

# Public Company Directors & Officers Liability Insurance



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## Public Company Directors & Officers Liability Insurance

# Directors & Officers (D&O) cover what is it?

Directors & Officers (D&O) liability insurance provides personal protection for Directors and Officers for claims made against them for Wrongful Acts committed while acting in their capacity of directors or officers of a company. It operates on a 'claims made' basis. This means that if a claim or circumstance arises, it is reported into the active D&O policy and not the policy that may have been in force at the time of the circumstance. For this reason, D&O insurance must be renewed annually to ensure that cover remains in place.

**Generally, Public Company D&O insurance is divided into three sides of cover:**

**Side A individual cover** provides personal protection for the directors and officers where no other indemnification exists. A director's personal liability is unlimited, so their assets are at risk.

**Side B company reimbursement** provides balance sheet protection for a company where it offers indemnity cover or is legally required to indemnify its Directors or Officers under Side A. In the UK, a company often provides indemnity cover or is legally required to indemnify Directors and Officers.

**Side C Securities Entity Cover** provides cover and additional balance sheet protection for the company. It is available for claims resulting from the sale of shares and securities and claims brought against a company by investors.

# Typical D&O exclusions

D&O Policies commonly contain a range of exclusions.

The following are examples of some of the typical exclusions you may encounter:



**Bodily Injury/Property Damage:** This is a standard policy exclusion that provides carve-backs (exceptions to the exclusion) for defence costs, Employment Practice Liability (EPL), Health & Safety Executive (HSE) investigations and corporate manslaughter. Sometimes an insurer may apply an absolute exclusion that removes all cover for these events.



**Professional Services:** Professional indemnity is separate insurance, so insurers often add a professional services exclusion. The exclusion wording can vary, with some wordings using less restrictive 'for' language or a 'failure to supervise or manage' carve-back. Others may apply absolute exclusions that will significantly impact cover should an investigation by a professional regulator take place.



**Fraud & Dishonesty/Conduct:** Since no D&O policy can cover criminal conduct, this is a standard exclusion. However, D&O policies respond on the basis of 'innocent until proven guilty', so the insurer will often provide defence costs up until a final adjudication proves guilt. Sometimes an insurer will add specific money laundering or bribery and corruption exclusions.



**Specific Matters/prior claims or circumstances:** D&O policies operate on a 'claims made' basis, so they will not cover previously reported D&O matters or D&O matters known at policy inception. If D&O claims have been made, the insurer may add a bespoke exclusion by endorsement (an amendment to the policy).

# Typical D&O exclusions



**Sanctions:** All D&O policy wordings should contain some form of Sanctions Clause that will prevent any cover benefiting any entity or individual subject to sanctions.



**Pollution:** Some D&O policy wordings will include a pollution exclusion, or the insurer may add one. Language can vary; sometimes, an insurer will insert a carve-back or sub-limit for defence costs or apply an absolute exclusion.



**Intellectual Property/Copyright Patent:** These exclusions are generally applied to certain technology risks and are often absolute. However, sometimes Side A cover or defence costs carve-backs may be available.



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## D&O claims

D&O claims can come from various sources, including but not limited to other directors or the company.

### Other directors / the Company

Directors or the company can accuse a fellow director of a Wrongful Act and bring legal proceedings against them.

**Example 1:** Following an RTO, it emerges that proper remuneration procedures for director bonuses were not followed. The company requests that funds be returned. Two directors object and legal action is brought against them by the company.

**Example 2:** It is alleged that an individual with multiple director and non-executive director positions diverts a contract through one of their other businesses. The directors, the company and shareholders bring an action against them for breach of duty for not acting in the company's best interests.

### Creditors

When the company takes on loans or stock onto the balance sheet, the directors can be held personally liable if the company fails to pay back a loan or sums due for stock or services received.

**Example 1:** After a company enters administration, certain creditors bring a claim of director misconduct and wrongful trading. They allege that just before entering liquidation, the directors cleared debts with creditors they had personal interests in and did not act in the interests of all creditors equally.

