v. Spectrum Info. Techs.*, 930 F. Supp. 825 (E.D.N.Y. 1996)
- *St. Paul Fire & Marine Ins. Co. v. Jacobson*, 48 F.3d 778 (4th Cir. 1995)
- *Stewart-Smith Haidinger, Inc. v. Avi-Truck, Inc.*, 682 P.2d 1108 (Alaska 1984)



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Sample Application Language

- The undersigned authorized agents of the person(s) and entity(ies) proposed for this insurance declare that to the best of their knowledge and belief, after reasonable inquiry, the statements made in this Application and in any attachments or other documents submitted with this Application are true and complete.
- The undersigned agree that this Application and such attachments and other documents shall be the basis of the insurance policy should a policy providing the requested coverage be issued; that all such materials shall be deemed to be attached to and shall form a part of any such policy; and that the Company will have relied on all such materials in issuing any such policy.

(see Exhibit 8)



Sample Application Language

VIII. REPRESENTATION: PRIOR KNOWLEDGE OF ACTS/CIRCUMSTANCES/SITUATIONS:

1. Has the **Applicant** at any time during the past three (3) years put its insurance carrier on notice of any potential or actual losses under its prior insurance program, that may have fallen under the scope of the proposed coverage? Yes No
If "Yes", attach an explanation.
2. If the **Applicant** has had any computer security incidents during the past two (2) years (incident refers to any unauthorized access, intrusion, breach, compromise or use of the **Applicant's** computer systems, including theft of money, proprietary information, or confidential customer information, denial of service, electronic vandalism or sabotage, computer virus or other computer incidents); respond to the following:
 - a. Was the **Applicant** specifically targeted for such computer attacks? Yes No
 - b. What were the direct costs associated with all computer attacks?
 - c. Have any of the computer attacks resulted in unauthorized access to, or corruption or erasure of, data?
 Yes No
 - d. Has the **Applicant** experienced a security breach that required notification of customers or other third parties? Yes No
3. No person or entity proposed for coverage is aware of any fact, circumstance, or situation which he or she has reason to suppose might give rise to any claim that would fall within the scope of the proposed coverage, except: NONE _____ or (Insert description)

Without prejudice to any other rights and remedies of the Company, the Applicant understands and agrees that if any such fact, circumstance, or situation exists, whether or not disclosed in response to question 1, 2, and 3 above, any claim or action arising from such fact, circumstance, or situation is excluded from coverage under the proposed policy, if issued by the Company.



Defenses

- Waiver
 - *Philadelphia Indem. Ins. Co. v. Horowitz, Greener & Stengel, LLP*, 379 F. Supp. 2d 442 (S.D.N.Y. 2005)
 - *Reinsurance Company v. Bennett*, 2008 WL 2485388 (S.D.N.Y. 2008)
- Incontestability



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Additional Materials

- Exhibit 1: Documentation Needed for Policy Assessment
- Exhibit 2: Sample broker agreements
- Exhibit 3: Sample broker/carrier agreement
- Exhibit 4: Broker Insurance Placement and Risk Management Service Summary and Representative Cases
- Exhibit 5: Sample RFPs for broker selection
- Exhibit 6: Coverage Denials Related to the Insurance Application Process
- Exhibit 7: Case Study: Care Risk Retention Group, Ohio App (2010)
- Exhibit 8: Sample Cyber Security Application
- Exhibit 9: List of Additional ACC Resources