



# WOODRUFF SAWYER

## Guide to D&O Insurance for De-SPAC Transactions 2023 EDITION



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# Going Public Through a SPAC Business Combination: Leverage Our D&O Insurance Experience and Knowledge

Woodruff Sawyer is the market leader when it comes to placing D&O insurance for companies going public, be it through an IPO, direct listing, or merger with a SPAC (a “de-SPAC” transaction). Experience matters in this arena. You want a specialist on your insurance brokerage team to work through all the D&O liability insurance issues that will arise before, during, and after the process of going public, as well as during the life of your public company.

There is significant complexity to the process of protecting a company and its directors and officers as they undertake the process of going public. This resource is your guide to the D&O insurance process for de-SPAC transactions.

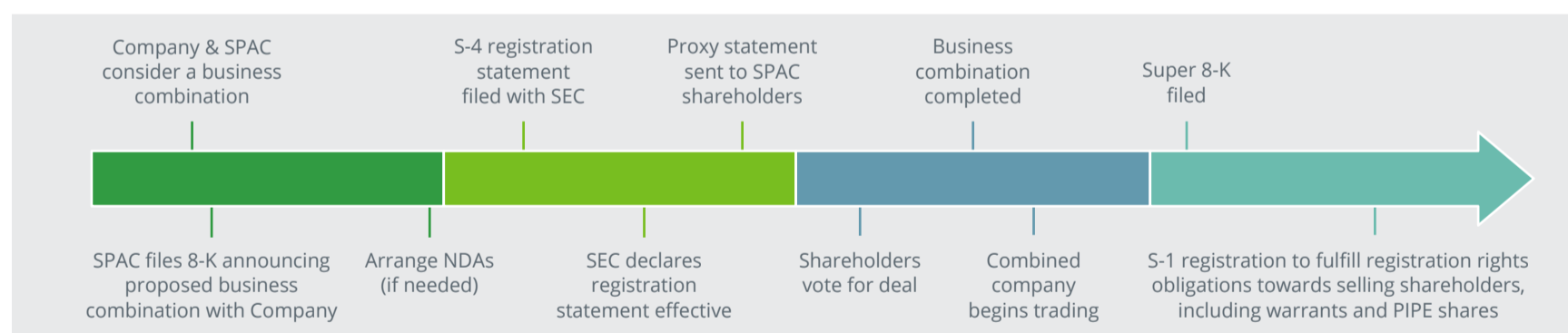
## De-SPAC Going Public Timeline

Click/tap an area of the timeline to learn more about the D&O insurance process for companies going public through a de-SPAC transaction. Your public company-ready D&O insurance policy must be ready to bind before your stock starts trading on a public exchange. **The key to an optimized outcome? Working with an experienced insurance broker and starting early.**

*Interested in D&O insurance for a SPAC IPO? Read our [Guide to D&O Insurance for SPAC IPOs](#)*

*If you are a foreign private issuer listing on a US exchange, there can be some additional elements of complexity when it comes to securing the right D&O insurance for you. This can include questions such as which carriers are right for you and whether you are more or less likely to be sued. Contact your Woodruff Sawyer account executive to discuss these issues further.*

## De-SPAC Going Public Timeline



## D&O Insurance Process

### ► PREPARE

- Select D&O broker
- Develop strategy
- Evaluate
  - Private company insurance
  - SPAC's tail policy
  - International insurance
  - Cyber insurance
  - Other insurance lines
- Governance counseling
  - Corporate governance policies
  - Choice of forum provisions
  - Indemnification agreements

### ► LAUNCH

- Broker sets up insurance carrier underwriting meeting
- Refine limits analysis
- Negotiate with markets
- Preliminary board presentation
- Negotiate coverage and pricing
- Negotiate warranty statements
- Present insurance program
- Schedule compliance training

### ► IMPLEMENT

- Finalize program
- Execute warranties
- Additional subjectivities
- Coordinate private to public coverage transition
- Bind program the day before the combined company begins trading

### ► ONGOING SUPPORT

- Continued carrier communications
- Counseling
- Training/education
- Market updates
- Claims support

Source: Woodruff Sawyer

# 1. Prepare

## A. Develop a Strategy

Setting the strategy involves taking a first look at several key questions, including the following:

- What is our philosophy on risk transfer and buying D&O insurance limits?
- Which insurance carriers are the best fit for our needs?
- Do we have any special or unusual risk exposures?
- Who are the key executives who will be involved in the insurance process?
- How involved does the board of directors want to be in making decisions about D&O insurance?
- What does the SPAC's insurance look like, and what is the best way to integrate it with the coverage for the combined entity?

