Introduction

Navigating today’s business environment is a mammoth task. Tightening regulations, emerging technologies, increasing shareholder activism, intensifying class action litigation activity, escalating merger objections and IPO activity, and increasing levels of public and governmental scrutiny are all challenges for corporate directors and officers.

Then there are emerging risks such as data breaches and cyber-attacks, climate change and even human slavery in the global supply chain, which can also drive claimants to bring legal proceedings against officers or boards.

Personal accountability has been a major theme since the 2008 financial crisis and continues unabated. Whether it’s the general public, the media, investors or government, executives are increasingly being held personally responsible for their actions, decisions and conduct.

As a result, company directors and senior managers globally face a real and growing threat from legal and regulatory liabilities. If things go wrong, they are increasingly likely to face costly regulatory investigations, criminal prosecutions or civil litigation, putting their personal assets and liberty at risk.

This Allianz Global Corporate & Specialty report examines both the present and future states of the Directors’ and Officers’ (D&O) landscape, identifying typical and emerging exposures, claims settlement trends, as well as risk mitigation and insurance strategies to help executives succeed in this volatile space.
The D&O landscape today
There are a growing number of areas that can result in a company and its directors being sued.

Notifications and loss trends
Analysis shows non-compliance with laws and regulations is the top cause of D&O claims.

Regional trends
Key issues on the boardroom risk agenda around the world - from Australia to the UK.

Fast-rising exposures: Emerging risks in focus
Cyber, climate change and supply chain risks are evolving, as executive liability exposures become more complex and interconnected.

Director’s Cyber Risk Checklist

D&O insurance explained
How D&O insurance works. What and whom is covered? Six steps to securing a program.

Risk management best practice
Risk Management Checklist. Top things a director should know about D&O risk. Top things a director should be asking about their D&O exposure.
Executive Summary

Rapidly changing risks and increasing compliance requirements mean corporate leaders are under scrutiny over alleged wrongdoing as never before. There are a growing number of areas that can result in a company and its directors being sued.

The landscape today ► 6

Tightening regulations, emerging technologies, increasing shareholder activism, intensifying class action litigation activity, escalating merger objections and IPO activity and the rise of regulator activism are among the many challenges facing corporate directors and officers. Executive liability is increasing yearly, particularly in areas such as employment and data protection.

Third party litigation funders are changing the global litigation map, with their influence pivotal in the development of collective actions against financial institutions and commercial entities and their directors and officers. Litigation funders are front and center in some of the largest multi-jurisdictional claims. Activity is expected to increase.

Managers face a growing threat from legal and regulatory liabilities which could result in costly investigations, criminal prosecutions or civil litigation, putting the company’s assets, and their own, at risk.

Notifications and loss trends ► 12

There is a growing trend towards seeking punitive and personal legal action against officers for failure to follow regulations and standards.

According to AGCS analysis, the number one cause of D&O claims by number and value is non-compliance with laws and regulations. Negligence; maladministration/lack of controls; breach of trust/fiduciary duty; and inadequate/inaccurate disclosure are the other top causes of D&O loss by number of claims received.

Claims severity is rising due to higher legal costs, increasing complexity, expanding regulatory investigations and cross-border actions.

Claims arise internally from trustees, subsidiaries, the company itself, and whistleblowers. Externally, creditors, shareholders, customers, suppliers, competitors, tax authorities, government regulators or even former employees bring the most claims.

There is a general trend for actions to be dismissed or resolved more slowly, meaning lengthier litigation, increased defense costs and higher settlement expectations among plaintiffs, particularly in the UK, Canada, Australia, France, Spain, Hong Kong and the US. According to AGCS, the average securities class action case in the US can take between three and six years to complete, while legal defense costs average around $10m, rising to $100m for the largest cases.

Regional trends ► 16

In the UK there are several key issues worrying executives beyond the potential implications of Brexit. These include the possibility that executives could face prosecution in future for offenses including fraud and money laundering carried out by staff. In Spain there is a trend towards increased liability for directors for non-criminal offenses, while France is ramping up its corporate governance regime, with new protections for whistleblowers. The focus on personal accountability is notable in Germany. The German market is typified by internal liability claims, where the company sues executives for wrongdoing or compliance failings. Around 80% of German D&O claims seen annually by AGCS are for such cases.

In the US, the number of securities class action filings is rising, potentially on course for its highest total for 12 years. In addition, at current pace, M&A-related filings in federal courts could double the annual numbers observed in the last four years. Meanwhile, the “Yates Memo” is a renewal of the government’s commitment to policing corporate wrongdoing and rewarding whistleblowers, a trend also taking root outside of the US. In Canada directors of private and public companies face exposure to claims for environmental clean-up costs. Increased oversight activity in Australia seems likely. In Hong Kong, authorities have commenced proceedings against companies for failing to disclose price sensitive information. In Singapore it is now a criminal offence for a director to make use of their position to gain an advantage for themselves. Regulatory scrutiny is also increasing across the United Arab Emirates, where a
new law sets the basis on which liability can be found against directors, while in South Africa, more frequent use of class actions may also expose directors to more claims.

A modest growth of securities-related litigation in Japan has been due to recent legislative changes making it much easier for investors to sue, especially regarding misrepresentation. Many Asian countries could see larger D&O liabilities in future, owing to changing attitudes towards corporate governance and accountability, increased regulatory activity and a growing compensation culture. Jurisdictions like Hong Kong, Thailand and Singapore are becoming more litigious.

In Latin America, and Brazil in particular, D&O insurance take-up has increased, with recent high-profile corporate scandals related to corruption practices resulting from lengthy criminal investigations.

Emerging risks ➤ 23

Executive liability exposures are becoming more complex and interconnected. Many large claims involve regulatory investigations and civil litigation in multiple jurisdictions. Emissions testing problems in the automotive industry are an example of a potentially systemic commercial D&O loss. Meanwhile, the Panama Papers leaks illustrate how a data breach can impact professional service providers and financial institutions, which could in turn spark multiple claims across several jurisdictions.

There is an enhanced focus on supply chain management. Emerging risks such as modern slavery, environmental pollution and climate change-related disclosures could result in reputational risk and shareholder activism, public outcry or governmental investigation. Activists are increasingly targeting companies and directors for not disclosing environmental data or risks to investors.

Data protection rules around the world are becoming increasingly tough as government agencies bolster cyber security. This significantly impacts businesses; penalties for non-compliance are increasingly severe.

A serious cyber incident can result in reputational and financial damage, as well as regulatory action. In more extreme cases a cyber security breach could cause a company’s share price to drop.

In future it may be possible to claim substantial damages from directors if there has been negligence in any failure to protect data or a lack of controls. There is currently uncertainty around the issue of directors’ cyber liabilities but it is likely that someone will make a successful argument that a director was negligent or had not paid sufficient attention to cyber security in future.

There are a wide range of scenarios in which a director could be considered negligent, such as a fund transfer fraud or where a vulnerable network is comprised, leading to significant business interruption, property damage or loss of intellectual property. Directors’ cyber exposures are likely to grow further with increasing reliance on technology. Technology, data and algorithms can become corrupted. For an analyst using predictive models to advise customers, this could open up liabilities.

Insurance and risk management ➤ 32

Increased corporate governance means more D&O exposures. Insurance can cover claims resulting from managerial decisions that have adverse consequences. Policies cover the personal liability of company directors but can also reimburse the insured company’s costs. Common risk scenarios range from employment and HR issues, to misrepresentation, to failing to comply with laws. Coverage does not include fraudulent or criminal activity.

Limits of insurance coverage purchased can range from $1m for SME companies to $500m+ for global Fortune 100 giants.

In order to tackle the increase in management risk in future, executives need to develop a first-class risk management culture. Examples include instilling sophisticated cyber and IT risk management, keeping records of all information relevant to a managerial role and maintaining open communication with authorities, investors and employees.

Executives should ask tough questions about compliance-related topics such as sanctions, embargoes, tax haven registrations, price-fixing and fraud and learn more about “classic” D&O exposures such as M&A, capital measures and IPOs. D&O coverage can be complex, so ensure key risks are covered. Conflicts of interest between the directors and the company must be avoided.

A company’s internal risk management and compliance structure should have all these points on the radar, and procedures in place that adequately address or prevent them. This is probably the only defense left for directors and officers if they face a problem in one of these areas.
In these times of rapidly-changing risks and increasing compliance, corporate leaders are under pressure as never before. The call for greater accountability of senior managers and boards has reached governmental regulatory bodies. Those who fail in their duty or conduct are more likely to face investigation and potentially be fined or prosecuted.

In 2015, a US Department of Justice (DoJ) directive, the "Yates Memo" affirmed the agency’s commitment to targeting executives for corporate wrongdoing, marking a trend that has even taken root outside of the US.

“Executive liability is increasing yearly, driven by a constantly evolving legal and regulatory environment,” says Paul Schiavone, Regional Head Financial Lines North America, AGCS.

“These are troubled times for companies and their executives. The ball keeps moving and each year brings the prospect of new shareholder or regulatory actions,” he says.

“And this development is not limited to a few countries only,” adds Bernard Poncin, Global Head of Financial Lines AGCS. “It has become a global phenomenon that needs to be given top priority within companies’ internal risk management departments.”

A Willis Towers Watson survey of 125 public and private entity senior executives found that one quarter had experienced a claim or investigation involving a director of their company. The respondents placed regulatory and other investigations at the top of their list of biggest fears.

1 Directors’ liability, Willis Towers Watson
There are a growing number of areas that can result in a company and its directors being sued. There is much more sensitivity around governance and conduct, while regulators and shareholders now more actively pursue directors, even across borders,” says Schiavone.

