State of D&O:

Five Risk Trends Private and Public Companies Can't Afford to Ignore

RT ProExec

CONTENTS

CONTACT

For more information, please contact your local RT ProExec broker at rtspecialty.com.

RT ProExec

STATE OF D&O: FIVE RISK TRENDS PRIVATE AND PUBLIC COMPANIES CAN'T AFFORD TO IGNORE

Who Counts as an Officer or Director?

A policy's interpretation of who is covered as a director or officer has significant implications at time of claim.

Many policies provide broad coverage to "insured persons" including "duly elected or appointed" officers and directors, and some policies have dropped the "duly elected or appointed" condition.

If your company has leaders who fall outside of traditional-suite level, Section 16 officers, review your policy and talk to your broker to ensure the correct executives have coverage.

Access to coverage may need to be structured by function rather than job title. It may be possible to negotiate an endorsement to expand or clarify coverage, or to specifically name the insureds.

It's not an easy time to lead a company. As we kick off 2026, both private and public organizations face unprecedented directors and officers (D&O) liability risks, ranging from economic disruption, geopolitical shifts, AI and cybersecurity exposures and a rapidly changing regulatory environment.

Despite these challenges, the (D&O) Directors and Officers insurance market is currently soft. Prices are down, capacity is up, and with a little negotiation, it may be easier to obtain broader terms, such as coverage for entity investigative costs.

UNDERSTANDING PUBLIC AND PRIVATE D&O

Both private and public companies can benefit from tailored D&O insurance to help protect against allegations of business mismanagement or breach of fiduciary duty as well as claims that arise from mergers, acquisitions, or bankruptcy.

Public and private D&O insurance policies share a similar structure, with three sides of coverage that provide protection for both the company and its directors and officers.

In **public companies**, D&O insurance is often accepted as a necessity due to securities exposure, but even then, it is not always given the attention it deserves.

"Companies that haven't been through claims assume they won't need insurance," explains Kevin M. LaCroix, Esq., Executive Vice President – RT ProExec. Companies secure coverage because they know it is considered necessary, but they don't dig into the nuances of policy terms because they don't think they'll ever actually need coverage. This can prove to be a major mistake because D&O claims are common.

"It's not a box checking exercise," says LaCroix. If your company ever faces a lawsuit, the details of your policy terms will determine whether you have sufficient coverage, so it's not enough to simply buy D&O coverage. You to verify that the coverage you have in place is tailored to your needs.

For **private companies**, D&O insurance is sometimes overlooked entirely. Once again, this can prove to be a costly mistake. "The (DOJ) Department of Justice and (SEC) Securities and Exchange Commission investigate both private and public companies," says Marissa Streckfus, Esq., Vice President – Claims Manager, RT ProExec. "Anything you see on the front page of the news has the potential to become a D&O claim, whether it is government funding, tariffs, natural disasters, cyber breaches, pricing issues, cost wars, regulatory changes, or evolving SEC stances. For both public and private companies, regulatory changes create real exposures – and that's something we are seeing a lot of now."

MANAGING EVOLVING RISKS

When risks evolve, D&O coverage tends to evolve with it. We saw this during the COVID19 pandemic, when the resulting wave of claims triggered new COVID related exclusions. Now we are seeing a similar pattern with tariff and AI related claims.

For corporate leaders and the brokers who serve them, this means D&O coverage requires specialized and ongoing attention. While a policy may provide baseline coverage, it may not fully address the specific risks and requirements of an organization.

"Many people do not understand that there is no standard policy structure. Every carrier has their own policy terms," says LaCroix "I don't think buyers appreciate that these changes can make a difference in the event of a claim." A knowledgeable broker who "understands the organization's objectives and advocates for your company and can be instrumental.

Currently, we are seeing a wide range of old and evolving risks, as well as several new and emerging risks. Five exposures stand out as particularly relevant for both private and public companies.

RISK TREND #1: ECONOMIC DISRUPTION AND GEOPOLITICAL SHIFTS

Both private and public companies are navigating a great deal of uncertainty. Shifting political stances, international trade disruption, labor market dynamics and changing regulations all add up extremely challenging decisions for corporate leaders.

In 2025, we have seen a flurry of executive orders related to governmental reform and deregulation – many of which are now being litigated. Businesses often get caught in the middle of political battles, forced to implement plans without knowing how policy will develop.

Tariffs and H1B visas are two recent examples of rapidly changing scenarios that may constrain trade, increase operating costs, and deflate profit margins.

While uncertainties drag on, business does not stop. Decisions must be made based on an anticipated outcome. When companies guess wrong, and things do not go as anticipated, shareholders may not be understanding of the resulting chain of events and their financial impacts.

