



WOODRUFF  
SAWYER

100  
YEARS AND  
COUNTING

10th Annual Edition

# D&O LOOKING AHEAD GUIDE

D&O Considerations for 2023



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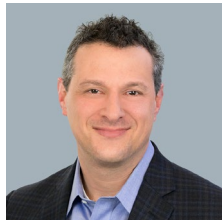
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## Expert Insights

Click below and see what advice our experts have for you as you plan for 2023.



**Brendan**  
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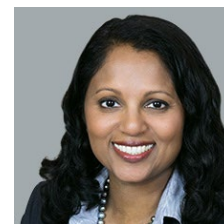
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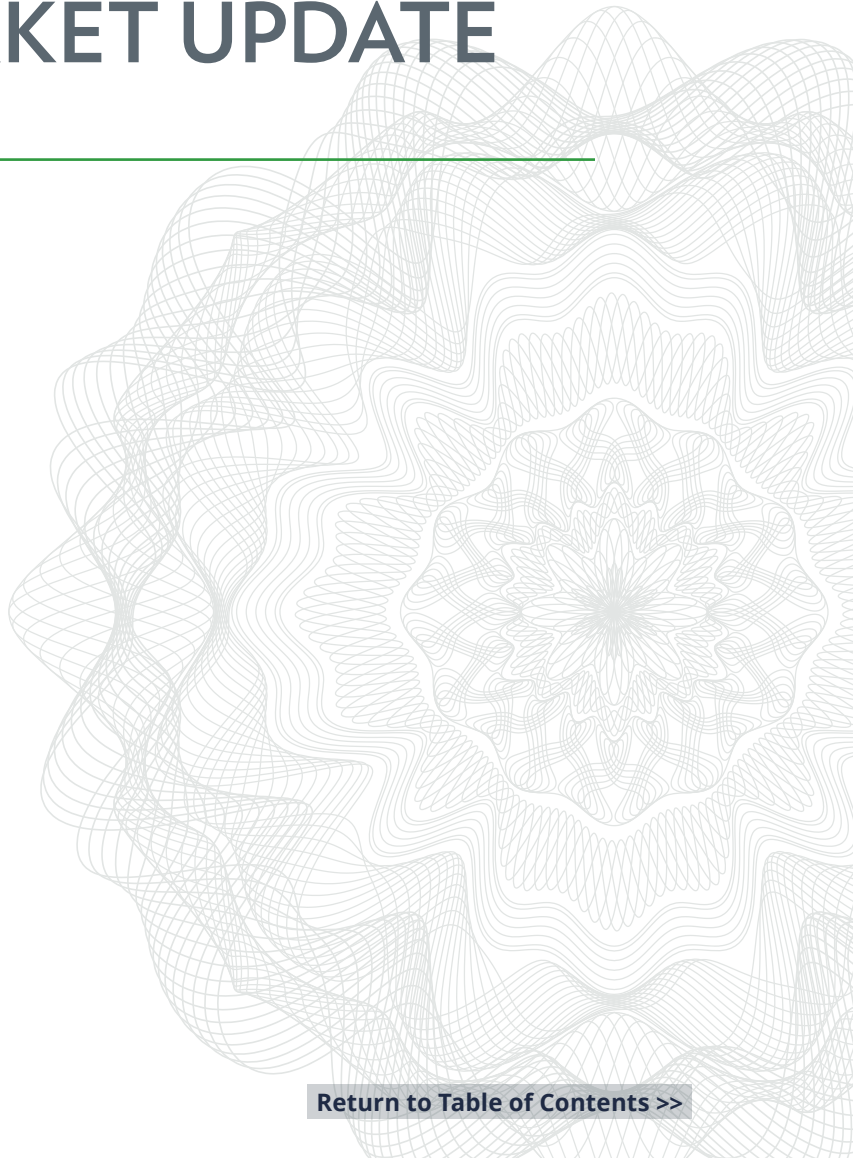


**Priya**  
Ease Claims  
Resolutions with  
Communication

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# 1.0 D&O MARKET UPDATE

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## 1.1 US Markets

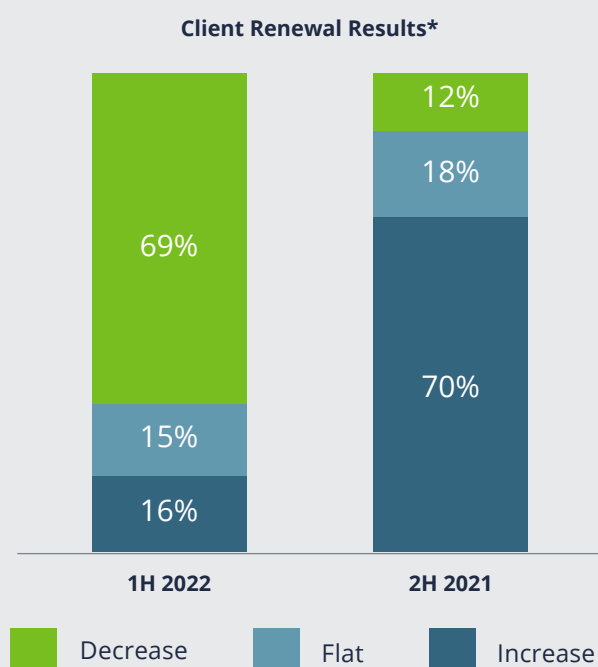
The first half of 2022 brought rapid and dramatic change to the world of US public company D&O insurance. It feels like 2021 is a distant memory: the hot IPO market has cooled, SPAC IPOs have ground to a near halt, and incumbent carriers are now fending off new insurance market entrants that are aggressively targeting their insureds.

During 1H 2022, pricing trends flipped from where they were in 2H 2021. This shift is most dramatic for those business sectors where Woodruff Sawyer's clients happen to be most heavily weighted: life science, technology, and IPOs. These industry segments were hit hardest by the hard market and consequently are gaining the most benefit from the current, more competitive market. More mature companies or those in less risky industries are also benefiting from the improving market, but the scale of the percentage decreases through the rest of this year and into 2023 will be somewhat more muted. As always, clients beset by tricky litigation, or litigation precursors such as large stock drops after releasing bad news, may still see increases.

Comparing data from 2H 2021 with 1H 2022 is telling. According to Woodruff Sawyer's data, 70% of clients renewing between July and December of 2021 received an increase in premium. Another 18% of those renewals came in flat. Only 12% resulted in a decrease.

Starting in January of 2022, the trend flipped: 16% of clients experienced an increase, 15% obtained a flat renewal, and 69% obtained a decrease.

### Dramatic Shift in D&O Renewal Results: 69% of Clients See a Premium Decrease in 1H 2022



\*Shows what percent of clients experienced flat or changing renewal premiums and does not indicate by what percentage premiums increased or decreased

Source: Woodruff Sawyer

In last year's *Looking Ahead*, we predicted pricing relief was on the way, but the speed with which the market turned has been surprising.

We expect this trend to persist into 2023.

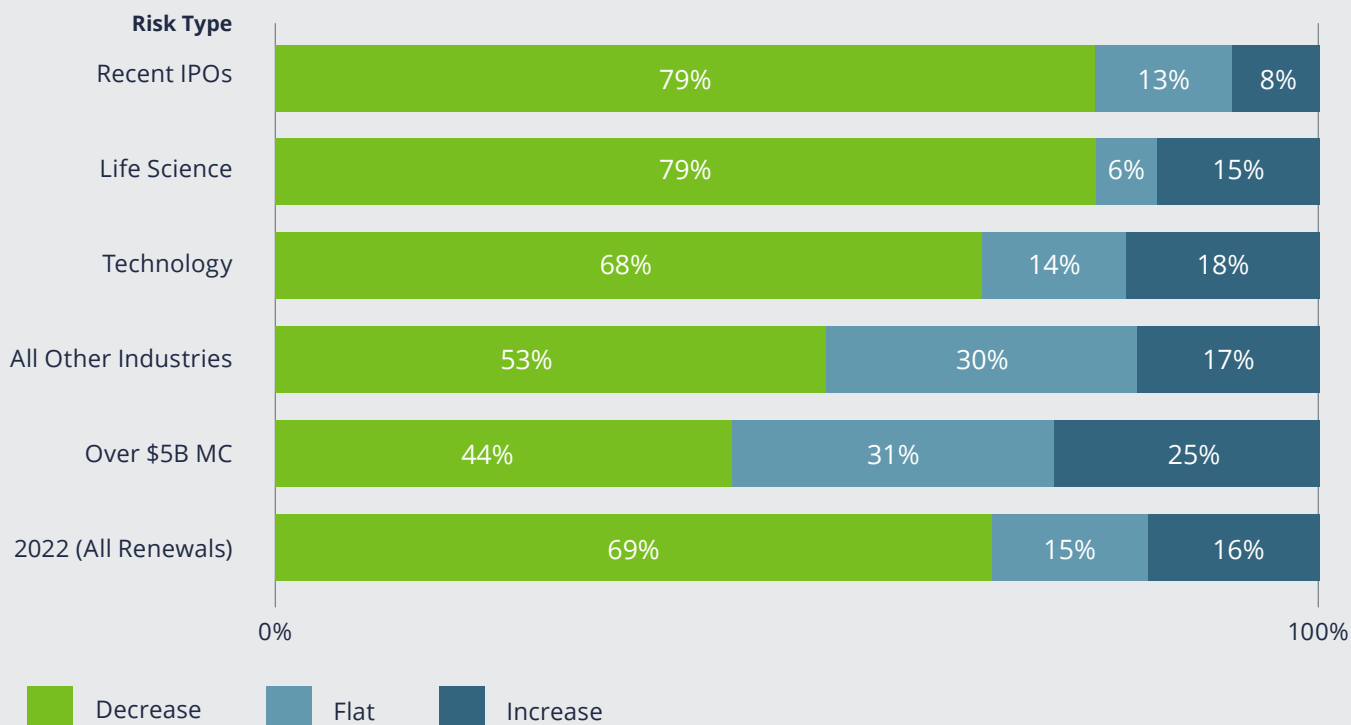
## Public Company Renewal Pricing: New Entrants Result in Lower Premiums

Market-leading carriers are responding to competition from new entrants into the public D&O marketplace by reducing premiums to retain their clients. Indeed, a welcome sign of a softened market is that D&O buyers now have incumbent and alternate markets quoting their programs. However, most D&O buyers are still reluctant to leave their incumbent primary carrier to maximize potential premium savings.

According to Woodruff Sawyer data, only 18% of public company renewal decreases were achieved by moving to a new primary carrier.

Not all industry segments received a decrease at renewal. Mature and lower risk profile clients saw fewer decreases in their renewals than clients with a more difficult risk profile and historically higher premium.

