

**Business
Insurance
Broker
Services
Agreement**

Checklist



by John "Johnny" E. Miller



A special 65-item **checklist** for use in reviewing
business insurance broker services agreements.

In your contracts management activities, it is likely that you will be asked by your employer to review your entity's business insurance broker services agreements. Once the exclusive domain of only in-house counsel or an entity's outside counsel, business insurance broker services agreements are often additionally reviewed by an entity's contract management personnel in order to potentially surface additional issues that may not have been considered by counsel. Sometimes this additional contract review is requested by your CFO, your risk management group, or your procurement management. As with any substantive agreement executed by an entity, business insurance broker services agreements are important contracts that need to be properly reviewed.

Normally, an entity will want to focus on its core competencies and will authorize another company or companies (knowledgeable about insurance matters) to represent the entity in the sourcing, procurement, and ongoing management of the entity's insurance portfolio. Bigger entities will generally use a broker—not an agent (captive or independent)—because brokers are like a state-licensed super-independent agent with more education and experience than an agent. Brokers have a duty to analyze the insured's entity for the correct insurance coverage. Brokers carry errors and omissions insurance, as well as other insurance to cover the broker's liabilities to the insured and others.

I never cease to be amazed how many entities (big and small) engage business insurance brokers without using a written broker services agreement. In my contracts management career, I have reviewed many business insurance broker services agreements. In order to systematically cover the multitude of unique issues in a typical insurance broker services agreement review, I have developed a practical Business Insurance Broker Services Agreement Checklist. Set out below is my 65-item checklist that I use in reviewing business insurance broker services agreements:

Business Insurance Broker Services Agreement Checklist

- ✓ Does the agreement contain broker risk management functions (i.e., risk identification and analysis, insurance audit, risk control evaluation, and risk financing plans)?

Typically, business insurance is a broad description of the following 13 general types of insurance:

- **Property insurance**—loss/damage to the location of the business or its contents;
- **Casualty insurance**—loss/damage to the business;
- **Commercial general liability (CGL) insurance**—third party bodily injury/death, property damage, advertising injury, and reputation damage liability caused by negligence;
- **Commercial auto insurance**—damage to an entity's vehicles and damage caused to others by an entity's vehicles;
- **Workers' compensation insurance**—liability to employees for accidental job-related injuries;
- **Business interruption insurance**—loss or damage to cash flow and profit caused by business interruption;
- **Health insurance**—workers' health insurance;
- **Life and disability insurance**—workers' life and disability insurance;
- **Insurance specially written and scripted for a particular task;**
- **Umbrella coverage**—higher levels of coverage to augment certain policies like CGL;
- **Directors and officers insurance**—covering liabilities that an entity's directors and officers may incur;
- **Products liability insurance**—loss as a result of a defective product that causes injury or bodily harm; and
- **Professional liability insurance**—loss sustained because of an error or oversight on insured's part.¹

- ✓ Does the agreement cover broker administration functions (claims management, confidentiality, service level agreements, reports, and periodic broker assessments)?
- ✓ What are the broker's marketing functions to obtain the required insurance?
- ✓ What are the broker's claims services?
- ✓ Does the broker have any loss control services?
- ✓ What are the other required broker services?
- ✓ Does the statement of work for the broker specify what the broker is to do in definitive and precise language and terminology?
- ✓ Does the statement of work contain "negative scope," telling the broker what work the broker should not do?
- ✓ Is the broker's compensation clearly covered?
- ✓ What is the term (period of performance) of the agreement?
- ✓ What are the broker's general liability indemnification and intellectual property infringement indemnification obligations?
- ✓ Is there a method for dispute resolution (including broker fee disputes)?
- ✓ What audit rights does the insured have of the broker's appropriate books and records?
- ✓ Does the broker have publicity constraints regarding the insured?
- ✓ What is the governing law of the agreement?
- ✓ Is the broker service team clearly identified?
- ✓ What are the termination for default provisions of the agreement?
- ✓ Can the insured terminate the broker for convenience (without fault)?
- ✓ Is there insurance the broker must carry (i.e., errors and omissions, etc)?
- ✓ Is the broker required to add the insured as an additional insured party under the broker's errors and omissions insurance coverage?
- ✓ Is the broker required to provide the insured with a waiver of subrogation from the broker's errors and omissions insurance carrier?
- ✓ Will the broker provide run-off services after termination for a reasonable time period (if required)?
- ✓ Is the broker required to obtain occurrence or claims-made type insurance coverage for the insured?
- ✓ Is the broker required to obtain additional tail or nose coverage for the insured?
- ✓ Is the ownership/use of broker services work products clearly stated?
- ✓ Address conflicts of interest (actual, potential or subject matter) and establish a conflict procedure.
- ✓ Address confidentiality of your entity's information.
- ✓ Address data privacy.
- ✓ Add the broker's document retention obligations.
- ✓ Address the broker's business continuity obligation.
- ✓ Consider a convergence of several preferred insurance brokers that can provide the full range of brokerage services in return for discounted pricing.
- ✓ Use periodic broker performance assessment/scorecards.
- ✓ Consider making brokers responsible for complying with your entity's policies and guidelines.
- ✓ Require the brokers to be knowledgeable about your entity.
- ✓ Require broker compliance with all applicable laws and regulations, such as ethics laws/regulations, state broker's laws/regulations, insider-trading laws, Foreign Corrupt Practices Act, anti-boycott laws, and export compliance laws/regulations.
- ✓ Consider requiring the broker to use your entity's approved couriers so your entity can leverage the courier volume for discounts.
- ✓ Attach a list to the agreement of all of your entity's affiliated entities that are to be covered by the agreement.
- ✓ Perhaps seek most-favored-customer pricing.
- ✓ Use service level agreements.
- ✓ In addition to policy limits per occurrence and in the aggregate, insurance commonly also has separate dollar limits on liability due to intentional acts (like libel, slander, false imprisonment, etc.), advertising injury, damage to the insured's rented property, fire damage, and faulty product manufacture. Are these limits clearly stated to the broker?
- ✓ Insurance policies are "auditable"—meaning the initial premium charge can be later increased if the initial estimate of exposure (such as number of employees, gross revenue, etc.) is under calculated. Over-estimates are not entitled to a full prorated refund and are subject to a minimum premium limit. The minimum premium limited can be waived by or negotiated with the broker. Make sure this issue is addressed.
- ✓ In the event of early cancellation by the insured of an insurance coverage, there is a minimum earned premium amount.