“Regulations are being put in place to hold executives to account and increase executive liability. We have seen this prominently in financial services with questions over executive conduct, but we are seeing executive accountability increase in other areas like employment and data protection,” says Schiavone.

The US Securities & Exchange Commission (SEC) made a record payout in 2014 of $35m to just nine "whistleblowers", showing the extent to which it encourages cooperation from those being investigated.

“There is increased sensitivity around executive conduct and poor judgement. There is less tolerance in ethical areas like human rights or modern day slavery (see page 31), while at the same time we see more shareholder activism and concerns about the inequality of executive pay,” says Schiavone.

“SEC chair Mary Jo White has made some very public statements about private institutions,” says Laura Coppola, Regional Head of Commercial Management Liability North America, AGCS.

“Some of the exposures public companies have traditionally taken the burden of having, and dealing with, will morph into a large private company exposure as well,” she adds.

Increasing scrutiny is also growing in Asia. In May 2016, Singapore’s financial regulator, the Monetary Authority of Singapore, ordered the closure of the Singapore branch of Swiss BSI Bank for alleged breaches of money laundering requirements.2

“Regulator activism has been on the rise around the world. Regulators increasingly share resources and information both nationally and across borders,” says Damian Lynch, Regional Head Financial Lines Asia, AGCS.

“Some Asian countries have increased director obligations, while regulators have become more aggressive and fearless in attempts to stamp out corrupt practices,” he says.

Of note among Asian countries taking recent action against corrupt practices are the Chinese response to GlaxoSmithKline’s 2013 bribery case, for which the company was fined nearly $500m3, and charges of corruption against the Japan Transportation Consultants in 2014 for bribery activities in Vietnam, Indonesia and Uzbekistan, for which the company was ordered to pay around $1m in penalties4.
Legal Viewpoint: Clyde & Co.

Actions go global

Securities class action litigation against entities and their directors and officers is increasingly becoming a global issue. The influence of third party litigation funders is changing the global litigation map, with third party funding pivotal in the development of collective actions against financial institutions and commercial entities and their directors and officers.

Litigation funders are actively seeking out new jurisdictions and Clyde & Co expects this activity to increase. In other jurisdictions, such as Hong Kong, there is a move towards softening the rules on champerty and maintenance to allow commercial third-party funding of litigation, and funders are “circling” the jurisdiction in anticipation. Litigation funders are front and center in some of the largest multi-jurisdictional claims against companies and directors, with the Volkswagen litigation in Germany, the Netherlands and the US being a prime example. Hand in hand with this comes the ever expanding territorial reach of the US plaintiff bar, who are increasingly involved in litigation overseas, the silicosis litigation in South Africa (which it is anticipated will spread to claims against directors for failures under the relevant legislation) being an example of this.

The increasing globalization of securities class actions can also be seen through the impact that a decision in one part of the world can have in another part: for example, the decision of the US Supreme Court in Morrison v. National Australia Bank, 561 U.S. 247 (2010), which, broadly, held that the US Courts do not have jurisdiction over securities transactions that take place outside the US, meaning that non-US investors who purchased their shares in a non-US company outside the US, are closed out of any US litigation and must look elsewhere for redress, has been the catalyst for collective actions in the UK.

Morrison also led towards increasing interest in the development of the collective action regime in the Netherlands, utilizing the collective settlements procedure under the Dutch Act on Collective Settlement of Mass Damages (WCAM), most recently seen in March 2016 in the mass investor settlement of the claim against Fortis relating to its participation in the acquisition of ABN AMRO. That said, the exposure to securities class actions will continue to be shaped by the collective action regime in each jurisdiction, with the US, Australia and Canada currently having the most progressive class action regimes, while in a number of other jurisdictions the regime is either rarely utilized or being developed. It is anticipated that securities class actions regimes will continue to develop and extend across the globe, although the time frame for this is likely to extend beyond the next three to five years.

Impact for directors

As collective actions develop internationally, there can be no doubt that this heightens exposures. However, the playing field remains an uneven one, and the likelihood of a collective action depends on a myriad of different factors, including appetite for litigation and the spread and make-up of the shareholders concerned. Meanwhile, a number of jurisdictions, in developing their collective action regimes, have been keen to avoid what are sometimes seen as the worst excesses of other systems. Recently there has been movement to limit the extra territorial effect of the collective action mechanisms in the Netherlands. However, as matters stand, actions such as the Volkswagen emissions case have also highlighted how entities and directors may potentially be subject to multiple shareholder class actions in different jurisdictions, arising from the same events.

Clyde & Co is a global law firm.
The litigation landscape

In the US, suing companies and their directors is big business and remains the key driver for large D&O claims. The plaintiff bar and litigation funders actively seek the next opportunity to pursue companies and their directors on behalf of shareholders.

“The frequency and severity of D&O claims has been increasing in the US. There is more money in bringing a lawsuit and lawyers continue to find new ways to make a fast buck,” says Schiavone.

“What’s behind this trend is heightened regulatory oversight by the SEC and other regulatory bodies who are paying more attention to corporate risk and even downright malfeasance around corporate behavior,” adds Coppola.

"With mandates like the Yates Memo, which really puts a spotlight on how aggressive regulators are going to be, I think we are going to see a lot more shareholder activity in the future."

Securities class action lawsuits reach post-crisis high

US securities class action lawsuit filings in 2015 were at their highest level since the 2008 financial crisis, with 234 complaints filed. There was a near doubling of the average settlement to $52m in 2015, compared with $36m in 2014. The 10 largest settlements totaled $3.5bn, representing about 70% of the entire $5bn in aggregate settlement values in 2015.

Health, technology and finance firms continue to dominate filings, followed by industrial and consumer companies.

US securities class action filings against foreign firms continued at elevated levels, although they are down from the 2011 spike when claims surged against Chinese companies in so-called “reverse take-over” deals. In 2015, 17% of securities class actions were against foreign firms compared with 24% in 2011.

According to Cornerstone and the Stanford Law School Securities Class Action Clearinghouse 2016 midyear assessment, plaintiffs filed 119 new federal securities class action cases during the first half of 2016, a 17% increase over the last half of 2015.

Shareholder activism

Shareholder activism, already robust in the US, is strengthening globally, as shareholders increase their influence on corporate conduct and directors and management decisions.

Australia has seen a rise in shareholder class actions, due to much tougher disclosure rules, a strict liability regime for directors, regulatory support for collective actions and the introduction of litigation funding, with exposures in some cases matching those of the US. According to law firm Herbert Smith Freehills LLP, there have been over 20 shareholder class actions which have resulted in settlements ranging from $20m to $200m since 2000\(^1\).

Shareholder activism has also spread to Asia. According to Activist Insight, companies headquartered in Asia faced over 40 public demands from shareholder activists this year at time of writing.

Securities actions are growing in Europe, too, notably the Netherlands. In March 2016, Fortis (Ageas) reached a €1.2bn settlement under Dutch Collective Settlement Procedures, notable for its size which rivals some of the largest US shareholder class actions. The company reached an agreement with D&O insurers to contribute €290m to the settlement\(^2\).

Dutch collective settlement procedures had previously been used by investors in Royal Dutch Shell to obtain a $381m settlement and is currently being used by investors in a number of other high-profile cases.

UK investors have been testing new legislation, using the Financial Services and Markets Act (FISMA), to bring claims there. Section 90A of the Act enables investors to seek damages for financial misstatements or omissions in listing particulars and prospectuses.

Collective redress is being used in Germany under the German Capital Markets Model Case Act, which enables similar securities lawsuits to be combined in a streamlined process.

The law has not yet been widely tested, but that could change if large claims like that filed by Volkswagen investors make it to court. Hundreds of investors filed a suit in a German regional court seeking some €3.3bn in damages for alleged breaches of stock market duty related to evading emissions tests\(^3\).

The EU has looked to strengthen shareholder rights, but there aren’t many opportunities for shareholders to sue directors in Europe, according to Stephan Kammertoens, Global Head of Financial Lines Claims, AGCS.

“There is currently not a shareholder litigation culture in Europe, but a number of proceedings in Germany are moving in that direction. Large financial institution shareholder settlements like that of Fortis are still not common,” he says.

According to law firm Clyde & Co, internationally, despite a slight dip in derivative claims, there is also a trend towards litigation by shareholders to seek a personal remedy from the company and/or its directors for the infringement of shareholders’ rights or for damage caused to the company. Potential routes are dependent on the jurisdiction in question but include proceedings for the winding up of a company, derivative actions, shareholder oppression litigation and securities class actions. This trend does not belie the fact that such actions may be unsuccessful.

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1. Australian Shareholder Class Actions - What Directors Need to Know, Herbert Smith Freehills LLP, Lexology
2. Ageas Reaches Settlement with Insurers and the Insured related to the Fortis legacies, Ageas
3. Investors’ lawsuit seeks $3.3bn from Volkswagen, Bangkok Post
Tactics of shareholder activism

- Buying corporate shares to build a stake to influence general meeting decisions
- Making a private approach to a company’s board to voice concerns
- Threatening potential action over ignored concerns (common in the UK and Australia)
- Using public announcements, press articles or social media to voice concerns and propose actions (directors will have to grapple with increased shareholder activism through social media)
- Seeking personal remedy from the company and/or directors for infringement of shareholders’ rights or damage caused to the company
- Initiating proceedings for winding up of a company, derivative actions, shareholder oppression litigation (unfair prejudice actions in the UK) and securities class actions

Bottom line: UK investors’ tactics less aggressive; US investors often adversarial, frequently orchestrated by organized activists and activist hedge-funds.