An initial strategy session can go a long way toward making the overall process run smoothly and efficiently.

## B. Evaluate

### i. Private Company Insurance

Ideally, you will have had at least \$5 million to \$10 million of D&O insurance limits in place as a private company. When purchasing your private company D&O insurance, consider whether you need an endorsement to ensure that your private company policy will provide coverage should you attempt to take steps to go public but fail. This move protects Ds and Os should the process of undertaking a de-SPAC transaction lead to an unfortunate or unexpected outcome. Another advantage of purchasing \$5 million to \$10 million of private company D&O insurance is that this coverage ensures that the subsequent public company D&O insurance program is not vulnerable to having warranty statements apply to this first \$5 million or \$10 million layer of insurance.

Private company D&O insurance policies are typically one-year policies, so keep an eye on your renewal date. You could find yourself needing to renew your private company D&O insurance policy even amid your go-public activities. This need is likelier now, given the current often-extended SEC review timelines.



*Given the cost of D&O insurance for private companies, here are five key questions to ask to help determine the limit for your private company.*



*This Guide to Private Company D&O Insurance can help large private companies navigate the complicated topic of D&O insurance.*

## ii. SPAC's Tail Coverage

Find out the level of coverage the SPAC has and ensure that it retains that level throughout merger negotiations and post-merger. If the SPAC is extending its investment period to continue to negotiate or close the merger, it may be tempting to reduce the limit of its original SPAC IPO D&O policy to save on costs. However, reducing that limit will mean additional indemnification burdens on the target company. Understanding the level of coverage on the SPAC side and the costs associated with it will be key to ensuring the right level of coverage for the combined entity.

## iii. International

Newly public companies can suddenly find themselves subject to intense scrutiny, including in non-US jurisdictions. Before going public, make sure that you have analyzed your non-US subsidiaries and determine whether a local D&O policy might be warranted. Just because your US-issued policy says in the text of the contract that it is supposed to respond worldwide does not mean that it actually will. Many foreign jurisdictions require D&O insurance policies, if placed, to be placed locally.

[>> Learn more about protecting directors and officers of foreign subsidiaries](#)

## iv. Cyber

Cyber security is an exploding area of concern for many companies and, in some cases, effectively managing this exposure is fundamental to the success of a company. This topic is a board-level issue that needs to be addressed in a timely and comprehensive way.

[>> Learn more about cyber disclosure](#)



[See our \*Cyber Liability Insurance Buying Guide\*](#)



[Cyber Looking Ahead to 2023](#)  
*With cyber liability insurance becoming more ubiquitous and complex, get our insights into what to expect for 2023.*



[Reps & Warranties Insurance](#)  
*is increasingly being used by some serial SPACers for their deals. Your Woodruff Sawyer account executive can tell you more about this trend.*

## v. Other Insurance

A newly public company has to be ready for public-company scrutiny and having a buttoned-up risk management program across all lines of insurance (not just D&O insurance) is critical. This is something the board will care about at least by proxy season, given the required disclosures concerning a board's role in enterprise risk management.

## C. Governance Counseling

### i. Corporate Governance Policies

D&O insurance is important—and consideration should also be given to implementing corporate governance policies that can help mitigate D&O risk. Examples include: insider trading policies (including the correct implementation of 10b5-1 trading plans), corporate communications policies, and appropriate [indemnification agreements](#).

### ii. Choice of Forum Provisions and Exculpation Provisions

Your bylaws are a place where you can make strategic choices about where you will be sued in the future. [State choice of forum provisions](#) are a must.

Another way to limit duplicative litigation is to implement Federal Choice of Forum provisions. These provisions are allowed under Delaware law, which can be influential for other jurisdictions as well. [It is a good idea to include these provisions in your company's charter documents](#) as they may help you avoid having a suit challenging the disclosure being brought in state court in addition to federal court.

>> [Learn more](#) about [Federal Choice of Forum provisions](#)

Delaware companies can now take advantage of limited [exculpation provisions](#) for their officers. This step is something you will want to implement before becoming a public company.