### D&O Renewal Results by Risk Type in 1H 2022

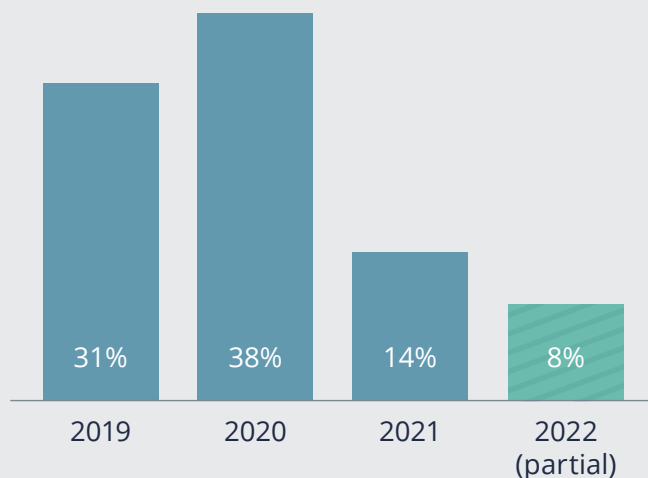


Source: Woodruff Sawyer

Notwithstanding the overall market, some companies still saw an increase in their renewal premiums. However, the severity of the increase continues to drop. So far in 2022, the median increase was just 8%. This is a far cry from the last three years, where median increases were 31% in 2019, 38% in 2020, and 14% in 2021.

### The Frequency and Severity of Median Premium Increases Continues to Drop

#### Median D&O Premium Increase



Source: Woodruff Sawyer

### IPO and Direct Listing D&O Insurance Marketplace

Coming off a record-breaking 2021, the public markets have cooled significantly. In the first half of 2022, the number of public company listings dropped to their lowest levels since 2016.

D&O premiums for these companies are still shaped by the *Supreme Court's 2018 Cyan decision*, which allowed plaintiff's attorneys to file Section 11 suits concurrently in federal and state court. Because state court cases tend to settle for much higher amounts than federal cases, the decision exposed insurance carriers to much higher potential losses. As a result, in less than two years, the average price of the first \$10 million of D&O insurance for an IPO company more than quadrupled.

More recently, insurance carrier exposure to state court litigation for IPO companies has waned as companies have adopted *federal forum provisions*, which push IPO-related litigation back into federal court. While pricing for the first \$10 million of insurance on a new IPO peaked in Q1 2021, pricing has since moderated due to this changing litigation dynamic. Nevertheless, D&O insurance pricing for new public companies is still far more expensive than pricing for mature public company peers.

Having said that, recent IPO and direct listing companies are seeing the largest percentage decreases at renewal. Those companies purchased towers at the height of the hard D&O market and, as a result, there is more premium in their programs to cut. This dynamic explains why recent IPO renewals are, in some cases, now experiencing decreases of 20% to 50% compared to our reported 2021 overall median decrease of 13% in 2021 and 15% for 1H 2022.

## New D&O Insurance Capacity

New insurance carrier entrants—with the expense of few, if any, legacy claims—were attracted to last year’s pricing environment. They entered the D&O insurance market and built business plans assuming the pace of new public company business would continue. The sharp decrease in IPOs and SPAC deals so far in 2022 has forced incumbents and new entrants to compete almost exclusively on renewal business. This has brought welcome competition to the D&O market across the board, including renewals for companies just one year out from an IPO.

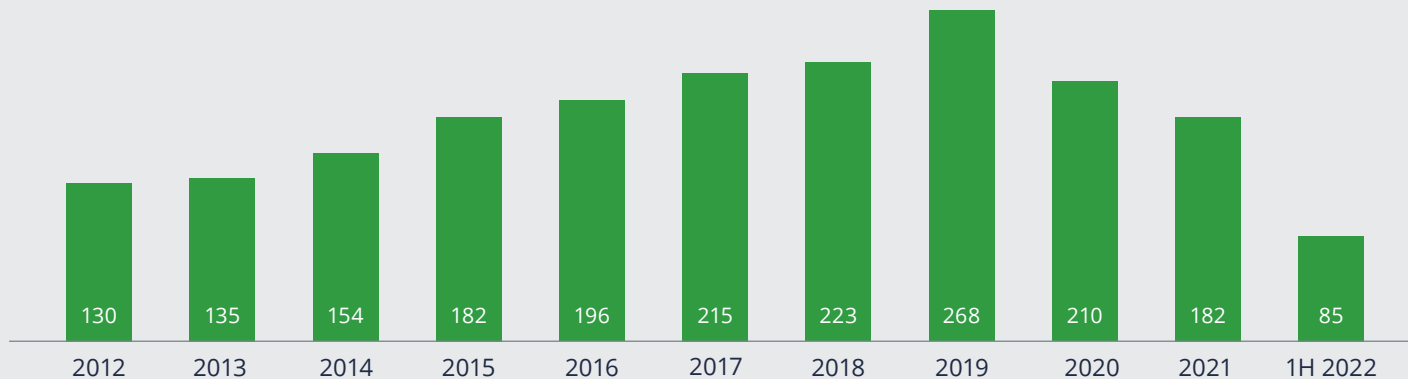
As expected, the more favorable risks are benefitting first from the new capacity. More challenged risks will still benefit from the new capacity, but not at the same scale.

One of the hallmarks of the recent hard market was how disciplined underwriters became around managing limits. In some cases, entire books were adjusted to remove layer exposures of \$10 million and larger. As this market develops, different schools of thought and strategies among carriers will certainly emerge. Some D&O buyers will benefit from carriers that shift to offering larger limits again.

## Securities Litigation Filings Down, Settlements Up

In the last decade, securities class action filings peaked in 2019, when a record 268 lawsuits were filed. In the last two years, the number of suits decreased to 210 in 2020 and 182 in 2021. With 85 suits filed in 1H 2022, this year is on track to end with around 170 cases filed—a 7% year-over-year decrease.

### The Last Decade: Securities Class Action Filings Peaked in 2019 and Are Currently Trending Downwards



Source: Woodruff Sawyer

While filing activity is down, settlement amounts are not. There were 48 settlements reached in 1H 2022 for an aggregate total of \$1.4 billion, which exceeds the 10-year average, median, and 75th percentile amounts. When viewed by industry sectors, life science and technology companies accounted for 58% of the settlement dollars this year.

A higher-than-usual backlog of open claims remains—476, many of which have been open for several years. Longer duration cases are correlated with larger settlements, suggesting that claim severity will continue to be a problem for D&O underwriters.

### Broad Global Uncertainty & Governance Drives Underwriter Concern

While a steady stream of COVID-related cases continues, the feared tsunami of pandemic-related litigation never really hit. Today, that fear has been replaced by broad concern for the challenges presented by the macroeconomy. Inflation, higher interest rates, the threat of recession, the war in Ukraine, choked supply chains, and a volatile stock market have also helped create a remarkably difficult operating environment for management teams and boards.

Underwriters are looking for companies to demonstrate resilience and strong corporate governance around [cyber security](#), [ESG](#)

([Environment, Social and Governance](#)), [privacy oversight](#), [climate change](#) and, of course, [financial health](#).

Derivative litigation stems from a myriad of underlying issues (safety, regulatory, antitrust, [privacy/data breach](#), and [diversity](#)) and the potential for that list to include financially distressed companies is real. One underwriter in our Underwriters Weigh In™ survey commented, “[The derivative landscape is terrifying...balance sheets are saddled with debt and facing massive interest rate hikes when they refinance, driving risk of increased Chapter 11 filings.](#)”

Carriers will look favorably on companies that demonstrate they are well positioned to address these macroeconomic realities as well as risk related to corporate governance.

### SPAC IPOs & De-SPAC Transactions: Lawsuits Abound

The SPAC craze of 2020 and 2021 has come to a screeching halt during the first half of 2022. As detailed in the Woodruff Sawyer article, “[Taking Stock of SPACs: 2022 Trends in Review](#),” the drastic slowdown has been marked by withdrawals, an increase in liquidations, longer SEC review periods, extensions and delays, more lawsuits, bankers’ scaling down their SPAC operations, and more negative shifts in sponsor economics and target valuations.

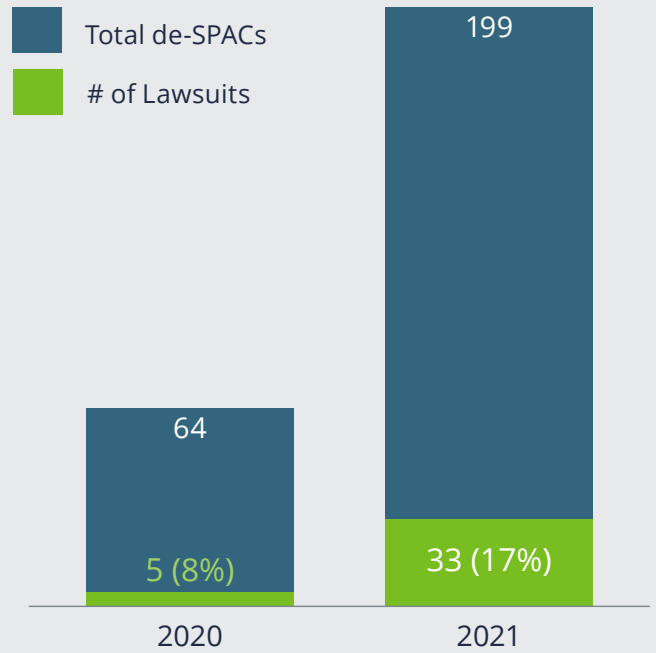


Even during the boom period, SPAC and de-SPACs had garnered the attention of the plaintiff's bar. (As a reminder, a de-SPAC is the process whereby a publicly traded blank check/special purpose acquisition company merges with a private operating company, resulting in the private operating company becoming a public company trading on an exchange.) In 2020, five de-SPAC companies were sued, but in 2021, there were 33 suits—a 560% increase. Underwriters are closely monitoring the huge class of 2021 SPACs that are aging into a period where litigation is common.

In addition, the SEC has proposed rules that would extend Section 11 liability to the de-SPAC target and offering underwriters. Even without this change, 8% of de-SPACs received a securities class action suit in 2020 and 17% in 2021. Extending Section 11 liability to the de-SPAC target and offering underwriters would make those suits an even more attractive target for the plaintiff's bar.

According to *SPACInsider*, there are more than 600 SPACs seeking merger partners. We expect many of these SPACs will be unable to find a partner over the next year.

