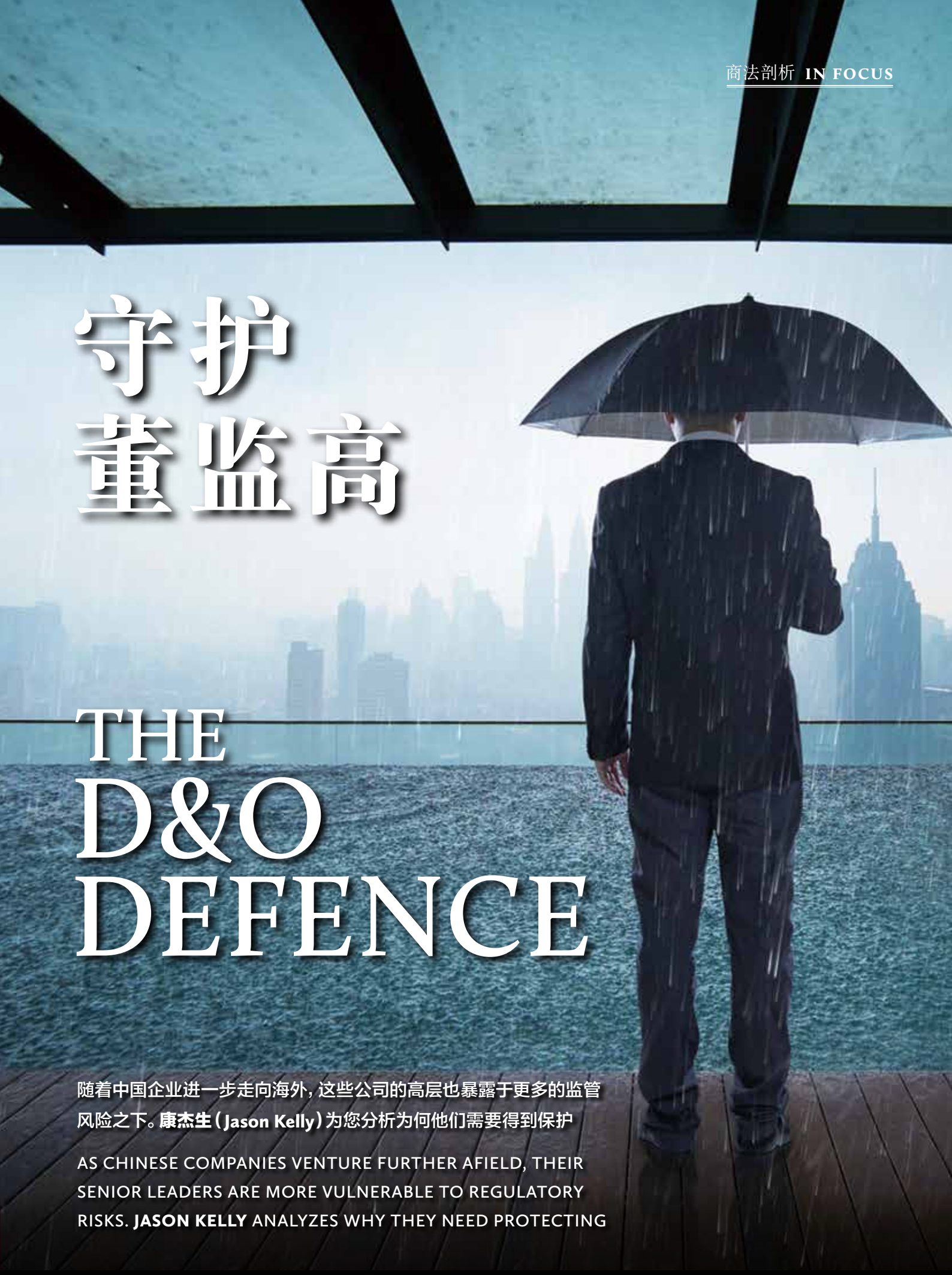

守护董监高

THE D&O DEFENCE

随着中国企业进一步走向海外，这些公司的高层也暴露于更多的监管风险之下。康杰生（Jason Kelly）为您分析为何他们需要得到保护

AS CHINESE COMPANIES VENTURE FURTHER AFIELD, THEIR SENIOR LEADERS ARE MORE VULNERABLE TO REGULATORY RISKS. **JASON KELLY** ANALYZES WHY THEY NEED PROTECTING

董事、监事及高级管理人员责任保险（“D&O 保险”或“董责险”）为可能针对公司管理人员提出的索赔提供了重要保障。董责险主要涵盖由监管调查或股东针对公司（或其管理人员）提起的诉讼而产生的抗辩及和解费用。