## D. Implement Non-Disclosure Agreements (If Needed)

Sometimes the SPAC's S-4 registration statement will be filed confidentially. If that is the case, you will want to have your broker ask each insurance carrier to sign a non-disclosure agreement (NDA) before being sent the confidential S-4 filing. In addition, some companies are more comfortable speaking to insurance carriers with an NDA in place. Ask your Woodruff Sawyer account executive about how we have greatly streamlined this process.

## 2. Launch

### A. Broker Sets Up Insurance Carrier Underwriting Meeting

Your D&O insurance broker will facilitate a meeting with insurance carriers. This meeting is an opportunity for the carriers to get to know the company and for them to ask questions. This is a critical part of the D&O insurance underwriting process for a company that is about to go public.



[Captives: A New Option for D&O Insurance?](#)

[Delaware Approves Using Captives for D&O Insurance](#)



[Watch the Webinar](#)

### B. Refine Limits Analysis

Choosing D&O insurance limits should not be limited to peer data benchmarking and referencing overly broad cuts of settlement data that may not be directly relevant to you. Consider a customized approach, the type of approach that Woodruff Sawyer is able to offer clients through its proprietary database, **DATABOX™**.

### C. Negotiate with Insurance Markets

The [current litigation environment](#) for companies undertaking a de-SPAC transaction is a challenging one. [Short-seller attacks](#) are an especially pernicious risk for de-SPACing companies. Significant lead time and a clear strategy will help you optimize your insurance coverage. Management and the board will want to consider a variety of issues, including what type of D&O insurance program structure makes the most sense for the company given the current pricing environment and the company's own unique risk profile.

Coverage terms in the D&O insurance contract can be challenging but will remain broad if negotiated upfront by a skilled broker. If you are working with a carrier that has panel counsel, you will want to vet this list before finalizing your carrier decision. If you are asking outside counsel to review the terms and conditions of your D&O insurance policies, you will want to loop outside counsel into your broker's process sooner rather than later.

### D. Negotiate Higher Limits Warranties

Higher limits warranties are conditions precedent ("subjectivities") to a new layer of D&O insurance being placed for a company. When a company buys an additional, new layer of insurance (a higher limit) that it did not purchase the previous year, the insurance carriers may require that the buyer affirm the following with respect to that new layer or layers: The buyer's directors and officers know of nothing that's likely to give rise to a claim. Exceptions must be disclosed, and coverage for the disclosed exceptions will normally be excluded from the new layer or layers of insurance being placed.

Should a claim arise, the warranties will be tested. In some circumstances, carriers may assert that no coverage is available because the warranty was inaccurate (i.e., something that should have been disclosed was not). The stakes are high and insurance carrier warranty language can vary dramatically. Woodruff Sawyer carefully negotiates the language of the higher limits warranties.

### E. Present Insurance Program to Management

This step should not be a “big reveal.” Rather, your broker should be updating you on the progress of your D&O insurance program negotiations as they happen. That way, you can weigh in on certain strategic decisions such as what [self-insured retention \(like a deductible\)](#) to take. During this process, the final pricing of your program options will come into sharper focus as well. Ultimately, you and your broker will come up with a joint recommendation for the board of directors.

### F. Brief Board of Directors

Even very sophisticated boards of directors may be unfamiliar with all the current issues at play when it comes to protecting themselves and their companies against the types of claims that are filed against new public companies. A good practice is to have your broker brief your board on the current litigation environment, as well as D&O insurance carrier market dynamics. In our experience, most boards like to hear about the proposed insurance program directly from their insurance broker. This step allows the board to have a robust discussion about personal liability and the proposed D&O insurance program. Your board is likely to want to provide input on the D&O insurance program structure and how much in limits should be purchased as well.

### G. Schedule Executive and Employee Compliance Training

Being employed by a public company can be very different from being an employee of a private company. Schedule your “We’re public. Now what?” training to fall either right before or right after the date the company starts trading on a national exchange so that employees gain a timely understanding of things like tipper-tippee insider trading liability and the like. This training can be provided by your outside counsel, Woodruff Sawyer, or both.



## 3. Implement

### A. Finalize Program

Things like the valuation of the company may not have been as clear earlier in the process as they are towards the end of the going public timeline. In addition, management and the board may have been mulling certain key decision points. As the SPAC shareholder vote approaches, however, all aspects of the D&O insurance program need to be finalized.

