

INDEMNIFICATION

ISSUE

Protection for directors and officers revolves around the issue of indemnification: can companies legally and completely protect their leadership in every scenario? The short answer is no. The long answer is that, while indemnification provisions and regulations can be complex and confusing, they often provide protection – but not in all cases. Directors & Officers (D&O) insurance has evolved to address the uncertainties of indemnification, and validating the efficacy of a company's indemnification protection is key in structuring a meaningful risk management program for directors and officers. D&O insurance can fill the gaps, thus complementing indemnification to provide a complete umbrella of protection. Inadequate D&O programs can leave those gaps unfilled.

IMPACT

Narrowly drafted indemnification provisions can place the personal assets of directors and officers at risk. Also, indemnification status can change during a merger or acquisition. An acquiring company may refuse or withhold indemnification to the directors or officers of the target company. Furthermore, the scope of indemnification afforded a director or officer of a subsidiary may be significantly narrower than that afforded the parent company, which may leave the personal assets of the subsidiary's directors and officers exposed.

ACTION

- Have outside counsel review any corporate by-law amendments to see if they might change the protections afforded the directors and officers of the company and its subsidiaries.
- Check the applicability of state statutes that allow a company to limit a director's personal liability by adopting certain changes to its certificate of incorporation.
- Consider indemnification mapping to ensure consistency between and among subsidiaries and the parent.
- Determine the need for, and value of, individual contracts of indemnification to underscore the company's commitment to the broadest financial protection for its directors and officers (consider the impact of the *Troy*¹ decision on transactions outside of Delaware).
- Be aware that some D&O insurers underwrite a risk based on the scope of indemnification, considering mandatory indemnification, advancement of defense expenses and other ultra-protective provisions.

CONTACTS

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¹ *Schoon v. Troy Corp.*, 948 A.2d 1157 (Del. Ch. Mar. 28, 2008).