随着董事会和公司治理结构的不断演变，董责险正变得越来越重要，并且已经成为公司管理层广泛使用的风险管理工具。董责险能够让董事会在争取股东最佳利益而制定战略时，从容不迫且更具灵活性。

在亚洲，董责险仍处于起步阶段，但是这一情况很有可能有所变化，尤其是在中国。中国公司的规模越来越大，地位越来越重要，经营区域越来越广，结构也越来越复杂，过去未曾出现过的风险和责任问题也随之日益凸显，需要更加成熟的企业管理标准。在澳大利亚的股东诉讼风险、在欧洲的雇佣歧视诉讼、在马来西亚的网络攻击或者在香港的证券调查都是董事会需要解决的实际问题。

如果没有董责险，这些事件将会对公司造成巨大的财务灾难；就个人而言，也会对董事和高管人员自身产生毁灭性影响。以下是中国公司需要开始认真考虑董责险的八大原因。

（一）公司越大，责任越大。一些中国公司正快速成长并跻身全球最大型的跨国公司之列。2016 年前三个季度，中国公司花费超过 1410 亿美元用于海外收购，主要集中在西欧和美国。但是在 A 股上市公司中，只有大约 10% 的公司购买了董责险。随着中国公司在全球范围内不断扩大规模，董责险已经成为与公司治理息息相关的一环。

特别在西欧和美国，中国公司需要为监管调查或股东集体诉讼相关的成本管理做好准备。这些类型的董责险索赔相比亚太地区更为常见。调查或诉讼的相关成本可能会飞涨：在美国最大的股东诉讼案中，安然公司 (Enron) 向索赔人支付的证券诉讼和解赔偿金超过了 80 亿美元。对冲基金管理公司 Och Ziff Capital Management 在非洲面对的行贿指控，仅诉讼费就超过 1 亿美元。

（二）市场不同，规矩有别。中国公司凭借自己的能力成为跨国企业，不仅仅是通过变革性的并购交易，还通过开创性的产品和服务扩展到亚洲周边市场。然而，即便在亚洲，各个国家的监管方式也很不一样。一些普通法司法管辖区（例如香港和新加坡）拥有健全的和可预测的法律体制，也拥有竞争性较强的董责险保险市场。

公司在其他亚洲市场运营会遇到各种特有的挑战和责任问题。例如，在越南，谁为劳动事故承担责任？在美国或英国，违反反贿赂法的公司如何解决当局的索赔？在菲律宾，谁来支付监管调查的相关抗辩费用？在印度尼西亚，公司如何就雇佣歧视索赔进行辩护？

当公司身处未知领域时，董责险会为它们保驾护航。尤其是中国公司为响应“一带一路”政策，投身基础设施建设之时，董责险更是至关重要。

（三）IPO 监管改革趋势考验董事会的公司治理能力。中国计划将国内 IPO 监管由“审核制”改革为“备案制”，

Directors and Officers liability (D&O) insurance provides essential cover for a company's senior leadership against claims that may arise against them. D&O insurance primarily covers defence and settlement costs related to regulatory investigations or an action brought against a company by a group of shareholders.

As the role of the board and corporate governance has evolved, D&O insurance has become an important and widely used risk management tool for company leaders. D&O cover gives boards the flexibility and confidence to pursue those strategies that deliver the best outcomes for shareholders.

D&O insurance is still in its infancy in Asia, but this is likely to change, especially in China. Risks and liabilities that didn't exist in past years loom large for growing Chinese businesses as they become bigger and, more importantly, geographically broader and more complex enterprises that require sophisticated corporate governance standards. The risk of a shareholder action in Australia, a discrimination lawsuit in Europe, a cyber-attack in Malaysia or a securities investigation in Hong Kong are real issues that boards need to mitigate.

Without D&O insurance, the financial consequences of such an event could be catastrophic for a company, and devastating to the directors themselves at a personal level.

There are eight reasons why Chinese companies need to think seriously about D&O.

(1) Expanding Chinese companies face expanding liabilities. Chinese companies are fast becoming some of the largest multinational conglomerates in the world. In the first three quarters of 2016, Chinese companies spent more than US$141 billion on foreign acquisitions, predominately in western Europe and the US. But only about 10% of Chinese listed companies in the A-share stock exchange have D&O insurance. This is a major corporate governance concern as Chinese companies expand around the world.

