



D&O:  
Mind the Gap



## Last year exclusive independent research from AIG suggested a level of complacency among senior business leaders when protecting themselves against risk. Specifically they were unduly relaxed about the increasing level of personal risks faced in today's dynamic business environment. One year later, we ask ourselves, what has changed?

Directors and officers continue to face unprecedented regulated and political scrutiny. Britain continues to overhaul its corruption laws following the introduction of the UK Bribery Act in 2011. Effective 24 February 2014 prosecutors in the United Kingdom are able to use deferred prosecution agreements (DPAs). Under a DPA criminal charges are dropped after a period of time if a company complies with the terms of the agreement. These terms typically include a hefty fine and an injunction order such as an overhaul of compliance systems to prevent future wrongdoing. Although frequently used in the United States DPAs are a new concept in the UK.

Regulatory enquiries remain on the rise. In a time of scarce resources regulators are continuing to look at the most effective ways in which these can be utilised. Self-reporting continues to be encouraged by promises of leniency and the Serious Fraud Office is exploring a US-style bounty system financially incentivising whistleblowers.

It is clear that businesses are feeling the impact of regulatory scrutiny. The Financial Services Authority handed out a record £312 million fines in 2012. It's successor, the Financial Conduct Authority, gave £474 million in fines in 2013. Even with these record fines the UK remains behind the US in terms of financial penalties. As such, we should anticipate the numbers continuing to increase. Further, enforcement bodies, prosecutors and other claimants continue to target individual directors and officers either as sole defendants or co-defendants as the public continues to demand accountability.

Shareholder activism is also becoming more prevalent and is moving beyond executive remuneration with activists pushing for companies to spin off underperforming units, return excess cash to shareholders or revitalize management. In a recent speech, Bill Ackerman of Perishing Square, said, "there are a lot of opportunities for Shareholder Activism in markets outside the US. Europe is 10 years behind the US in the degree of shareholder activism and how directors respond". Lawyers in the UK and Europe are also warning their clients to brace themselves for activist funds looking to agitate for change.

Businesses continue to be exposed to unfamiliar risks and liabilities through international expansion. This can specifically impact local directors and officers. If a local policy is necessary to comply with local regulations there can be consequences for both the D&O and the company if it doesn't comply. The Insurer may not be able to settle a loss to a D&O directly leaving him / her without protection if the parent company is unable to indemnify. The company can be exposed to income tax if it elects to transfer money or inject capital back into the country to offset a loss. In addition to the complexities surrounding claims scenarios, non compliance with local tax and insurance regulation can result in both fines and/or penalties for the D&O and the company.

Finally, recessionary related issues continue to impact companies even as we are beginning to see signs of a return to growth.




"Given their level of individual exposure, senior business leaders need to pay more attention to where their personal risks lie, and seek timely advice on monitoring, avoiding and mitigating exposures."




# Key Trends

In order to gain a comparison we asked new and benchmarking questions in the most recent Ipsos MORI Captains of Industry survey. The findings make interesting reading – while there is an elevated level of overall concern the specific attitudes of many have not changed.

We see four key themes emerge.

## 1. The current business and regulatory environment is making these senior business leaders more concerned about their liabilities as a D&O

As background context, a significant majority, 64%, think that the level of regulation affecting business in the UK overall has increased in the last year. This is up from 57% in 2012.

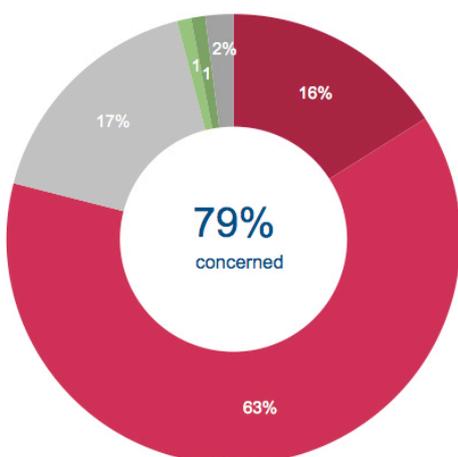
More specifically, an overwhelming 79% are more concerned about their potential liabilities, with 16% much more concerned and 63% a little more concerned. (Chart 1)

This concern is, in many cases, a reflection of actual experience. Nearly a third of large businesses have faced a regulatory inquiry in the last 2 years.