Tariffs have already triggered liability. In one case, a securities class action against Dow Inc. accuses the company of making misleading statements regarding the impact of tariffs. According to the D&O Diary[1] , the company released statements saying it was "well positioned to weather macroeconomic and tariff related headwinds" but the 2Q25 earnings figures were disappointing, and the CEO blamed the tariffs as part of the reason.

In another example, the D&O Diary[2] reports that CarMax is facing a class action lawsuit over claims that the company mislead investors by presenting overly optimistic growth prospects even though recent growth were driven by customers speculating about tariff impacts.

Bankruptcy is another growing risk for both public and private companies. Munich Re[3] says there were 694 bankruptcy filings in 2024, the largest number since 2010. Bankruptcy filing spanned a broad spectrum of industries.

"Bankruptcies are a hot topic," says Streckfus. "This is ramping up and an important exposure for private companies." Companies facing bankruptcy should talk to their broker about D&O risks early in the process, as it can trigger wrongful act lawsuits.

RISK TREND #2: SHIFTING SOCIAL, LEGAL AND REGULATORY PERSPECTIVES

Regulatory violations that result in financial loss or non-compliance can lead to D&O claims filed by investors, government entities, shareholders, and others. The regulatory landscape is particularly treacherous now with shifting social and political viewpoints accelerating the pace of change.

For example, some companies that once leaned into DEI policies have now reversed their positions, risking backlash from both sides of the political spectrum.

In one instance, the retailer Target has drawn considerable attention due to its DEI policies. According to CNN[4], Target faced litigation for allegedly concealing the financial impact of its DEI programs and Pride merchandise, and then its retreat from DEI triggered calls for boycotts.

The Corporate Transparency Act is another example. In early 2025, reporting was required[5] by certain companies. Now, it seems that reporting may not be required[6].

Legal rulings can also cause major shifts in the risk landscape – and the potential for major shifts has increased thanks to a recent reversal of the Chevron deference.

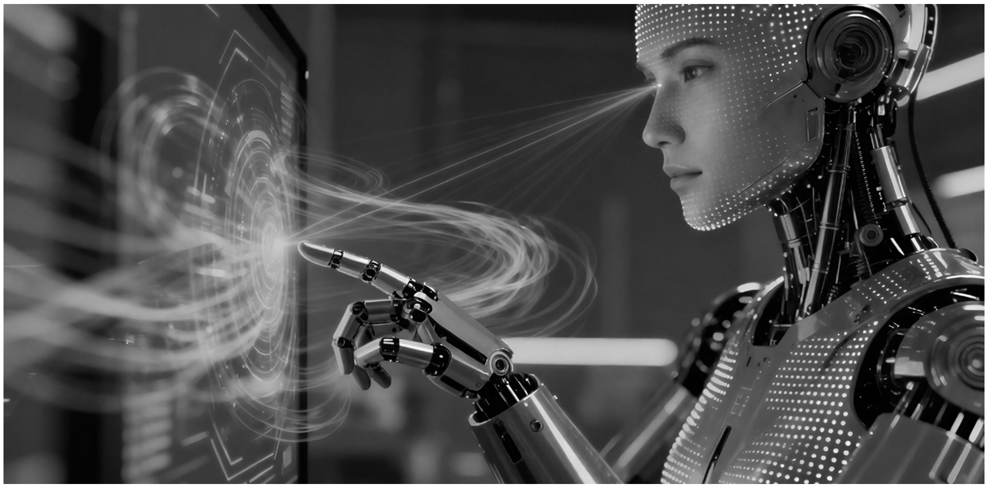
Regulations Affecting Public and Private Companies

- SEC Reporting (depending on private company size)
- Corporate Transparency Act
- Wage and Hour Laws
- The Equal Employment Opportunity Commission (EEOC) laws
- Labor and Employment Laws (depending on state)
- Occupational Safety and Health Administration (OSHA)
- Data Privacy Laws
- Health Insurance Portability and Accountability Act (HIPPA)
- Gramm-Leach-Bliley Act (GLBA)
- Payment Card Industry Data Security Standard (PCI DSS)
- Industry-Specific Regulations
- Climate Disclosure Laws (depending on state)

Under the principle of Chevron deference, courts have typically deferred to an administrative agency's interpretation of ambiguous federal statutes.

However, according to the American Bar Association[7], two cases – Loper Bright Enterprises v. Raimondo and Relentless, Inc. v. Department of Commerce – have challenged Chevron deference. The Supreme Court rulings are expected to affect many regulatory environments, including securities, tax and financial regulations, as well as healthcare and many other industries subject to federal regulations.

At the same time, the prevalence of legal system abuse continues, leading to an expensive and unpredictable legal environment for business. Munich Re[8] reports that contributing factors include economic inflation, society's desensitization to large verdicts, public distrust of corporations and attorneys and generational shift in jury pools. Third-party litigation financing is yet another contributing issue.