Particularly in Western Europe and the US, Chinese companies need to be prepared to manage the costs related to a regulatory investigation or a class action shareholder lawsuit, which are much more common sources of D&O claims than in Asia Pacific. The costs related to investigations or litigation can skyrocket quickly – the securities settlement paid to claimants in the largest US shareholder action, Enron, was more than US$8 billion. Defence costs alone related to bribery allegation investigations in Africa for hedge fund manager Och Ziff Capital Management have exceeded US$100 million.

(2) Liabilities, legislation and practices are different in every market. Chinese companies are becoming multinational corporations in their own right, not just through transformational M&A deals, but through organic expansion into other markets around Asia with groundbreaking products and services. But even within Asia, countries vary widely in their regulatory approach.

Some common law jurisdictions such as Hong Kong and Singapore have established and predictable legal frameworks, as well as a highly competitive market for D&O insurance. But operating in other Asian markets can present a variety of unique challenges and liability questions.

这可能使董事会面临新的上市公司治理相关的挑战。现行的 IPO“审批制”主要是监管机构对每宗计划的 IPO 进行仔细的审查和批准。因为需要层层审核，这一流程可能需要数年，经过数轮的监管审查。与之相对，注册制旨在简化审查流程，转而强调上市公司 IPO 招股书披露等信息披露的高质量、完整性和充分性，因此潜在的投资者可以根据完备的信息做出投资决定。

注册制旨在更强调上市公司信息披露的充分性，因此这一计划中的监管改革可能使上市公司面临更多来自投资者、财经媒体、竞争对手等各方的检视，从而可能使董监事面临更多问责。相关审查和向董事会问责意味着董监事须承担更高风险的责任。董责险可以解决和管理相关责任。

（四）风险变幻，难以预测。公司董事和高管每天都要面对业务上的艰难决策，他们必须根据现有信息适时了解不断变化的风险。然而，即便履行了受托义务，他们仍可能因不可控外力而出现失误。

譬如网络风险。就在几年前，实物财产盗窃是大多数公司面临的最迫切的问题；而如今，网络犯罪才是可能摧毁整个企业的巨大威胁。采取必要的网络安全防护措施来应对此类威胁、让企业建立起业务延续性计划，逐渐成为公司治理的重要内容，并被纳入董事会监管指导方针。面对这些挑战，董责险能帮助高管为公司谋求最大利

For example, who bears responsibility for an industrial accident in Vietnam? How can a company settle a claim by US or UK authorities that they have violated anti-bribery legislation? Who will pay for defence costs around a regulatory investigation in the Philippines? How will the company defend itself against a workplace discrimination claim in Indonesia?

D&O insurance protects companies when they find themselves in uncharted waters. This will be especially relevant as Chinese companies step to the infrastructure forefront as part of the country's official Belt and Road initiative.

(3) Shift in regulatory approach around IPOs poses test for corporate governance at company boards. China's planned shift from an approval-based system to a registration-based system for IPOs on the nation's stock exchanges is likely to pose new challenges for listed company governance at the board level.

The current approval-based system relies primarily on detailed review and approval by the regulator for every proposed IPO. Because of the level of scrutiny needed, this process can take years and require several rounds of regulatory review. A registration system, by contrast, aims to simplify this review process by shifting the emphasis to the quality, integrity and sufficiency of information disclosure made by the listing company in, for example, its IPO prospectus, so prospective investors can make fully informed decisions.

中国计划 [改革境内 IPO 监管制度]，这可能使董事会面临新的上市公司治理相关的挑战

China's planned shift [towards a new IPO regulatory system] is likely to pose new challenges for listed company governance at the board level

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益，为他们解除后顾之忧，而无需战战兢兢地选择所谓最保守的策略。

董责险以往曾被认为是董事会玩忽职守的诱因。实际上却正好相反，优秀的董事清楚自己身上的义务和责任，在监管环境日益复杂的情况下，如果公司没有为他们购买董责险，他们便不愿（且通常不会）加入公司。董责险恰恰表明公司管理水平优秀，管理层能力卓越。

（五）投资者不可能永远处于被动。在亚洲，股东诉讼和集体诉讼并不常见。这要归因于多种因素，比如处于变革中的法律和监管环境并未明确认可集体诉讼制度。但澳大利亚过去十年的经验表明，这种情况可能会迅速改变。

在美国以外，澳大利亚现在已成为公司面临集体诉讼风险最高的司法管辖区。1992 至 2004 年间，澳大利亚的投资者或股东集体诉讼增加了 31%，而在 2004 至 2016 年间，增加超过 50%。

> 优秀的董事清楚自己身上的义务和责任，在监管环境日益复杂的情况下，如果公司没有为他们购买董责险，[董事] 便不愿（且通常不会）加入公司
>
> *Good directors know their obligations and liabilities and, in an environment of increasingly complex regulation, should not (and often do not) serve unless a D&O policy is in place*