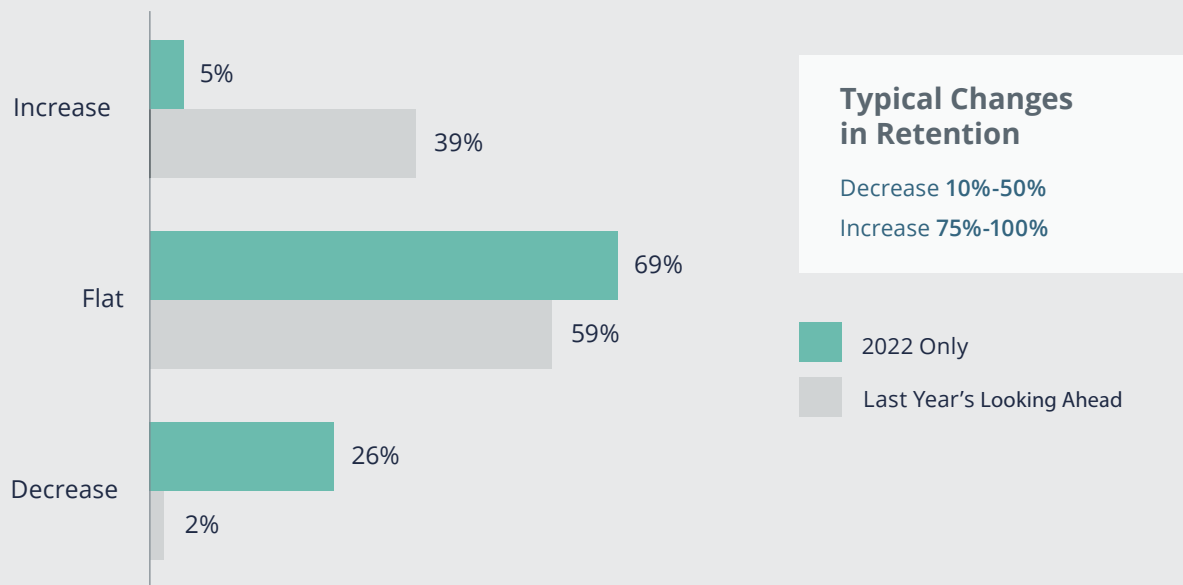
## Percentage of de-SPACs Subject to an SCA



## 1.2 Self-Insured Retention Trends

The trend of increasing retentions has slowed and there are opportunities to lower retentions for the first time in several years. The average retention for an IPO company in Q1 2018 was \$2.5 million. By Q1 2021, that average figure had jumped to \$13 million. Mature public companies did not experience that massive leap, but retentions were generally on the rise.

## A Startling Shift Toward Decreases in D&O Retentions in 1H 2022



Source: Woodruff Sawyer

That trend has now turned. In the first six months of 2022 only 5% of clients experienced an increase in retention while 26% of companies achieved a decrease in their retention. The remaining 69% stayed flat. The median retention remains \$5 million.

In 2020, 95% of underwriters expected retentions to increase—today that figure in our [Underwriters Weigh In™ survey](#) stands at 9%.

### 1.3 Pricing Trends from CIAB

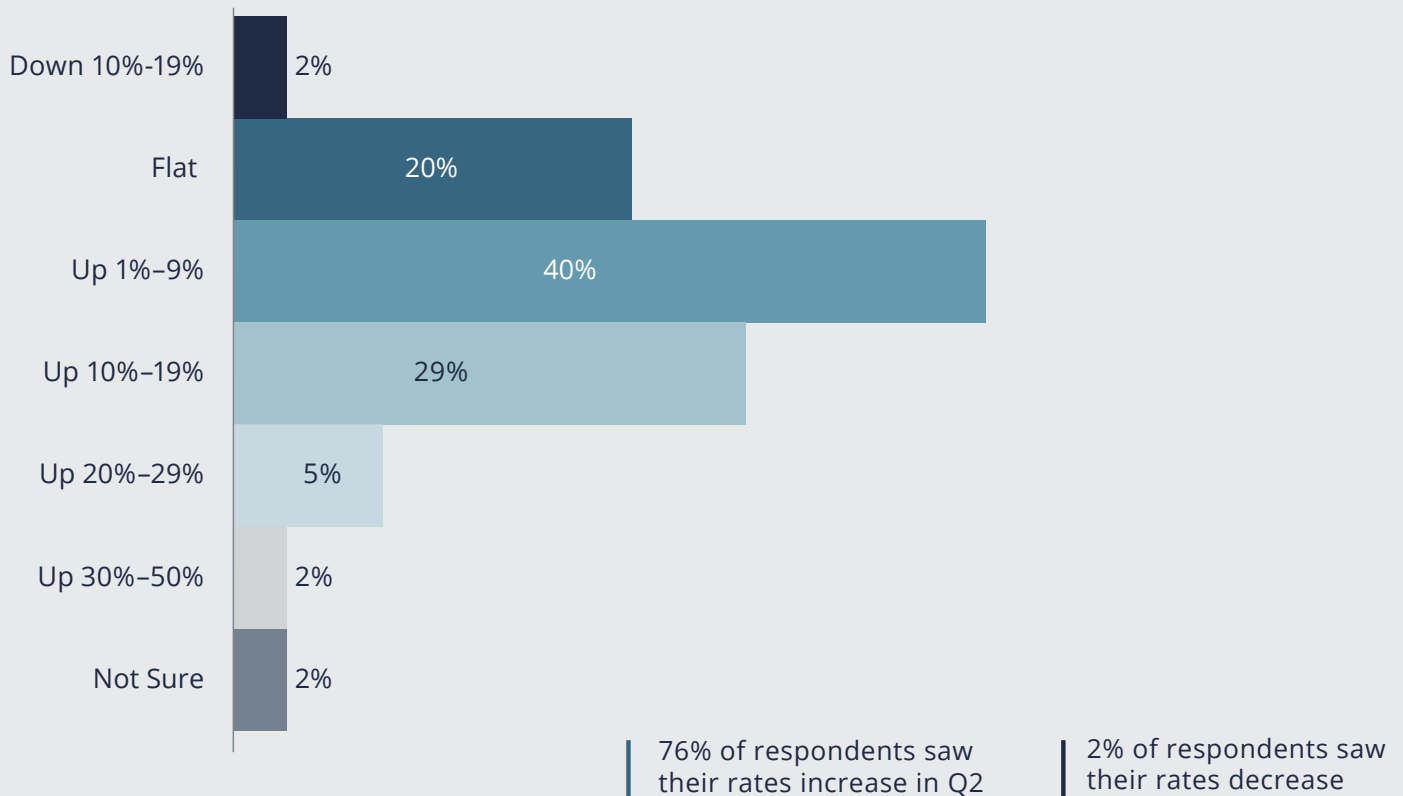
The Council of Insurance Agents & Brokers' Commercial Property/Casualty Market Survey reports that the second quarter of 2022 was

the 19th consecutive quarter of increased premiums for most but marked the first quarter in recent memory where premium decreases began for some. Respondents reported an average increase of 7.1% across all-sized companies. During the past couple of quarters, however, it's worth noting that the rate of increase has decelerated.

Although premiums increased for all lines of business, price increases in some lines (such as D&O) moderated in Q2 2022 compared to previous quarters. Certain lines like cyber, however, continued to experience rising rates.

The average D&O rate increased 7.9% over the prior quarter. Data showed 76% of the respondents saw rate increases in Q2, with 36% of respondents experiencing a rate increase of at least 10%. Only 2% of respondents saw a rate decrease.

