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2024

TRENDS IMPACTING



# Directors & Officers Liability

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## 2024 Directors and Officers (D&O) Insurance Market Update

2023 welcomed attractive pricing and in many cases, single and double-digit premium reductions to D&O insurance programs, where the corporation's risk profile and balance sheet remained stable. New and existing D&O insurers focused on retention of customers and growth of market share where opportunity presented itself.

An increase in supply of D&O Insurance capacity at competitive rates is expected to continue in 2024 with stable to moderate premium reductions for companies performing well and in less risky industries. How long this softening market will continue is unpredictable. Clients with past or current litigation, volatile stock fluctuations, or poor financials may still see material changes to their D&O program, including rate and retention increases, or limited options for insurance limits. Sectors such as biotech, cannabis, and cryptocurrency, and transactions such as IPOs, reverse takeovers, and de-SPAC transactions may still experience firmer market pricing and/or restricted appetite and capacity.

D&O underwriters will remain diligent in their review of exposures and acceptance of risk. There is a continued focus on the balance sheet, with underwriters looking for evidence that clients can weather the storms of inflation, labour and supply chain disruptions, and macroeconomic factors that may destabilize predictability.

## Public Company D&O Liability Update

Directors and officers of public companies in Canada and the US continue to track annual securities class action filings as an indicator of D&O insurer loss results and relevant trends to watch for. In 2023, the number of US federal court securities class action lawsuit filings increased by approximately 8%, and we expect Canadian results will track similarly to the US; however, actual figures for Canada were not available at time of writing. In 2023 we saw a

number of interesting events and factors that led to securities class action filings, including a series of US bank failures in the early part of 2023, along with macroeconomic factors such as inflation, supply chain disruptions, and labour supply issues that affected company financials and led to negative news or alleged misleading disclosure to investors. Regulatory enforcement and increasing whistleblower complaints to regulators by investors and stakeholders, relating to sustainability-related disclosures, is another area that is being watched closely by D&O insurers. Overly promotional "greenwashing" or conversely boilerplate, vague or incomplete disclosures can and are leading to litigation and enforcement action globally.

## Private Company D&O Liability Update

Private companies and their senior leadership are not immune to D&O liability claims. In recent years there has been an uptick in lawsuits filed by various stakeholders of the organization alleging oppressive conduct, bankruptcy-related claims, and employment claims for wrongful dismissal, change in working conditions, and harassment. The Oppression Remedy in particular is one of the broadest shareholder remedies in common law, and is being used by minority shareholders, creditors, directors and officers, and other claimants to bring a lawsuit against the organization and its individuals to remedy alleged oppressive conduct. Oppression lawsuits can be very complex and more costly than a standard D&O liability claim, regardless of the size of organization or ownership structure.

Private companies should also be aware of the risks associated with transactions of any kind, whether they involve the sale of a company to a private equity fund or other third party, or the raising of private or public funds through an IPO, RTO, or SPAC in the USA. These transactions will benefit from active D&O insurance through the transaction and may require D&O "tail coverage" (extended claims reporting period under a current D&O policy after expiry) to close the deal. Companies looking to purchase D&O liability coverage or tail coverage for the first time to coincide with a transaction may find it cost prohibitive or not available. Purchasing D&O liability insurance well in advance of these scenarios will ensure the corporation's senior leadership is well protected prior to the transaction and beyond closing for unknown claims that may arise after the transaction closes.



## New “Forced Labour and Child Labour in Supply Chains Act”

The Act recognizes Canada's commitment against forced labour and child labour in supply chains and received royal assent to become law in 2023, with first reporting under the Act due prior to May 31, 2024. On December 20, 2023, the Government of Canada issued guidance related to what qualifies as a reporting entity, rules for the attestation of the report, contents of the report, and the online questionnaire that must accompany the report. Companies that fail to submit a satisfactory annual report or make their report public could face a fine of up to C\$250,000, and in addition, a company's director or officer who directed, authorized, assented to, acquiesced or participated in any of these offences can also be found guilty of that offense. While a D&O policy has yet to be tested by a conviction under the Act, it would be prudent to review the corporation's D&O insurance program to ensure there are no material exclusions present that prohibit defense costs for individual directors and officers. Fines and penalties are generally not insurable in Canada and should fines and penalties arise out of a breach of this Act, there is no assurance these would be payable under a D&O policy.

## Corporate Governance Update

Performance expectations of boards and directors in Canada are increasing, and the functional relationship between board and management is key to a successful working board. As such, Canadian public companies are conducting board evaluations and soliciting management's feedback to improve board function. The use of third-party service providers and facilitators to conduct board evaluations has also

become prevalent, with the disclosure of the process and changes to governance and board effectiveness activities disclosed in annual proxy materials. Activities such as conducting educational sessions on key topics like climate and cybersecurity, earlier distribution of board materials, and frequent conversations with key management are becoming common practice and can help reduce the probability of inaccurate or untimely reporting of material information to shareholders.

Mandatory climate-related disclosure continues to advance at varying pace across jurisdictions and is becoming more onerous and complex. In Canada, climate-related disclosure requirements for public companies that reflect ISSB/CSSB standards are expected to be proposed for comment and final disclosure rule, however reporting issuers will not be required under securities legislation to provide climate-related disclosure based on ISSB/CSSB standards until the process is complete. The federal government has also signaled they may require corporate climate disclosure from private companies in the future.

In the United States, climate-related disclosure rules were proposed in March 2022; however, the SEC has pushed the expected adoption of its final rules until April 2024. The rules would require issuers to include certain climate-related disclosures in their registration statements and periodic reports. Furthermore, in California, the Governor passed new legislation requiring large companies to disclose their Scope 3 Emissions, regardless of materiality, starting in 2026.

Lastly, securities regulators in both Canada and the US have provided guidance to reporting issuers concerning cybersecurity disclosure obligations when a material cybersecurity incident has occurred. Disclosure rules surrounding relevant topics such as climate, cybersecurity and even artificial intelligence continue to evolve and highlight the need for directors and officers to remain diligent in dedicating attention and resources to these key areas of risk



## ABOUT DANIELLE GORST

*National Practice Leader, Financial Lines*

Danielle brings more than 25 years of financial lines insurance experience with over 13 years in Executive Protection Underwriting with a leading global insurer, in addition to 12 years as a specialty broker in the placement of Directors and Officers Liability and ancillary lines of coverage.

Danielle works directly with Account teams and provides consultative advice to Navacord clients on strategy and placement of coverage, claims advocacy, in addition to thought leadership and white papers on current trends impacting Directors and Officers Liability. Danielle is often a presenter at Board Governance and Audit Committee Meetings, and a speaker at industry events discussing topics specific to Directors and Officers Liability.

Danielle has a Bachelor of Commerce Degree completed with a concentration in Insurance and Risk Management from the University of Calgary, and has completed the Canadian Securities Course.

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*Contact a member of your Service Team with any questions you have regarding your D&O coverage.*

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