**Example 2:** After new owners asset strip a company and pay a dividend to shareholders, the company enters administration. Creditors subsequently bring a claim alleging numerous directorial failings.

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## D&O claims

### Shareholders

While a shareholder and a director are defined separately under UK law, a person can often hold these positions simultaneously in smaller businesses. In larger enterprises, where different individuals may be shareholders and directors, a shareholder can take legal action against a director if they believe they have not acted in the company's best interests.

**Example 1:** A company's product is proven not to perform as advertised, and subsequent fines and investigations turn out to be much more costly than expected. So, investors take legal action against the directors, alleging that they were aware of the details and had misled the investors, causing a substantial loss in value to the company and shareholders.

**Example 2:** Investors bring a derivative claim against directors for failing to manage climate risk and adequately prepare the company to transition to net zero carbon emissions in line with international agreements.

*"We have worked with Clear Insurance for over 10 years who act as the key insurance broker/advisor for our clients who include LSE and AIM listed companies. We have always found their advice and assistance to be of the highest standard. Recently they have been instrumental in assisting newly listed clients in acquiring D&O insurance in an increasingly challenging market without compromising in cost or coverage."*

**Westend Corporate LLP.**



# Public Company Directors & Officers Liability Insurance

## D&O claims

### The sale of the company or its shares

If a company is sold or sells a percentage of its shareholding, the purchasers may bring a claim against the directors, alleging that the directors misrepresented the company's worth by overstating its value.

**Example 1:** Following a subsidiary company's sale, an action is brought against the Topco directors, alleging that they misrepresented the value of the subsidiary and either moved assets or withheld crucial information that would have significantly reduced its purchase value.

**Example 2:** Following an investor presentation and fundraising, an investigation reveals potential negligence by directors. Consequently, the disclosures made to investors/shareholders in good faith could now be construed as misleading or misrepresentative. A precautionary notification is made, and a claim is brought against the directors.

### The Regulators

There are over 90 regulators in the UK, both statutory and professional. Each can launch an investigation into a company and its directors within its remit if a wrongful act is alleged.

**Example 1:** After identifying failings in a company's financial reporting, HM Revenue & Customs (HMRC) and the Serious Fraud Office (SFO) investigate its tax affairs and whether the directors failed in their duty of care to the company.

**Example 2:** Following a fire that resulted in a tragic loss of life, an HSE investigation alleges significant failings on the part of management. Corporate manslaughter charges are brought against the directors of the company.

**Example 3:** A major cyber attack leads to a significant loss of customer data. The Information Commissioner's Office (ICO) investigates General Data Protection Regulations (GDPR) failings and alleges that the directors failed in their duty of care to ensure appropriate procedures were in place.

**Example 4:** A company's sudden collapse into administration leads the Insolvency Service to investigate the potential failings of the board. The company's board is also hauled before government committees and hearings to answer questions in a public forum.

# ESG – Environmental, Social and Governance

A company's environmental, social, and governance (ESG) policy has become a key area of scrutiny for underwriters when assessing a D&O risk. ESG that encompasses an enormously wide-ranging field. Broadly speaking, it can be summarised as:



**Environmental:** This covers a company's carbon footprint, energy efficiency, its impact on the local environment, and the steps it's taking toward lowering emissions. Depending on the sector and territories, it can encapsulate other areas of climate change, biodiversity, and sensitive environmental issues.



**Social:** This can include community relations in the areas a company operates, labour standards, wages and benefits, health and safety, supply chain, and many other social issues.



**Governance:** This concerns the Governance of the Environmental and Social categories and the general corporate governance of the group.

**The risks underwriters assess when considering ESG include but may not be limited to:**

- Environmental groups and activist investors
- Misrepresenting climate credentials also known as 'greenwashing'
- Employee claims
- Derivative actions
- Regulatory investigations and fines

It is essential to have a robust ESG company policy in place. Insurers will not only view it positively when reviewing risk, but some will also offer extra capacity to companies with a good ESG record.