此外，股东激进主义所带来的风险也在快速增加。激进的投资者在 2014 年将目标对准了韩国综合性大型企业三星电子，就三星物产与第一毛织的合并展开了争论；如今，在外部压力下，三星电子即将与投资者妥协重组公司，向投资者返还更多自由现金流。

这些趋势表明，亚洲公司股东诉讼的可能性在不断增加。未来，预计公司管理将受到股东的密切关注，董责险索赔的可能性也会不断上升。

（六）美国上市背后的董事和及高管责任。在美国上市是中国公司获得国际资本的普遍方式。虽然公司通常会深入考虑美国上市的监管合规责任，他们却往往会忽

A registration-based system tends to put greater emphasis on the sufficiency of information disclosure by listed companies, so this planned move by the regulators is likely to see greater scrutiny on the sophistication of governance processes at listed companies and the accountability of its directors. This scrutiny and enhanced accountability at the board level means there is a greater risk of liability to directors. D&O insurance can address and manage this liability.

(4) Risks are always evolving and rarely predictable. Directors and officers face difficult decisions every day in the course of their business, and they must navigate evolving risks in real time, based on the best information available to them. But even in the course of fulfilling their fiduciary duties, they can be exposed to errors due to forces outside of their control.

Take cyber risks as one example. Just a few years ago, theft of physical assets was the most pressing security issue facing most companies – today, cybercrime is a threat that can destroy an entire business. Putting in place requisite cyber resilience measures to address such threats, and having business continuity mechanisms in place, is increasingly becoming a governance issue and making its way into regulatory guidelines for boards. Amidst these challenges, D&O insurance affords company executives the peace of mind to pursue what is best for the company, not just the safest option.

In the past, it was sometimes suggested that having D&O insurance created a perverse incentive for boards to neglect their duties of care. This is simply not the case. In fact, the reverse has proven to be true. Good directors know their obligations and liabilities and, in an environment of increasingly complex regulation, should not (and often do not) serve unless a D&O policy is in place. The presence of D&O insurance demonstrates a company with good governance and strong leadership at the highest levels.

(5) Investors are unlikely to stay passive forever. Shareholder lawsuits and class action litigation are currently uncommon phenomena in Asia. This is attributable to a variety of factors including a developing and fragmented regulatory climate that does not set clear legislation around class action litigation. The experience of Australia in the past decade reveals that this can change rapidly.

Outside of the US, Australia is now the jurisdiction in which a corporation is most at risk of facing class action litigation. Investor or shareholder class actions increased in Australia by 31% between 1992 and 2004, and by more than 50% between 2004 and 2016.

Risks arising from shareholder activism are also evolving rapidly. Activist investors began targeting Korean conglomerate Samsung in 2014 to dispute a merger between related companies Samsung C&T and Cheil Industries. Today, under pressure externally, Samsung Electronics is on the verge of compromising with investors to restructure the company and return more free cash flow to investors.

These trends highlight the increasing likelihood of shareholder actions throughout corporate Asia. Expect corporate governance to be under the microscope from shareholders in the years ahead, and the likelihood of a D&O claim to increase.

(6) Listing in the US presents a wide range of risks and liabilities to directors and officers. Listing in the US is a common way for Chinese companies to gain access to international capital. While companies tend to consider carefully the regulatory compliance burden of a US-listing, they tend to under-appreciate the considerable

视股东诉讼或集体诉讼带来的巨大风险。在美国上市的中国公司已经成为集体诉讼的主要目标。这一趋势在2011 年达到顶峰，当时针对中国买壳上市的集体诉讼达到 31 起。

大量股东诉讼使美国成为董责险总保费最高以及索赔最多的单一市场 —— 实际上，股东诉讼和集体诉讼的和解金和抗辩费用约占该市场董责险所有赔付金额的90%。任何要在美国上市的公司都应清醒地意识到这个重大风险。

（七）在香港上市的中国公司受到香港证监会调查的风险正不断增加。香港证监会曾立场清晰地表明，要对市场参与者和上市公司进行谨慎监管。香港证监会法规执行部执行董事魏建新（Tom Atkinson）于 2016 年 11 月表示，“企业欺诈与不当行为”已令香港股市蒙受了巨大损失，上市公司董事和高管的欺诈和滥用权力“已成为大众投资者利益和香港市场道德操守的最大威胁之一”。

