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D&O Looking Ahead

D&O Considerations for 2024

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Insurance Services | Risk Management | Employee Benefits

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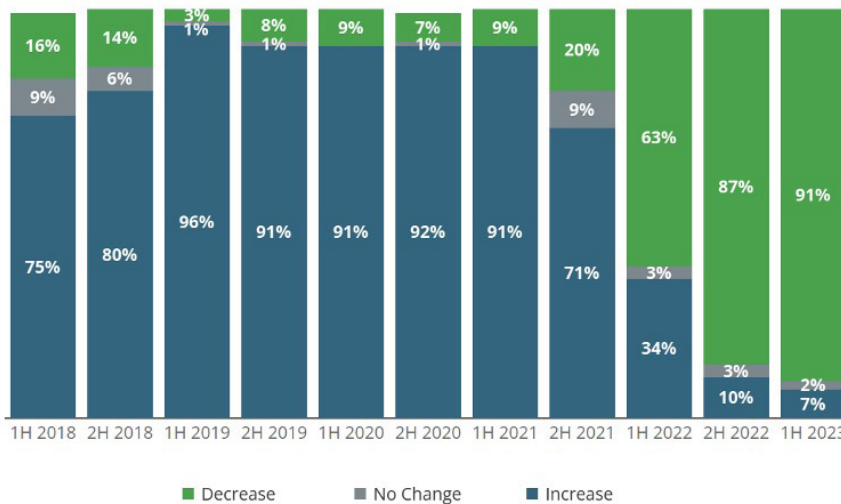
1.0 D&O Market Update

1.1 US Markets

The public company D&O insurance market of late has been a roller-coaster ride for all participants—and the dramatic changes over the last five years, which we’ve documented in previous *Looking Ahead Guides*, continued into 2023. Woodruff Sawyer data shows that in the second half of 2021, 71% of public companies renewing the same year-over-year program experienced a price increase.

A year later, that figure completely reversed, with 87% of public companies achieving a decrease in total cost on their renewal program. The soft market trend accelerated into 2023, with 91% of Woodruff Sawyer public company D&O clients renewing with cost decreases in the first half of 2023.

Public D&O Annual Renewal Results for Cost Change Over 5 Years*



91%
of Our Clients Experienced Cost Reduction in 1H 2023

* Data shows percentage of clients who experienced flat or change in renewal premiums for ABC program and does not indicate percentage premium increase or decrease.

Source: Woodruff Sawyer Annual Client Renewals

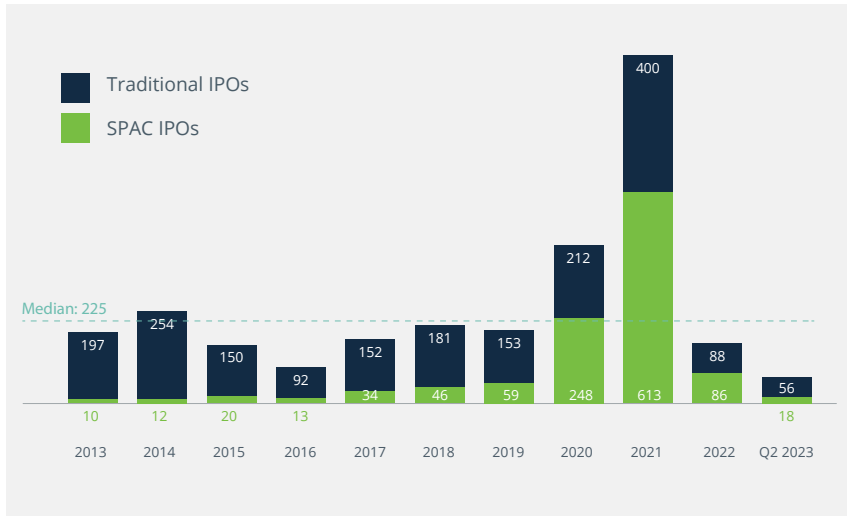
There are multiple reasons for this rapid shift in D&O insurance cost. One of the most significant was the increase in initial public offering (IPO) filings that occurred in 2020 and 2021. While carriers were grappling with legacy claims and uncertainty around their exposure, the IPO and special purpose acquisition company (SPAC) markets opened up to record-breaking levels. Between 2017 and 2019, IPO filings in the US averaged 234 per year. That figure more than doubled to 460 filings in 2020. And, in 2021, IPO filings had a record-breaking year with 1,013 total.

Heightened IPO Activity in 2020 and 2021 Dramatically Increased Demand for Public D&O Insurance, Fueling Price Hikes in a Market with Limited Capacity



The already hard market with reduced capacity and rising rates, combined with unprecedented demand for D&O insurance for new public companies, pushed the price of D&O insurance to record highs in 2021. The Woodruff Sawyer Market Rate Pricing Index™ shows the impact these dynamics had on median pricing. By the first quarter of 2021, median premiums for public company D&O rose to 4.7 times what they were in Q1 2018.