Specifically, a total of 31% have faced a regulatory enquiry of which 15% were formal, 8% informal and 8% had both formal and informal inquiries. (Chart 2)

In addition, more than 4 in 10 of these large companies have been subject to a whistle-blowing allegation in the last 2 years - 43% stated this has happened to them. (Chart 3)

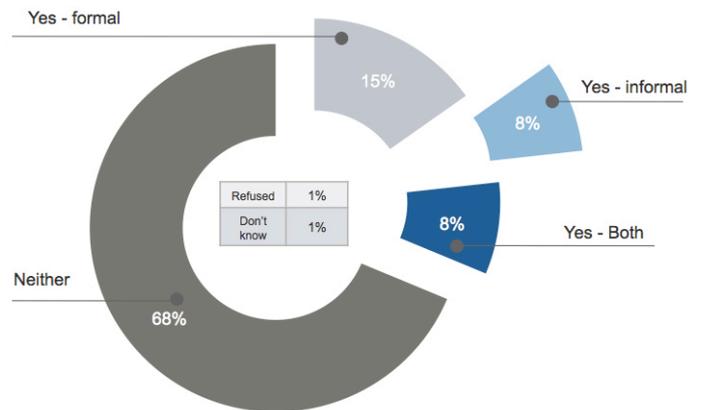
**Chart 1: To what extent does the current business and regulatory environment make you more or less concerned about your potential liabilities as a D&O?**



■ Much more concerned ■ A little more concerned ■ Has no impact  
■ A little less concerned ■ Much less concerned ■ Don't know

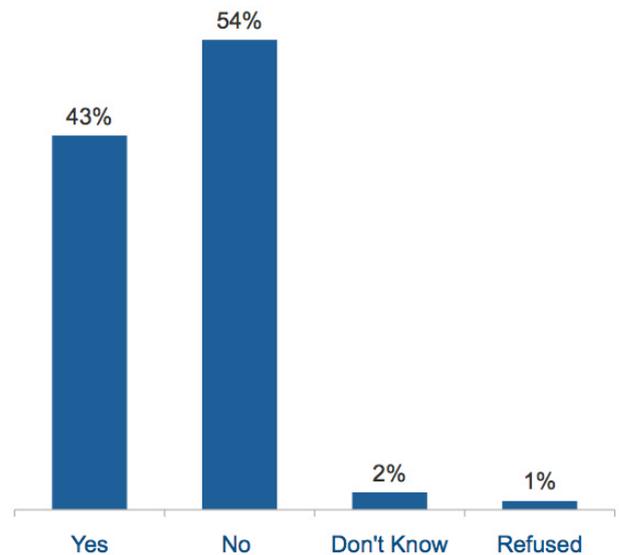
Base: British Captains of Industry (105) interviewed Sept-Dec 2013

**Chart 2: Can you please tell me in the past 24 months... Has your company faced a formal or informal regulatory enquiry?**



Base: British Captains of Industry (105) interviewed Sept-Dec 2013

**Chart 3: And still thinking about the past 24 months has your company been subject to a whistle-blower allegation?**

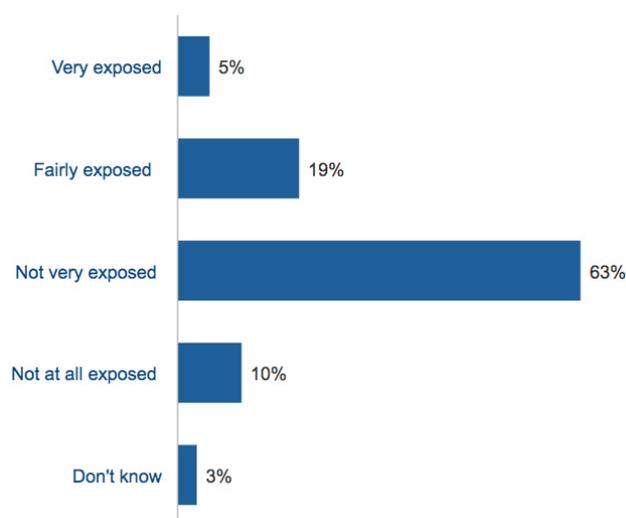


Base: British Captains of Industry (105) interviewed Sept-Dec 2013

**2. This heightened level of concern is not translating into how directors and officers feel about their potential exposure to management liability actions**

