

Litigation and Liability

Three Evolving Liability Issues Every Director Needs to Know About

By R. Damian Brew and Sarah Downey

The potential for personal exposure for directors and officers is constantly growing in the current business environment. In this context, directors and officers—and the companies they serve—must consider three critical emerging issues: individual accountability, cyber risk, and shareholder activism.

Individual accountability. Recently, both the U.S. Securities and Exchange Commission (SEC) and U.S. Department of Justice (DOJ) announced their renewed efforts to hold directors and officers accountable for corporate wrongdoing. For example, in September 2015, the DOJ released what has become widely known as the Yates Memo, which includes specific guidance around naming and prosecuting individuals in the most egregious cases of corporate wrongdoing. The DOJ's policy requires corporations to provide all relevant facts about the individuals involved in any alleged misconduct in order to receive cooperation credit. The memo also emphasizes that prosecutors pursuing civil and criminal actions should coordinate with one another.

The SEC's and DOJ's new directives could impact a corporate executive's ability to obtain indemnification from their organization. Should a corporation ultimately sacrifice an executive, will it by extension stop footing a director's defense costs? In addition to these directives motivating executives to ensure that the company's indemnification obligations are as broad as possible, they highlight the importance behind ensuring that the company has a

robust directors and officers (D&O) insurance program in place—one that includes sufficient protection for executives.

If an individual has been targeted or is unable to extricate himself or herself from a prosecution or civil action, even after the company has resolved the case against the corporate entity, D&O insurance may be the individual's last line of defense. D&O insurance—particularly Side A coverage—should be viewed as a form of personal asset protection for the executives. Side A difference-in-conditions (DIC) insurance provides coverage to directors and officers in situations where the company is unable or unwilling to indemnify the individual (for example, in a bankruptcy scenario). It can also fill the gap in the underlying traditional coverage should an insurer become financially unable or unwilling to pay.

Cyber risk. Advances in technology and global connectivity increase potential cyber exposures. Corporations can no longer exclusively focus on the prevention of cyberattacks. They must also focus on cyber resiliency—the ability to anticipate, prepare for, and learn from cyberattacks.

It has become increasingly important that executives and the companies they serve ensure that they have an appropriate risk transfer mechanism in place—one that includes cyber insurance. Cyber insurance is an effective way to reduce the immediate cost of a cyberattack. As it relates specifically to directors and officers, a more proactive approach includes ensuring that there are sufficient D&O insurance limits in place. To date, director and officer

defendants have largely been successful in obtaining dismissals of cybersecurity-related derivative litigation. However, it is far too early to dismiss cybersecurity-related D&O claims as a potential and real source of exposure for directors and officers.

Shareholder activism. Shareholder activism has become one of the most important issues confronting corporate officials today. With regard to insurance, activism is notable in how activists are willing to litigate against current or former directors and officers of a company to achieve their goals. This increased potential for litigation highlights the need for appropriate D&O insurance limits that can protect management and the board. This also includes sufficient Side A DIC limits.

In the face of mounting risks, D&O liability insurers in today's market continue to evolve and offer broad coverage options. Directors and officers are advised to consult closely with their insurance brokers and counsel to ensure the companies they serve have robust D&O insurance programs that protect their personal assets against these exposures.

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