Source: Activist Insight, Half-year review, July 2016

Compliance failings

There is a growing trend towards seeking punitive and personal legal action against officers for failure to follow regulations and standards – or conversely towards encouraging whistleblowing or early cooperation. As a result, threat of personal liability against individual officers if corporate fraud is uncovered within their organization is a concern. And not just in the US.

The focus on personal accountability is notable in Germany, where regulators, prosecutors and companies have actively pursued individual directors for conduct or compliance failings.

Corruption and bribery, together with competition and cartel investigations, have been some of the main causes of German management liability claims, where directors at some of the largest German companies have been sued.

“If you are appointed to the board of a German company you should take a close look at how the organization approaches corporate governance and compliance,” says Martin Zschech, Regional Head Financial Lines Central & Eastern Europe, AGCS. “Executive liability in Germany often comes down to having the right controls and procedures in place.”

Although executives can recover legal costs and settlements from insurers, legally they must carry a personal deductible of one-and-a-half times their salary. Most directors purchase their own insurance to cover the deductible and pay the premium out-of-pocket.

Executives in Germany may also find they are held accountable by their own companies. The German market is typified by internal liability claims, where the company sues executives for wrongdoing or compliance failings. There has been a marked increase in such cases since the 1997 German Federal Court of Justice ruling in *ARAG v Garmenbeck*, which obliged German supervisory boards to pursue executives where fiduciary duty breaches occurred.

For example, ThyssenKrupp was fined €200m by Germany’s competition watchdog for cartel allegations and the company sued, unsuccessfully, a director in a bid to recover the fine.

The court held that a fine imposed against a company may not be recovered from an individual and that a fine against an individual may not exceed €1m, whereas against a company it may reach up to 10% of the annual turnover of its group. The court argued that it would undermine the legislative intent to fine individuals and companies differently if a company were able to recover its fine from an individual. In this regard, an appeal has been filed to the Federal Labor Court in Germany against this decision. The outcome will be closely monitored by the German D&O market.
Securities class action litigation against companies and their officers is increasingly becoming a global issue due to the influence of more third-party funders seeking jurisdictions in which to operate.

A study by Marsh found that UK professional and management liability insurance notifications increased from between 200 to 300 in the years 2005 to 2007 to a peak of 1,685 in 2012, a figure that has since averaged at 1,300.

The biggest exposures, and source of D&O claims, are in the US and Australia. Germany is another market where executive liability has increased. Twenty years ago there was little demand, but a changing regulatory and legal environment has seen an increase in executive exposure and D&O claims.

“Germany, together with the US and Australia, is now the region with the most D&O claims in the world,” says Martin Zschech, Regional Head Financial Lines Central & Eastern Europe, AGCS.
Frequency

In mature markets, D&O claims frequencies gradually have increased over time, albeit with a notable spike around the global financial crisis.

US filings and enforcement actions – a proxy for claims frequency in the US – doubled to over 2,000 at their 2011 peak from 1,000 in 2006, according to Advisen. Filings have since settled at around 1,500 in 2013, 2014 and 2015.

The increase in claims has been particularly pronounced in Germany – 20 years ago AGCS would have seen 40 to 50 executive liability claims in Germany annually, now there are around 120, according to Stephan Kammertoens, Global Head of Financial Lines Claims, AGCS.

The increase reflects Germany’s changing legal environment, in particular the rise of “internal liability” cases which follow a regulatory investigation or a criminal prosecution where the company sues individual board directors, as with ThyssenKrupp. Around 80% of German D&O claims seen annually by AGCS are for such cases, while the remainder are related to insolvency or other criminal prosecutions.

As an example, the supervisory board of Siemens sued its management board after it reached a $1.6bn settlement with US and German prosecutors in 2008. The company sought to recover damages from 11 former top managers and supervisory board members for breaches of organizational and supervisory duties related to bribery and corruption allegations.

“German public prosecutors are well resourced, with significant expertise, and are prepared to go after directors of German and European companies,” says Kammertoens.

Severity

While frequency of claims has increased in several key markets, severity also has risen sharply due to rising legal costs, increasing complexity of large claims, and expanding regulatory investigations and cross-border actions.

A 2015 AJ Gallagher study of large US D&O claims showed that severity of the 50 largest claims doubled over an eight year period, from under $100m per claim in 2006 to $200m in 2014 and 2015.

The severity of D&O claims has increased as claims have become complex and exposures large, according to Kammertoens. The net result is larger, costlier, more numerous and increasingly more complex claims to litigate.

Legal costs

Kammertoens comments that the complexity of claims is reflected in higher legal and defense costs, which can easily absorb one quarter to one third of the insured sum.

According to law firm Clyde & Co., there is also a general tendency towards actions being dismissed or settled more slowly, with the consequences trending to being lengthier litigation, increased defense costs and higher settlement expectations among plaintiffs who are investing more time and expense to build legal cases. This trend isn’t solely a US one, but is noted in the UK, Canada, Australia, France, Spain and Hong Kong.

In the past six years defense costs have almost doubled for large D&O claims, explains Paul Schiavone, Regional Head Financial Lines North America, AGCS. “This is a critical issue for executive liability insurers,” he says.

The average securities class action case in the US takes between three and six years to complete, while legal defense costs average around $10m, rising to $100m for the largest cases, according to Schiavone.

High levels of complexity translates to significant amounts of time and resources to resolve claims, requiring specialist lawyers and judges. Regulatory defense costs are also an issue, especially when investigations span many jurisdictions.

"Large cases are carried out in the limelight with a high degree of reputational risk. So companies will fight them because the stakes are often just too high," Schiavone says.

1 D&O Claims Trends, Q2 2015, Advisen
2 Siemens settles last bribery suit against former executives, Reuters
3 Market Conditions, Public Company Directors & Officers Liability Insurance, Arthur J Gallagher
Billion dollar settlements

Recent years have seen some large corporate liability cases with settlements that run well into the billions. In such cases, defense costs and civil litigation can result in D&O claims valued in the hundreds of millions of dollars.

One trend of the past decade has seen companies targeted by regulators and legal action outside their home territories. For example, Volkswagen faces regulatory investigations in both the US and Europe, following emissions test cheating accusations.

“Such large cases are challenging to investigate and defend and we see this in the largest D&O claims, which are becoming bigger and more expensive,” says Schiavone.

These cases aren’t just in sectors like finance, technology or biotech, he explains. “One of the largest claims in Europe involved the collapse of the Italian dairy firm Parmalat while one of the largest settlements ever was for a consumer group, Cendant Corporation.”

In Germany, a number of large commercial executive liability claims have exceeded €1bn, although they often settle at much lower amounts. Large D&O claims of $100m or more include Daimler-Chrysler and Siemens.

“Most companies buy large limits, but there is the potential to be caught short by very big claims,” says Schiavone.

Largest securities class action settlements

<table>
<thead>
<tr>
<th>Rank</th>
<th>Company</th>
<th>Settlement Years</th>
<th>Total settlement value ($bn)</th>
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<tbody>
<tr>
<td>1</td>
<td>Enron</td>
<td>2003 - 2010</td>
<td>$7.24bn</td>
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<tr>
<td>2</td>
<td>WorldCom</td>
<td>2004 - 2005</td>
<td>$6.2bn</td>
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<tr>
<td>3</td>
<td>Cendant</td>
<td>2000</td>
<td>$3.69bn</td>
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<tr>
<td>4</td>
<td>Tyco International</td>
<td>2007</td>
<td>$3.2bn</td>
</tr>
<tr>
<td>5</td>
<td>AOL/Time Warner</td>
<td>2006</td>
<td>$2.65bn</td>
</tr>
<tr>
<td>6</td>
<td>Bank of America</td>
<td>2013</td>
<td>$2.43bn</td>
</tr>
<tr>
<td>7</td>
<td>Nortel Networks (I)</td>
<td>2006</td>
<td>$1.14bn</td>
</tr>
<tr>
<td>8</td>
<td>Royal Ahold</td>
<td>2006</td>
<td>$1.1bn</td>
</tr>
<tr>
<td>9</td>
<td>Nortel Networks (II)</td>
<td>2006</td>
<td>$1.07bn</td>
</tr>
<tr>
<td>10</td>
<td>McKesson HBOC</td>
<td>2006 - 2008</td>
<td>$1.04bn</td>
</tr>
</tbody>
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* Source: NERA Economic Consulting (through December 31, 2015)*

The complaint against Nortel Networks was first filed in New York on February 16, 2001. On March 17, 2004, a separate case was also filed against Nortel Networks, purporting different allegations. The two class actions relate to alleged violations of US federal securities laws and encompass two alleged class periods, between October 24, 2000 and February 15, 2001 in one action (the action known as “Nortel I”), and between April 24, 2003 and April 27, 2004 in the other action (the action known as “Nortel II”).
D&O Claims

Top causes of Directors and Officers’ loss
By number of claims (%)

- Non-compliance with laws and regulations: 34%
- Breach trust/fiduciary duty: 21%
- Negligence: 7%
- Maladministration/lack of controls: 6%
- Inadequate/inaccurate disclosure: 2%
- Other: 30%

The top five causes of D&O loss account for over 70% of all claims by number.

Top causes of Directors and Officers’ loss
By value of claims (%)

- Non-compliance with laws and regulations: 61%
- Breach trust/fiduciary duty: 14%
- Negligence: 10%
- Maladministration/lack of controls: 4%
- Inadequate/inaccurate disclosure: 1%
- Other: 10%

The top five causes of D&O loss account for 90% of all claims by value.

- Average claim value for breach of trust/fiduciary duty: €1m+
- Average claim value for non-compliance with laws and regulations: €850,000+
- Average claim value of all D&O claims analyzed: €470,000

Over half (11) of the costliest 20 D&O losses result from non-compliance with laws and regulations.

