

# D&O Insurance: An Essential Tool in the Evolving ESG Landscape

[Blog](#) Hunton Insurance Recovery Blog

## **Hunton Andrews Kurth LLP**

**USA** | November 28 2023

On September 26, 2023, KPMG published independent research showing that three-quarters of global businesses feel they are not ready for new ESG reporting regulations. KPMG’s findings are the latest reminder to businesses—and their directors and officers and other insureds—about the important role that Directors & Officers (D&O) insurance can play as businesses and organizations strive for ESG compliance and work to mitigate ESG-related risks.

### **Increased Regulatory & Shareholder Scrutiny**

The evolving ESG landscape is causing considerable uncertainty for many companies, both in terms of compliance strategies, but also in avoiding lawsuits and regulatory investigations.

Companies are facing a host of new mandatory ESG reporting regulations in both the United States and abroad, including the SEC’s anticipated climate disclosure rule, California’s landmark climate disclosure laws and the EU’s CSRD, among others. Companies are also experiencing increased risk of regulatory enforcement actions relating to ESG disclosures. The SEC, for example, has accelerated ESG enforcement efforts in recent years, highlighting the SEC’s heightened focus on public-facing ESG-related disclosures.

Litigation-driven demands relating to ESG action—and inaction—are also growing. On the one hand, companies are facing increased pressure from many investors and other stakeholders to expand their ESG initiatives and commitments. Companies that ignore these demands open themselves up to litigation risk for not

doing enough. On the other hand, with the growing anti-ESG movement, companies face the risk of litigation when they do take action. These developments show the bind that businesses, and their directors and officers, face. They can be sued for *ignoring* ESG. But they can also be sued for *considering* ESG.

### **A Proactive Approach to D&O Insurance & ESG**

Against this backdrop, businesses should consider the important role that D&O insurance can play in mitigating risk and potential uninsured exposures, as well as its role in assuring protection for directors, officers, and key employees who qualify as insureds. While D&O policies may generally respond to claims against corporations and their management spurred by these types of ESG risks, the specific policy language is crucial. For example, D&O insurance policies often afford coverage for regulatory investigations, with some policies specifically extending such coverage for books and records demands, and securities lawsuits alleging inadequate disclosure. But even when D&O insurance policies include specific coverage for these potentialities, D&O insurers, regardless of the explicit coverage provided for government investigations and other non-litigation matters, may nevertheless seek to limit coverage by asserting exclusions, sublimits, or narrow definitions of covered conduct.

With the risks posed by ESG rules and disclosures evolving, and the uncertainty of how D&O policy terms may apply to ESG risks, consultation with experienced coverage counsel is essential to position businesses' insurance assets to respond to new and evolving ESG-related risks. Where businesses cannot completely avoid ESG-related liabilities, they can, by being proactive about insurance issues, at least mitigate the impact that these exposures have on the corporate bottom line.

*\* This is a modified version of an article included in Hunton Andrews Kurth LLP's ESG Hot Topics – Fall 2023 newsletter. A copy of the full newsletter can be found [here](#).*

Hunton Andrews Kurth LLP - Michael S. Levine, Lorelie S. Masters and Alex D. Pappas

Powered by  
**LEXOLOGY.**