### B. Execute Warranties

Each newly purchased layer of insurance may require a warranty statement that says, in effect, that the company and its directors and officers know of nothing that is likely to give rise to a claim. Companies have a duty to update any material changes in risk before the D&O program is bound.

### C. Additional Subjectivities

Subjectivities are carrier-imposed condition precedents to their insurance becoming effective. These conditions, be they answers to outstanding carrier questions or other items, need to be addressed at this time. A common subjectivity that will be addressed in due course is that the company start trading on an exchange. The most critical subjectivity, however, is usually the higher limit warranties.

### D. Coordinate Private-to-Public Coverage Transition

Some brokers routinely recommend sending your private company insurance program into runoff. This may or may not be the right choice in your case. If you can get it, the better coverage path is for the public company policy to provide “look-back” coverage.

This path is also more cost-efficient because it lets you avoid purchasing private company runoff.



*Do you need a [Tail Policy](#) for your Private Company D&O Insurance?*

### E. Bind the Public Company D&O Insurance Program

The SPAC shareholders have voted in favor of the business combination, and your private company will begin trading as a public company the next day—congratulations! Before you pop the champagne, email your broker instructions to bind the D&O insurance program.

Most companies choose to bind their public company D&O insurance program shortly after the SPAC shareholders vote in favor of the deal, but the timing can be different in some circumstances. In all cases, however, you want the public company D&O insurance program to be in place before the first trade of your stock as a public company on a national exchange.

What if your deal does not close? This situation can happen for a variety of reasons, including perhaps so many redemptions that a minimum cash condition for closing was not met. Whatever the reason, if you are not going to close the deal you will, of course, not bind the new D&O insurance program. Instead, your existing private company D&O insurance policy will remain in place.

With an increased number of SPAC deals closing but also with many deals falling through, you might find yourself in a dispute with a SPAC over a failed deal. It is a good idea to discuss various deal termination scenarios ahead of time with your broker to understand the need for or availability of coverage.

## 4. Ongoing Support

### A. Counseling

One of the reasons companies hire Woodruff Sawyer is the ongoing support we can offer on topics ranging from insurance and claims to corporate governance as it impacts D&O risk. Talk to your Woodruff Sawyer account executive to find out more.

### B. Support for Corporate Activities

Are you opening a new subsidiary in a foreign country, planning a follow-on offering, or perhaps contemplating M&A activities? These are all times to contact your D&O insurance broker to determine if these activities will impact your D&O insurance. In the case of M&A, your broker should be able to assist with things like insurance due diligence and the placement of any needed [reps and warranties](#) policies.

### C. Board Training/Education

Congratulations on going public—now the challenge of life as a public company begins. Keeping directors, officers, and the company on track includes training and education. To help our friends and clients, Woodruff Sawyer provides a variety of resources including webinars and white papers. You can also [sign up](#) to receive our weekly blog on topics related to D&O risk and corporate governance, [the D&O Notebook](#), as well as issues that pertain to SPACs in [the SPAC Notebook](#). In addition, your Woodruff Sawyer account executive can send you our latest Board Education Resource Guide, which includes information about a variety of resources, including Woodruff Sawyer's own customized sessions.



*Our annual [Board Education Resource Guide](#) lists a variety of events for directors that are being hosted by leading organizations across the US.*

### D. D&O Liability and Insurance Market Update

The insurance market is a dynamic system, and the legal landscape can shift quickly. An experienced D&O insurance broker can help you stay abreast of the latest developments.



*Need help planning for the upcoming year? Check out our [Looking Ahead Guide for D&O Insurance](#).*