Source: Allianz Global Corporate & Specialty. Data based on accident years 2011 to mid-year 2016. AGCS analyzed 576 claims from 49 countries. All claims figures quoted are 100% (not only the AGCS share but including reinsurers’ shares). While the losses analyzed are not representative of the industry as a whole, they give a strong indication of the major risks which dominate current D&O loss activity.
Increasingly litigious markets

Outside of the US and Europe, Japan, China and other Asian markets are moving towards a more litigious culture.

For example, perceived weaknesses in corporate governance and senior management culture recently have been a feature of executive liability in Japan.

Senior executives at Japanese electronics company, Olympus, were prosecuted for accounting fraud in 2013 – the scandal only came to light after the CEO was fired for questioning suspicious payments related to an acquisition.

A modest growth of securities related litigation in Japan has been due to recent legislative changes making it much easier for investors to sue, especially regarding misrepresentation.

“There is a school of thought that corporate governance practices in Japan lag behind other mature markets and that claims will ultimately result and will likely increase over time,” says Damian Lynch, Regional Head Financial Lines Asia, AGCS.

“Checks and balances are only as good as a company’s culture. Most companies look good on paper but values need to be enforced,” says Lynch.

“The key for underwriters is to get a feel for the company culture and look to other information sources, such as analyst reports and press articles – anything that suggests how the company actually is, as opposed to how it says it is,” he says.

1 Olympus scandal: Former executives sentenced, BBC
To date, a larger driver of executive liability and D&O claims in Asia has been exposure to the US through securities and debt listings, as evidenced by several “reverse-take-over” claims in 2011. Almost 25% of class action claims filed against US-listed companies in the first half of 2011 were against companies based in China.1

Many Asian countries are drifting towards potentially large D&O liabilities, owing to changing attitudes towards corporate governance and accountability, as well as increased regulatory activity and a growing compensation culture.

“Shareholders are less likely than in other markets to sue – but this is changing. There is a strong view that jurisdictions like Hong Kong, Thailand and Singapore are becoming more litigious and will become more like the US or Europe,” Lynch says.

Executive liability can increase rapidly, triggered by a change in attitudes or the introduction of new laws or means of litigation. For example, the introduction of shareholder class action laws in Australia has seen exposures skyrocket.

“Australia 20 years ago reminds me of Asia today. The market was soft, with few losses. Then there was a wave of serious claims from the financial crisis. Now, arguably, Australia is up with the US in terms of litigiousness,” says Lynch.

Few companies in China buy D&O insurance, with the exception of foreign executives and Chinese companies with US exposure, but risks are significant and executives’ personal assets can be threatened.

“The D&O market in China is still a fraction of the size of Australia, despite its much larger economy and population. There are some very different dynamics at play that make it one of the hardest countries in the world in which to underwrite D&O insurance, but the market will grow in China,” says Lynch.

“Claims in Asia are a double-edged sword,” he adds. “The D&O market in Asia could double or triple if we saw claims, as it will lead to a change in buying attitudes.”

Regarding Latin America, D&O insurance take-up has increased in many markets due to several specific drivers: increased exposure to US class actions by Latin American companies; enhanced compliance with the Organization for Economic Cooperation and Development (OECD) corporate governance; expansion of global insurers into the marketplace; and several recent high profile corporate scandals such as Petrobas in Brazil. Other Brazilian companies, including Banco Bradesco, Braskem and Electrobras, have been named in securities class actions in the US.

“Civil lawsuits in Brazil, as well as securities class actions suits in the US, antitrust violations, a severe and still ongoing financial recession and a strict government regulated environment against companies and their executives is driving increased D&O purchases,” says Diego Assef, Senior Claims Specialist Financial Lines, AGCS.

“As many companies act globally, they face multiple challenges at the same time in different places. Central coordination and local, tailor-made measures and actions have to go hand in hand to ensure that the entire group is protected in a smart and efficient way,” says Bernard Poncin, Global Head of Financial Lines AGCS.
Regional Trends: Hotspots Snapshot

Clyde & Co and AGCS examine the latest D&O developments around the globe

UK

While directors grapple with the uncertainty and potential implications of the UK’s decision to leave the EU, there are a number of other developments to consider.

Importance of personal accountability continues to be a key theme underpinning the regulatory scrutiny of directors, with prescribed responsibilities a key plank of the Senior Managers and Senior Insurance Managers Regimes (SMR and SIMR, respectively) applying to financial services and insurers. Notably, under the SMR, there will be a statutory duty on senior managers to take reasonable steps to prevent regulatory breaches.

Senior managers caught by the SMR could also face criminal liability in the event of the failure of a bank if they recklessly make a decision. In addition to new conduct rules and penalties, the new regimes could give rise to a heightened risk of internal investigations.

Directors must also brace themselves for the prospect of eye-watering fines for health and safety, corporate manslaughter and food safety and hygiene offenses, following the implementation of the Sentencing Council’s landmark “definitive guideline” on sentencing. Fines could trigger investor claims against directors where the entity’s share price has suffered or the entity has gone out of business.

Collective actions against entities and their directors and officers in the UK appear to be having a watershed moment, with group litigation orders increasingly being utilized by shareholders. With claims against Tesco and threatened against Quindell, collective action has firmly entered the commercial entity sphere, following on the heels of actions against financial institutions.

Meanwhile, senior corporate executives could face prosecution in future for offenses including fraud and money laundering carried out by staff. The UK government is to consult on plans to extend “failure to prevent” offenses, currently only covering bribery and tax evasion, to a wider range of economic crimes committed by employees, also including false accounting.
Spain

Directors should be aware of the general trend in Spain towards increased liability for directors for non-criminal offenses. A clear example is the National Competition and Markets Commission (CNMC) which is ramping up its sanctioning of both entities and directors for infringements of competition law, having recently announced its intention to revitalize its authority to seek personal financial liability from executives who have participated in illegal agreements and to toughen the sanctions imposed on individuals.

Although the Spanish Competition Act limits the fines that can be imposed in a competition offense to a maximum of €60,000, the CNMC recently for the first time imposed sanctions on the corporate officers of several companies involved in a cartel, imposing its second largest fine. It issued a resolution on 26 May 2016, imposing a fine of €128,854,152 on eight companies and four managers for the existence of a cartel from 1996 until 2014, consisting in fixing selling prices and distribution conditions.

France

France is ramping up its corporate governance regime, with new protections for whistleblowers included in a government bill against corruption and transparency (“Sapin II”) which has been adopted by the French assembly. At the same time, a preliminary draft of French liability laws is currently under a public consultation process. From the perspective of directors, the most significant change is the creation of civil punitive damages, the introduction of which has the potential to change the shape of damages claims against D&Os. These potential legislative changes come against a backdrop of an aggressive approach towards tax avoidance and evasion by the French tax authorities.

US

The risk of being targeted in a securities class action remains a core concern for directors and officers. If the pace of filings in the first half of the year continues, by year end, 2016’s filings would represent the highest number of securities class actions since 2004. Directors outside the US should also keep a careful eye on US developments. According to Cornerstone, on an annualized basis, filings against foreign issuers increased from 2015 levels. Meanwhile, at current pace, M&A-related filings in federal courts will double the annual numbers observed in the last four years.

The greatest percentage of class actions continue to be brought against companies in the biotechnology, pharmaceutical, and healthcare sectors. More broadly, regulatory scrutiny remains another core concern for directors, which has been heightened by the Yates Memo, the September 2015, Department of Justice (DOJ) new directive aimed at targeting and holding accountable corporate executives.

Generally, there is a trend towards actions being dismissed or settled more slowly, with the likely consequences being lengthier litigation, increased defense costs and higher settlement expectations as plaintiffs invest more time and money in cases. With respect to derivative actions, defendants sometimes find themselves defending litigation in both state and federal courts, which inevitably leads to increased costs and challenges. The Plaintiffs’ bar views certain state courts as particularly friendly, which
drives up the settlement value of these cases. Directors of US companies, whether based in the US or overseas, should also be mindful of the broad reach of the Foreign Corrupt Practices Act (FCPA) and ensure their corporates have adequate anti-bribery procedures in place. Particular exposures for directors include failing to properly supervise employees and recognize red flags surrounding a transaction that suggest potential bribery.

Canada
Regulatory aggression continues to feature heavily in the landscape for directors. The Ontario Securities Commission (OSC) is becoming more demanding in its investigations, as is the Alberta Securities Commission. Whistleblower protections are being ramped up. The OSC Office of the Whistleblower will be open to receiving tips on potential non-compliance with securities legislation – the first program in Canada to provide financial incentives. A whistleblower may receive a cash pay-out of 5% to 15% of the total penalties imposed in a case.

Directors of private and public companies face exposure to claims by government agencies for environmental clean-up costs, especially after the insolvency of the entity. Especially troubling is that the liability can attach even if the directors were not involved in decisions that led to the contamination. Meanwhile, low commodity prices are causing difficulties for many resource companies, with an uptick in insolvencies and company restructuring. As a result, the personal liability of directors for statutory wage and benefit claims is an important risk.

Australia
Increased activity from the Australian Securities and Investments Commission (ASIC) seems likely after the government announced plans for additional resources during 2016. Recently, ASIC has shown an increased inclination to seek criminal penalties against directors, pursuing at least two for allegedly misleading the market in announcements issued to the securities exchange. Directors should also be aware of the rise in pre-inquiry and inquiry costs; regulators are using their information gathering powers more broadly and becoming more proactive across industries. The costs of complying with regulatory demands can be substantial. ASIC is also looking to recover its investigation costs in future, increasing the potential exposure of directors and officers.

