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D&O AND FI EXPOSURES IN A YEAR OF ELECTIONS

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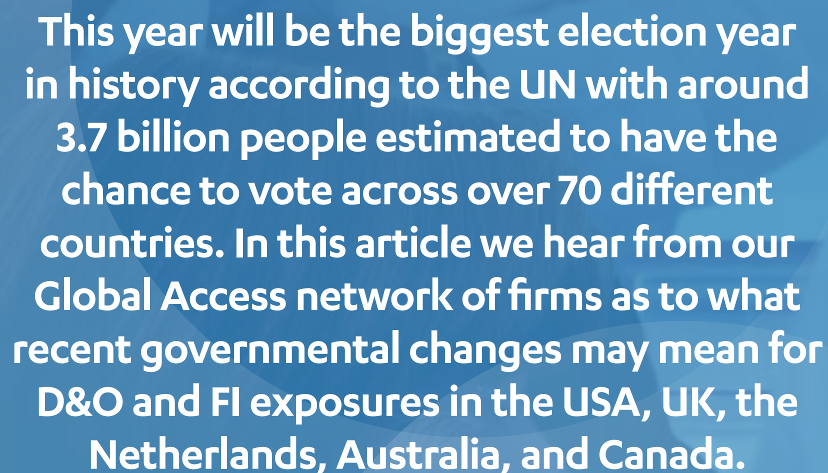


This year will be the biggest election year in history according to the UN with around 3.7 billion people estimated to have the chance to vote across over 70 different countries. In this article we hear from our Global Access network of firms as to what recent governmental changes may mean for D&O and FI exposures in the USA, UK, the Netherlands, Australia, and Canada.

USA

The results of the November 5, 2024, United States' election will have profound consequences within the United States that will rip roar throughout the world. The election will impact policyholder exposures and insurer claim experience, investment activities, and underwriting activities. President-elect Donald J. Trump, the 45th President of the United States, will become the 47th President of the United States, marking only the second time in United States history that a President will serve non-consecutive terms in office.

President-elect Trump and Vice President-elect J.D. Vance will enjoy a Republican majority in the United States Senate, that is sufficient to facilitate the confirmation of their cabinet appointees but is too small to avoid the 60-vote filibuster on legislation, As President, Mr. Trump will also have 4,000 to 5,000 appointments throughout the federal government and his transition team has been hard at work vetting individuals to serve in government, The Republicans have just secured a majority in the House of Representatives; the Republican majority in the House will be slim but will provide President Trump with an opportunity to use reconciliation to pass tax legislation, Armed with the experience of previously serving as President and first choice appointees, President Trump can be expected to promptly enact his policy agenda, In today's political and media climate considerable "resistance" can be expected throughout his term.

A Kamala Harris/Tim Walz administration would have resulted in a continuation of many of the Biden administration policies and produced a pronounced leftward shift in policy. In contrast, the Trump/Vance administration will dispense with many executive orders and policies of the Biden administration starting on January 20, 2025 and, moving forward, policy will move in a centre/right direction.

What impact do you anticipate the Trump/Vance administration will have on D&O exposures in the United States?

The Trump administration is expected to usher in a friendlier business environment, with a significant rollback in regulation and some attendant D&O exposures as well, President Trump's first term produced significant deregulation, which President Biden countered by imposing a record number of regulations, President Trump believes deregulation in his first term spurred greater economic growth than the tax cuts and has promised a significant reduction in regulation this term. Although a substantial decrease in the regulatory burden is expected, there may be areas such as cyber and artificial intelligence where additional regulations are promulgated.

Environmental, social, and governance (ESG) initiatives are expected to be a target for regulatory rollback and to be a significant source of the two-trillion dollar cut in the federal budget being eyed by Elon Musk, Although President Trump believes in clean air and clean water, he does not view climate change as an existential threat to humanity in the same way as his predecessor, The Trump administration is expected to move away from the "all of government" approach to ESG of the Biden administration, to refocus the government to more fundamental functions and to withdraw the United States from the Paris Climate Agreement. There likely will be revision to and elimination of a variety of ESG-focused rules promulgated by the United States Department of Labor, the United States Securities Exchange Commission, the United States Environmental Protection Agency, and other agencies, Green investment strategies may be impacted as well.