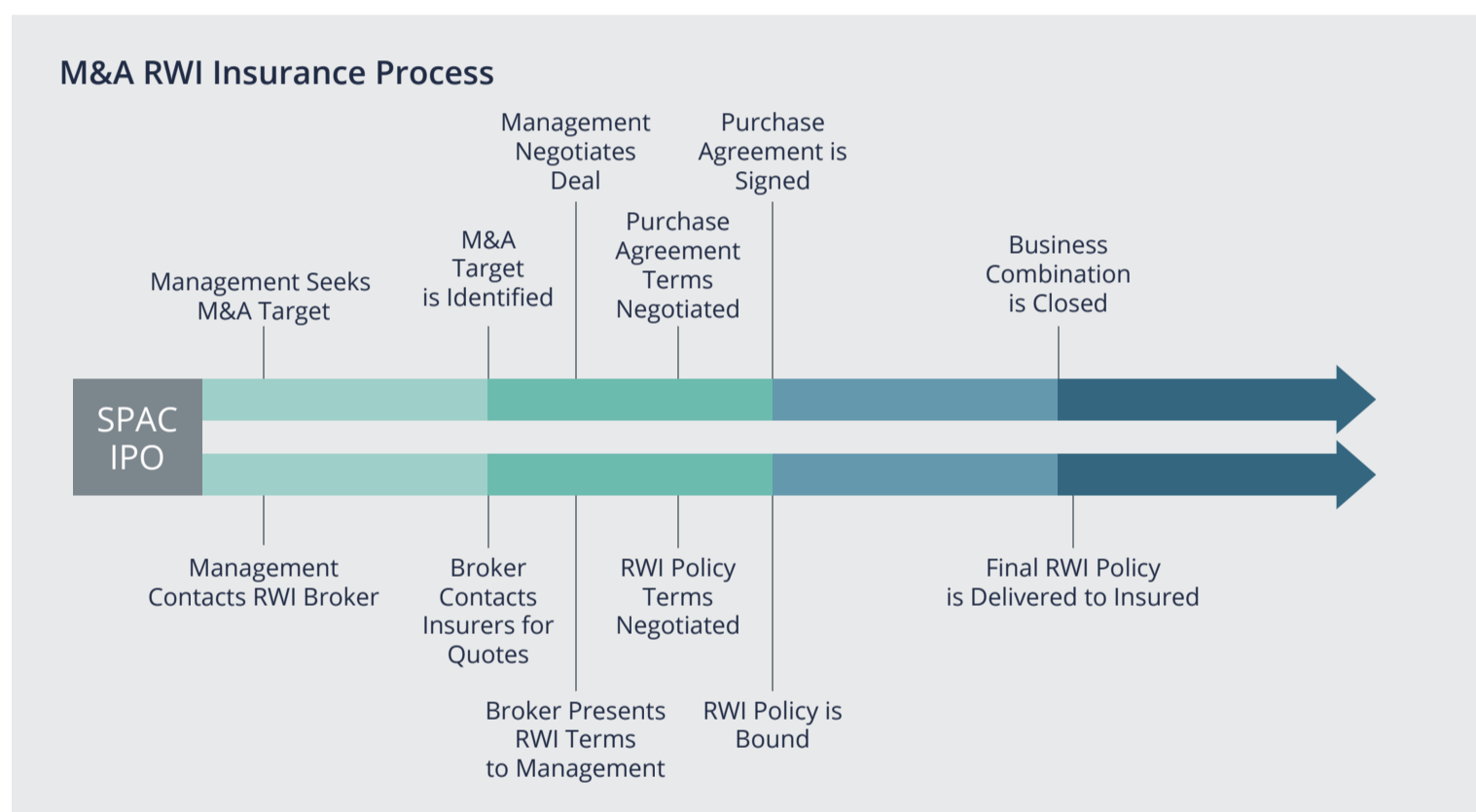
### E. Claims Advocacy

All companies hope they will never need to use their D&O insurance—but sometimes claims arise, and the policy is triggered. Claims—even the possibility of a claim—should be reported to your broker as soon as possible. In the midst of everything else, you don't want to find out that you had a misstep when it comes to your compliance with the terms of your D&O policy.

## What about M&A Reps and Warranties Insurance (RWI)?

Some SPACs have folded Reqs and Warranties (RWI) into their acquisition strategies. RWI is now used in almost all transactions done by private equity (PE) firms and is considered the market standard in the PE world. With many SPACs backed by PE firms, SPAC use of RWI continued in 2022. With increased scrutiny from regulators and shareholders of the nature of a SPAC team's due diligence efforts ahead of a business combination, the RWI process has helped several SPACs carry out and document a robust diligence process. Insurers have also become familiar with SPAC structures, and many of them are willing to offer coverage at very reasonable premiums. With over 25 insurers competing against each other in the RWI market, a good broker who specializes in SPAC RWI will be able to find several attractive options for coverage and explore opportunities for reducing premium on the combined entity's D&O coverage as well.