Culture and conduct is also a key regulatory focus. The ASIC corporate plan states it will focus its surveillance activities on the culture of companies it regulates, as it considers that poor corporate culture was a key driver of non-compliance in the financial services industry leading up to the global financial crisis.

More broadly, the downturn in the Australian economy may give rise to an increase in investor discontent and claims against directors.

Hong Kong
Directors in Hong Kong are coming under increasing regulatory scrutiny. In recent years, the Securities and Futures Commission (SFC) has been active in its pursuit of actions against market misconduct. It has commenced proceedings for failing to disclose price sensitive information as soon as reasonably practicable against a manufacturer of camera products listed in Hong Kong Main Board (and its CEO and financial controller) and a manufacturer of metal products listed in Hong Kong Main Board (and its senior management) respectively. The SFC is active in imposing heavy fines on financial institutions for non-compliance of their regulatory requirements. For example, a securities trading company was fined HK$2.7m for internal control failures and not reporting the deficiencies to the SFC in a timely manner. In 2016, the SFC also publicly censured or criticized a number of financial institutions for breaches of the Code on Takeovers and Mergers. It is expected that the SFC will continue to adopt a robust approach in its enforcement actions.

Singapore
In 2014, the Singapore Companies Act was amended, with a number of provisions impacting directors and officers implemented in 2015 and 2016. These include the expansion of the definition of director to include a person in accordance with whose directions or instructions the majority of the directors of a corporation are accustomed to act; making it a criminal offense for an officer to make improper use of their position to gain, directly or indirectly, an advantage for themselves or for any other person or to cause detriment to the
company. They also empower the Accounting and Corporate Regulatory Authority to debar a director in certain circumstances for the company’s failure to file any required document. Notably, the amendments also allow shareholders to bring statutory derivative action against directors of a listed company. More positively for directors, companies are now permitted (subject to certain exceptions) to indemnify an officer of the company against liability incurred to third parties.

United Arab Emirates
A significant change to directors’ exposures is the introduction of the UAE Commercial Companies law, which came into effect on 1 July 2015, and creates a statement of directors’ duties. The new law sets out the basis on which liability can be found against directors, which includes material error. These provisions of the new law may lead to an increase in the number of claims. Article 24 of the new law contains a new restriction on companies exempting officers (current and former) from liability.

Regulatory scrutiny across the region is increasing, particularly in the Dubai International Financial Centre, where enforcement action has increased. This has been accompanied by a regulatory focus on attributing blame against individual managers.

A particular risk area is outside entity directorships in foreign jurisdictions - an area where an increase in claims is expected, particularly as companies diversify their interests internationally. Awareness of the possibility of bringing a claim against a director is also increasing due to the publicity of some significant claims against D&Os ongoing in the UAE.

South Africa
There has been a recent trend towards shareholders seeking to hold directors liable for losses suffered by them as a result of the negligent or reckless conduct of directors. The statutory underpinning for such claims is the Companies Act No.71 of 2008 which codified directors’ liability in South Africa.

Overall, as the law stands, shareholder actions are likely to fail, but there is the potential for the position to shift.

Germany
The focus on personal accountability is notable in Germany, where regulators, prosecutors and companies have been known to actively pursue individual directors for conduct or compliance failings. Corruption, and bribery, together with competition and cartel investigations, have been some of the main causes of German management liability claims, where directors at some of the largest German companies have been sued.

Board members at companies in Germany should be cognizant of how the organization approaches corporate governance and compliance, as executive liability is all about having the right controls and procedures in place within the organizational culture. Executives in Germany may also find they are held accountable by their own companies. The German market is typified by internal liability claims, where the company sues executives for wrongdoing or compliance failings. Around 80% of German D&O claims seen annually by AGCS are for such cases.

Meanwhile, collective redress is being used in Germany under the German Capital Markets Model Case Act, which enables similar securities lawsuits to be combined in a streamlined process.

The law has not yet been widely tested, but that could change if large claims like that filed by Volkswagen investors make it to court. Hundreds of investors filed a suit in a German regional court seeking billions in damages for alleged breaches of stock market duty related to evading emissions tests.

Brazil
Brazil is actively pursuing corruption cases due to recent high-profile corporate and political criminal and regulatory scandals. As a result, many directors of impacted companies have hired defense at enormous expense. This has resulted in several securities class actions filings in the US and other countries, thus increasing insurance take-up in Brazil. The public awareness of D&O risks reached its peak in 2016.
Cross-border and systemic risk

With globalization, executive liability exposures are becoming more complex and interconnected. Many large claims involve regulatory investigations and civil litigation in multiple jurisdictions.

"International companies are being sued in the US, although claims and litigation growth outside the US has also been significant and is helping drive demand for global D&O insurance programs," says Paul Schiavone, Regional Head Financial Lines North America, AGCS.

The interconnectivity of risk seen in other areas of the corporate world, such as supply chains, is also present in executive liability, as is the potential for systemic risks for executive liability underwriters.

"Financial institutions have already shown the potential for industry wide claims, but the emissions testing problems in the automotive industry represent the first potentially systemic loss in the commercial D&O space that I have seen in 22 years of underwriting," says Schiavone.

Other risks, such as cyber and climate change, also present systemic loss scenarios. For example, problems at a widely used cloud service provider could impact hundreds of companies.

The Panama Papers leaks illustrate how a data breach can impact professional service providers and financial institutions, which could in turn spark multiple claims across several jurisdictions. Following the leak, government agencies and regulators around the world launched investigations into banks and professional service companies to check compliance.
Fast-rising exposures:
Emerging risks in focus

5 top emerging risks

- Cyber risk is a major emerging risk for directors and officers, but awareness and understanding of potential liability is low.
- In future it may be possible to claim substantial damages from directors if there has been negligence in any failure to protect data or a lack of controls. Landscape will get tougher.
- Robust mergers and acquisitions (M&A) activity a key driver of D&O litigation.
- Future development of claims against companies and directors arising out of the disclosure of climate-change related risks to investors likely.
- Rise of strategic litigation to combat modern slavery in supply chains.

Recent spikes in D&O claims related to mergers and acquisitions, as well as corruption and anti-competitive practices, have grown. However, almost any executive failing that gives rise to a regulatory investigation or a fall in share value could result in liability and claims made against directors and officers.

Emissions testing allegations in the automotive industry have, for example, highlighted the potential for environmental or climate change related liability claims. Ethical and social issues, like modern day slavery in the supply chain, are another potential source of claims, as are employment or discrimination disputes.

"This can be seen in Germany, where corruption and cartel allegations have dominated executive liability claims in recent years. Almost any issue that arises from non-compliance could create an exposure," explains Martin Zschech, Regional Head Financial Lines Central & Eastern Europe, AGCS.

Not only could these emerging exposures cause claims, but would expose the company to considerable reputational risk. A 2016 report by Deloitte, revealed that reputational damage was identified as the number one threat for large companies.

"In Germany, a supervisory board could go after management for all kinds of scenarios. There is a fine line between business risk and a wrongful act," says Zschech.

A number of fast-rising exposures – and their potential impact for directors – are considered over the following pages.

1 Reputation Matters, Developing Reputational Resilience Ahead of Your Crisis, Deloitte
Mergers and acquisitions activity

Mergers and acquisitions (M&A) activity continues to be a key driver of D&O litigation and is predicted to continue at a rapid pace in future, as deal makers are motivated by low interest rates, healthy stock prices, good employment numbers and plenty of cash. Activity has been robust. According to industry experts, there were around 44,000 transactions worldwide in 2015, for a total value of $4.5trn and activity is expected to remain strong through 2016 and 2017.

M&A activity represents a critical time for companies and officers, whether as an acquirer or a target. Acquiring companies often face liquidity problems due to high acquisition costs, while targeted companies often face unprecedented scrutiny for past wrongful acts among executives.

As buyers and sellers are not always forthcoming about business operations and inherent risks, however, post-sale disputes are common and financial issues surface. Run-off claims can mean holding steep reserves and paying extra premiums for up to six years after the date of the transaction.

According to Cornerstone Research, at current pace, M&A-related filings in federal courts in the US will double the annual numbers observed in the last four years.

To help alleviate such matters and facilitate the process for a merger, acquisition, divestiture or other business transaction, parties are increasingly purchasing transactional liability insurance, which offers financial protection (for the company and shareholders) against inaccuracies made about target companies or businesses in connection with mergers, acquisitions and divestitures.

Between 2011 and 2015, reports show that use of transactional liability insurance, which is provided by insurers such as AGCS, has grown 240% globally.

“Mergers and acquisitions, but also divestitures, belong to the more riskier moments in the life of a company,” says Bernard Poncin, Global Head of Financial Lines AGCS.

“Expectations are always high, and synergies are easier planned than realized. This unique and specific risk situation has also led to the development of new products. The appetite for transactional liability insurance has increased tremendously over the past couple of years with a global market penetration of 20%.”

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* Source: Institute for Mergers, Acquisitions and Alliances (IMAA)
** Allianz Global Corporate & Specialty
Cyber risk

Perhaps, the most topical emerging liability risk for executives is technology – cyber risk in particular. According to the **2016 Allianz Risk Barometer**, cyber risks feature in the top three corporate risks for the first time. Companies are worried about increasing sophistication of attacks but tend to underestimate the impact of technical IT failure, human error or even rogue employees as cause of costly damages. Data protection rules are becoming increasingly tough as government agencies bolster cyber security. This significantly impacts businesses; penalties for non-compliance can be severe.

Awareness of cyber risk is highest in the US, where strict data protection laws require companies to notify individuals of a breach but a heightened cyber liability focus is seen in the Middle East, Singapore and Australia, while the European Union is also moving ahead with plans to harmonize its rules.