The extent to which ESG considerations will be compromised is not clear, The European Union has its own corporate ESG disclosure requirements that mandate U.S. based company compliance beginning in 2026. California also has a climate risk disclosure rule, and other states have ESG laws as well, Traditionally, corporations have sub-served what is now called ESG by being good corporate citizens.

In as much as many regulations tend to impose requirements and increase exposures rather than to limit practices that increase company liabilities, the

net impact of reduced regulation is expected to reduce exposures, In addition, to the “E” component, the ”S” and “G” components similarly are expected to be subjected to a reduced regulatory burden with DEI taking a back seat to merit.

What impact do you anticipate the Trump/Vance administration will have on FI exposures?

President Trump is likely to pick up where he left off in his first term by deregulating banks and other financial institutions and easing restrictions on lenders, These efforts included passing the Economic Growth, Regulatory Relief, and Consumer Protection Act, which loosened restrictions and requirements on banks and lenders. The Biden administration reinstated many of these rules and the second Trump term will again scale back regulation.

The Trump administration is expected to be supportive of bitcoin and crypto-currency, President Trump pledged to maintain the current level of bitcoin holdings that the United States has amassed from seizing assets from financial criminals, He has stopped short of proposing a formal federal reserve of digital currency but has indicated that regulations would be more friendly to the industry. The war on the gas and oil industry will be replaced with greater fracking freedom and “drill baby drill” in an environmentally responsible manner,

President Trump may seek to claw back as many of the clean energy tax credits in the Inflation Reduction Act as possible, but insofar as Congressional approval is required and businesses are relying on such credits, sunsetting is a more likely approach.

What potential risks/exposures do you anticipate that underwriters will need to be wary of in the US over the next 12 months?

A couple of macro-economic points are worth making. A Trump administration that is successful in reducing inflation could benefit insurers by decreasing claims and general operational costs. Tax cuts targeted at businesses could foster entrepreneurship and innovation, increasing the demand for business insurance. Lower interest rates could influence insurer financial and investment strategies, It is not clear what impact a change in administration may have on social inflation. Most tort reform measures require action at the state level.

Emerging risk types and related exposures are not expected to change appreciably in the short term, Administrative agencies remain very powerful, but the same limitations imposed by the United States Supreme Court on agency authority (e.g., the major issues doctrine and elimination of Chevron deference) will apply with equal force to the Trump administration (see S.M. Seaman “A Trilogy of U.S. Supreme Court Decisions Empower Regulated Entities to Challenge Agency Regulations and Actions” (July 2024)).

Overall, political risks and trade risks in the United States have increased in recent years. The specifics of the planned mass deportation activities are not yet known, but this could both present and limit exposures faced by companies, If Robert F. Kennedy, Jr. can influence health related policy and food regulation, the United States could experience a more favourable health blueprint for the country and increase in life expectancy over a period of time, It remains to be seen whether and what type of changes to health care may be proposed, but it is unlikely that Trump will begin his second term the way he began his first by attempting to terminate the Affordable Health Care Act.

UK

We now have the first Labour government in 14 years after the Labour Party secured a landslide victory in the General Election in July. Labour ran its election campaign on a simple slogan – "Change" – and we can expect just that following the King's Speech in July and the Autumn Budget last month.

The Government has made clear that two of its focus areas are economic growth and green investment. The plans for economic growth will need to be carefully balanced against increased regulatory burdens on businesses.

What impact will the Labour government have on D&O exposures in the UK?

We expect to see increased accountability for directors when it comes to financial reporting following the change of Government. During the King's Speech in the summer, the Government demonstrated its commitment to establish a new, more powerful regulator in the "Audit, Reporting and Governance Authority" (ARGA) which will be able to investigate and sanction directors for neglect or breaches of their duties in respect of financial reporting.