[Read more in our Representations and Warranties Insurance Buying Guide](#)



## Ongoing D&O Coverage

The operating company must establish a process around its annual D&O insurance renewal. Starting the renewal process with an expert D&O insurance broker early saves time, averts potential frustration, and can save on costs. Companies can optimize the renewal process by being prepared and taking a focused approach to their D&O insurance renewal. Getting up to speed on the litigation environment and the current state of the insurance market is a key step. A great resource for this subject is the Woodruff Sawyer [D&O Looking Ahead Guide](#). Having trusted advisors on your side helps ensure your success.

## Choosing the Right Insurance Broker: Questions to Ask

Given the rapidly changing nature of the D&O insurance market and the peculiarities of D&O insurance for private companies on track to going public, your choice of insurance broker is consequential.

A quirk of the insurance market is that to optimize your result, you must choose one insurance broker to approach all the viable insurance markets on your behalf. Sending multiple insurance brokers into the market will lead insurance carriers to conclude that you don't know what you are doing and that you are not a serious candidate for their insurance capacity. For this reason, if you are interviewing D&O insurance brokers, be sure to instruct them to refrain from sending your name into the market until you have actually chosen them to be your broker.

Not unlike bankers, lawyers, and accountants, different insurance brokers bring with them varying levels of experience and resources. You want to be sure to work with a brokerage firm—and individual brokers—who place a significant amount of premium with the major insurance carriers.

To get the optimal D&O insurance coverage at the best possible price, here are some questions to ask potential D&O insurance brokers before you choose one.

1

What level of experience does the particular brokerage team you are talking to (not just the brokerage firm, but your particular team) have when it comes to placing D&O coverage for companies going public through a de-SPAC transaction?

It is critical that your D&O insurance broker has extensive and current experience working with companies going public through a de-SPAC transaction. The D&O insurance market for companies going public changes rapidly. Unless your broker is in the market every day, you will miss out on the latest developments in the terms and conditions of your policy, which are critical elements of your negotiated, customized D&O insurance program.

2

What reach does the brokerage team have in the D&O insurance markets?

Ask whether the brokers on your team have extensive and long-term relationships with public company D&O insurance underwriters. Having a broker with years of experience and rapport built into their underwriter relationships can make a significant difference in the terms and pricing of your policies and the speed with which they can be placed.

3

Will the broker be using a wholesaler or making a direct placement?

Many brokers only do a limited amount of public company D&O insurance business, particularly for companies becoming publicly traded for the first time. These brokers may be excellent in other areas but will inevitably have to use a “wholesale” broker to work on your going-public D&O insurance if they do not transact a large volume of this business routinely. That can be a big negative for you, especially if there is a claim, because the person you are talking to will have no relationship with the insurance carrier that will be deciding whether to pay or deny your claim.

4

Can your broker clearly articulate the business and legal risks you face?

There is little chance your D&O insurance broker will do a good job of ensuring you have insurance coverage for critical risks if your broker cannot clearly articulate them. If your broker is not an expert in understanding the risks you face, you’re talking to the wrong person.

5

What experience does your broker have in terms of advocating for coverage payments with carriers on behalf of clients with complex claims?

Many brokers have an anemic claims function at best, and often the same claims person who handles client auto or workers’ compensation claims is also handling your difficult D&O insurance claims. Given the complexity of D&O insurance claims, this is a mistake. Find out if your broker has specialists who can swing into action on your behalf.

It is in your best interest to choose a broker that has the experience and expertise to be able to recommend the most strategic insurance program placement options, as well as one with extensive experience managing the types of claims brought against public companies, including in connection with de-SPAC transactions.

## Questions About This Guide? Comments? Compliments?

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INSIGHTS: D&O NOTEBOOK



## About Woodruff Sawyer

**As one of the largest insurance brokerage and consulting firms in the US,** Woodruff Sawyer protects the people and assets of more than 4,000 companies. We provide expert counsel and fierce advocacy to protect clients against their most critical risks in property & casualty, management liability, cyber liability, employee benefits, and personal wealth management. An active partner of Assurex Global and International Benefits Network, we provide expertise and customized solutions to insure innovation where clients need it, with headquarters in San Francisco, offices throughout the US, and global reach on six continents.

### For more information

Call 844.972.6326, or visit [woodruff Sawyer.com](https://www.woodruff Sawyer.com)

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[D&O Notebook >>](#)

[D&O Looking Ahead >>](#)

[Guide to D&O Insurance for IPOs and Direct Listings >>](#)

[SPAC Resources >>](#)

[SPAC Notebook >>](#)

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