"Cyber and privacy is the number one emerging risk for directors and officers, but awareness and understanding of the risk is not always high," says **Paul Schiavone, Regional Head Financial Lines North America, AGCS**.

A serious cyber incident can result in reputational and financial damage, as well as regulatory action. In more extreme cases a cyber security breach could cause a company’s share price to drop, which might in turn see directors sued for breach of their fiduciary duty.

"It may be possible to claim substantial damages from directors if there has been negligence in any failure to protect data or a lack of controls," says **Emy Donavan, Regional Head of Cyber Liability North America, AGCS**.

There have already been a number of securities class actions and derivative class actions filed in the US related to data breaches involving the theft of personally identifiable data, including those against Target and Home Depot. However, most cases are still pending and there remains little case law in this area.

"There is uncertainty in US case law on the issue of directors’ cyber liabilities but that is not to say it can’t happen. It is only a matter of time before someone makes a successful argument that a director was negligent or had not paid attention to cyber security," she says.
Change in Europe

The introduction of tough EU data protection laws in 2018 will increase executive’s liabilities for data breaches or personal data misuse in Europe. Fines for breaching the rules are as high as 4% of global revenues, which could run to billions of dollars.

Several European countries – including France and Italy – have already taken steps to make directors liable if they fail to take reasonable steps to prevent a data breach. Boards are expected to have a detailed strategy for combating cyber risks and may face claims if they fail to do so.

According to law firm Clyde & Co, while to date claims by shareholders against directors in respect of cyber or data breach issues have been rare (in the UK for example, there had been none by mid-2016), as privacy and network security issues are increasingly viewed as a board issue, it may become more difficult for directors to escape liability in the event of a serious loss by the company.

As cyber security becomes a competitive advantage, it also predicts a potential rise in US securities class actions as a result of data breaches. The landscape for directors who do not prioritize data security issues is only going to get tougher on both sides of the Atlantic, and cyber security-related D&O litigation is anticipated more widely; in France, Spain, the UAE and Australia to name but a few.

"Exposures also exist where companies with an overreliance of networks and systems do not have viable workarounds. If a director knew about such exposures but failed to put in place appropriate contingency plans, they could be made liable in the event of a sizable loss,” says Donavan.

"There are a wide range of scenarios in which a director could be considered negligent, such as a fund transfer fraud or where a vulnerable network is comprised, leading to significant business interruption, property damage or loss of intellectual property,” she adds.

Directors’ cyber exposures are likely to grow further with the increased reliance on technology in many sectors.

"Companies increasingly rely on technology, data and algorithms, which can become corrupted or contain flaws. For an analyst using predictive models to advise customers, this could open up huge liabilities,” says Donavan.
Growth in outsourcing and cloud computing is also creating exposures. A breach at, or the failure of, an outsourcing partner could result in litigation if the directors failed to ensure appropriate due diligence and audits were carried out, for example.

The 2013 Target data breach involved a malware attack on one of the company’s vendors, giving hackers access to Target’s online vendor portal.

“Any cyber event that significantly impacts a company’s reputation and its share price could result in shareholder action. The best way that directors and officers can protect themselves is to discuss cyber risk at a board level and address these exposures as part of robust risk management solutions,” Donavan adds.

“Many directors used to see cyber as an IT issue and not an exposure for the board to consider,” says Donavan. “But there is no escaping cyber risk in the context of business judgment. Directors need to be adequately informed, otherwise they leave themselves exposed. While there is still not significant case law addressing cyber for directors and officers, it will not be possible to just plead ignorance. That will not save directors from personal liability.”

Executives are able to gain some protection – both directly and indirectly – for cyber related risks from insurance. Cyber risk is broad and touches on many areas of risk and insurance products, including financial lines, errors and omissions (E&O), professional liability, crime, general liability and kidnap and ransom.

“Companies need to sit down and identify gaps in cover and seek solutions,” says Donavan.

Standalone cyber insurance has been designed to specifically cover business losses and liabilities arising from cyber exposures and can pay for the cost of important pre- and post-loss crisis management services that can help plan a response and mitigate the impact of a cyber event, she says.

Of particular concern to directors will be the extent of cover for regulatory investigations and legal defense costs available under a D&O policy. Some insurers have moved to include specific wordings for cyber-related executive liabilities.

“Buying cyber insurance, or ensuring that cyber is not excluded from the D&O policy, is not sufficient,” says Donavan.
Global director’s risk checklist: **Cyber risk**

This checklist has been designed as a practical guide to issues that directors may wish to take into account when dealing with cyber risks. It is a general non-exhaustive checklist and is not jurisdiction specific. It should not be used as a substitute for professional advice on issues within your jurisdiction and should not be taken as providing legal advice on any of the topics discussed.

### Cyber Risks

**IT security**
- Maintain strong and properly configured firewalls
- Obtain, maintain and update antivirus/anti-malware software regularly
- Limit third party access to the network
- Restrict use of external devices
- Require strong passwords that are regularly changed
- Use appropriate encryption on portable devices
- Periodically perform security audits
- Regularly review security outsourcing and cloud-based services
- Perform random staff testing (using test email) to measure effectiveness of security and company policies
- Consider implementing Digital Loss Prevention (DLP) software to monitor traffic outbound on your network, which can help identify breaches as they are happening

**Policies**
- Provide training and company policies on detection of suspicious activity
- Implement policies for network use and the use of portable devices
- Ensure you understand reporting requirements in your jurisdiction
- Identify employees and parties affected by the breach and act accordingly
- Enact strict, role-based permissions to areas of the network containing sensitive data

**Response plan**
- Devise and implement clear communication plan for notifying data breaches
- Devise and implement plan to handle media enquiries
- Maintain and update training regarding cyber risks
- Adequately communicate policy for reporting suspicious activity
- Raise awareness of staff about phishing and other techniques
- Encourage vigilance among staff

**Data Protection**
- Consider forming a specific cyber security committee
- Consider engaging specialist third parties to undertake monitoring, assessments and security tests as part of enterprise risk management
- Cultivate law enforcement and third-party contractor contacts in advance
- Ensure cyber strategy is reviewed and revised periodically

**Board engagement**
- Proactively engage with risk by performing detailed risk assessment and implementing a clear and robust cyber security strategy
- Maintain cyber strategy periodically reviewed and reviewed periodically
- Ensure cyber strategy is revised periodically
- Ensure cyber strategy is reviewed and revised periodically

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This checklist has been designed as a practical guide to issues that directors may wish to take into account when dealing with cyber risks. It is a general non-exhaustive checklist and is not jurisdiction specific. It should not be used as a substitute for professional advice on issues within your jurisdiction and should not be taken as providing legal advice on any of the topics discussed.
Proactively engage with risk by performing detailed risk assessment and implementing a clear and robust cyber security strategy.

Consider forming a specific cyber security committee.

Consider engaging specialist third parties to undertake monitoring, assessments and security tests as part of enterprise risk management.

Cultivate law enforcement and third-party contractor contacts in advance.

Ensure cyber strategy is reviewed and revised periodically.

Response plan

Provide training and company policies on detection of suspicious activity.

Implement policies for network use and the use of portable devices.

Maintain and update training regarding cyber risks.

Adequately communicate policy for reporting suspicious activity.

Raise awareness of staff about phishing and other techniques.

Encourage vigilance amongst staff.

Devise and implement clear communication plan for notifying data breaches.

Develop a clear and defined data breach response plan that minimizes loss and quickly restores operation.

Form a dedicated response team who are first responders in the event of a breach – ensure members are from varying disciplines.

Create list of external vendors to address security issues in event of a breach.

Maintain a 24/7 senior management approval list in event of a cyber breach.

Set up defined and separate communication network for responders to communicate with one another.

Ensure response plan is communicated, tested and revised periodically.

Preserve forensic information for investigations and improving security.

Communicate cyber breaches internally to maintain awareness of threats.

Consider appointing external lawyers to manage fallout from the breach.

Notify insurers as necessary.

Devise and implement plan to handle media enquiries.

Ensure you understand reporting requirements in your jurisdiction.

Identify employees and parties affected by the breach and act accordingly.

Enact strict, role-based permissions to areas of the network containing sensitive data.

Maintain strong and properly configured firewalls.

Obtain, maintain and update antivirus/anti-malware software regularly.

Limit third party access to the network.

Restrict use of external devices.

Require strong passwords that are regularly changed.

Use appropriate encryption on portable devices.

Periodically perform security audits.

Regularly review security outsourcing and cloud-based services.

Perform random staff testing (using test email) to measure effectiveness of security and company policies.

Consider implementing Digital Loss Prevention (DLP) software to monitor traffic outbound on your network, which can help identify breaches as they are happening.

*Checklists produced by Clyde & Co and Allianz Global Corporate & Specialty*
Viewpoint: Clyde & Co.

Climate change related disclosures

Environmental activists have been ramping up their focus on targeting companies and directors for a number of years and there are signs that, going forward, we may see the development of claims against companies and their directors arising out of the disclosure of climate-change related risks to investors.

Another current trend is an increase in shareholder resolutions filed at company annual meetings related to climate change, the aims of which can include to force the company to disclose more climate change information, for example on greenhouse gas emissions, or to analyze risks and opportunities created by climate change.

In July 2016, the Governor of the Bank of England, Mark Carney, told a Toronto audience that only one third of the world’s top 1,000 companies are offering effective disclosures to investors about the potential impact of carbon pricing on their business.

In the US there has been renewed interest by both regulators and plaintiff’s counsel regarding disclosure of climate change and other environmental risks. In 2015, the SEC reviewed what companies should disclose with respect to climate change, and is currently looking at publishing new rules in that regard.

