of the company's business and affairs are usually expected to make a more complete investigation than outside directors. For example, in the *BarChris* case, the court noted that the CFO could not rely entirely on the audit firm with respect to the company's financial statements.

If a claim is made that the Form S-1 was materially deficient, ultimately a court will assess the reasonableness of the diligence process that was undertaken. The plaintiffs bringing the claim and the court assessing the claim's merits will have the benefit of hindsight, whereas it is impossible to be certain in advance that the investigation taken will be considered sufficient to sustain a due diligence defense. This residue of uncertainty steers most IPO companies, and their directors and officers, to indemnification arrangements and D&O insurance.

[B] Steps Commonly Taken to Establish a Due Diligence Defense

There is no single blueprint for a due diligence defense. Directors and officers should work with company counsel to develop, implement, and document an effective and sensible plan for their due diligence in light of the relevant facts and circumstances. Table 12-1 illustrates steps routinely undertaken by directors and officers in connection with an IPO.

Table 12-1

Establishing a Due Diligence Defense

- ❒ Participate in drafting sessions (in the case of officers) and in board meetings (in the case of directors) at which the Form S-1 is reviewed and discussed.
- ❒ Review and comment on drafts of the Form S-1, inquire about parts that are not understood, and follow up on areas that appear incorrect or incomplete.
- ❒ Be generally advised by company counsel on disclosure requirements and liability standards in an IPO.
- ❒ Seek advice from company counsel on specific disclosure requirements under applicable SEC and exchange rules, as questions arise.

- ❒ Review key disclosure decisions and unusual disclosures with company counsel.
- ❒ Ensure that each section of the Form S-1—and each amendment—is reviewed by the company personnel with the most knowledge about the relevant topic.
- ❒ If the company has separate counsel for specialized areas such as intellectual property or regulatory matters, arrange for that counsel to review the applicable portions of the Form S-1.
- ❒ Make sure that information supplied by third parties for the Form S-1 is obtained from reliable sources.
- ❒ Ensure that the underwriters and their counsel receive access to all documents, information and persons, inside and outside the company, requested as part of their due diligence.
- ❒ Hire qualified and experienced law and audit firms for the IPO.

§ 12:7.3 Indemnification and Exculpation Arrangements

[A] Corporate Charter and Bylaws

Directors and officers are usually entitled to indemnification under the company's corporate charter or bylaws if they have met the applicable standard of conduct. For a company incorporated in Delaware, the director or officer must have "acted in good faith and in a manner the person reasonably believed to be in or not opposed to the best interests of the corporation, and, with respect to any criminal action or proceeding, had no reasonable cause to believe the person's conduct was unlawful." For derivative claims (those brought against directors or officers by stockholders in the name of the corporation) in which a director or officer is found liable to the corporation, indemnification is permitted only to the extent the applicable court determines that, despite the adjudication of liability but in view of all the circumstances of the case, such director or officer is "fairly and reasonably" entitled to indemnity. Such a finding is unusual. The Delaware statute further provides that to the extent a director or officer is "successful on the merits or otherwise" in defense of a claim, such director or officer shall be indemnified against expenses actually and reasonably incurred in connection therewith.