

Using M&A insurance on tech deals

Issue 3: Fintech, edtech and healthtech/
medtech

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In our second issue, we looked at some focus areas for M&A insurers in the software/SaaS, internet telephony and on-demand sectors. In this note, we dig deeper into key underwriting topics for fintech, edtech and healthtech/ medtech deals.

In our final issue, we will look at artificial intelligence, robotics and semi-conductor/manufacturing.



Fintech

Key areas of focus include:

- _ Consumer disputes
- _ Data protection/ CCPA/ GDPR
- _ Financial regulations
- _ PCI compliance
- _ Professional liability/ errors and omissions



Edtech

Key areas of focus include:

- _ Child safety
- _ Data protection/ CCPA/ GDPR
- _ Education department regulations
- _ Government Contracts
- _ Intellectual property



Healthtech/medtech

Key areas of focus include:

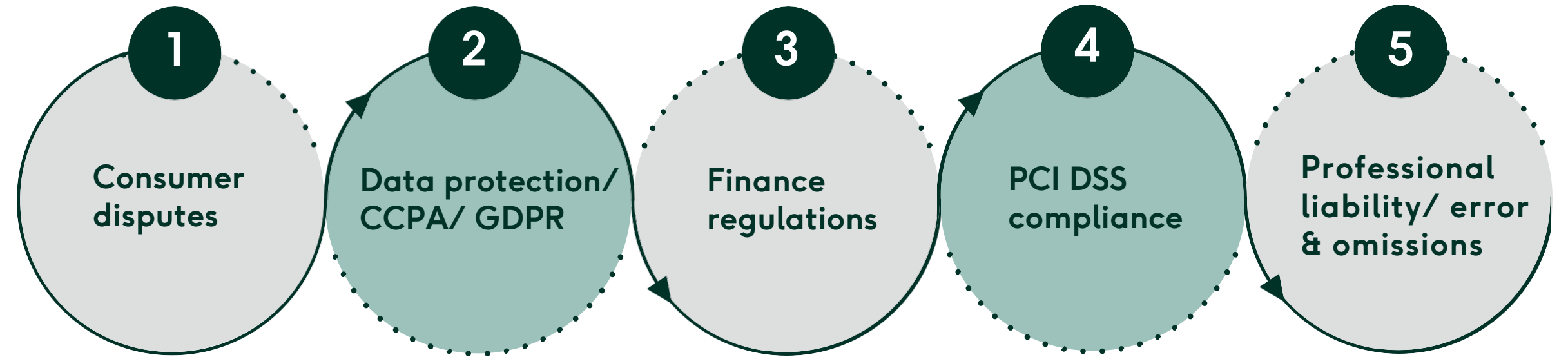
- _ Billing and reimbursement matters
- _ Intellectual property
- _ HIPAA/ HITECH compliance/ data protection
- _ Product liability
- _ Regulatory and licensing

Fintech

The fintech sector has experienced exponential growth over the past five years as technological advancements in payment processing, blockchain, AI, cryptocurrency and big data is used by disruptors to challenge the status quo of the traditional finance model. The sector is broad in application, with fintech products ranging from those that benefit individual retail consumers, corporations and large financial institutions. While insurers were once wary of such transactions, there is increased appetite in the M&A insurance market to underwrite these deals.

Insurers will take comfort from deal teams that are able to demonstrate their expertise in the sub-sector and the ways in which that expertise has informed their business and legal diligence.

There are a number of underwriting factors to consider when structuring M&A insurance on a fintech transaction



The insurer will expect the buyer to have reviewed any material disputes that have taken place between the target and customers.

The insurer will look to understand the nature of the disputes that have taken place to understand whether they relate to a connected, systemic issue.

The buyer should be able to identify the various stages of ongoing disputes (e.g. arbitration, litigation etc.) and make an assessment of the likely outcome. The insurer will want to understand the potential impact of any ongoing customer disputes from both a financial and reputational perspective.

Maximum coverage for data protection matters will be achieved where a full data protection audit has been undertaken. Insurers recognize that this is not always possible, particularly when the transaction is on an accelerated timeline.

Insurers will expect, however, that the buyer has reviewed data protection policies and practices of the target, including with respect to any penetration testing that may have been conducted, as well as the cyber coverage maintained by the target.

The buyer will likely identify areas of non-compliance in the course of diligence. This does not automatically exclude cover for data protection, but insurers will expect the materiality of such breaches to be quantified and described, as well as a plan to improve compliance post-closing.

A key area of focus for the insurer will be ensuring that the target has complied with the applicable financial regulations.