The energy sector is already being targeted. In November 2015, the New York Attorney General (NYAG) subpoenaed Exxon Mobil regarding the sufficiency of its disclosures on the impact of climate change on their business. In November 2015, it reached a settlement with Peabody Energy in which it agreed to disclose more about climate change risks. There is every chance that these actions could spill over into other industries.

If it turns out that the information disclosed to investors regarding the consequences of climate change risks is incomplete or misleading, the company and its directors could face an array of potential claims, from class actions to shareholder derivative claims (in climate-change related suits, claims could be based on breaches of statutory or fiduciary duties, compensation for lost corporate value attributable to a failure to mitigate or adapt).

Although it is widely accepted that the consequences of climate change are difficult to predict, the weight of scientific and economic evidence available to directors and officers may make it increasingly much more difficult for them to defend themselves on the basis that the effects of climate change were not reasonably foreseeable.

The risks are not confined to the US; there have been a number of claims related to environmental liability disclosures in Canada, and although not a disclosure case, the 2015 Supreme Court of Canada decision in *Chevron Corporation v. Yaiguaje* illustrates the cross-border reach of corporate environmental liability.
Modern slavery and the rise in strategic civil litigation

The concept of modern slavery is a broad one, including the like of servitude, forced and compulsory labor and human trafficking. An estimated 45.8 million people are trapped in modern slavery globally, according to The Walk Free Foundation’s 2016 global slavery index, emphasizing the need for large organizations to focus on this potential risk in supply chains.

According to law firm Clyde & Co, in the UK for example, the Modern Slavery Act 2015 (MSA) is the latest response to this issue. Under the MSA, commercial organizations with a global turnover of £36m ($55.1m) or more, and conducting any part of their business in the UK, are required to publish an annual “slavery and human trafficking statement” – steps (if any) taken to ensure modern slavery is not taking place in its own business and supply chains. The statement must be approved by the board and signed by a director. Although larger companies are affected, suppliers of any size need to take note, as they will undoubtedly come under pressure to ensure their own supply chains are in order.

Legal sanctions for failure to comply are limited – there are no fines or penalties, but the secretary of state is empowered to commence proceedings for an injunction requiring an organization to prepare a statement, with public scrutiny, reputational concerns and the press likely to be the primary drivers of compliance. California has similar legislation and non-governmental organizations are actively engaged in “public shaming” exercises, the law firm notes.

There are key sectoral (such as agriculture, construction, food-processing and home/domestic work) and country risks which will act as drivers for enhanced due diligence for those affected. Procurement policies addressing modern slavery, contractual protections in supply contracts, clear labor and whistleblowing policies will all be important.

While there may of course be repercussions for directors of companies that do not comply, the obligation is on the company, not the director personally. However, directors should ensure they have taken steps to verify the contents of the statement.

There are predictions that there will be considerable litigation arising from the MSA in future, with construction companies operating in Qatar cited as a sector that will be targeted by non-governmental organizations. The Freedom Fund has recently launched a guide which emphasizes the importance of strategic litigation to combat modern slavery.

The Costco litigation in California, brought by a consumer and which sought to represent all California consumers of Costco prawn products under the Californian Transparency in Supply Chains Act, while dismissed, highlights that class actions may be a sign of things to come. The stock drop that followed this litigation should also act as a warning sign to directors.

1 The Global Slavery Index, The Walk Free Foundation
What is D&O insurance?*

D&O insurance policies offer liability cover for company managers to protect them from claims which may arise from the decisions and actions taken within the scope of their regular duties. As such, companies’ D&O insurance has become a regular part of companies risk management.

Companies purchase D&O cover because managers can make mistakes. D&O coverage includes financial protection for managers against the consequences of actual or alleged “wrongful acts”. Policies cover the personal liability of company directors but also the reimbursement of the insured company in case it has paid the claim of a third party on behalf of its managers in order to protect them.

Coverage is usually for current, future and past directors and officers of a company and its subsidiaries. D&O insurance grants cover on a claims-made basis. This means that claims are only covered if they are made while the policy is in effect or within a contractually agreed extended reporting period, which can extend up to another 72 months or even longer in some countries.

Coverage does not include fraudulent, criminal or intentional non-compliant acts or cases where directors obtained illegal remuneration, or acted for personal profit.

Therefore, D&O insurance raises many important questions which companies must face: How much is enough? What and who is covered – and not covered? Should small-to-medium sized enterprises (SME) purchase D&O? What does the typical program look like? How can risk management protect officers from the many perils they face in today’s business environment?

* The insurance policy forms the contract between the insured and the insurance company and may contain limits, exclusions, and limitations not detailed in this article.
How does D&O insurance work in practice?

1. A manager allegedly fails to perform his or her management role.

2. As a result, several people (internal and/or external claimants) decide to sue the manager.

3. Manager is informed of the claim.

4. Manager contacts the legal and risk management departments.

5. Legal and risk management departments inform their D&O broker/insurer and provide claim description.

6. If the claim is covered, the insurer pays for the defense costs.*

7. If the claim is covered and the case is lost, the insurer pays for the loss and for the defense costs.*

* subject to terms and conditions of the respective insurance policy

What is covered?
- Allegation of a wrongful act
- Costs and expenses of an insured e.g defense costs
- Financial losses where the insured is held liable

Who can claim?
- Stockholders, investors, creditors, banks
- Supervisory board
- The company itself, employees
- Regulators, state authorities, unions
- Customers, suppliers, competitors

Common D&O risk scenarios
- Employment practices and HR issues
- Shareholder actions
- Reporting errors
- Inaccurate or inadequate disclosure (for example, in company accounts)
- Misrepresentation in a prospectus
- Decisions exceeding the authority granted to a company officer
- Failure to comply with regulations or laws
- Corporate manslaughter
- Insolvencies
- Creditor claims
- Mergers and acquisitions
- Divestitures
- Competitor claims
- Claims made by the company, itself

Common D&O exclusions
- Fraud
- Intentional non-compliant acts
- Illegal remuneration or personal profit
- Property damage and bodily harm (except corporate manslaughter)
- Legal action already taken when the policy begins
- Claims made under a previous policy
- Claims covered by other insurance
- Fines and penalties

Source: Allianz Global Corporate & Specialty.
D&O insurance structure

The structure of a D&O insurance policy depends on which of three insuring agreements are purchased (ABC policies are generally chosen, as these are standard form policies for publicly listed companies; for private or non-profit companies, only AB policies would be used) [see table].

<table>
<thead>
<tr>
<th>Cover</th>
<th>Description</th>
<th>Who is the insured?</th>
<th>What is at risk?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Side A</td>
<td>Protects assets of individual directors and officers for claims where the company is not legally or financially able to fund indemnification</td>
<td>Individual officer</td>
<td>His/her personal assets</td>
</tr>
<tr>
<td>Side B</td>
<td>Reimburses public or private company to the extent that it grants indemnification and advances legal fees on behalf of directors/officers</td>
<td>Company</td>
<td>Its corporate assets</td>
</tr>
<tr>
<td>Side C</td>
<td>Extends cover for public company (the entity, not individuals) for securities claims only</td>
<td>Company</td>
<td>Its corporate assets</td>
</tr>
</tbody>
</table>

Directors and officers are confronted with an increasing peril that their company may not be able to reimburse them for loss. An extra layer of defense to personal funds can be secured by purchasing Side A cover, which insures directors and officers only (not the company) when indemnification is unavailable.

Often not enough coverage is bought for the risk, so a major trend is for more Side A cover to be purchased in order for an individual officer to protect personal assets.

D&O cover has become a regular cover for large multinational companies, but all sizes of organizations – public, private or non-profit – have potential exposures.

There is increasing demand for SME D&O cover, though penetration is still low due to lack of awareness and education. D&O products are perceived to be expensive, but actually are quite affordable. For example, a small firm with a $100m turnover can obtain no-frills D&O cover with very low limits for less than $1,000 per year.

### Six steps to structuring an insurance program

1. Benefit from the degressive nature of insurance pricing and prefer higher limits over lower limits. Large towers offer great value for premium money, as the price per unit of capacity gets cheaper the higher the tower.
2. Consider special and dedicated protection for the natural insured persons that cannot be eroded by entity coverage elements and still works in case the entity can no longer indemnify (dedicated Side A sitting excess of ABC).
3. Diversify your program. A tower consisting of many carriers with small lines is much more stable than the same tower consisting of few carriers with large lines.
4. Make sure you have an international insurance program in place in case your subsidiaries operate in strictly non-admitted territories.
5. Confirm the claims department of your lead carrier has already successfully settled large claims. What is their claims protocol in general? Meet with claims people as well as with underwriters.
6. Don’t overload policies with too many (exotic) “extras”. The limit must be available for the main risks (Regulatory, SEC, M&A, etc) and should not be eroded by details that can be easily self-insured, especially if they concern the entity.

### Average D&O limits

- **Unlisted companies** ($500m to $2.5bn revenue) = approx $75m limit (average)
- **Listed companies** ($500m to $2.5bn revenue) = $125m to $150m limits (average)
- **Global Fortune 100 companies** (>=$50bn revenue) = approx. $500m+ limits (average)
- **SME companies** (<$250m revenues) = $1m to 10m; up to $25m with international exposures (average)
How D&O insurance works: **Excess layer structures**

Larger sized programs with limits over $30m are usually too large for one insurer and require a group of insurers to share the risks. In this setup, the lead insurer is usually more experienced and able to handle wordings, advise on international insurance program (see below) setup and settle claims. The lead carries the "primary layer" up to, for example, $30m, and would pay claims up to that amount. When that limit is reached, it "erodes" and the next layer kicks in, up to a certain amount, and so on. The lead insurer carries most of the claims and generally pays defense costs and creates policy wording, so is most at risk. Hence, premiums are much higher.