## Average D&O Rate Trends in Q2 2022



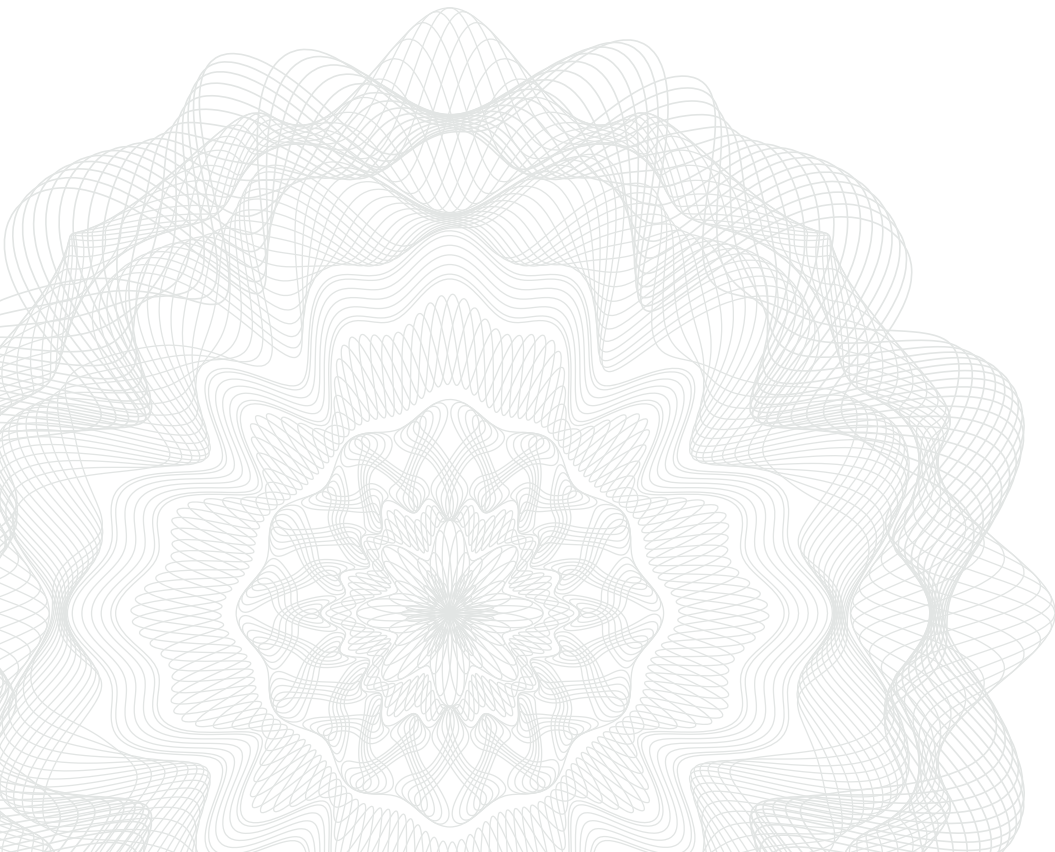
Source: CIAB Q2 2022 P/C Market Survey



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## 2.0 HOT TOPICS

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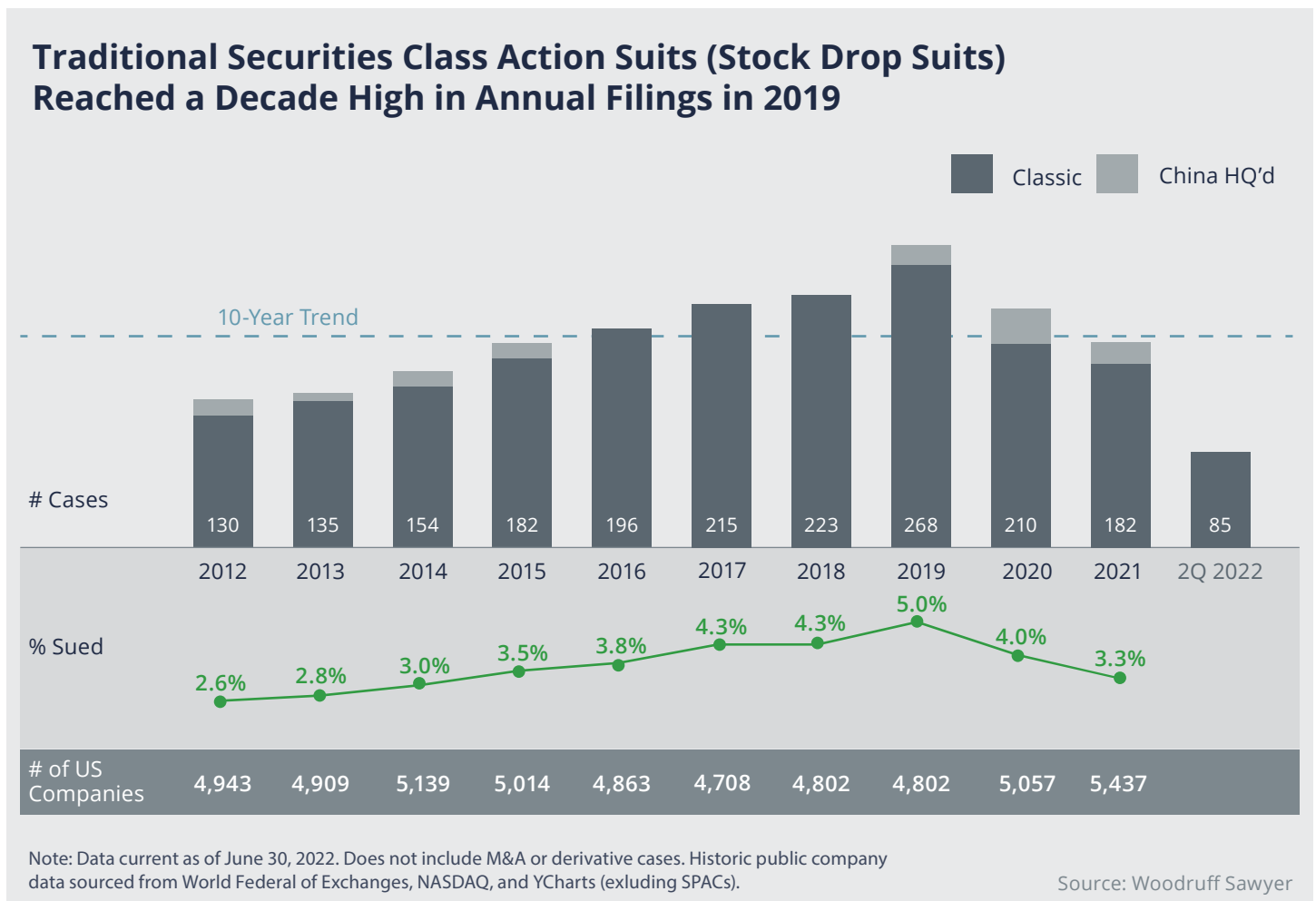
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In a notable piece of good news, the rate of filings for securities class action lawsuits continues to diminish. However, the economic, regulatory, and cultural-hot-button drag on boards of directors will continue to be intense through the end of 2022 and into 2023.

## 2.1 Good News: The Overall Rate of Securities Class Action Suits Continues to Diminish

A decline in the overall rate of securities litigation for the third year in a row is good news indeed. This is a continuation of the decline we’ve seen since filings peaked in 2019; we hope this trend will continue in 2023.

As always, Woodruff Sawyer’s *DataBox™ Report* provides details about the rate of securities class action lawsuit filings, including by industry and market capitalization.



## 2.2 Settlements Are Getting More Expensive, Part I: Increase in the Median and Average

While D&O insurance rates are trending downward, a headwind may be the escalating cost to defend and settle D&O litigation. The per-hour rate of top securities defense attorneys at major law firms is now more than \$2,000/hour, and the per-hour rate of the teams that staff these matters has increased over the years as well.

In addition, D&O insurance carriers are paying for very large settlements. The settlements in 1H 2022 have exceeded the 10-year average, median, and 75th percentile amounts. This is not a trend that anyone, other than the plaintiffs' bar, wants to see persist.

There were 48 settlements reached in 1H 2022 for an aggregate amount of \$1.4 billion. One-third of them settled for over \$20 million—an unusually high percentage. By contrast, in the previous five years, an average of 27% of cases settled for over \$20 million.

### Top 10 Settlements in 1H 2022: Payouts Represent 72% of Total Settlement Dollars

Entity	Suit Year	Industry	Cash Settlement Amount	Case Notes
Teva Pharmaceutical Industries Ltd.	2016	Biotechnology	\$420M	Price-fixing and collusion interrelated with a large acquisition
Blackberry Limited	2013	Technology	\$165M	Misrepresentation of revenue growth that led to write down of \$1 billion of unsold devices and layoff of 40% of workforce
Walgreens Boots Alliance Inc.	2015	Trade/Retail	\$105M	Misrepresentation of revenue growth pertaining to merger
Nielsen Holdings plc	2018	Service	\$73M	Misrepresentation of revenue growth related to EU data privacy laws
Mallinckrodt plc	2017	Biotechnology	\$65.75M	Violation of antitrust laws
Bank OZK	2018	Financial	\$45M	Misrepresentation of ability to assess credit risks
Chicago Bridge & Iron Co.	2017	Construction	\$44M	Post-acquisition accounting issues that led to a \$2 billion claim being filed
Uniti Group, Inc.	2019	Financial	\$38.88M	Misrepresentation of revenue growth pertaining to its spin-off
2U, Inc.	2019	Technology	\$37M	Misrepresentation of revenue growth
Nissan Motor Co., Ltd.	2018	Manufacturing	\$36M	Misrepresentation of CEO's compensation and use of corporate assets for personal purposes

## 2.3 Settlements Are Getting More Expensive, Part II: Duration

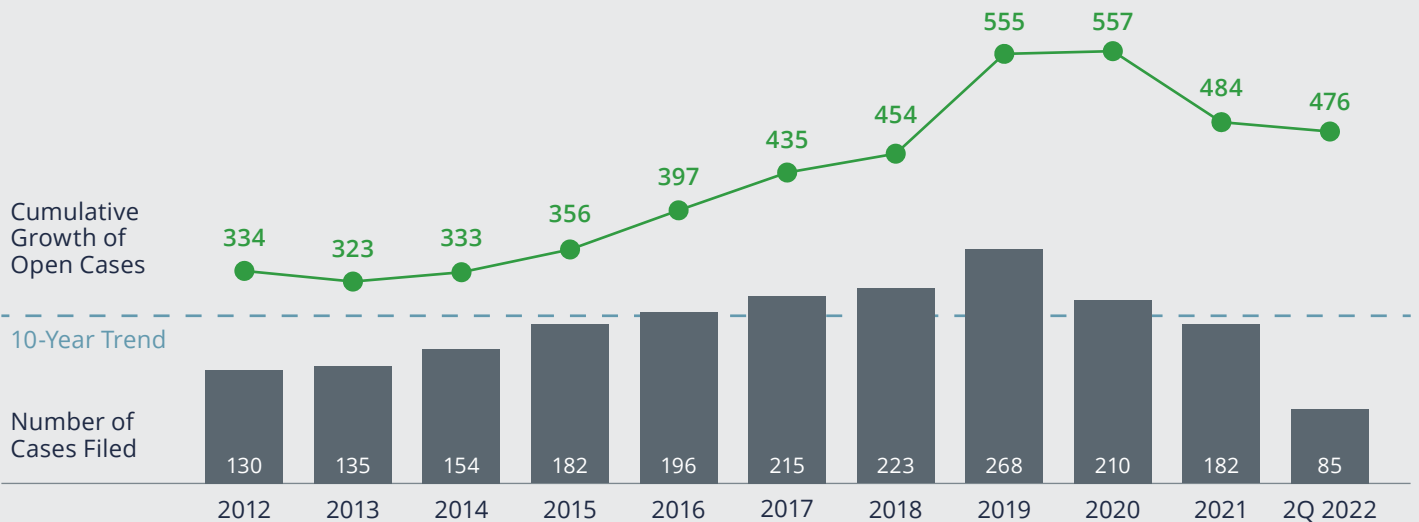
We have found there is a strong correlation between the duration of a case and the cost of defense and settlement. Insurance carriers have noticed this as well, and thus have been concerned about the large backlog of unresolved securities class action lawsuits.

There were 555 unresolved securities class action cases in 2019, and 2020 ended with an all-time high of 557 unresolved securities

class action cases. As a result, having just 484 unresolved cases by the end of 2021 was good news, as was the fact that the unresolved case count dropped to 476 by the end of the first half of 2022.

Despite this positive momentum, however, there are still a lot of unresolved cases, particularly compared to an average of 395 unresolved cases per year for the five-year span before 2019. Note that before the run-up to 2019, the more “normal” number of annual unresolved cases was in the mid to low 300s.

### Unresolved Traditional Securities Class Action Suits Have Dropped From An All-Time High in 2020



Note: Data current as of June 30, 2022. Does not include M&A or derivative cases.

Source: Woodruff Sawyer

## 2.4 “It’s the Economy, Stupid.”

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The number one thing on the minds of boards of directors as they plan for 2023 is the economy, and rightly so. Capital markets are off, inflation is worrying, and businesses everywhere are bracing for a serious recession.

The economic environment makes planning and forecasting particularly challenging, but companies do not have the luxury of simply shrugging their shoulders. Indeed, investors are looking to companies to disclose their expectations. Smart companies will do so, but with more attention than ever to following the steps required to get the most out of the [forward-looking statement safe harbor](#) available to them.

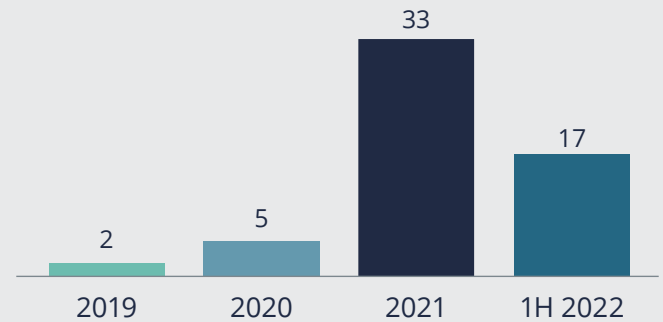
## 2.5 Bad News for De-SPAC Transactions: Plaintiffs Are Eagerly Pursuing These Cases

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The sheer volume of cases being brought against companies that recently went public through a de-SPAC transaction is cause for concern. This 2021 phenomenon has continued in 2022, and we think it will persist in 2023.

\*Not finalized at the time of this writing.

### Securities Class Actions Against De-SPACs



Source: Woodruff Sawyer

The trend of “[short reports](#)” being published on newly de-SPAC’d companies—and the willingness of courts to take these reports seriously—is adding fuel to this fire.

The Securities and Exchange Commission (SEC)'s new [proposed rules](#) are also adding to the pain being felt in SPAC-world. These rules go a long way to imposing on SPACs all the same restrictions and disclosure responsibilities associated with classic IPOs.

## 2.6 Cyber Disclosure and the SEC

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The SEC has thrown in the towel on gently encouraging companies to engage in what the SEC considers to be the adequate disclosure of cyber risks. Having run out of patience, the SEC has issued a set of proposed rules\* that are sure to challenge even the most mature of public companies.



While the rules are still merely proposed as of this writing, there is no doubt that the final rules will include a requirement to make expedited disclosure of material cyber breaches. In addition, the SEC wants to see substantially more disclosure about cyber governance at both the management and board level.

Finally, the SEC wants companies to disclose the presence of a cybersecurity expert on the board, something that will no doubt lead to more recruiting of such experts for public company boards of directors.

***The SEC's New Proposed Cybersecurity Disclosures: Next Steps for Boards of Directors >>***

The SEC has proposed new rules around cybersecurity disclosures. Find out how we got to this point, the scope of the proposed SEC rules, and more issues important to directors.

## 2.7 The "E" in ESG: Climate Disclosure and the SEC

Investor focus on Environmental, Social, and Governance (ESG) is not going away, and the SEC has waded into the climate mix by issuing a new set of proposed rules\* that runs almost 500 pages. While the new climate disclosure obligations are significant, the runway for

compliance is rather short. If final rules are adopted in 2022, we expect they are likely to apply to most filers beginning with their annual reports for fiscal year 2023.

