



# Why Your D&O Policy Probably Will Not Save You

What every CEO, CTO, and CISO needs to understand about federal prosecution — before the subpoena arrives.

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**Here's an uncomfortable conversation worth having with yourself  
before someone else forces you to have it.**

You probably assume your Directors and Officers (D&O) insurance is the backstop that catches you if a regulatory situation ever turns criminal. It's a reasonable assumption. It's also wrong in ways that matter — and the moment you discover that, it's usually too late to do anything about it.

**This isn't a scare piece. It's a clear look at three things the Department of Justice's own data and the standard fine print of executive insurance policies make plain:**

1. How often the DOJ wins these cases (spoiler: almost always).
2. Who, specifically, they're coming for now (spoiler: you).
3. What your D&O policy actually does when the verdict lands (spoiler: it can leave you worse off than having no policy at all).

If you read nothing else, read Part 3. That's the part that surprises people.

## Part 1. The DOJ Doesn't File Charges It Expects to Lose

Federal prosecutors don't gamble. By the time an Assistant U.S. Attorney brings charges, they've usually been quietly building the case for years. The evidence is already stacked. The witnesses are already cooperating. The paper trail is already pulled.

That's why the numbers look the way they do:

- The overall federal conviction rate runs between **90 and 95 percent**.
- In 2025, the DOJ's Fraud Section — the specialized team handling healthcare, financial, and consumer fraud — charged 265 individuals and had 235 convictions.
- The Health Care Fraud Unit alone: 194 charged, 150 convicted.
- Roughly **90 percent of federal defendants plead guilty** rather than face trial. For those who do go to trial, conviction rates still top 90 percent.

Why do so many people plead out? Math, not cowardice. Federal sentencing guidelines hand down dramatically longer sentences after a trial loss than after a plea. Even defendants who genuinely believe they're innocent often plead guilty because the downside of losing at trial is too catastrophic to risk.

Translation: by the time charges hit your desk, your options have already narrowed to two — accept a negotiated outcome, or roll the dice against an opponent that wins more than nine out of ten times.

## Part 2. The Target Has Moved — and It's You

For most of the last two decades, "corporate prosecution" meant prosecuting the corporation. Big fines. Deferred prosecution agreements. Compliance monitors. Individual executives were charged in only about 34 percent of cases that ended in a corporate criminal settlement.

### That era is over.

The DOJ has openly made individual accountability a top enforcement priority, and the charging data backs it up. In closely-held organizations — where the line between "the company decided" and "a person decided" is short — top management is convicted in roughly **51 percent** of cases.

### What "Willful Violation" Actually Means

**"Willful violation" is a charging theory custom-built for executives. To convict you, prosecutors don't need to prove you personally pushed a button. They need to prove either:**

- *You knew about a specific regulatory obligation and consciously chose to disregard it, **or***
- *You were aware of a substantial risk that a violation was occurring and failed to act.*

That's it. That's the whole standard. And if you're a sitting CEO, CTO, or CISO, both elements — awareness and authority — are usually already in place before the conversation even begins.

### CISOs: Your Job Title Just Became a Liability Category

In 2022, Joseph Sullivan, Uber's former Chief Security Officer, was convicted in federal court for how he handled the company's 2016 data breach. He didn't write malware. He didn't steal data. He made **decisions about disclosure** — and those decisions became a federal conviction.

The message that case sent to every security officer in the country was simple: your title doesn't insulate you. Your decisions define your exposure. The same logic now extends to CTOs whose architectural choices touch regulated data, and to CEOs whose strategic decisions set the company's risk posture.

#### **Delegation is not a defense.**

If compliance raised a flag, if legal counsel outlined the obligation, if a risk assessment named the vulnerability — and the violation continued — prosecutors will follow the paper trail of willful disregard right up to whichever executive had the authority to stop it.

## Part 3. The D&O Illusion (Read This Part Twice)

This is where the briefing gets genuinely uncomfortable, because the way most executives think their D&O insurance works in a criminal case isn't how it actually works.