Is this clearly worked out with the broker? If so, is the amount reasonable?

- ✓ Typical insurance “exclusions” address depreciation (not measurable), nuclear disaster/war (uninsurable), auto liability (covered by other policies), arson and fraud (contrary to public policy), and punitive damages. Are exclusions clearly addressed with the broker?
- ✓ Some entities that are satisfied with their broker negotiate further broker savings in exchange for not soliciting competitive quotes. You may want to try this approach.
- ✓ Use “off” renewal dates by not starting policies at the end or beginning of a calendar year to give the insurance companies more unrushed time to quote the insured’s policies. This will give your entity a better opportunity to explain to the insurers the low risk nature of your entity’s business.
- ✓ Broker fees typically charge on a commission basis ranging from 10 to 15 percent of premium. Many savvy insureds try to negotiate that down to from 8 to 10 percent, or to seek a reasonable fixed fee not based on premiums.
- ✓ Regardless of whether or not you are happy with your brokers, conduct a request for proposals (RFP) every three to five years. Proposals in response to broker RFPs should be evaluated on premium savings, service fees, contingency revenue, coverage enhancements, service capabilities, claims management, alignment with insured, performance criteria, and benchmarking capabilities.
- ✓ The insurer’s duty is to provide the legal defense of the insured covering fees and costs and to indemnify the insured for resulting damages awarded/settled up to the policy limit. You have to check the applicable insurance policy to see if the policy limit is inclusive of defense fees/costs. So, when comparing policies offered by brokers, be sure it’s ‘apples to apples.’

- ✓ Insurance policies vary as to if the insured can choose its own defense counsel or if it must accept whoever the insurer chooses. Address this issue with the broker.
- ✓ Exactly what is covered by insurance depends on the substantive law of each state. Therefore, be sure your broker helps you understand how your entity’s insurance coverage varies from state to state.
- ✓ Some types of insurance offer two types of coverage—“claims made” and “occurrence”—that the insured needs to consider and arrange with the broker. Occurrence forms cover losses that happen during the policy term. The loss can be reported years later, but the key is when it happened. A claims-made policy covers claims made during a certain period of time. The loss may have happened many years in the past, but is reported during the current policy term.

It is difficult to move from one type of form to the other. Occurrence forms are somewhat more valuable since they respond to claims years later. A claims-made form certainly has value, but it has no guarantee of continued insurability, so if the insured is for some reason cancelled by the insurer, the insured may not have coverage in the future for activities in the past.

The key concept to remember is that a claims-made policy normally costs less than an occurrence policy, but insureds run the risk of not being covered for a potential claim because the insured did not discover it until after the insured’s policy expired. The decision (between claims-made and occurrence) is a gamble, and the insured pays a price to lower its risk. Tail coverage picks up where a claims-made policy leaves off, covering occurrences that happened while the policy was effective, but claimed after the policy expired. As a result, the combination of a claims-made policy and tail coverage looks very much like an occurrence policy, with one big difference: when an occurrence policy expires, the premiums stop, while the coverage (on occurrences that happen during the policy period) continues on an ongoing basis. Tail coverage, on the other

hand, is something the insured purchases after the insured’s claims-made policy expires, and the insured continues to pay for it until it decides that the risk of discovering an old occurrence no longer outweighs the cost of the tail coverage premium. The cost of an occurrence policy is high, but fixed, whereas the cost of a claims-made/tail coverage combination is initially lower, but of longer duration and potentially of higher total cost.