Smart boards will ask their management teams how their current efforts stack up against the proposed rules. Most companies will have to engage in some level of additional work. This extra regulatory burden may be particularly onerous at a time when the economy is going through a downturn and corporate resources are limited. The SEC will not consider this to be a mitigating factor, however, so companies are well-served to familiarize themselves with the proposed rules and come up with a plan sooner rather than later.

In some cases, readiness may well include empaneling a new board member with climate expertise.

***Governance Disclosure and the SEC's Proposed Climate Rules >>***

Read more for insight into the Proposed Rules' governance-related disclosures and how you can begin assessing your company's risk.

\*Not finalized at the time of this writing.

## 2.8 The “S” in ESG: Post-Dobbs Employee Health Benefits

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Providing excellent employee health benefits is typically regarded as one way that corporations can take a positive step when it comes to considering the “Social” part of ESG. Unfortunately, the Supreme Court’s decision in June 2022 that effectively overturned *Roe v. Wade* has created chaos in the world of employee benefits.

Employers are struggling to determine to what extent they can still provide benefits that include abortion services, recognizing that many related services (such as certain recommended procedures in the case of miscarriage, among others) are now being denied due to the landmark decision in *Dobbs v. Jackson Women’s Health Organization*.

In addition to needing to sort through a 50-state regulatory landscape due to *Dobbs*, employers are also now being forced into the position of deciding whether to attempt to provide abortion and related services notwithstanding local rules and regulations—including the potential for criminal liability. As we discuss in our [FAQs](#) on the topic as well as a recent [webinar](#) that also addressed the [D&O liability issues](#), the landscape is fraught.

Boards and management teams should expect to grapple with these issues well into 2023. It is inevitable that a state

attorney general will bring on more pieces of aggressive litigation against corporate actors whose health care policies offend them, whether on religious grounds or otherwise.

This is also a place where social media may end up being less than constructive. Now is a good time to review and refresh your company’s [corporate social media policy](#).

### ***Director & Officer Liability Issues Post-Roe: Dobbs v. Jackson FAQs >>***

Get insight into the director and officer liability concerns for companies that wish to provide a medical travel benefit or reimbursement program to employees in states where abortion services are restrictive.

## 2.9 International Insurance Placements Will Continue to Be Challenging

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Sometimes it seems as if the globe is coming together, and the world is getting smaller. This was not the case, however, in 2022. International issues will continue to be a concern in 2023. One hopes that Russia’s aggression in Ukraine will be resolved sooner rather than later. In the interim, obtaining insurance in the region will be [especially challenging](#).

Companies with international subsidiaries should always take placing international D&O insurance policies seriously. If conflict flares in a region where you do business, having existing insurance can buy you some time if insurance carriers determine that they want to exit a particular geography, such as what has happened in [Russia](#).

### ***Multinational Companies and Local Foreign D&O Liability Insurance >>***

Identify important considerations when it comes to D&O insurance for your non-US subsidiaries, including why you may want to implement local foreign policies and who is at risk.

## **2.10 D&O Insurance Captive**

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As discussed elsewhere in this *Guide*, the market for D&O insurance has eased significantly. Nevertheless, D&O insurance brokers and buyers welcomed the February 2022 news that Delaware had modified its corporate law in a way that makes a D&O insurance captive a viable alternative for some companies. Specifically, a properly designed D&O insurance captive implemented by a Delaware-incorporated company can now respond to non-indemnifiable “Side A” loss.

As we outlined in [FAQs](#) and a [webinar](#) on the topic, a D&O insurance captive will not make sense for most companies. However, a D&O insurance captive can be a marvelous, innovative solution for those large companies whose rates remain extremely high and that have substantial cash balances they are willing to segregate into a captive. Woodruff Sawyer is proud to have assisted one of our clients in implementing the first major D&O insurance captive intended to take advantage of Delaware’s new rules.

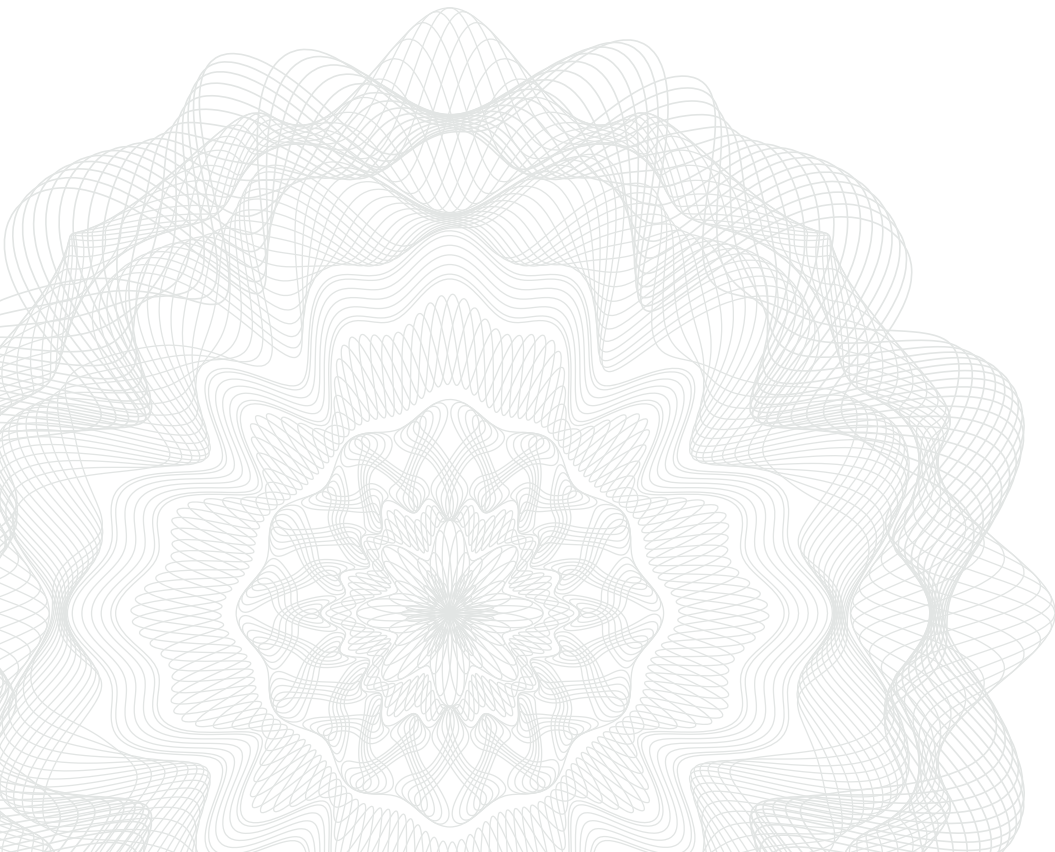
### ***D&O Game Changer: Delaware Approves Using Captives for D&O Insurance >>***

Read our critical FAQs for D&O insurance buyers and beneficiaries to get up to speed on captives as an alternative to traditional D&O insurance.

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## 3.0 UNDERWRITERS WEIGH IN™ SURVEY

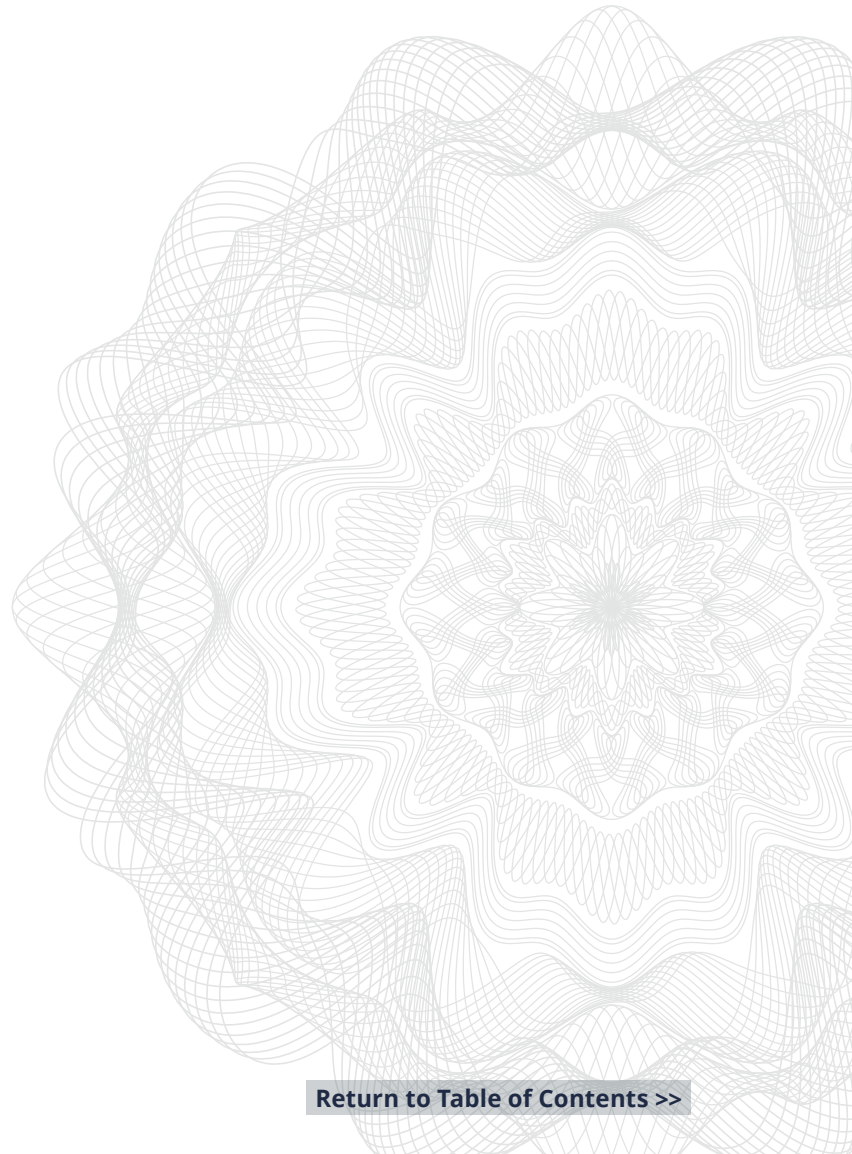
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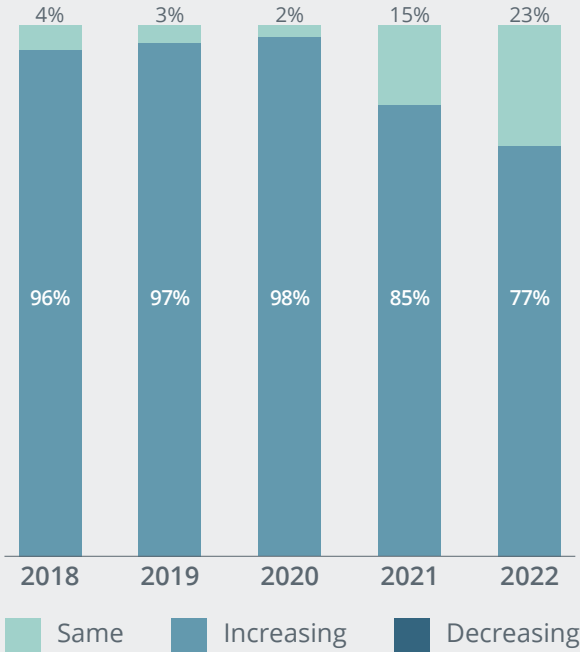
**Good brokers are first and foremost advocates for their clients.** As part of this advocacy, good brokers also listen to their insurance carrier partners to better understand their view of the world, including their current appetite for risk. Woodruff Sawyer is in conversation with insurance carriers every day. For this section of Looking Ahead, we surveyed 39 insurance carriers with whom we place D&O insurance around the world. We asked questions regarding the current risk environment, risk appetite, and future pricing expectations.

