


How to gain commercial advantage from your binders

15 December 2023  Tim Johnson

Binder renewal season is with us, in advance of many binders renewing on 1 January 2024. Whilst most binders are based in model forms, where there is often little commercial opportunity to negotiate, there are nevertheless a number of areas where we often see a lack of clarity or unintended consequences.

By paying attention to specific areas, there are subtle ways in which you can gain real competitive advantage, and these can make a big difference to future revenue streams.

1. Exit

Many standard binders contain a potentially problematic contradiction. Binders generally include a provision setting out their duration. Many binders also include a fixed period to terminate early, at any time (normally on 30, 60 or 90 days' notice). This can effectively make the fixed period redundant – they aren't fixed term binders at all, but rolling binders, terminable at any time for any reason, fault or no fault (but subject to the fixed duration as a maximum)

Whilst these are more important for binders with exclusivity or minimum volume targets, you should always ensure that the Section 36 termination period does not enable quicker exit and capacity migration than you intend.

2. Ownership of wordings

Most standard binders typically allow the capacity provider to retain all records. Binders often then state that all records are the property of the insurer. However, if the coverholder has drafted its own policy wordings or related policy documents (or paid lawyers to do so on their behalf), they will want to be able to use those wordings with a different (or multiple) capacity provider in future. However, they will not be able to do this if they have assigned the rights to the wordings or other policy documents to the insurer.

Whilst there are clearly potential consequences for the future use of the wordings, there are also potentially issues over which party is responsible for the wording from a regulatory perspective (i.e. compliance with FCA PROD Rules). If the clauses in the binder do not reflect the reality, this can cause confusion and potentially unintended regulatory consequences (for example, an insurer being considered to be the product manufacturer, when in fact it is not).

The solution is to make sure you agree who the "manufacturer" of the wordings is (as per FCA Prod Rules), and add wording to the binder to specify that the wordings belong to that manufacturer and that there is no transfer or assignment of proprietary rights within them (unless specifically agreed between the parties).

3. Commission

We could draft an entire article on the subject of how to gain commercial advantage from commission payments, but some repeated issues are:

1. Make sure legacy commissions post-termination are specifically addressed in the binder;
2. Ensure commissions are refunded for cancellations or termination, on a pro-rated basis to reflect time on risk (and specify the period

over which pro-rated calculations are made) – some standard binders does not do this automatically; and

3. Where profit commission is payable, check over how many years deficits can be rolled forward – in some cases this rolls forward, meaning a single year deficit can impact multiple years.

4. Complaints handling

Depending on the extent of the authority being delegated, standard form binders are usually very black or white – either the Coverholder can handle complaints, or it can't. Where complaints handling authority is delegated, be sure to clarify whether this includes complaints relating to the insurer and ensure that the insurer has the responsibility for responding to such complaints (or is at least included in the process). In many binders we have seen, the coverholder is responsible for handling complaints against the insurer without an obligation for the coverholder to even inform the insurer of the complaint.

5. Interest on premiums

The standard form binder specifies that the capacity provider retains all interest on premiums held. Whilst that may be beneficial on paper to the insurer, in many cases the administrative burden and cost of calculating the allocation of interest (particularly where the coverholder co-mingles money with other insurers' money) may not justify the amount of any interest earned.

6. PII and cyber cover

Premiums can be significant, depending on the limits required. The standard form binder is only setup for a fixed coverage limit across the contract length. You may want to consider tracking coverage limits with book value – with limits to increase with growth of the book.

The extent of cyber cover required will depend on how much data is being hosted; if the coverholder is hosting all data, then cyber coverage limits need to increase proportionately to the data volumes / sensitivities.

7. Exclusivity

Most binders are non-exclusive; the standard form binders are set up in this way. If you don't want your coverholder working with other capacity providers for similar risks, then you should consider adding wording on this. Commission rates are likely to vary depending on the level of exclusivity granted.

8. Data

Standard form binders are usually set up so that Coverholder and insurer act as independent data controllers. However, the very nature of this agreement is the Coverholder is operating under a delegated authority, acting as the insurer's agent. Therefore, the same rules apply to data processing; the Coverholder is (in the majority of cases) a processor, not a data controller. The capacity provider will usually be the data controller. Any means and purposes of data processing (which is the data controller test for the purposes of data protection laws) is ultimately determined by the insurer. It is important that the binder accurately reflects the position.

9. Book ownership

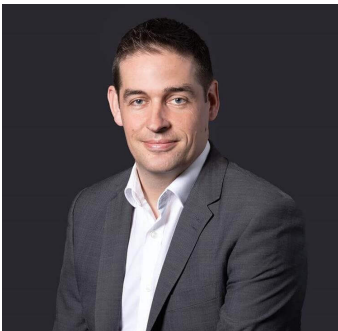
Last, but definitely not least. Standard form binders are often silent on the question of who owns the book? On termination, can the capacity provider take it? Or, can the Coverholder migrate it to a new provider? Put simply – you need to specify this clearly.

It may not be easy trying to amend terms when it comes to bulk renewal deadlines; these are often long-standing relationships where the parties have operated without issue over time. However, you may want to use this as an opportunity to prompt more practical discussions if your strategic objectives are changing in the short-medium term.

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