Another way of risk sharing is through proportional coinsurance, where insurers split the premium proportionally depending on their risk share. Claims would be settled likewise. More difficult scenarios with mixtures of proportional and non-proportional elements also exist.

**International programs**

Larger clients with subsidiaries in other countries need an international insurance solution to protect directors and officers in all markets. Some markets require the company to take out insurance from a locally admitted insurer. Other more progressive markets allow a master policy to be issued in another country that covers local exposures. Cover is typically provided by a combination of locally admitted policies and a global master policy, which provides additional cover to harmonize the protection globally (unless standalone local policies are required).
Risk Management Best Practice

Global Director’s Checklist

Company indemnification
Ensure you are fully aware of:
- the circumstances in which the company will indemnify you
- the circumstances in which your decisions may be ratified by the company
- D&O insurance in place to cover you as a director of the company
- exclusions in the policy— for example, it is common for insurance to exclude cover for loss due to fraud, dishonesty, wilful default or criminal behavior
- the fact that penalties imposed are often uninsurable.

Civil liability
Be aware of the following possible claims against directors:
- **Claims by the company** for breach of any duty owed to the company whether under company documents, statutory duties or fiduciary duties
- **Derivative actions** brought by one or more shareholders against the company’s directors, seeking redress on behalf of the company for a wrong committed by those directors
- **Shareholder oppression** brought by one or more shareholders against directors and/or the company itself where the conduct of a company’s affairs has been unfairly prejudicial or discriminatory against the interest of members
- **Claims by third parties**, though rarer, can be brought in contract, tort or under statute.
  The following are a few examples of where liability may be established:
  - in contract, if a director personally guarantees his/her company’s debts
  - in contract, if the director does not make it clear that s/he is contracting as the agent of the company, and not on a personal basis
  - in contract, if the director enters into a contract on behalf of the company but exceeds his/her authority and the company sets it aside
  - in tort, if the director makes a fraudulent or negligent misstatement which induces a third party to enter into a contract with the company or otherwise acted to their detriment.

Criminal liability
There are a number of criminal exposures for directors, including but not limited to:
- wrongful trading
- theft
- fraud
- money laundering
- bribery
- market manipulation.

Regulatory liability
In addition to civil and criminal liabilities, note that directors are also subject and face potential exposure to liability under financial, competition, health and safety and environmental regulations.
Company duties
Review company documents carefully and ensure you understand:
- the duties you owe to the company
- which powers may be exercised and in what circumstances
- what restrictions are placed on you
- whether you face personal liability
- whether directors’ liability is joint or several.

Statutory duties
Directors will often be subject to legislation governing directors’ duties to the company and its members. Ensure that you:
- understand and comply with the duties in force in your jurisdiction
- consider how they can apply to all aspects of your role
- consider to whom the duties are owed – the company or its shareholders?
- consider what duties will be owed if the company faces financial difficulties.
  Do you have to act in the best interests of creditors?
- if you possess a specialist skill which you utilize in conducting your duties as a director,
  be aware you may be held to a higher standard
- keep detailed records of meetings and decisions taken

Breach of statutory duties potentially exposes directors to claims from the company and/or its shareholders and, in some cases, its creditors. It may be possible in some jurisdictions for directors to be personally liable for the loss.

Fiduciary duties
Directors owe fiduciary duties to their companies. When carrying out your duties as a director, bear the following in mind:
- you may not be able to delegate without express authority
- you must understand and consider the overall risks that impact
  upon the company’s position in performing your role
- advice provided to you by third parties or advisers (such as accountants or lawyers) should not
  be relied on unless you have independently understood and considered the relevant issues
- you should not bind yourself as to how you will exercise your discretion in future
  e.g. by making an agreement to vote in a certain way
- you should consider whether to exercise your discretion where to do so would be advantageous to the company
- you should not personally exploit or take advantage of information or
  opportunities that you are made aware of due to your role as a director
- where a company is part of a consolidated group, directors must act in the
  interests of the company itself, as opposed to the group’s interests.

This checklist has been designed as a practical guide to the potential duties and liabilities of directors of companies. It is a general non-exhaustive checklist and is not jurisdiction-specific. It should not be used as a substitute for professional advice on issues within your jurisdiction and should not be taken as providing legal advice on any of the topics addressed.
Risk Management Best Practice

Particular D&O Exposures Checklist*

Exposures for directors of publicly listed companies
Be aware that directors may be personally liable for loss resulting from untrue or misleading statements in or omission of required information in listing particulars in respect of an offer of securities to the public or an admission to trading on a regulated market.

If the director has been dishonest or reckless regarding the truthfulness of the information provided, they may be subject to both civil and criminal prosecutions. Directors should:
• seek appropriate legal advice
• complete full and proper due diligence
• personally review and query the prospectus or listing particulars before signing anything.

Exposures following Company Insolvency
It is not uncommon for directors to face costly proceedings in circumstances where their company becomes insolvent, as liquidators will carry out extensive investigations into the causes and will often seek to hold persons responsible and/or to recoup monies lost. Be aware that the following may apply in your jurisdiction:
• you may be under a duty to minimize loss to the company and its creditors as soon as you know (or ought to have known) that there is no reasonable prospect of the company avoiding an insolvent liquidation
• your actual skill, knowledge and experience (and what a reasonable director in your position should possess) may be taken into account
• you may be under a duty to obtain professional advice if at any time there is uncertainty as to the company’s ability to continue as a going concern
• you may subsequently be exposed to director disqualification proceedings if failures are identified.

Bribery
Many jurisdictions are focused on stamping out bribery in companies and have legislated accordingly. It is important to bear in mind that statutes covering bribery are often international in scope.

Directors should be mindful:
• that the business, even if based entirely in one jurisdiction, may be held responsible for the acts of its foreign associated persons
• that organizations incorporated elsewhere but carrying on business in another jurisdiction or employing citizens from the other jurisdiction should not assume that they will fall outside the reach of bribery laws

Directors may also be exposed to liability when the company itself is being investigated. In the UK and US, for example, prosecutors can make deals with the company in exchange for lighter penalties. Such arrangements require the full cooperation of the company, which could include the company providing the prosecutor with information and documents during the course of its investigation which can then be used for the purpose of prosecuting directors.
Health Safety and Environmental Law
Directors should be aware of:
- applicable health and safety laws that may expose directors to liability, for example, failing to ensure the welfare at work of employees
- Applicable environmental laws such as how the company deals with waste.

Breaches of these laws may expose directors to civil, regulatory and criminal liability.

Manslaughter
Be aware that directors can, in certain circumstances in some jurisdictions, be convicted of manslaughter if death is caused as a result of their negligence.

Cartels/Competition
Individual directors who are found guilty of engaging in dishonest anti-competitive conduct can be personally fined, disqualified and even subjected to imprisonment.

Money Laundering
Most jurisdictions have money laundering laws. Directors carrying out relevant financial business must:
- be aware of the requirements of applicable laws and regulations
- ensure internal processes are in place to identify, record/report on this issue
- provide proper training.

Extradition
A number of jurisdictions have legislation providing for the extradition of individuals.

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Risk Management Best Practice

**Top things a director should know about D&O risk**

- Be as transparent and candid as possible, there is nothing worse than a bad surprise
- Make sure that risk management is a culture not a department
- Understand that the current business environment involves dynamics and complexities that increase at the same time and that a shift of power towards regulators and compliance in general is occurring – an explosive mixture that will probably increase management risks going forward
- Recognize new challenges such as cyber, IT and digital transformation which add to the normal risks
- Instill first-class cyber and IT risk management with the help of an insurer, including smart back-up systems and emergency solutions
- Keep open communication channels to authorities, regulators, capital markets, employees
- Keep record of emails, meetings minutes, calendar and all other documentation related to current managing role
- Choose a defense lawyer carefully, based on qualifications with defending D&O lawsuits in similar cases; in any doubt, the insurer can provide a recommendation
- Maintain an early risk dialogue with the insurer, before asserting a claim for damages against a D&O
- Involve the insurer early on if trying to mitigate/settle a claim or potential claim
- Set up a system for reporting claims internally so that colleagues understand what to look out for and what needs to be reported internally and to insurers.

**Top things a director should be asking about their D&O exposure**

- Ask about sensitive compliance-related topics such as sanctions and embargos, tax haven registrations (money laundering, tax evasion), smart tax engineering that may be legal but no longer accepted, cartels, price fixing, corruption and bribery, and tax and accounting fraud
- Find out about the style and substance of investor communications and the public in general, including authorities and NGOs, relating to media sensitive topics such as environmental, social and governance (ESG), corporate social responsibility (CSR), etc.
- Find out about the “classic” D&O topics, such as M&A, capital measures, IPOs. A company’s internal risk management and compliance structure/organization should have all these points on the radar, and procedures in place that adequately address/prevent all the above (probably the only defense left for D&Os in case they face a problem in one of these areas)
- Beware of conflicts where both a corporate entity and its directors are insured under the same policy, but their interests may not be aligned: Which implications and possible impact could such a conflict have over D&O exposure/coverage?
- Ask proper questions in the event of representation by a holding company: For example, a holding company appoints a director to the board of another company to represent its rights and interests, where the holding company holds 25% of the shares: Which D&O policy would be applicable? The holding company or the D&O policy of the company where the director is working?
- Ask about a notice of circumstances and when/how to notify the insurer about it
- Ask if prior approval is needed from insurers, before instructing/appointing a defense counsel
- Decide if you should discuss steps with the insurer before intending to admit liability or pay money to third parties without insurer’s prior consent and agreement, since this fact could prejudice the ability to obtain an indemnity under the policy, even if that liability is considered to be certain.
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