New this year and by request, we asked underwriters to share their thoughts regarding their answer to each question if they wanted to do so.



# Q1: Is D&O risk going up?

**2022 Survey Results:** Decreasing percentage of underwriters think D&O risk is increasing.



## Woodruff Sawyer Commentary

Insurance underwriters see all the things that go wrong for directors and officers. This makes it all the more notable that for the second year in a row, the percentage of underwriters who think D&O risk is increasing actually *decreased*.

## Underwriter Thoughts

Even though the percentage is less than last year, a majority of underwriters still think that the risk is increasing.

### Select underwriter comments:

Given the bear market, risk will increase for all publicly traded companies as share prices continue to fall. It is probably a necessary adjustment, but the fallout will be swift for certain companies. We're already seeing it in the life science space as many companies that went public a few years ago have bottomed out as their pipelines have failed. Tech companies that rode the COVID-19 wave with their offerings have also come back to earth.

The derivative landscape is terrifying and SCAs are bound to recover from their recent lows. Balance sheets are saddled with debt and facing massive interest rates hikes when they refinance, driving risk of increased Chapter 11 filings.

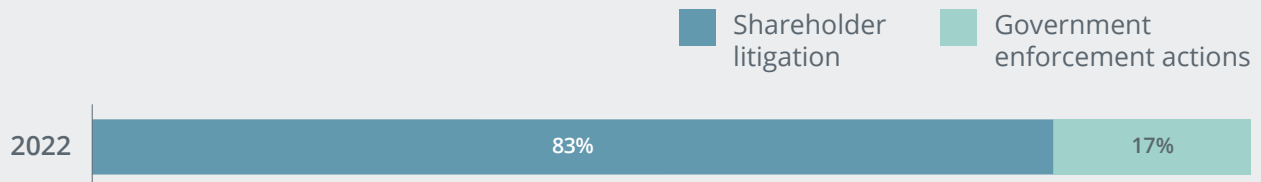
Various new regulatory exposures like ESG, diversity, and inclusion initiatives.

Higher settlements and higher defense costs.

## Q2: As you look out into 2023, should companies be more worried about shareholder litigation or government enforcement actions?

### 2022 Survey Results:

83% of underwriters think that companies should be more worried about shareholder litigation.



### Woodruff Sawyer Commentary

We were prompted to ask this question for the first time this year by the uptick we've seen in regulatory activity with the current administration, including the SEC's vigorous rulemaking and enforcement action cadence. Notwithstanding all of this activity, the vast majority of underwriters still see shareholder litigation as the more serious concern.

### Underwriter Thoughts

Select underwriter comments:

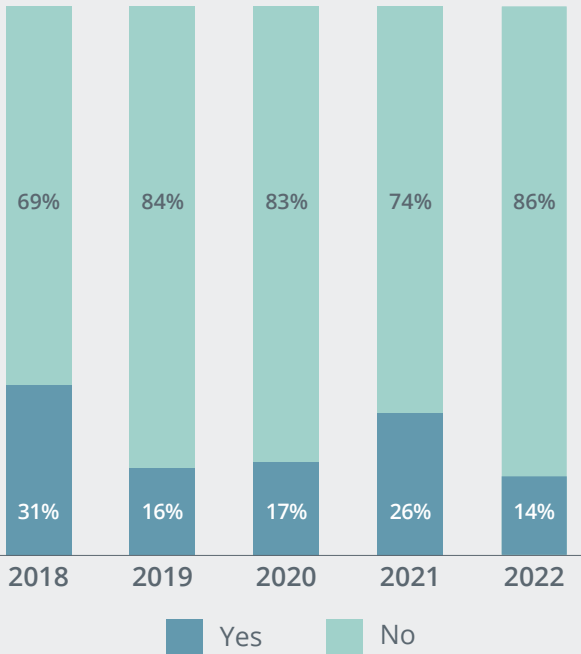
I think the government has plenty else to worry about...

This [shareholder litigation] is still the main risk in our view, but the SEC is getting more aggressive.

# Q3: Are companies as aware as they should be of the frequency, risk, and cost of D&O litigation?

## 2022 Survey Results:

86% of underwriters think that companies are not as aware of the frequency, risk, and cost of litigation as they should be.



### Woodruff Sawyer Commentary

The answers to this question may reflect a level of skepticism about whether companies accurately calculate their own risk.

### Underwriter Thoughts

Select underwriter comments:

Everyone assumes they will never get sued.

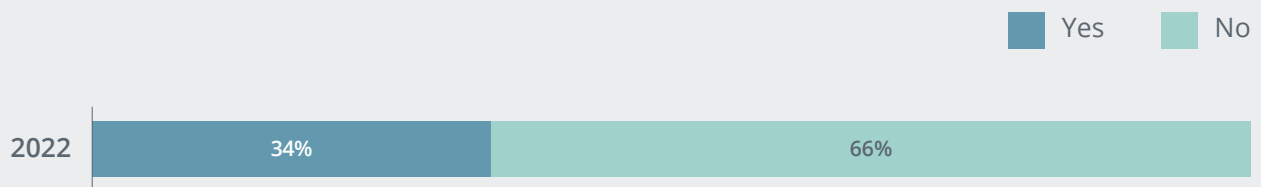
On the cost side, "inflation" has been very real and persistent for several years. Costs of defense combined with overall loss cost inflation is a significant concern that companies, brokers, and insurers should all be more aware of.



## Q4: Are companies willing to go to trial (and not settle) in the right circumstances?

### 2022 Survey Results:

Only 34% of underwriters think that companies are willing to go to trial (and not settle) in the right circumstances.



### Woodruff Sawyer Commentary

The cost to defend and settle a case is going up. Where this is dramatic, it can impact the calculus of whether a company wants to pay a settlement or take a case to trial. At this time, a clear majority of underwriters believe that their insureds would prefer to settle a case than defend themselves in court.

### Underwriter Thoughts

Select underwriter comments:

Companies, yes. Insurance carriers... remains to be seen.

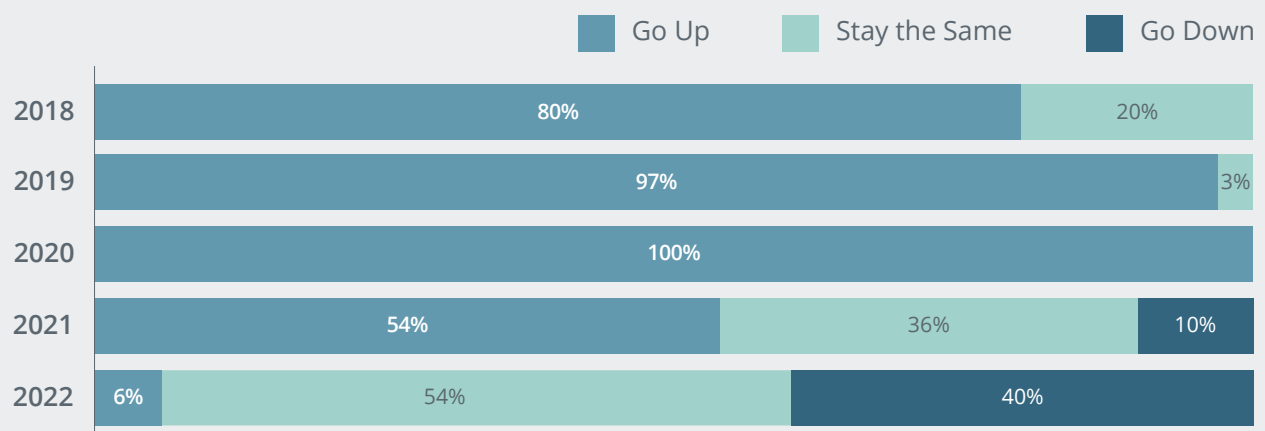
The industry needs more companies that are willing to take strong cases to trial.

I think they would fight if it was on their dollar, but they see insurance as free money to settle.

## Q5: Industry-wide, do you expect D&O premium rates for mature public companies to go up, stay the same, or go down?

### 2022 Survey Results:

94% of underwriters expect D&O premiums to stay the same or go down.



### Woodruff Sawyer Commentary

Oh, what a difference time makes. Last year's answer to this question predicted the break in the hard market. This year's results indicate that the softer market will persist, at least in the near term.

### Underwriter Thoughts

Select underwriter comments:

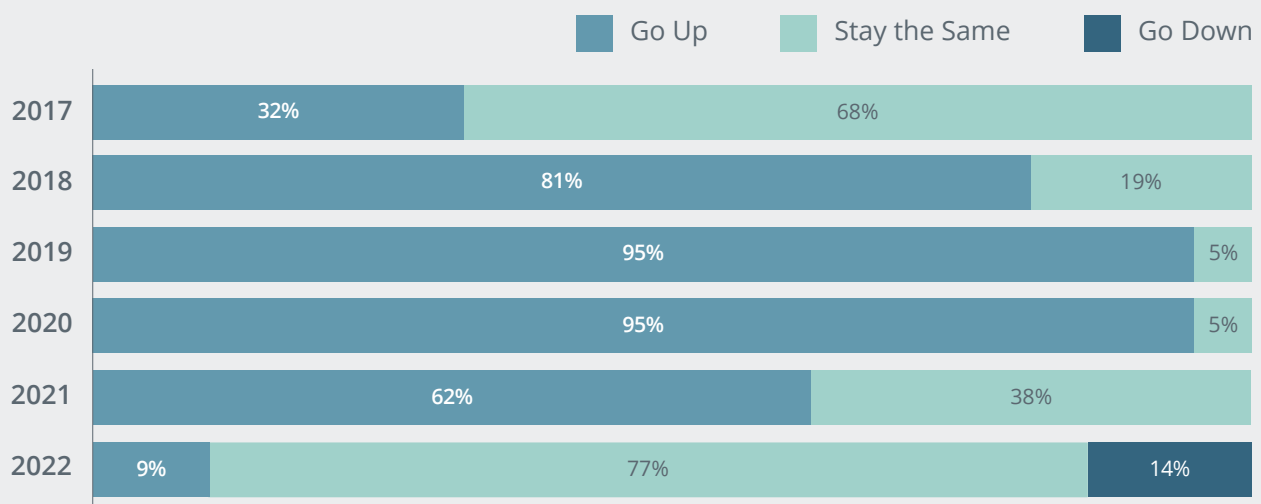
They shouldn't go down, but sadly they will. The only thing that seems to drive underwriting discipline is whether one is compensated on top line or bottom line. We never learn.

