

# ESG AND THE IMPACT ON PRIVATE COMPANIES' D&O COVERAGE:

**A robust ESG (Environmental, Social, and Governance) plan allows companies to better facilitate top-line growth, reduce costs, minimize regulatory and legal interventions, increase employee productivity, and optimize investment and capital expenditures.** Embracing ESG not only benefits stakeholders and employees but also improves company performance. [1]

There are SEC requirements in the pipeline that may soon impact what information gets reported by public companies for their disclosures. This will affect privately held businesses that are part of a value chain for publicly held entities. Also, proactive efforts will help private companies with plans to go public in the future since arranging reporting compliance is a complicated process that takes time.

**However, it's not just the actions of financial markets that should encourage a focus on ESG issues, there is an acceleration in regulatory focus on ESG, and this focus will soon flow toward private companies.**

For example, in May 2021, President Biden signed the Executive Order on Climate-Related Financial Risk. Relating specifically to private companies, the order allows the federal government to measure and report on climate-related financial risk in government contracts. The message is: regulation is coming for everyone.

As businesses become more transparent about their environmental, social, and governance (ESG) work, insurance carriers will also look at it during the underwriting process of D&O coverage. Increasing compliance requirements and the prospect of regulatory or legal action resulting from various ESG issues are affecting directors and their insurance policies. In addition to new laws and regulations around the world, companies and their directors and officers also face increasing litigation from environmental groups, activist investors, and even disgruntled employees.

“Regulatory action due to ESG-related issues should be a major concern for directors – a breach in regulations can trigger a D&O policy, subject to its terms and conditions,” explained Lydia Miller, global underwriting and product analyst, Financial Lines at AGCS. “Although criminal fines and penalties are not covered, a policy can cover defense costs until such conduct has been established.” [2]

## HOW SHOULD A PRIVATE COMPANY RESPOND?

The answer might be that you have already started. In many cases, building an ESG plan starts by organizing, labeling and recording actions already taking place and then building on those.

### FOR EXAMPLE, ASK YOURSELF:

- E** Have we checked in with outside legal counsel on any new environmental or supply chain regulations that may apply to our business?
- S** Are we up to date on compliance with any new pay transparency and/or PTO and Leave regulations that have recently been enacted?
- G** We have corporate bylaws and governance documents, have we done internal audits/checks to ensure our D&Os are abiding by them?

These might be functions that you never thought of as ESG, but they are a great foundation for a more robust and expansive plan.



For more information about ESG and the impact on Private Companies' D&O Liability, email the BRP Management Liability Practice:

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[1] <https://www.privatecompanydirector.com/features/should-private-companies-and-family-businesses-care-about-esg>

[2] <https://www.propertycasualty360.com/2023/01/04/cybersecurity-esg-among-areas-of-concern-to-do-underwriters/?slreturn=20230222115721>