Other Factors Impacting Business Decisions Today

- False Claims Act (FCA) Actions Against Businesses
  - Tariff evasion enforcement[9]
  - Health care fraud enforcement[10]
  - DEI program anti-discrimination enforcement[11]
  - Civil cyber fraud enforcement[12]
- Cryptocurrency GENIUS Act
  - Federal regulatory system for stablecoins[13]
- Federal Communications Commission Actions
  - Defamation claims
  - Media broadcast license scrutiny
- Immigration-Related Exposures
  - DOJ Corporate Enforcement
  - Expansion of CWAPP to include immigration violations[14]
  - Securities D&O lawsuit alleging understatement of visa-related risks[15]
- State of Incorporation (D-Exit)

RISK TREND #3: AI-RELATED RISKS

ChatGPT burst onto the scene in late 2022. Since then, companies have been scrambling to implement generative AI into their operations.

According to McKinsey & Company[16], as of 2025, 88% of companies report using AI and 79% of companies report using generative AI. Just two years earlier, only 55% and 33% of companies were using AI and generative AI, respectively.

When companies adopt new technology at such rapid speeds, there are bound to be a few bumps in the round. In terms of D&O risks, companies can find themselves in hot water over their AI usage in a few different ways:

- **Regulation.** The National Conference of State Legislators (NCSL)[17] shows that many states have been busy adopting new AI regulations. For example, Oregon recently enacted a new law to prohibit AI agents from using licensed or certified medical professionals' titles. As more and more state-level regulations roll out, companies will need to deal with an increasingly complex patchwork of rules.
- **Disclosure.** Because AI is hot, company leaders may want to boast about their AI adoption, but it's important to keep claims firmly grounded in reality. The SEC[18] has already brought charges against companies over misleading statements regarding their AI usage.
- **Deception.** Bots can scan the internet, click on links and even post on social media. When companies deploy bots to artificially inflate their numbers, claims of fraud may ensue. In one example, the CEO and founder of a privately held social media company has been charged with fraud. According to the D&O Diary[19], federal prosecutors allege that 95% of the company's claimed users were actually bots.
- **Discrimination.** AI models may be discriminatory if the data used to train them is biased. When AI models are used to make high-stakes decisions, it becomes a major risk. In one example, Reuters[20] says Amazon has had to scrap a recruiting tool that was found to discriminate against women.
- **Competitive Impacts.** Companies don't just have to think about their own AI adoption. They also have to consider how AI usage at other companies could impact them. In one example, law firm Johnson Fistel[21] has announced a class action lawsuit against Reddit alleging that the company failed to disclose how changes in the Google Search algorithm and rollout of features like AI Overview impacted traffic.

RISK TREND #4: CYBERSECURITY OVERSIGHT EXPOSURES

Cyberattack and data breach risks aren't new, but they are continuing to evolve. Cybersecurity is no longer simply a tech issue. More and more, corporate leaders are being held accountable for their company's cyber governance, and incidents can trigger both cyber liability claims and D&O claims.

In addition to shareholder class action lawsuits, companies may also face charges from regulatory bodies. In 2024, the SEC[22] announced charges against four companies over misleading cyber disclosures. The SEC has also finalized new rules on cybersecurity disclosures that, according to The CPA Journal[23], will require increased documentation, disclosure and transparency.

At the same time, AI-powered attacks are making incidents more dangerous. McKinsey & Company[24] warns that hackers can use AI to creating convincing phishing messages, fake websites, and deepfake videos on an unprecedented scale, with fast breakout times of less than an hour. Phishing attacks have increased by 1,200% since generative AI emerged in late 2022. The good news is that AI is also powering cybersecurity defense.

RISK TREND #5: TCPA, MARKETING AND SPAM

Amid a deluge of bots, robocalls and scams, there has been a push to protect consumers and ensure data privacy. California rolled out its California Consumer Privacy Act in 2018, and several other states followed suit with their own consumer privacy laws. Meanwhile, Harvard Business Review[25] says Google has been phasing out third-party cookies, with major implications for advertising.

TCPA rules are also changing. The Telephone Consumer Protection Act, or TCPA, was enacted in 1991 to protect consumers from unwanted telemarketing calls. Since then, communication technology has changed.

According to Munich Re[26], two regulatory changes to the TCPA went into effect in 2025. The first, effective as of January 27, requires written consent for each marketer that sends robocalls or texts, closing a lead generator loophole that lets multiple companies use a single consent to contact an individual. The second change, effective as of April 11, allows consumers to revoke consent through any reasonable method.

TCPA violations can be costly, and as D&O Diary[27] explains, both commercial general liability and D&O policies may exclude coverage. As regulations evolve and consumer protections increase, corporate leaders may want to take a closer look at their practices.