The relevant regulations will depend on the nature of the target's activities. For example, where the target is facilitating stock trades, they will be subject to SEC and FINRA regulations. If the target is making loans, then they will be subject to the Fair Debt Collection Practices Act and the Fair Credit Reporting Act.

The buyer should identify any historic non-compliance and quantify any potential exposure the target faces as a result.

If the target processes or accepts credit cards, the insurer will expect the buyer have to undertaken a review of the PCI DSS regulations.

The buyer should demonstrate that the target has accurately identified its PCI level. The buyer must review the measures the target has in place, including (i) installation and maintenance of a firewall configuration to protect cardholder data, (ii) methods for appropriate protection of cardholder data, (iii) encryption of cardholder data across open, public networks, and (iv) the use (and regular updating) of sufficient anti-virus software and programs. The insurer will expect the buyer to have identified any areas of material non-compliance and quantified the potential level of penalties the target faces as a result of such breach.

The insurer will want to establish whether the target provides 'on-premise' advisory services. If this is the case, then they will look to understand in which jurisdictions the advisors are based and the training that they have received and continue to receive on an ongoing basis. They will also expect any periods of system downtime to have been identified. To the extent the target handles funds, the target should have in place stand-alone coverage to cover its fiduciary liability.

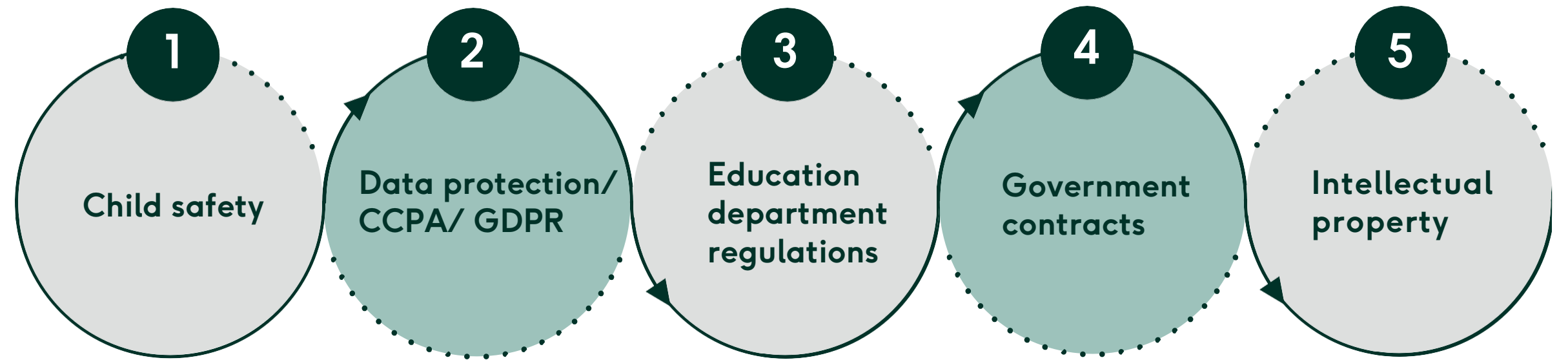
it is important to review any underlying professional liability/errors and omissions polices the target has in place. To the extent the insurer cannot provide cover on an outright basis, the R&W/W&I policy should be able to sit in excess of the existing policies if deemed to be sufficient.

Edtech

Much like the shift from office working to home working, the COVID crisis has resulted in a sharp decrease in the number of contact hours experienced by students. School children and university students alike have experienced long periods of being taught from home, which has been possible only by technological advancements in the edtech space.

Demonstrating a deep understanding of the key underwriting factors relevant to the industry sub-sector in question is critical to avoiding or limiting the scope of deal-specific exclusions from your R&W/W&I policy.

There are a number of underwriting factors to consider when structuring M&A insurance on an edtech transaction



Child safety will be a particular concern for insurers on an edtech transaction.

Insurers will require confirmation that the target has in place all relevant and appropriate safeguards in place to ensure child safety.

They will expect that all features and applications are suitable for end users and that any age restricted features are enforced accordingly.

The insurer will expect diligence around any direct messaging/ chat applications, particularly where the business provides messaging directly to students.

If personal information is being collected from children/ students, insurers will also expect the buyer to thoroughly diligence the target's compliance with the Children's Online Privacy Protection Act (COPPA) and other applicable regulations.

Maximum coverage for data protection matters will be achieved where a full data protection audit has been undertaken. Insurers recognize that this is not always possible, particularly when the transaction is on an accelerated timeline.

Insurers will, however, expect that the buyer has reviewed data protection policies and practices of the target.