The market is still underpriced in this sector, but new market entrants will continue to keep pricing flat to down.

## Q6: Industry-wide, do you expect D&O SIRs\* for mature public companies to go up, stay the same, or go down?

### 2022 Survey Results:

91% of underwriters expect D&O SIRs to stay the same or go down.



### Woodruff Sawyer Commentary

Underwriters are reluctant to reduce SIRs, but competition may make it impossible for them to resist the downward pressure. Indeed, the 2022 survey is the *first time in six years that any underwriters indicated that they expect SIRs to go down.*

### Underwriter Thoughts

Select underwriter comments:

This does depend on market cap growth or if there has been a claim.

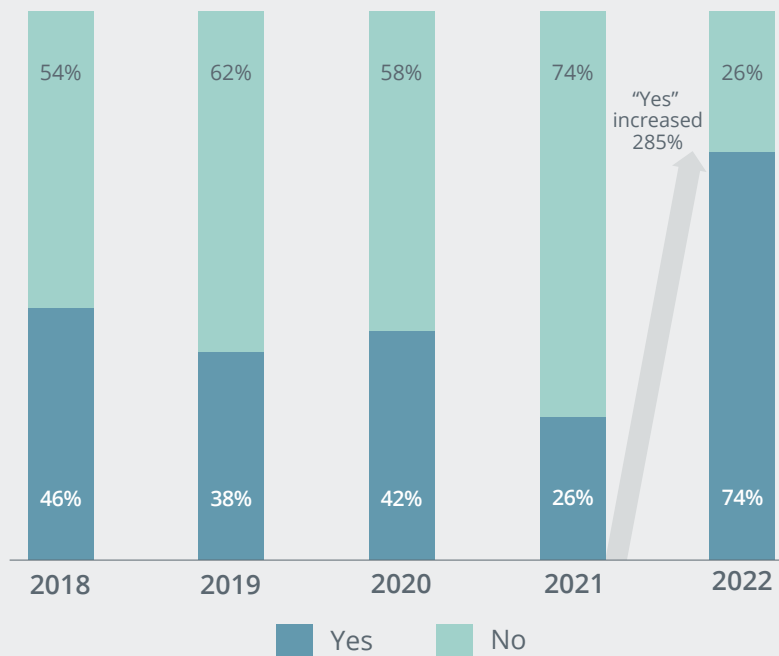
Given the current rate of inflation and defense costs inflation, I don't foresee retentions reducing across the board, although there may be some correction on retentions for those companies that went public over the last two years.

\*Self-insured retentions.

## Q7: Will you quote the primary layer for most public companies?

### 2022 Survey Results:

74% of underwriters will quote the primary layer of D&O insurance.



### Woodruff Sawyer Commentary

This is an enormous(!) spike in the number of underwriters willing to quote the primary layer—great news for D&O insurance buyers.

### Underwriter Thoughts

Select underwriter comments:

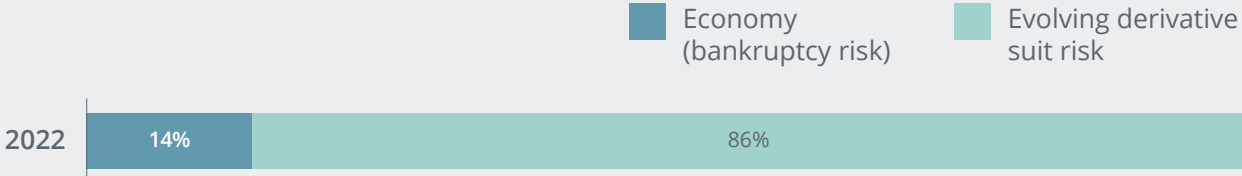
Except FI.

The terms may not be as aggressive as the marketplace, however.

# Q8: As you think about quoting Side A in 2023, do you anticipate being more concerned about the economy (bankruptcy risk) or evolving derivative suit risk?

## 2022 Survey Results:

86% of underwriters anticipate being more concerned about evolving derivative suit risk when they think about quoting Side A in 2023.



## Woodruff Sawyer Commentary

Given the 24-7 news coverage of a looming economic downturn, we were surprised by this response. Our experience in the market, however, tells us that this response might be less about the economy and more about underwriters' concerns that insureds persistently underestimate the risk of large cash settlements for derivative suit litigation.

## Underwriter Thoughts

Select underwriter comments:

Probably equal weight for derivative and solvency/bankruptcy risk heading into 2023; both are concerning.

Bankruptcy risk for private companies.

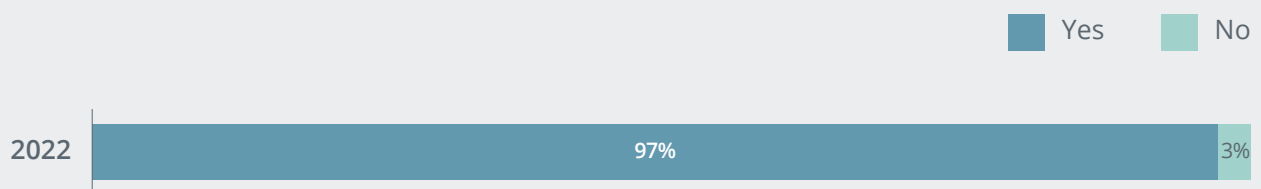
Derivatives will start taking bigger and bigger chunks of Side A programs. It is horribly underpriced for the current risk. Bankruptcy will just be a fun amuse bouche for the main event.

Even as access to capital becomes more of a challenge, severity concerns in *Fortune 100* D&O are my main concern.

## Q9: For the right risk, would you offer a layer of ABC that is \$10M or larger?

### 2022 Survey Results:

97% of underwriters will offer a layer of ABC that is \$10 million or larger.



### Woodruff Sawyer Commentary

We introduced this question for the first time this year to calibrate market recovery. In the hard market, we often saw carriers cutting limits by 50% or more. Given that carriers were cutting limits a short time ago, we were frankly surprised by this response. However, in comments we saw clear concern that carriers that offer higher limits for short-term income may find their portfolio unbalanced sooner rather than later.

### Underwriter Thoughts

Select underwriter comments:

Those opportunities are very few, though.

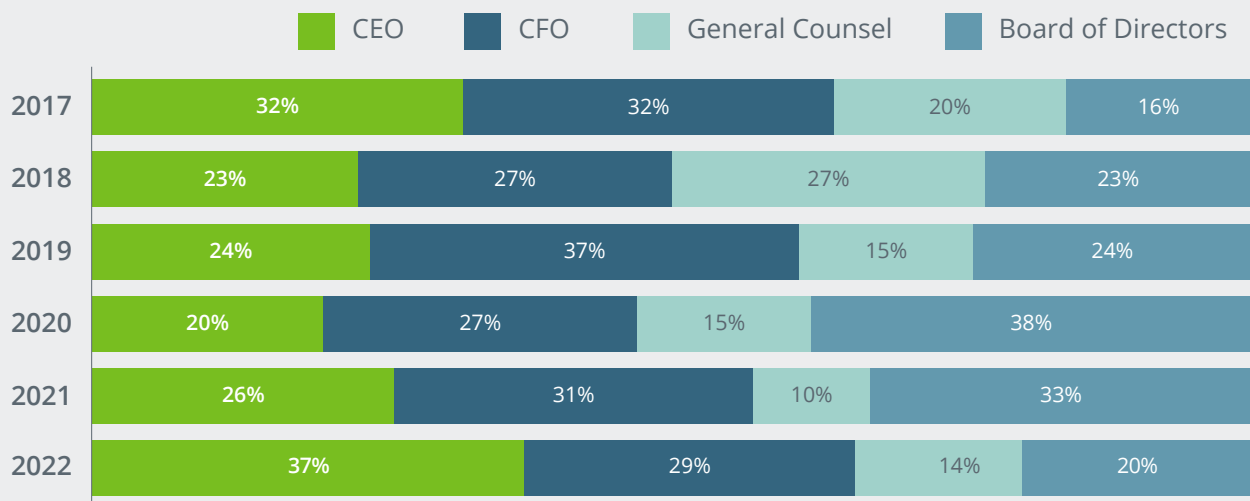
If it's priced accordingly.

Unbalanced line size [compared] to portfolio was a key contributor to underperformance in many portfolios, which led to the start of the market correction in 2018. With inherent uncertainties in the economy, now is the time to maintain line size discipline and not double down for the sake of preserving income.

## Q10: Who is the most critical person at a company when you think about mitigating D&O risk?

### 2022 Survey Results:

37% of underwriters think that the CEO is the most critical person at a company when they think about mitigating D&O risk.



### Woodruff Sawyer Commentary

It's 2017 all over again. After a few years of underwriters telling us they thought the Board of Directors was the most critical party when it comes to mitigating D&O risk, they are now back to thinking it's the CEO.

### Underwriter Thoughts

Select underwriter comments:

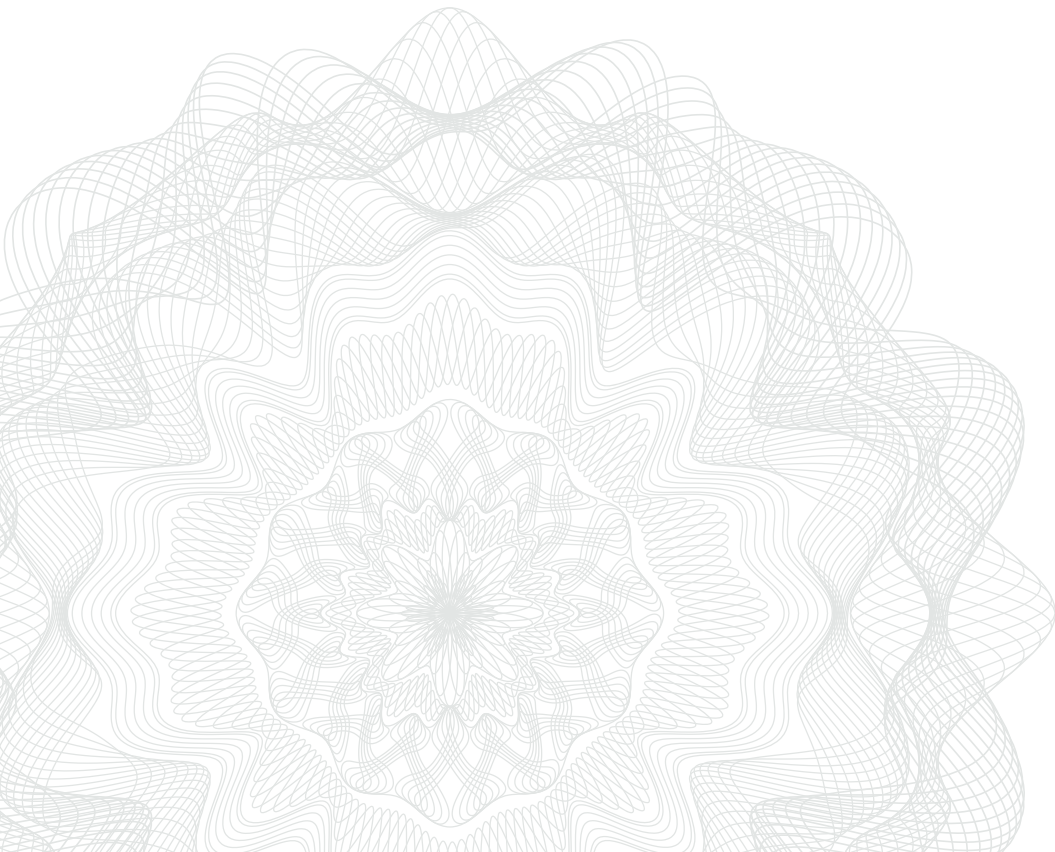
CEO sets the tone for the company. If they ride the other execs hard, they will cut corners to hit numbers, etc.