香港证监会 2017 财年的支出预算预计为 19 亿港元，自 2008 年起增加了近三倍。支出大幅增加是由于人事费用的增长，自 2008 年起，香港证监会的员工总数近乎翻倍，已达到 917 人。员工总数增加主要发生在其执行和中介机构部门。根据香港证监会公布的数据，在 2016 财年，监管机构启动了 515 起调查，虽低于 2015 财年的 553 起，但仍是 2009 财年 275 起的近两倍。从 2009 财年起，香港证监会提起的诉讼数量也接近翻倍，2016 财年达到 105 起。

港交所的交易市值中有超过 40% 是中国公司。几乎每家香港上市公司都有董责险，但这并不一定足以负担监管调查的相关抗辩费用。

（八）亚洲的监管机构可能会仿效香港。亚洲的证券和公司治理监管依旧分散，但香港证监会是该地区最受尊敬的监管机构之一。其他主要资本市场和企业聚集中心可能会效仿跟进。新加坡金融管理局也开展了自己的执法活动，最著名的的例子是针对马来西亚国有基金一马发展有限公司（1MDB）、瑞士的瑞意银行（BSI）及瑞士安勤私人银行（Falcon）的反洗钱监管行动。各国际银行新加坡分行的董事和高管需要在这一新环境下认清自己的职责和责任。

香港和新加坡为整个地区的资本市场和公司治理监管奠定了基调。在未来几年，其他亚太市场可能会陆续采用类似的严格执法模式。

中国公司与西方企业一样，在防范全球风险方面的任务非常艰巨。面对期待最大化投资回报的股东，以及积极保护和健全资本市场的监管机构，企业需要做出明智的决策，使自己防范不同市场和文化带来的金融风险。与此同时，中国公司将越来越意识到，通过安排全面的董责险保障，能帮助公司吸引最好的董事和高管，领导公司不断蓬勃发展。

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risk of a shareholder or class action. US-listed Chinese companies have been major targets for class action lawsuits. This trend peaked in 2011, when 31 class actions were filed against Chinese reverse mergers.

The preponderance of shareholder lawsuits in the US has made it the largest single market for D&O insurance premiums and claims – settlements and costs related to shareholder and class action lawsuits accounts for about 90% of claims paid. Any company looking to list in the US should be acutely aware of this significant risk.

(7) Hong Kong-listed Chinese companies are under increasing risk of investigation by the Securities and Futures Commission (SFC). The SFC has made it clear that it's taking a vigilant approach to supervision and regulation of market participants and listed companies. Tom Atkinson, the executive director responsible for SFC's enforcement division, said in November 2016 that "fraud and misconduct at the corporate level" had cost the Hong Kong stock market a big loss, and fraud and misuse of powers by directors and officers of listed companies "pose one of the greatest threats to the investing public and the integrity of Hong Kong markets".

The SFC's budget for the 2017 financial year is estimated at HK$1.9 billion, a near-threefold increase since the 2008 financial year. The bulk of this expenditure increase is due to staff costs, with headcount nearly doubling since 2008, to 917. The focus of the SFC headcount increase is in its enforcement and intermediaries divisions. According to SFC's own figures, in 2016 the regulator commenced 515 investigations, less than the 553 in 2015 but still almost double the 2009 figure of 275. SFC proceedings have also nearly doubled since 2009, up to 105 in 2016.

More than 40% of the Hong Kong Stock Exchange's market capitalization is comprised of Chinese companies. Nearly every listed company in Hong Kong has D&O insurance, but it is not necessarily sufficient to cover the defence costs of a regulatory investigation.

(8) Regulators around Asia are likely to follow Hong Kong's lead. Securities and governance regulation around Asia remains fragmented, but Hong Kong's SFC is one of the most respected regulatory agencies in the region. Other major capital markets and corporate centres are likely to follow suit.

The Monetary Authority of Singapore is also stepping up its enforcement activities, most notably in relation to anti-money laundering regulations targeting Malaysian strategic development company 1MDB as well as Swiss private banks BSI and Falcon. Directors and officers at Singapore branches of international banks will need to take careful consideration of their responsibilities and liabilities in this new context.

Hong Kong and Singapore have historically set the tone for capital markets and corporate governance regulation for the entire region. The coming years should see other Asia-Pacific markets adopt a similarly firm enforcement approach.

Like their Western peers, Chinese companies have a daunting task ahead in navigating global risks. With shareholders looking to maximize their investment returns and regulators expected to aggressively pursue their interest in protecting the integrity of capital markets, companies will need smart policies that protect their businesses from financial liabilities across markets and cultures. Meanwhile, Chinese companies will increasingly find that a comprehensive D&O policy will help them attract the best directors to lead their growing businesses.