Insurers will also want to understand the type of information collected from students/children, how that data is used by the target and implications for privacy law compliance.

The buyer will likely identify areas of non-compliance in the course of diligence. This does not automatically exclude cover for data protection, but insurers will expect the materiality of such breaches to be quantified and described, as well as a plan to improve compliance post-closing.

The nature of the edtech target's business will determine the extent to which the target is subject to education regulatory requirements.

Insurers will expect the buyer to have evaluated the extent to which a target is subject to education regulatory requirements and its compliance profile.

A target's compliance history, including any prior or ongoing regulatory/ administrative proceedings will be important for the buyer to understand.

Insurers will also expect buyers to identify the extent to which any consents from or notices to education regulatory authorities are required in connection with the proposed transaction.

Depending on the edtech target's business, many of its customers may be state or local governmental authorities – for example, school districts.

Insurers will expect the buyer to have reviewed the target's contracting practices with its governmental authority customers.

To the extent that consents from or notices to such customers are required in connection with the proposed transaction, the insurer will want to understand the parties' plan for obtaining such consents and delivering such notices.

Buyers should also be attuned to other issues that can arise in the context of contractual arrangements with governmental authority customers, such as (i) compliance with customer-specific data privacy addendums and (ii) sales/use tax compliance (and any exemptions available under state law for educational institutions).

Understanding how the IP of the target is managed and protected will be a key area of focus for a buyer.

Insurers will expect the buyer to have reviewed the target's registered patents and trademarks.

Insurers will look to get a feel for the target's general IP management processes and expect to see evidence of written standards and procedures regarding the development and protection of IP.

Importantly, insurers will want to understand whether there are any ongoing disputes with third parties concerning IP infringement.

Insurers will also want to understand whether any IP was developed in cooperation with governmental authorities or educational institutions and where the ownership of such IP lies.

Healthtech/ medtech

The healthtech (technology-enabled healthcare services delivered mainly outside of hospital) and medtech (therapeutic technologies and devices for the purposes of in-hospital care) sectors have experienced heightened levels of activity in the past nine months.

There are a number of underwriting factors to consider when structuring M&A insurance on a healthtech/ medtech transaction



A buyer on a healthtech/ medtech transaction should pay particular attention to whether a significant portion of revenue is derived from Medicare/Medicaid. If so, insurers will expect a billing and coding audit to have been carried out in order to get comfortable providing coverage.

Insurers will want to understand the details surrounding any related regulatory actions involving the target, whether as a direct or indirect party.

Understanding how the key IP of the target is managed and protected will be a key area of focus for a buyer.

Insurers will expect the buyer to have reviewed the target's registered patents and trademarks.

Insurers will look to get a feel for the target's general IP management processes and expect to see evidence of written standards and procedures regarding the development and protection of IP.

Importantly, insurers will want to understand whether there are any ongoing disputes with third parties concerning IP infringement.

Ensuring that sensitive patient information is stored and protected in a secure way will be of key importance to insurers.

To the extent the target is deemed to be a covered entity in the US, the buyer will need to evidence that there are the necessary physical, network and process security measures in place to ensure HIPAA compliance. The insurer will also want to understand whether there has been a recent security audit carried out in respect of the target in line with HITECH to determine whether the appropriate standards are in place.

Data protection in general, as covered in our prior slides, will also be of importance.

Insurers will expect the buyer to have reviewed the internal policies and procedures of the target and identified any areas of non-compliance.

Product liability, product recall and product warranty will be key areas of focus for an insurer on a healthtech or medtech transaction. The insurer will want to understand whether the target has in place insurance policies in respect of these important areas.

As part of the insurance due diligence, the insurer will expect the buyer to have reviewed whether insured limits and scope of coverage are sufficient. An insurer will also want to understand the target's claims history.

It is possible for the R&W/W&I policy to sit in excess of any underlying policies where the insurer gets comfortable with the level and scope of cover in place.

The regulatory and licensing landscape for healthtech/ medtech is onerous and can be subject to regular changes in line with the latest legal and technological developments (e.g. DEA/ FDA / NICE compliance).

Insurers will want to understand that the target has in place all necessary licenses to operate in each jurisdiction.

The buyer should identify any areas of historic non-compliance with regulatory or licensing requirements.

In regulated industries, being able to articulate why certain regulations do not apply or do not pose a material risk to a particular target is as important as being able to demonstrate a high degree of sophistication when it comes to regulations that are central to a target's business.

The bolder your ambition, the better we become.

If you would like to discuss how to get the most from M&A insurance on an upcoming technology deal, or to find out if we can use our expertise and creativity to help you to resolve any other transaction issues, please contact:

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