This comes at a time of record-high insolvencies in the UK with average monthly numbers for 2024 being on par with 2023, which saw the highest annual number of company insolvencies since 1993. Whilst the Labour government is looking to "kickstart economic growth", the current economic climate increases the ratio of potential exposures for D&Os to insolvency-related exposures. This coupled with increased regulation of reporting standards may result in further claims. To add fuel to the fire, in recent years we have seen increased activity from litigation funders in the UK who are seeking assignments of potential claims from insolvency practitioners of insolvent companies to pursue claims against former directors.

Labour's plans to introduce significant reforms to employment rights may place a greater burden on D&Os. For example, Labour's commitment to flexible working arrangements may mean that business leaders must carefully manage their duty to promote the success of their company against employees' requests to change their working hours.

What impact will the Labour government have on FI exposures?

Labour's manifesto made clear that it wanted to "make Britain a clean energy superpower" by delivering zero-carbon electricity by 2030. More recently, at the COP29 Climate Conference on 11 November, Keir Starmer announced a new climate target for the UK to reduce greenhouse gases by 81% on 1990 levels by 2035. With an increased focus on green energy, we expect to see greater regulatory scrutiny of green initiatives and investments.

Earlier this year we already saw the introduction of the Financial Conduct Authority (FCA) anti-greenwashing rule on 31 May 2024 which requires that the promotion of financial products and services within the UK must be "fair, clear, and not misleading".

Under Labour's plans, FCA-regulated entities (including banks, asset managers, pension funds and insurers) will have to develop and implement credible plans to align with the Paris Agreement treaty on climate change. This adds a risk of increased regulatory action and potential group actions for greenwashing-type claims,

There is also increased pressure on financial institutions following the introduction of the FCA's Consumer Duty in July 2023 requiring FCA-regulated entities to act to deliver good outcomes for retail customers (which the FCA described as a 'paradigm shift'). Labour wants to reinforce consumer protection and is supportive of the FCA's new outcomes-focused approach to regulation, so we do not expect the Government to stand in the way of any further measures introduced by the FCA to expand its remit.

Labour previously indicated it was a supporter of the FCA's controversial, so-called 'name and shame' proposals whereby the FCA intends to publicise those individuals who are subject to FCA investigations. However, in more recent months there may be a slight softening of the regulator's plans to publicise all investigations following significant pushback on these proposals from the financial sector.

What potential risks/exposures do you anticipate that underwriters will need to be wary of in the UK over the next 12 months?

The rise in insolvencies may lead to increased exposures for D&Os of insolvent companies. In recent years the Courts have grappled with the question as to at what point in time directors of companies in financial difficulties will need to consider the interests of creditors following the Supreme Court decision in BTI 2014 LLC v Sequana SA. In the last six months, we have also seen for the first time the directors of a company being found guilty of the novel claim of 'misfeasant trading" resulting in the directors of a collapsed high-street retailer facing a judgment of circa £110 million. These case developments demonstrate the potentially significant exposures that D&O insurers may face if the policyholder company is in financial difficulties.

The Government's commitment to green energy initiatives may create opportunities for growth, however, given the increased regulation surrounding the promotion of such products and services, we expect that underwriters will be carefully assessing the risks of underwriting such enterprises.

Underwriters should also be aware of the risks impacting pension trustees in recent years and forthcoming changes to follow. There is increased pressure on trustees to show they are delivering value for money and the Pensions Regulator (TPR) and the FCA is prepared to fine Defined Contribution pension schemes for failing to do so. TPR will also impose fines for non-compliance with climate reporting requirements. There is more change to follow with trustees potentially being exposed to regulatory enforcement action if they fail to comply with deadlines and duties associated with connecting to the pensions dashboard (such as ensuring data is accurate and reliable).

We also expect Insurers will be keeping a close eye on potential increases in the number of employment claims in the forthcoming years as a result of the proposed changes to employment legislation.

THE NETHERLANDS

The Dutch political climate is increasingly fragmented and polarized. Right-wing populism, driven by issues like immigration and EU relations, has surged, with Geert Wilders' Freedom party (PVV) winning the November 2023 elections. Traditional centrist parties, including those of former Prime Minister Mark Rutte, have lost ground.

