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2023

TRENDS IMPACTING

Directors & Officers Liability

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The Directors and Officers Liability (D&O) insurance market continues to soften for companies who can demonstrate strong corporate governance practices and financial flexibility in uncertain economic times. Review Navacord's 2023 whitepaper to understand the D&O liability trends for the year and their potential impact on your D&O insurance program.

1. 2023 DIRECTORS AND OFFICERS (D&O) LIABILITY MARKET UPDATE

2022 brought rapid change to the D&O insurance market, which transitioned from an extremely hard market through the pandemic of 2020 and 2021, to a more stable and competitive market in the latter half of 2022. New D&O insurer entrants and existing markets are being drawn in by the higher pricing environment and are building business plans to expand in 2023. More mature companies and those deemed to be in lower risk industries will benefit from the current competitive market and, in general, will experience stable terms and conditions on their D&O insurance programs. Clients with past or current litigation, volatile stock fluctuations, or poor financials may still see material changes to their D&O programs, including moderate and sizeable rate increases, deductible changes, and/or reduced limit options. While flat premiums are generally expected in 2023 for clients with no material risk change, there will also be an opportunity to test the market for price reductions for companies that were more aggressively hit by the recent hard market. Sectors such as Biotech, Cannabis and Cryptocurrency, and transactions such as IPOs (Initial Public Offerings), RTOs (Reverse-Takeover), and SPAC (Special Purpose Acquisition Corporation) mergers will still experience hard market pricing and/or restricted appetite.

2. PUBLIC COMPANY UPDATE

Directors and Officers of public companies continue to monitor the risk of a Securities Class Action lawsuit brought by the company's shareholders. While the number of total filings in Canada pales in comparison to the United States (US), Securities Class Action lawsuits have declined each year from 2019 through 2022 in both countries after experiencing record highs from 2017 to 2019, mainly due to the reduction of merger-objection and Rule 10b-5 cases filed in the US. Although overall filings have dropped, there has been a rise in median settlement amounts in 2022 by over 50% in the US. Potential settlements combined with increasing defense costs are two factors that boards will need to consider as they review their D&O Liability insurance programs in 2023. The most common allegations in lawsuits were misled future performance, and allegations related to regulatory issues. Filings against health and technology and the electronic technology sector were most common, and there was an increase in cases related to cryptocurrency, ESG (Environmental, Social and Governance) disclosure fraud allegations, and SPACs. Audit committees and external auditors must continue to exhibit extra diligence in fulfilling their responsibilities to ensure transparency and timeliness of disclosures in support of investment decisions.

3. PRIVATE COMPANY UPDATE

Private companies and their leadership can be sued by many stakeholders, including but not limited to: their employees, customers, lenders, shareholders, and government regulatory bodies. Directors & Officers Liability insurance policies for private companies are quite broad in their coverage response to claims and have become an even more attractive product given rising claims and litigation costs in recent years, and the unique exposures presented by the pandemic and future economic uncertainty. Mass employee layoffs during the pandemic, allegations of discrimination or harassment with "return to work" policies, and ongoing "#metoo" allegations are just a few examples where D&O insurers note an increased level of claims activity. The risk of bankruptcy, CCAA proceedings, and oppression claims have also risen in frequency in Canada and can leave senior leadership exposed to personal liability risk. Additionally, there are 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 often require some level of D&O "Tail Coverage" (extended claims reporting period after a policy expiry) to close the deal. Companies looking to purchase D&O coverage for the first time, to coincide with a transaction, may find it costly or simply not available.

4. MACRO-ECONOMIC UNCERTAINTY AND ITS IMPACT ON D&O INSURANCE

The current economic environment is at the top of mind for every corporate board in 2023. Inflation, an energy crisis, supply chain issues, labour shortages, war, and stock market volatility are factors that will have an impact on corporate balance sheets and may heighten the risk of bankruptcy or disruption for many companies, both public and private. Any uncertainty, let alone macro-economic factors, makes budgeting and forecasting difficult for senior management and boards, and the risk of a material misstatement or error in reporting information to shareholders or regulatory bodies is higher than normal. Expect D&O insurers to assess the impact of macro-factors on the company, the adequacy of disclosure of threats to investors if the company is publicly traded, and the level of claims risk if these exposures are not considered and addressed.

5. ENVIRONMENTAL, SOCIAL AND GOVERNANCE (ESG) UPDATE

ESG issues continue to be important to investors, lenders, proxy advisors (ISS and Glass Lewis), and insurance partners. Since matters related to diversity, equity and inclusion, and the environment are attracting plaintiffs' lawyers and lawsuits brought by shareholders, D&O Insurance may become a key resource for C-Suites and boards.

D&O insurers are highly focused on taking on risk where clients have strong disclosure and reporting practices or are experiencing improvements in ESG ratings and rankings. Many public companies already prepare Sustainability or Climate Reports, and while this may tick the D&O underwriter's box, the substance and achievability of stated ESG goals and avoidance of "greenwashing" will be equally as important to D&O insurers through 2023 and beyond. Balancing financial performance, adequate and timely disclosure of ESG commitments to shareholders, and forecasting in a time of economic uncertainty is a top priority for any leadership in 2023. Outside of diversity and climate concerns, the protection of data and the tracking and reporting of privacy exposures ranks as one of the top governance priorities for boards. Your insurance advisor will help you present ESG specific materials and responses to insurer queries that make certain the information is factored into D&O premiums, as well as terms and conditions of the policy.

About Danielle Gorst

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Danielle brings more than 20 years of financial lines insurance experience with over 13 years in Executive Protection Underwriting with a leading global insurer, in addition to nine 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.

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

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