Similar to last year, 24% of respondents say they think their assets are very or fairly exposed compared to 20% in 2012 –a very small increase. At the other end of the spectrum, 63% feel their assets are not exposed compared to 57% in 2012. (Chart 4)

**Chart 4: How exposed do you feel your personal assets are to management liability actions?**



Base: British Captains of Industry (105) interviewed Sept-Dec 2013

**3. With D&O insurance mainly discussed by the board at renewal there is an opportunity to educate further during the year to ensure key areas of exposure and protection are understood**

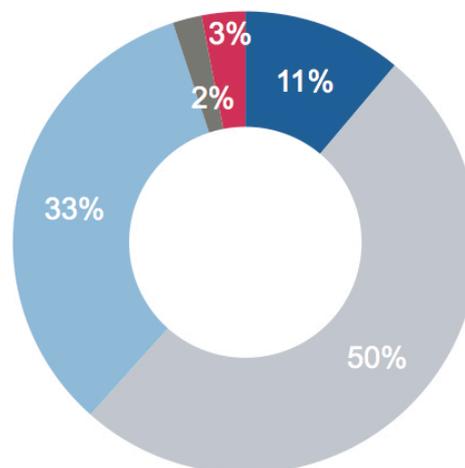
Nearly three quarters of boards (73%) discuss D&O at renewal time only - compared with 68% in 2012. A minority of 17% discuss D&O several times a year, and only for 2% was it a topic at every board meeting.

The level of understanding of D&O at board level has decreased since 2012. This year 61% felt they knew a great deal or a fair amount about their D&O insurance and their insurer compared to 72% in 2012. A third only knew a little. (Chart 5)

**4. For companies operating internationally there is a high level of comfort with their D&O policy being globally compliant**

78% claim they are very or fairly comfortable their policy is globally compliant. It should be noted that in today's fast moving business and regulatory environment what is compliant today may not be compliant tomorrow.

**Chart 5: How much do directors on your board know about the Directors & Officers insurance they have and the insurer it is placed with?**



■ A great deal    ■ A fair amount    ■ Just a little  
■ Nothing at all    ■ Don't know

Base: British Captains of Industry (105) interviewed Sept-Dec 2013

Companies operate in a constantly evolving environment, and with opportunities come new risks. Regulators and prosecutors are also continuing to become more focused on compliance and the trend of co-operating and co-ordinating investigations is only becoming more prevalent. All of this increases the potential exposure for individuals and necessitates D&Os asking themselves the question "am I doing everything to protect myself personally".

**AIG believes there are 5 key questions Directors and Officers should ask to ensure they are protected in the event of a claim**

1. Do I clearly understand the risks I am facing in today's complex business environment, how they could affect me and how I can mitigate them?
2. What is the structure of our D&O programme and does it address my needs?
3. How does indemnification work in the jurisdictions our company operates? Do I need a local policy?
4. Are there adequate protections in place for me as an individual?
5. What are the claims handling capabilities of my insurer and how would they respond in the event of a claim?



## About the author

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## Technical note

Established in 1981 and conducted on an annual basis, the Ipsos MORI Captains of Industry survey is the authoritative view of senior business opinion in Great Britain today. 105 interviews were carried out with respondents selected from the top 500 companies by market capitalisation and revenue, and top 100 by capital employed. Respondents are Chairman, CEO, MD/COO, FD or other board directors. Interviews were carried out face to face (3 were carried out over the telephone) between 9<sup>th</sup> September and 12<sup>th</sup> December 2013.

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