Despite initial challenges in forming a coalition due to significant divisions between right-wing populists and other parties, a right-wing coalition has now been successfully established. This coalition prioritizes key issues such as migration control, addressing housing shortages, and reducing economic inequality.

The first months of this new administration have been challenging, marked by an absence of clear policy direction. As a result, we anticipate a more active judiciary stepping in where policies fall short. The Shell case is a recent example, with judges taking on significant responsibility in the face of unclear governance.

While the Netherlands is navigating uncharted political territory, the question remains as to how this new landscape will impact D&O and FI exposures. This impact on exposures might be limited, because of the coalition structure the Netherlands has, which limits any one party's influence over policy, but also because D&O and FI exposure in the Netherlands is heavily shaped by EU regulations and global events, such as the US elections. The Netherlands is just a small country in this international playing field.

What impact has the change in government had on D&O exposures in the Netherlands?

The current government aims to strengthen the Dutch economy, in line with previous administrations, by enhancing the business climate in the Netherlands. One of the key strategies to reach this goal is to reduce the regulatory burden. While deregulation may lessen oversight and compliance requirements, especially in sectors like finance and the environment, it could also elevate risks for D&Os. If corporate actions fail to meet broader national and international governance expectations this could expose D&Os to increased legal and reputational liabilities.

This is even more so the case now that (fairly) recent jurisprudence (the Shell case) has shown that corporates can be held accountable by courts to uphold ESG standards, despite the political landscape setting out a corporate friendly climate. This could result in heightened risks for D&Os if they do not prioritize ESG factors. Noteworthy is the trend that, in addition to holding the company itself liable, as a pressure tactic, D&Os are also being personally held accountable for their company's compliance with ESG obligations.

What impact has the change in government had on FI exposures in the Netherlands?

Now that FI is subject to a robust regulatory framework, particularly at the European Union level, we expect less of an impact from the change in government on FI exposures in the Netherlands. We anticipate that regulations, especially around ESG and transparency, will continue to tighten. The EU has set ambitious targets for ESG disclosures and sustainability, and regulatory bodies are increasingly focused on enforcing transparency in operations and reporting. While more stringent rules may seem to increase liability risks, this heightened regulatory environment could, in fact, serve as a safeguard. Stronger regulations provide clearer standards, which can help limit exposure to litigation or enforcement actions for non-compliance, thus potentially reducing liability risks for FI over the long term.

What potential risks/exposures do you anticipate that underwriters will need to be wary of in the Netherlands over the next 12 months?

In the Netherlands, underwriters may need to be cautious of several potential risks and exposures over the next 12 months:

- **Cyber & IT**: we expect significant cyber incidents to occur relatively frequently in the Netherlands. Cyber-attacks, such as ransomware attacks, have become more sophisticated and criminals more frequently threaten publication of the stolen and encrypted data in what is called 'double extortion'.

- **ESG and Climate Change Litigation:** ESG and climate change litigation in the Netherlands is expected to intensify as stakeholders increasingly hold companies accountable for their environmental impact and sustainability claims.

  A key development in this field is the recent win for oil giant Shell against green groups in the Dutch Court. In November 2024, of The Hague overturned the 2021 ruling in the climate case against Shell. The court confirmed Shell's duty to align its business model with climate goals, particularly limiting global warming. While Shell's efforts to reduce direct (scope 1) and electricity-related emissions (scope 2) are in line with climate objectives, the court found no legal violation regarding Shell's scope 3 emissions, which stem from fossil fuel use by end-users (e.g., gasoline consumption). The court ruled that there is no clear standard for reducing these emissions and questioned whether a court order would effectively reduce global emissions, as other producers might compensate for Shell's reductions.

  However, it is expected that the case will be appealed to the Supreme Court and so this may not be the end of the matter.

- **Class actions:** The Netherlands' WAMCA law (2020) allows class actions to seek monetary damages, expanding litigation possibilities and increasing potential risks and exposures. However, stricter standards for claim organizations and judicial caution in accepting cases ensure that only well-supported claims proceed. Recent developments focus on consumer protection, data privacy, and environmental claims, with courts balancing accessibility and accountability.

