



■ **INDEPTH FEATURE** Reprint January 20

D&O RISK & LIABILITY

Financier Worldwide canvasses the opinions of leading professionals around the world on the latest trends in D&O risk and liability.





UNITED KINGDOM

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Respondents



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Marcus Porter-Wright has 29 years of experience in the financial lines insurance sector of the London insurance market. He has spent his career at Marsh and specialist independent Lloyd's brokers, before joining Willis Towers Watson to head up the GB Financial Institutions division of FINEX. He has a wealth of client service experience, having managed financial lines programmes for global banks, insurance companies and businesses within the wider financial services sector. Additionally, he has led one of the largest London insurance market divisions specialising in specie insurance.



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Guillaume Deschamps has more than 18 years of experience within financial lines insurance. Starting as a D&O underwriter at AXA Corporate Solutions in Paris, he latterly took charge of the French, UK and Asian books of business. Following 12 years at Marsh, where he ran the D&O practice for continental Europe, he moved to Willis Towers Watson where he leads the Financial and Executive (FINEX) risk team, delivering a broad range of client risk solutions for D&Os including D&O, cyber, professional indemnity and kidnap and ransom. He also leads the FINEX practice in the Central Europe and Russian territories.

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Q. Could you outline some of the key factors currently driving the personal risks facing D&Os in today's market? How has this changed over the past few years and what major new risks have arisen?

A: Traditionally, directors and officers (D&Os) have been most at risk from shareholder claims alleging wrongful acts and financial mismanagement. More recently, the risks have broadened into new areas, moving away from the confines of financial misrepresentation. Examples of the new risks include the implications of the high-profile #MeToo movement, climate and environmental issues, the Australian Royal Commission, increased regulation, the opioid crisis, vaping and airline crashes. Furthermore, the increase in significant cyber attacks against businesses, particularly those involving data breaches, are an area creating increased concern in relation to D&O liability. Looking forward, we anticipate that machine learning (ML) and artificial intelligence (AI) will give rise to liability concerns.

Q. In your opinion, have there been any recent, high-profile D&O claims

cases in which the outcome proved to be particularly significant? How might such cases impact on how D&Os view the risks they face?

A: In Europe, the D&O claim that many insurers and D&Os can have in mind is the claim made against Volkswagen (VW) and some of its D&Os. This could potentially lead to a catastrophic loss for the D&O liability insurance market. Looking further afield, high-profile cases in the US and Australia could also prove to be significant, further highlighting to D&Os the need fully understand the risks they face.

Q. How has the changing risk landscape impacted the insurance market in terms of capacity, premiums and cover available to D&Os?

A: While overall capacity in the global insurance market is still notionally around US\$1bn, we are seeing a significant reduction in insurer appetite leading to a reduction of participation on certain risks and business sectors. Additionally, insurers are imposing more restrictive conditions and are generally taking a less flexible

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approach to amending coverage terms. Specifically, they are using sub-limits, tailored exclusions and higher deductibles, particularly for what they perceive to be high-risk areas. Finally, premium rates are subject to increases across virtually all sectors and industries. There are several reasons behind this deterioration in market conditions but claims, both new and historic, are a major factor. In addition, the risk landscape is leading D&O insurers to revisit their appetite and risk rating models.

Q. In terms of D&O insurance, what steps should companies take to ensure they offer their D&Os an appropriate level of coverage?

A: The starting point for an analysis of an appropriate level of coverage is the extent to which a company is intending to or is permitted to offer indemnification to its D&Os, which will vary across jurisdictions. The insurance market is increasingly sophisticated as to the differences in risk between jurisdictions. But, given the background of more difficult insurance buying conditions, companies are seeking a

deeper understanding of their exposure to D&O claims to define, qualify and quantify their D&O risk profile. This ‘risk assessment’ process will allow a company to understand its exposure to potential D&O claims, give a better understanding of the real limits required and ultimately allow a stronger negotiation on premium costs. Regular communication between the company and its D&Os is also necessary so individuals potentially exposed to D&O claims can better understand the reality of those claims, what is at stake if they are sued for a wrongful act committed or allegedly committed, and how a D&O liability insurance policy will respond. In the current environment, companies should be looking to buy as much cover as is available to them within budgetary restraints.

Q. How have D&O insurance policies evolved in recent years? Have there been any general changes in terms, exclusions, pricing and so on?

A: Fierce competition in the past 15-20 years among insurers has led to a proliferation of extended policy features as they sought to differentiate their policies in

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a commoditised market. Examples include extensions granted in respect of the UK Bribery Act, corporate manslaughter and in respect of the financial services industry, the risk to individuals as approved persons and latterly senior managers under the Senior Managers & Certification Regime (SM&CR). Now the insurance market is in a period of change, insurers have changed course. Extensions are being removed and coverage restrictions imposed. Themes are additional cover being sub-limited, tailored exclusions being imposed and a higher deductibles requirement, particularly for what they perceive to be high-risk areas. Premiums are increasing across the board and at the extreme end some insurers have walked away from risks they no longer consider to be profitable.

Q. What advice would you give to both companies and D&Os when they are assessing the merits of a particular D&O policy? Which elements are of paramount importance?

A: Companies and their D&Os will need to consider their unique risk profile and undertake a risk management analysis to highlight key areas of risk.



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Careful consideration should be given to priorities, such as the extent to which coverage should be ring-fenced for the main board or ‘top-up’ cover for non-executive directors. Often there is a misunderstanding as to the definition of directors within the policy and it is important to review who falls for cover and if this meets the company’s expectations. D&Os should make sure that their risk advisers are keeping them fully informed of the macro insurance environment and the likely impacts on their ongoing premiums. Risk advisers should also be supporting businesses to help select suitable solutions based on the scope of covers, the clarity of wording and the rating and experience of individual insurers. The ability to issue local D&O policies should also be considered, especially where a business’s risk profile is international.

Q. How might the personal risks facing D&Os evolve in the months and years to come? To what extent are they becoming more complex, international and unpredictable in scope?

A: For business leaders, particularly those in organisations with international

scope, there are a raft of issues to consider, including the difficulties associated with dealing with multiple sanctions regimes, navigating antitrust laws across borders, and complying with bribery and corruption legislation. There are a number of additional risks which D&Os should be cognisant of and it is clear that many of these risks are complex and will develop as global trade and technology advances. First, corporate culture. D&Os should be comfortable that the culture of the organisation in which they are operating matches the stated values and prioritises both good behaviour and compliance. Weak and unethical cultures have been blamed for many of the systemic failures in the financial services industry and beyond in the past decade, and regulators are increasingly focused on corporate culture as a means to improve behaviours and outcomes. Second, climate change and environmental impact. There is evidence of regulators holding senior managers to account for financial risks associated with climate change, with the UK’s Prudential Regulation Authority (PRA) publishing a supervisory statement on the topic. The PRA says that few firms are taking a strategic approach to how actions today



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will affect future financial risks, and it expects firms to have clear roles and responsibilities for the board and its sub-committees in managing risks from climate change. Finally, modern slavery and human rights. Increased regulation and scrutiny of the human rights impacts of corporations continues across the world, with public opinion arguing that human rights breaches are occurring as a result of sponsorship or funding that derives from companies in the developed world. □

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