I think they are all important. The CEO sets the tone at the top. The board should be active gatekeepers and challenge management when needed.

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# 4.0 EXPERT INSIGHTS

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## Brendan Williams

Senior Vice President,  
Management Liability

[READ BRENDAN'S BIO >](#)

## 4.1 Save Money on Your Public Company D&O Renewal

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### **Q. How do I ensure I am getting the most competitive premiums possible on my public company D&O renewal?**

**A.** An effective D&O broker is working year-round to ensure you are as well positioned as possible at renewal. While financial information is readily available to D&O insurers via SEC filings and quarterly earnings transcripts, D&O insurance underwriters often have no independent insight into your company's adherence to strong corporate governance principles.

A strong D&O broker should have securities and litigation attorneys on your D&O team who can proactively assist you with training sessions and legal consulting services that will serve to enhance your governance risk profile.

Strong corporate governance remains one of the most critical (and often overlooked) components of a company's D&O risk profile. At renewal, D&O carriers will reward an enhanced risk profile with broader terms and conditions, and lower pricing.



## Seth Naterman

Senior Vice President,  
Management Liability

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## 4.2 Optimize Your D&O Insurance Underwriter Meeting

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### **Q. How do we optimize our D&O insurance underwriting meeting?**

**A.** Planning is key. Senior management with experience speaking to the investment community should lead the session. It's best to hold a practice session with your insurance underwriting meeting attendees up to a week before the underwriting meeting to establish the cadence of your presentation and discuss likely questions or concerns that should be addressed. Expect your broker to send you a list of questions in advance of the practice session to ensure that you have time to gather supporting details before the meeting, if needed.

For the actual underwriting meeting, it's best to use an investor-style presentation to guide the discussion and leave insurers with a reference point when reviewing their notes to prepare quotes.

Finally, this is not a hype session: Candor goes a long way with D&O insurance underwriters.



## Lauri Floresca

Senior Vice President,  
Cyber Liability

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### READ NOW >

#### *Get the Cyber Insurance Buying Guide*

Better identify your cyber risks, understand what cyber insurance covers, and see how a comprehensive approach best protects your organization.

#### *Looking Ahead Guide to Cyber Liability Insurance*

With cyber liability insurance becoming more ubiquitous and complex, get our insights into what to expect in the coming year.

## 4.3 Proposed SEC Cyber Rules May Increase Litigation

### **Q. Will the SEC's new proposed rules on cyber security disclosure lead to more D&O litigation?**

**A.** Very likely, yes. Although cybersecurity has become one of the most critical and challenging risks for companies to address, the plaintiffs' bar has only had limited success at holding management responsible for cyber breaches through securities class action litigation. This may change if the SEC's proposed new rules are adopted. The proposed rules\* require that companies provide much more information about material breaches on an expedited basis. This accelerated time frame is problematic for many reasons, including because the materiality assessment is itself so tricky. If management's assessment proves to be wrong—for example, if what seemed like a small breach turns out to be much more extensive after further investigation—expect shareholder plaintiffs to file suits alleging that management misled investors.

D&O insurance carriers are already asking more detailed questions about your cyber security controls and board oversight. The new rules will further amplify carriers' desire to thoroughly vet your cyber posture before offering insurance terms.

\*Not finalized at the time of this writing.



## Jon Janes

Vice President,  
Management Liability

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## 4.4 Providing Notice for Auxiliary Lines

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### **Q. How do I know when I should provide notice to an insurance carrier for my employment practices liability, fiduciary liability, and crime insurance policies?**

**A.** Knowing what requires a notice and when to provide it is a critical issue for these policies—late notice will result in a coverage denial that could be impossible to reverse. To avoid this, take time to understand how your policies define a claim or a loss. These definitions can include matters that are not adversarial, like an Equal Employment Opportunity Commission (EEOC) charge, and matters that fall below the deductible. You also want to know how long you have to provide notice, e.g., 30 days after the matter is known or within 30 days after the policy expiration.

Ideally, you and your broker will negotiate your insurance policy's notice provision to reflect how your organization works, including identifying who must be aware of a matter before notice is required and setting a dollar threshold. You could also batch noticing matters every quarter, for example.



## Jane Njavro

Senior Vice President,  
Management Liability

[READ JANE'S BIO >](#)

## 4.5 D&O Insurance Market for Foreign Filers

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### **Q. Considering the ongoing conflict in Ukraine, what are best practices to handling Russian exposure?**

**A.** While conflicts often erupt in the world, what makes Russian exposure different is the combination of many companies winding down their operations in Russia and global insurers excluding Russia (and Belarus) from worldwide policies.

Insuring anything with a Russia-based exposure right now can be extremely challenging. If you currently have a locally admitted policy in Russia issued by a non-Russian carrier, it is likely that your western insurance carrier will be unable to provide a renewal of your policy. This is the case even for companies that are not sanctioned. The solution to provide ongoing coverage can be found in the domestic Russian market. Reach out to a broker based in Russia who will be able to coordinate the required materials and source local capacity. You will want to start this process sooner rather than later.



## Jacob Decker

Vice President, Director  
of Financial Institutions

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## 4.6 Innovative Financial Institutions

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### **Q. Within the disruptive fintech and digital asset sectors, what are the key factors for placing quality D&O insurance?**

**A.** Unless your fintech company can make insurance underwriters comfortable in a few key areas, you will be treated punitively. This goes double for various flavors of neo-banking, payments, and digital asset infrastructure companies.

Does the company have the appropriate regulatory posture with relevant stakeholders? Is there a management team with experience operating in a heavily regulated environment? Is there appropriate risk and fee structure disclosure? Does the company have adequate liquidity? These are just some of the key questions insurance underwriters will ask.

If you can put your best foot forward when approaching the market, good insurance solutions are available. A knowledgeable broker who can help you present your risks is the key to obtaining quality insurance.



## Emily Maier

Senior Vice President,  
National Group Leader —  
M&A Insurance

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### READ NOW >

#### *Guide to Representations and Warranties Insurance*

As representations and warranties (R&W) insurance becomes increasingly mainstream, get this comprehensive breakdown of this facet of coverage.

#### *The Impact of the Russian Invasion of Ukraine on the Reps and Warranties Insurance Market*

Get detailed insight into the impact of this conflict on RWI diligence, exclusionary language, and sale and purchase agreement (SPA) drafting.

## 4.7 Putting Together a Reps & Warranties Policy

### **Q. How is going through the diligence process of putting together a Representations & Warranties insurance (RWI) policy anything other than a burden and extra work?**

**A.** The RWI diligence process can be useful to your deal in and of itself. First, your diligence will be reviewed by a group of M&A experts who literally do nothing but evaluate the quality and thoroughness of diligence on thousands of deals. Second, the process can be useful for bolstering your buyer's disclosure (and the buyer has a vested interest as well).

To maximize efficiency, involve your RWI brokers early in the process. They can confirm what kind of coverage is available in the market. Also, having them work alongside as the deal develops ensures timelines are met. Moreover, the insurance market will provide quotes in the early stages outlining the key areas of diligence they expect, giving you insight into where they feel the most likely breaches may occur.



## Priya Cherian Huskins, Esq.

Senior Vice President,  
Management Liability

[READ PRIYA'S BIO >](#)

## 4.8 Ease Claims Resolution with Effective Communication

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### **Q. What are potential challenges I should anticipate if I have to provide notice of a claim on my D&O policy?**

**A.** In the current environment, there are a number of traps for the unwary. One of them is the prevalence of very high self-insured retentions. When you must pay the first \$10 million or more of costs for a lawsuit, it's easy to fail to provide your carrier with timely notice, obtain permission for your choice of counsel, or even provide your carrier with updates at an appropriate cadence. This is a terrible mistake.

A good broker will encourage timely communication with your entire suite of insurance carriers. The day you need your carrier to contribute to the resolution of your litigation can arrive faster than expected. For example, you may have an unexpected opportunity to settle. You want to be ready to move quickly, which means implementing a strategy of staying close to your carriers throughout your claim.



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## **5.0 CONCLUDING PERSPECTIVE**

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A MESSAGE FROM

## Carolyn Polikoff

National Commercial Lines Practice Leader

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As discussed in this 10th edition of our *D&O Looking Ahead Guide*, the softening D&O insurance market is a welcome change. Compared to 2021, renewal premiums for public companies in 2022 have mostly decreased or remained flat. Certain industry segments, and companies with high-risk profiles, are seeing the largest price decreases. And while we did predict pricing changes in last year's *Looking Ahead Guide*, they've come sooner than expected. Even better news: We predict this trend will continue into 2023.

But not all is rosy in the D&O marketplace. Underwriters are concerned about macroeconomics, the war in Ukraine, and a volatile stock market. They're closely monitoring whether a wave of SPAC and de-SPAC lawsuits will come to fruition. This uncertainty makes it even more important to have a knowledgeable and trusted D&O insurance broker on your side to help navigate an increasingly complex marketplace.

Woodruff Sawyer provides our clients with expert, unparalleled business-specific and industry knowledge as well as best practices to protect our clients' people and assets. Our emphasis on data-based decision making allows us to guide clients through the D&O insurance marketplace effectively and successfully.

For example, our **DATABOX™** database contains details for all federal securities class action lawsuits in the past 40 years and allows us to provide clients with SCA claim scenario models based on their specific business and risks. **DATABOX™** also enables us to experiment with predictive loss modeling that is based on accurate, real-life settlements—features that are crucial when it comes to deciding on what D&O program to purchase.

In addition, our annual **Underwriters Weigh In™** survey, now in its sixth year, helps our clients better understand the D&O insurance environment and marketplace, providing a glimpse of what carriers are expecting in the upcoming year.

We expect the soft market and advantageous pricing will continue into 2023 due to factors such as more competition in the public D&O marketplace. Still, each company and each industry has their own unique challenges, and Woodruff Sawyer helps guide our clients when it comes to making smart, evidence-based insurance purchasing decisions. With our experienced team and proven expertise, we help our clients decipher D&O insurance options, determine the right amount of insurance to purchase, and leverage our strong carrier relationships to build programs with competitive pricing.

## Additional Resources

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[D&O Notebook >](#)

[SPAC Insights >](#)

[Cyber Insights >](#)

[M&A Insights >](#)

[P&C Insights >](#)

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

[Guide to D&O Insurance for  
SPAC IPOs >](#)

[Guide to D&O Insurance for  
De-SPAC Transactions >](#)

[Woodruff Sawyer Events >](#)

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# 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. If you have any questions or comments regarding the *Looking Ahead Guide*, please contact your Woodruff Sawyer Account Executive or email us at: [LookingAhead@woodruffswayer.com](mailto:LookingAhead@woodruffswayer.com).

## For more information

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