AUSTRALIA

What impact have the changes in government had on FI and D&O Insurers in Australia?

Not only is Australia a geographic outlier, but it is also an antipodean in terms of election cycles. The last Federal election was in May 2022 where the Australian Labor Party secured a majority government for the first time since 2007. The next Federal election is due in September 2025 with significant State elections to be held in NSW in March 2027, and in Victoria in November 2026.

So, we turn to 'hindsight' rather than 'foresight' to offer an Australian perspective on the impact of changes in government on class actions in Australia, and the corresponding impact on FI and D&O insurers.

State legislation significantly impacts class action exposures in Australia. The clearest example is legislation in the State of Victoria which permits Group Costs Orders (a form of contingency fee for lawyers) to be ordered in class actions in the Supreme Court of Victoria whereas any form of contingency fees generally remain prohibited in other States. That has seen a flood of securities class action filings in that Court to the detriment of the Federal Court and NSW Supreme Court (which previously dominated filings in that arena). The permitting legislation was enacted by a Labor government with ties to historically union aligned plaintiff firms that dominate those filings. A recent Full Federal Court decision has seen the approval of a novel contingency funding arrangement for solicitors known as 'Solicitors Common Fund Order' by the Court to address the balance. The validity of that order is the subject of an appeal to the High Court, essentially on the grounds that it is inconsistent with the prohibition on contingency fees in other states.

The approach to class action legislation has varied significantly depending on which political party is in power. While Labor governments have focused on expanding access to class actions, Liberal governments have sought to regulate and limit aspects of class actions to reduce litigation risks for corporations.

What have been the most significant areas of reform for recent governments in Australia?

One of the most significant areas of reform under Labor governments has been the regulation of litigation funding. Litigation funders provide financial backing for class actions, taking on the legal costs (including the risk of adverse orders) in exchange for a portion of the settlement if the case is successful.

The Gillard Labor government (June 2010 – June 2013) introduced reforms to create clearer guidelines for litigation funders, ensuring greater transparency and accountability. These reforms aimed to protect claimants from excessive fees while ensuring that litigation funding remained a viable avenue, especially in complex class actions against well-resourced defendants.

Labor governments championed consumer rights, and their class action reforms reflect these priorities. The rise of class actions targeting corporate misconduct, particularly following the FSRC demonstrated the importance of class actions as a tool for holding corporations accountable. There was also a sense that class actions could ease the burden on regulators by seeking redress for consumers.

In contrast, Liberal governments have focused on limiting aspects of the class action system, with the goal of reducing the financial burden on corporations. Liberal governments prioritized policies that protect corporations from what they view as excessive or opportunistic litigation. In 2020, the government classified litigation funders as Managed Investment Schemes, requiring them to comply with stringent regulatory requirements. This brought greater transparency to litigation funding but also imposed substantial compliance costs. Some critics argued the reforms would discourage funders from supporting class actions, thereby limiting access to justice for vulnerable claimants.

The current government will observe as the High Court resolves the validity of contingency fees. If the High Court rejects the validity of these fee arrangements outside of Victoria, it may become an election issue for the 2025 Federal vote.

What potential risks/exposures do you anticipate that underwriters need to be wary of in Australia?

Insurers with D&O and FI exposure in Australia should watch the outcome of the High Court's decision on contingency fees. The approval of Solicitors Common Fund Orders will increase the attractiveness of Australia as a target for self-capitalised plaintiff firms looking to enter the Australian market or expand their presence.

While the advent of broad contingency fees will encourage plaintiff firms, that appetite will be constrained by five recent successful securities class action defences that have limited recent filings and shifted the balance in favour of defendants on core questions of liability, causation and loss/damage. The legal precedents established by those hard-fought wins are beyond the ambit of changes of government.

CANADA

Canada's political landscape is currently defined by a minority Liberal government led by Justin Trudeau, who won the 2021 federal election. The next federal election must occur by October 2025.

However, due to the minority government's position, an earlier election could be triggered if the government loses a confidence vote in the House of Commons. Current polling suggests the Conservative Party is well ahead of the Liberals, indicating a potential shift in government towards a more conservative and populist administration.