The decision between these types of coverage effectively hinges on the nature of the insured’s risks. If its business is such that any liability is immediately apparent, and thus claimable, the insured is probably safe with a claims-made policy. If, however, the insured’s potential liability can linger undetected for years, then it may be safest with an occurrence policy.

- ✓ Also consider nose coverage. This is the opposite of tail coverage, although it fulfills a similar need. Nose coverage most commonly provides prior acts coverage for insureds that are moving from a claims-made policy to an occurrence policy. It is generally provided by the replacement policy.²
- ✓ You can maximize a broker’s performance when (1) the insured pays the broker a fixed fee, not a commission, on premiums; and (2) the broker passes-through all insurer rebates and contingent insurer commissions to the insured. In some cases the broker will only agree to pass-through rebates and contingent insurer commissions above a certain dollar cap level. If this is the case, be sure the cap levels are reasonable.
- ✓ Require the broker to review your entity’s policies and guidelines to see if they comply with the insurance agreements.
- ✓ Look into some of the largest brokers, including: Marsh & McLennan, Aon, Willis Group Holdings, Arthur J. Gallagher & Co., Wells Fargo Ins. Services, Brown & Brown, Jardine Lloyd Thompson Group, BB&T Insurance Services, Hilb Rogal & Hobbs, and Lockton Companies.

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- ✓ Look into some of the largest business insurers, including: AIG, Berkshire Hathaway Group, Allstate, Hartford Financial Group, The Travelers Companies, Liberty Mutual, Nationwide, Progressive, Loews Corporation (CNA), and Chubb. Brokers should pick market leaders.
- ✓ Brokers should have a valid broker license in each applicable state.
- ✓ Check with the applicable state department of insurance regarding broker complaints and ethical violations.
- ✓ When brokers look at insurance companies, they should consider price, stability (with a good rating), and service.
- ✓ One progressive trend among insureds is to not eliminate the broker, but rather to redefine the broker's role and let the broker handle things like solicitations of bids from insurers, post negotiation policy delivery, and office policy administration. This allows the insureds to tell the insurers what the insureds actually do (in person and in the insurance applications) to get a much better understanding of the insured company, thus reducing risk in the minds of the insurers and potentially reducing policy premiums. This sort of thing is being done by insureds like Whirlpool, Wolter Kluwers, Brinker International, Caesars Entertainment, and others.
- ✓ An insured could potentially reduce broker spend by:
 - Doing a "convergence" of brokers to the insured's top few brokers so that those brokers become the insured's preferred providers, potentially granting the insured better discounts including volume discounts;
 - Using some variation of the Whirlpool, Wolter Kluwers, Brinker International, and Caesars Entertainment approach so that the broker's role is somewhat redefined to allow value-added discussions

between the insured and insurers to improve the insurers' understanding of what the insured does so as to reduce premiums;

- Starting a preferred partnership program/initiative with some of the insured's top brokers and insurers to solicit their creative ideas to reduce insurance costs;
- Enhancing the broker services agreement with selected brokers to reduce costs (such as prohibiting broker premium commissions and passing through insurer's rebates and contingent commissions to the insured) and concurrently improve broker services and quality;
- Using an "RFx" or questionnaire to get competitive proposals;
- Reducing irrelevant or repetitive coverage;
- Adopting/maintaining a consistent safety plan;
- Adopting health-specific changes to the workplace;
- Increasing workforce training;
- Removing undesirable risks; and
- Creating/implementing a disaster plan.

- ✓ Include a partnering provision with brokers to proactively help discover mutually beneficial ways to improve the broker relationship, as well as to discover ways to further enhance communication, innovation, technology improvements, performance, risk-reduction, continuous improvement, and spend/cost savings with brokers.
- ✓ Pay the broker fees in installments and not upfront.
- ✓ Beware of open-ended provisions that allow for renegotiation of broker's fees

in the event of changes in your entity's operations and exposures.

- ✓ Don't assume.
- ✓ Ask yourself: What is missing?
- ✓ Put it in writing.

The goal of business insurance broker services agreements is to facilitate a win-win relationship between your entity and your insurance brokers. This Business Insurance Broker Services Agreement Checklist is not exhaustive. Every insurance brokerage engagement arrangement for broker services has some unique aspects that may not be addressed in this checklist. However, if you routinely use this checklist as one of several resources when you review a business insurance broker services agreement, you will be pleasantly surprised with the large number of substantive, material, risk reduction, performance improvement, and cost-savings issues that will be surfaced for proper resolution. **CM**

ABOUT THE AUTHOR

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ENDNOTES

1. **Business.gov**, "Types of Business Insurance," available at www.business.gov/guides/finance/business-insurance/insurance-types.html, accessed January 23, 2009.
2. **Hutchinsontraylor.com**, "Claims Made vs. Occurrence Form," available at www.hutchinsontraylor.com/files/Claims-Made_vs_Occurrence_Liability_Form.pdf, accessed January 22, 2009.