NAVIGATING D&O RISKS

Public and private companies must take a proactive approach to protect their organizations from D&O claims. Board members must be carefully appointed based on their expertise, as they will be expected to provide diligent oversight for the company's growth, trade, AI, cyber and data protection and compliance strategies.

The soft D&O market gives corporate leaders a good opportunity to secure robust D&O coverage and thoughtful policy structure is crucial. For instance, LaCroix explains that a D&O policy typically doesn't cover entity investigative costs, and these costs don't count against the self-insured retention – a technicality that surprises many policyholders.

"Right now, some carriers are willing to offer this coverage, but they won't do so automatically. We are seeing brokers need to strongly negotiate to get it added," LaCroix says, adding that insureds may need some convincing. "It's a costly additional expense that companies don't always want to pay for, but it can be an important consideration. Leaders are quite disappointed when they find out during a claim that they don't have coverage."

If a claim occurs, having thoughtfully designed D&O coverage in place can make all the difference – but the insured is still responsible for timely reporting.

According to Streckfus, timely claim response is crucial, and a notice of a potential claim can come in many forms. "It doesn't have to be a formal lawsuit to constitute notice of claim. If you see a letter or email or have a conversation that hints of a potential claim, talk to your broker," she says. "Brokers are your advocate and they can help you navigate next steps. This is why you have coverage."

Sources

1. https://www.dandodiary.com/2025/09/articles/securities-litigation/tariff-related-securities-suit-filed-against-dow-chemical/
2. https://www.dandodiary.com/2025/11/articles/securities-litigation/carmax-hit-with-tariff-related-securities-suit/
3. https://www.munichre.com/specialty/north-america/en/insights/financial-lines/the-state-of-private-management-liability-insurance-2025.html
4. https://www.cnn.com/2025/02/21/business/target-dei-lawsuit
5. https://www.uschamber.com/co/start/strategy/small-business-corporate-transparency-act
6. https://tax.thomsonreuters.com/news/corporate-transparency-act-update/
7. https://www.americanbar.org/groups/business_law/resources/business-law-today/2024-august/end-chevron-deference-what-does-it-mean-what-comes-next/
8. https://www.munichre.com/en/insights/business-risks/impact-of-legal-system-abuse-on-the-us-civil-justice-system.item-23300f839cadad497538c08cdc0a6778.html
9. https://www.corporatecomplianceinsights.com/administration-heights-enforcement-focus-tariff-evasion/
10. https://www.lexology.com/library/detail.aspx?g=cf014b89-154a-41fb-b314-6add1a38a2df
11. https://www.law.com/corpcounsel/2025/06/17/the-fca-a-concluding-trifecta-of-anti-dei-whistleblower-litigation/?slreturn=20251113140053
12. https://natlawreview.com/article/doj-false-claims-act-cybersecurity-here-stay
13. https://www.brookings.edu/articles/stablecoins-issues-for-regulators-as-they-implement-genius-act/
14. https://natlawreview.com/article/doj-expands-whistleblower-program-include-corporate-immigration-violations
15. https://www.dandodiary.com/2025/07/articles/securities-litigation/geopolitical-developments-visa-policies-and-do-risk/
16. https://www.mckinsey.com/capabilities/quantumblack/our-insights/the-state-of-ai
17. https://www.ncsl.org/technology-and-communication/artificial-intelligence-2025-legislation
18. https://www.sec.gov/newsroom/press-releases/2024-36
19. https://www.dandodiary.com/2025/09/articles/artificial-intelligence/guest-post-ai-bot-do-risk/
20. https://www.reuters.com/article/world/insight-amazon-scraps-secret-ai-recruiting-tool-that-showed-bias-against-women-idUSKCN1MK0AG/
21. https://www.globenewswire.com/news-release/2025/08/12/3132228/0/en/Class-Action-Filed-Against-Reddit-Inc-Investors-with-Losses-Encouraged-to-Contact-Johnson-Fistel.html
22. https://www.sec.gov/newsroom/press-releases/2024-174
23. https://www.cpajournal.com/2025/08/27/the-sec-finalizes-rule-on-cybersecurity-disclosures/
24. https://www.mckinsey.com/about-us/new-at-mckinsey-blog/ai-is-the-greatest-threat-and-defense-in-cybersecurity-today
25. https://hbr.org/podcast/2024/05/tech-at-work-how-the-end-of-cookies-will-transform-digital-marketing
26. https://www.munichre.com/specialty/north-america/en/insights/financial-lines/navigating-tcpa-risk.html
27. https://www.dandodiary.com/2015/09/articles/d-o-insurance/do-insurance-the-question-of-coverage-for-tcpa-claims/