What impact would a change in government have on D&O exposures in Canada?

A potential shift in the Canadian government towards a Conservative leadership could impact D&O liability exposures, particularly if policy changes alter the regulatory landscape. The current Liberal government has been active in implementing policies that increase governance and transparency obligations for corporations, particularly around climate-related disclosures and sustainability reporting. A more conservative government may prioritize deregulation, reducing the compliance burden on corporations.

However, risks may still arise from ongoing securities class actions, climate change and environmental stewardship tort-based litigation, and regulatory enforcement related to climate, cybersecurity, and financial disclosures, which are expected to remain significant D&O exposure areas irrespective of the political landscape, Indeed, to the extent a new government causes less regulator intervention, one might expect the incidence of tort-based litigation to rise as public interest actors seek to fill the regulatory void.

An improvement in the overall financial markets would likely result in the creation of new resource, transportation and small manufacturing concerns and result in an increased demand for D&O coverages.

What impact would a Conservative government have on FI exposures?

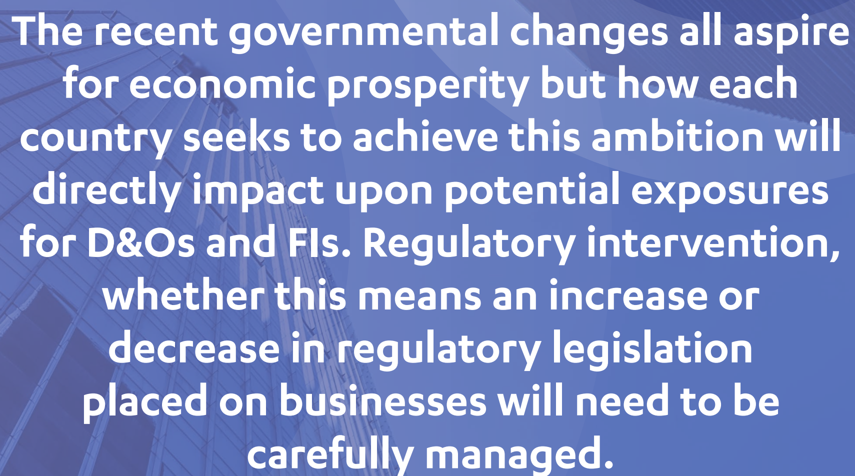
Financial institutions (FIs) in Canada face potential exposure shifts depending on the outcome of the next election. A Conservative government is likely to favour fiscal conservatism and could focus on reducing regulation in the financial sector, potentially easing compliance requirements.

However, a more populist agenda may introduce volatility in market conditions, particularly in areas like housing, lending, and inflation control. Risks around global economic challenges such as inflation, supply chain disruptions, and financial market instability, which were significant in 2023, are expected to persist and may still impact FI exposures, particularly in the context of loan defaults or investment volatility.

What potential risks/exposures do you anticipate that underwriters will need to be wary of in Canada over the next 12 months?

In the next 12 months, underwriters in Canada will need to remain cautious of several key risks, irrespective of any government changes. Notable risks include:

- **Sustainability and ESG Reporting**: Canadian regulations, especially around climate-related disclosures, continue to evolve. Even with a potential Conservative shift, these issues are global in nature and underwriters must consider the risk of non-compliance with international standards.
- **Cybersecurity**: As digital transformation continues, cyberattacks are increasing in sophistication and frequency, presenting significant exposure to businesses and financial institutions.
- **Economic Uncertainty**: Global factors, such as inflation and supply chain disruptions, will continue to create financial instability, affecting D&O claims related to financial mismanagement, misleading disclosures, and overall market volatility.



The recent governmental changes all aspire for economic prosperity but how each country seeks to achieve this ambition will directly impact upon potential exposures for D&Os and FIs. Regulatory intervention, whether this means an increase or decrease in regulatory legislation placed on businesses will need to be carefully managed.

2024 will be remembered as a historic year with more voters having had the opportunity to vote than ever before. The people have spoken, and it is now over to the world leaders to navigate us through the years ahead.

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