### The Trap: "Advancement" Is Not "Payment"

When criminal charges are filed, your D&O policy will almost certainly start paying your legal defense bills. Lawyers, expert witnesses, investigators, court costs. For a complex federal case, those bills routinely cross seven figures, and in high-profile matters they can exceed \$4 million *before trial even starts*.

This payment process is called **advancement of expenses**. Most executives feel reassured at this point — the system is working, the insurance is doing its job.

**Here's the clause almost nobody reads:**

**Advancement is not the same thing as payment. It's a loan, conditional on the outcome.**

Virtually every modern D&O policy contains a **"fraud" or "illegal acts" exclusion**. It's triggered by a final, non-appealable adjudication that you committed a willful or criminal act. The moment that finding is entered — guilty plea or jury verdict — the insurer's **recoupment right** kicks in.

Recoupment means the insurer can claw back every dollar it has paid toward your defense.

Read that again. The money that paid your defense team becomes a debt **you personally owe**, due upon conviction. It isn't forgiven. In most circumstances, it isn't dischargeable in bankruptcy. It's a personal obligation tied directly to your criminal judgment.

The insurance that felt like protection turns into a high-interest, non-dischargeable loan with a repayment trigger that fires at the exact worst possible moment of your financial life.

### Criminal Fines: Never Covered. Not Once. Not Ever.

The second illusion is simpler. D&O insurance **does not cover** criminal fines, court-ordered penalties, or restitution. Not partially. Not under special circumstances. Never.

This isn't something you can negotiate into your policy. It's public policy law. Insurers are flatly prohibited from indemnifying individuals against the punitive consequences of proven criminal conduct, because if they could, criminal penalties would lose their deterrent purpose. In most jurisdictions, your company can't indemnify you for those penalties either. Your employment agreement won't save you. Promises to "make you whole" stop at the courthouse door.

## What That Looks Like in Dollars

Here's an illustrative scenario for an executive convicted of a willful violation in a significant healthcare or data privacy case. Every number is realistic.

Exposure	Amount
Defense costs advanced by D&O carrier over 3 years	\$4,200,000
Criminal fine imposed at sentencing	\$2,500,000
Court-ordered restitution to victims / government programs	\$8,750,000
D&O recoupment claim (clawback of advanced defense funds)	\$4,200,000
<b>TOTAL PERSONAL FINANCIAL EXPOSURE</b>	<b>\$15,450,000</b>

### Why every line is realistic:

- Healthcare fraud penalties can reach three times the amount of improper billings, with per-claim multipliers on top.
- State data privacy regulators routinely impose eight-figure penalties for breaches tied to willful security failures.
- Securities and financial fraud cases regularly produce individual fines and disgorgement in the tens of millions.
- \$4.2 million in defense costs is conservative for a three-year federal prosecution involving expert witnesses, forensic analysis, and trial prep.

Every dollar in that table — **including the recoupment claim** — is owed personally by the individual executive. No insurance absorbs the impact.

### The Short List of What Your D&O Policy Will NOT Do

- It will not pay your criminal fines, statutory penalties, or court-ordered restitution. These are uninsurable as a matter of public policy.
- It will not protect you once a final adjudication of willful or criminal conduct is entered. That's when the exclusion activates.
- It will not forgive the defense costs already advanced. The recoupment right converts them into personal debt.
- It will not protect you under "personal profit" exclusions. Allegations of bribes, kickbacks, or illegal gains can deny coverage outright.

- It will not preserve policy limits indefinitely. Defense costs erode the total coverage dollar-for-dollar under "burning limits."

## Part 4. Why "I Delegated It" Won't Work

Every executive's instinct, faced with this kind of risk, is to reach for delegation. You have a Chief Compliance Officer. You have a General Counsel. You have outside auditors and a risk committee. Surely their sign-off transfers the risk away from you.

### Delegation Does Not Get you off the Hook

The willful violation standard doesn't require that you personally executed the prohibited act. It requires only that **you knew** (or were reckless about) a specific regulatory obligation — and that you had the **authority to make the organization comply**. For a sitting C-suite executive, both boxes are almost always already checked.

