

# Client Alert: 2019 Directors' & Officers' Liability Market Outlook

With the calendar fully transitioned to a new year, it is natural to take stock of recent trends within the Directors' & Officers' ("D&O") Liability marketplace, as well as consider what may be to come in 2019. With that as background, Aon Commercial Risk Solutions has identified some of the key considerations that marked 2018, as well as those that may define 2019. By no means is this list all-inclusive, but these items are likely to impact the market dynamics in the year to come, so the risk management community is advised to monitor them closely.

## Overall Exposure

In 2018, plaintiffs filed 403 Securities Class Actions ("SCAs"). While this count was down slightly from the 412 filed in 2017, it still represents a 99% increase over the 1997-2017 historical average of 203 filings, and only a 2% decrease from the watershed 2017 rate<sup>1</sup>. While the increase in the number of SCAs is remarkable, the probability of a public company facing a shareholder suit is quite concerning. According to Cornerstone Research, the probability that a company listed on the NYSE or Nasdaq will be defending itself against alleging shareholders over the course of a year is 8.4%. While the 403 SCAs in 2018 are well above recent averages, the probability of an SCA is significantly above long-term averages.

"8.4% of NYSE or Nasdaq listed companies were subject to a securities claim in 2018"

## Event Driven Litigation

Perhaps the most vexing challenge for underwriters since the accounting scandals of the early 2000's, Event Driven Litigation ("EDL") has arisen as arguably the driving force in 2019's D&O market. EDL refers to events, such as product failure, bodily injury, reputational damage, or other incidents that lead

to securities litigation. Often, the "event" leads to financial harm and a corresponding stock drop. Recent examples include a hospitality company / data breach (litigation filed in December 2018), utility company / California wildfires (litigation filed in November 2018), and consumer products company / increased cancer risk (litigation filed in February 2018). However, two specific types of EDL have emerged among all others.

### Cyber Risk is D&O Risk

In 2017, several notable cyber security breaches led to significant business and financial impact to large, sophisticated companies. 2018 saw a continuation of this trend, as a leading social media company faced securities litigation arising from privacy violations, a leading data firm faced securities litigation arising from General Data Protection Regulation compliance, and the U.S. Securities and Exchange Commission signaled increased interest in companies' cybersecurity policies, including disclosure.

### EPL Risk is D&O Risk

Beginning in the media and entertainment industry, #metoo has become a powerful force in the workplace and boardroom. In 2018, several instances of harassment matters led to securities litigation, including a well-known athletic apparel company, a national pizza franchise, and a large media company. Expect continued examples of these claims, as the

continues

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<sup>1</sup> Cornerstone Research. Securities Class Action Filings – 2018 Year in Review.

<sup>2</sup> <https://www.wsj.com/articles/where-have-all-the-public-companies-gone-1510869125>. Accessed January 14, 2019.

National Women’s Law Center, an organization which, among other things, disseminates information about the legal definition of harassment and how to bring an EEOC charge, reported a five-fold increase in the number of calls coming in to the organization seeking free legal consultations.

### Initial Public Offerings

In 2018, robust activity produced 190 Initial Public Offering (“IPOs”) pricings, raising over \$46 billion in capital<sup>3</sup>. While these statistics are interesting, perhaps the most notable D&O-related development for IPOs was the *Cyan* decision, which provides state courts concurrent jurisdiction for claims alleging violations of the 1933 Securities Act. D&O underwriters responded decisively to this decision, with significant rate increases for IPO placements (in some cases, triple or more relative to similar deals in recent years), and higher retentions (including, on certain deals, a separate / higher state court retention).

“Resulting from the *Cyan* decision, IPO’s faced a challenging D&O environment”

### Market Outlook

In 2018, D&O rates firmed across several classes of business, including public D&O rates (for the first time in several years). Expect insurers to push for continued rate increases in 2019, in some cases more aggressively than recent years, as continued loss trends along with historically low rates have created what many insurers

have deemed an unsustainable rate environment. Notable observations regarding other lines include:

- Crime: Significant social engineering limits are available (often for additional premium); Cryptocurrency will be a continued focus coverage topic in 2019.
- Cyber: Complexity of breaches has driven an increase in incident response expenses incurred by insureds; Average premium rates reflect a decline, however, dependent upon underwriting and scope of coverage.
- Employment Practice Liability / Wage & Hour: Traditional Employment Practice Liability rates are experiencing slight upward pressure, largely as a result of the #metoo claims; Pricing and retentions for Wage & Hour coverage continues to become more attractive.
- Fiduciary: Excessive fee exposures are of particular focus for underwriters, and insureds can expect more questions and potentially higher retentions specific to financial institutions. Some insurers are excluding loss related to proprietary funds in sponsored retirement plans, which has resulted in numerous “excessive fee” claims.

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<sup>3</sup> www.renaissancecapital.com. Accessed January 15, 2019.