*"CLEAR provided us with excellent service during the renewal process for our D&O insurance. Any queries we had were answered promptly and precisely – they were with us every step of the way to ensure we had the correct product for our needs."*

**Rebold Resources Plc.**



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## Mining / Oil & Gas

Environmental issues are a potential concern for exposure in D&O insurance especially within the mining and oil & gas sectors, with insurers paying close attention to Environmental, Social & Governance (ESG) policies when assessing risk.

### Specific areas of concern are:

- Tailing storage facilities (TSF) failure
- Regulatory investigations and fines arising from ESG-related issues
- Litigation risk from environmental groups
- Greenwashing
- Supply chain

*“Phoenix Copper was delighted to renew its D&O insurance through the Clear Group. As last year the service was prompt and efficient, and they took the trouble to properly understand our business before obtaining quotes. As a result, I believe we are paying a very competitive premium within the context of the mining sector as a whole. We look forward to working with them again next year.”*

**Phoenix Copper Ltd.**

Particular regard should be given to policy wording and applied exclusions.

While we can review and endeavour to tailor coverage to remove or limit such exclusions or conditions, this will depend on individual risk factors, such as industry claims activity, insurer appetite and risk exposure.



## Public Company Directors & Officers Liability Insurance

### Technology

**The technology sector** incorporates physical products like autonomous vehicles and robotics and digital products such as cryptocurrencies and blockchain technologies. Companies operating in this space can have large capital requirements and significant shareholder valuations attached before they become profitable.

Underwriters can view technology companies as high risk because they may be unfamiliar with the technology and lack historical data to help them assess risk and cyber exposures. Moreover, technology companies can be subject to a heightened risk of litigation, especially if they have any exposure to the US market.

Therefore, engaging a broker who will take the time to understand your business and products makes sense so your D&O risk can be competently assessed.

*“Clear have looked after our D&O insurance for several years. Despite the difficult markets they’ve done a great job on renewals, their service is excellent”*

#### Mobile Streams

### Life sciences

**In the life sciences sector**, it is ever more critical that D&O cover is correctly placed, as it is a highly regulated environment. An abundance of risk factors come into play in this field, such as:

- Clinical/product trials risk exposure
- Legislation
- M&A activity
- Licensing agreement disputes
- Ownership of intellectual property

This list is by no means exhaustive, so appointing an insurance broker who understands how these and other factors can affect your D&O risk is essential to ensure that the cover put in place fits your needs.

# Logistics and infrastructure

Companies within the **logistics sector** continue to face a range of challenges, among them levels of demand, disrupted supply chains and restrictions to free movement caused by Covid-19 and Brexit.

### Areas of focus for insurers in the sector are:

- Agreements with central governments, subject to guarantees
- Handling dangerous goods considering recent events
- ESG requirements

Underwriters look upon an **Environmental, Social & Governance (ESG) policy** that sets out the methodology you'll use to hit your ESG targets very favourably. It will also stand you in good stead in achieving a better outcome for your D&O placement.

*'We have just renewed our Directors' and Officers' Insurance with Clear. In what evidently is a difficult market, it has been a seamless process with first rate communication, plenty of notice and all in all, a flawless procedure.'*

**Great Southern Copper Plc.**



CLEAR. Different by choice

# CLEAR can do more...

As leading, independent insurance brokers, we continually ask what more can we do for our clients?

It's a question that motivates us to seek out and acquire specialist capabilities and innovate products and services to meet our clients' multiple insurance needs. Moreover, by cultivating this diverse insurance ecosystem, we can manage and deliver solutions in a strategic, interconnected and cohesive way.

Some of our specialist products and services include:

- **Claims management and loss recovery solutions**
- **Cyber liability insurance**
- **Directors and officers insurance**
- **After-the-event insurance**
- **Employee benefits**
- **Key person insurance**
- **Legal indemnities insurance**
- **Professional indemnity insurance**
- **Warranty and indemnity insurance**
- **Property owners insurance**
- **Lease-end dilapidations insurance**
- **Right of light**
- **Trade credit**
- **Fleet insurance**
- **Employment Practices Liability**
- **Crime insurance**

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