### What's left is the evidence. And that evidence increasingly lives in electronic form:

- Emails to the board.
- Slack messages to the compliance team.
- Quarterly risk reports.
- Memos from outside counsel.
- Minutes of executive committee meetings.

Prosecutors rarely need a confession anymore. They rely on a documented trail — electronic, thorough, time-stamped, preserved — showing that an executive was aware of a risk and failed to act.

#### An important reversal:

When a CTO or CISO formally notifies the CEO and Board of Directors about a technical inability to meet a critical obligation — say, regulatory compliance, or the "Harvest Now, Decrypt Later" threat from anticipated quantum computing capabilities around 2029 — the primary liability for inaction shifts up.

*From that moment forward, inaction by the CEO or Board can itself constitute a willful violation. Awareness, once established in writing, doesn't disappear.*

This is why every compliance escalation that lands on an executive's desk should be treated as a legal notice. Awareness is the precondition of willfulness. How you respond once you're aware decides whether that awareness becomes your defense — or the centerpiece of the indictment.

## Part 5. What to Do Before a Case File With Your Name on It

Once the DOJ — or one of fifty state regulators — serves a subpoena or sends a target letter, the most important decisions about your personal exposure have already been made for you. From that point, you're doing damage control, not protection.

Treat the four steps below as ongoing executive hygiene. Not a one-time legal project.

### 1. Get a Personal Read on Your D&O Policy

Hire independent coverage counsel — **not your corporate broker** — to walk through the recoupment provisions, the exact language of the fraud exclusion, the trigger for "final adjudication," and the definition of "insured person." CISOs in particular: get written confirmation that your role is covered.

### 2. Separate Your Personal Exposure From the Company's

Ask your General Counsel a different question than you usually ask. Not "what is the company's risk," but "what is **my** personal criminal exposure in my current role." The answers are usually different. Sometimes very different.

### 3. Document How You Respond to Compliance Escalations

When a risk is flagged to you, your written response becomes your defense — or the prosecution's exhibit. Ambiguity reads as willful disregard. Clarity reads as due care. Write accordingly.

### 4. Look Into Side A DIC Coverage

Side A Difference-in-Conditions coverage is a supplemental layer that activates when corporate indemnification isn't available — insolvency, derivative claims, and similar situations. It doesn't solve the criminal-fine problem (nothing does), but it materially reduces the defense-cost recoupment risk. For executives in high-exposure roles, it's worth pricing.

## The Bottom Line

The DOJ wins at rates approaching certainty. Its Fraud Section is structurally focused on individual executives. The willful violation standard is designed to reach decisions made at your level. And the D&O policy that feels like protection is, in a criminal conviction scenario, a defense-funding loan with an activation trigger at the worst possible moment — one that never covers the fines, penalties, or restitution.

This isn't pessimism. It's the operating reality reflected in the DOJ's own enforcement data and the standard language of the insurance industry.

The executives who navigate this well aren't the ones who trust their coverage. They're the ones who read it, stress-test it, and make today's decisions assuming it may not hold.

**The safety net is narrower than the marketing suggests. Plan accordingly.**

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*This article is intended for informational and educational purposes only and does not constitute legal, financial, or insurance advice. Executives should consult qualified counsel and experts regarding their specific circumstances, policy terms, and jurisdiction.*

*Data sources: DOJ Fraud Section 2025 Year in Review; DOJ Criminal Division public reports; Alston & Bird LLP DOJ Analysis (Feb. 2026); Arnold & Porter / AFS Law DOJ Fraud Section Takeaways (2025); Wiley Law DOJ Year-in-Review Alert (2025); U.S. Sentencing Commission Annual Report (2024); Transactional Records Access Clearinghouse (TRAC); NACD Director Essentials on D&O Insurance; Harvard Law School Forum on Corporate Governance.*



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[Info@TransformativIP.ai](mailto:Info@TransformativIP.ai)

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