Number of Traditional and SPAC IPOs in United States (2013–Q2 2023)

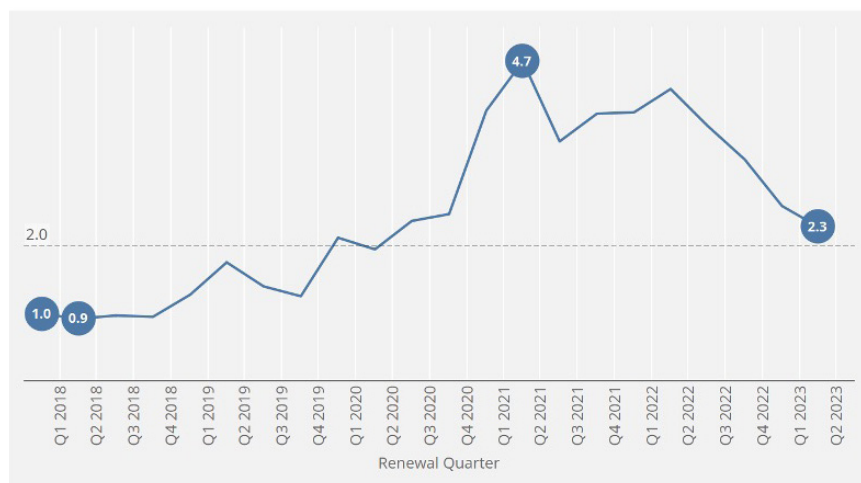


Source: Woodruff Sawyer Annual Client Renewals

As we reported in last year’s *Looking Ahead Guide*, new carriers unincumbered by existing claims, and drawn as they were by the attractive rate environment, injected large amounts of fresh capital into the D&O market. In a study published by S&P Global in 2021, the US D&O insurance market recorded \$4.1 billion in direct written premiums in Q3 2021, compared to \$2.9 billion just a year earlier—a 41% year-over-year increase.

Public D&O Insurance Market Rates Near 2020 Levels

Public D&O Insurance Market Rate Index (Q1 2018 = 1.0)



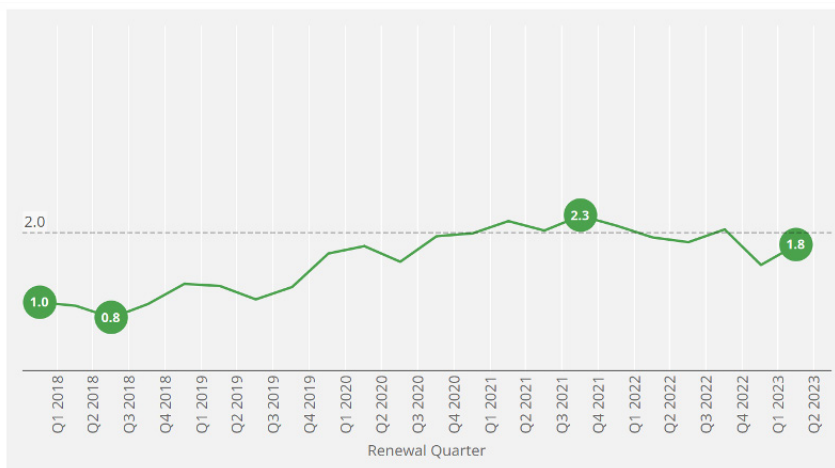
However, the boom times for insurance carriers did not last. In 2022, the combined factors of increased capacity and a drop in new IPOs, SPACs and de-SPAC transactions created fierce competition among carriers for the remaining business, including renewals. The result has been a swift drop in pricing. As demonstrated in Woodruff Sawyer's Market Rate Pricing Index™, Q2 2023 pricing has quickly fallen to 2020 levels.

Mature Public Company Premium Rates

For the last three years, the *Looking Ahead Guide* has documented the divergence in pricing between recent IPOs and mature public companies. The United States Supreme Court's 2018 decision in *Cyan*, which allowed plaintiffs' attorneys to file Section 11 suits concurrently in both federal and state court, created considerable uncertainty for underwriters. 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.

Mature mid- and large-size companies also experienced rate increases during 2018–2021. As painful as those increases were, they were less severe than those felt by recent IPO companies. The graphic below shows Woodruff Sawyer Market Rate Pricing Index™ for mature companies. After removing new public companies from the data set, the data shows median pricing peaked at 2.3 times relative to Q1 2018 rates (versus a peak of 4.7 times for all public companies).

Public D&O Insurance Market Rate Index for Mature Companies* (Q1 2018 = 1.0)



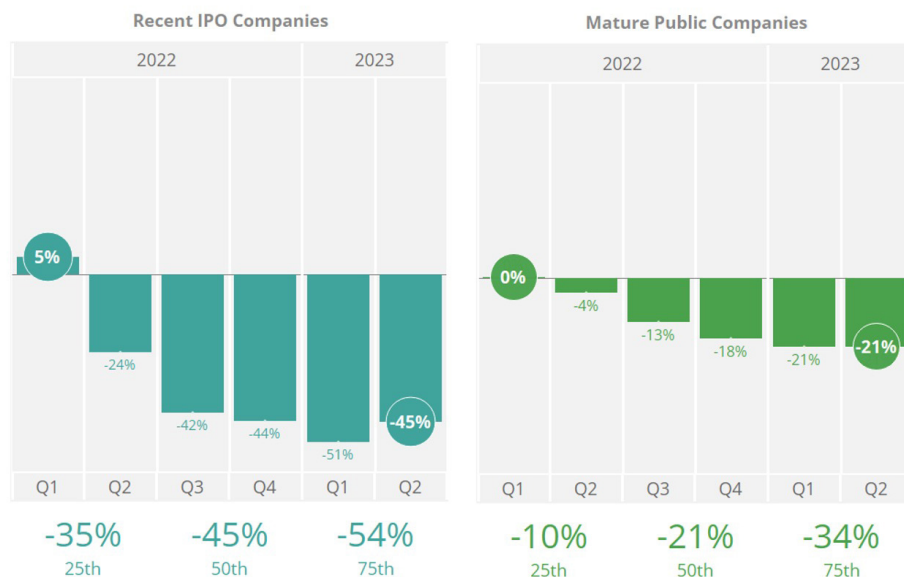

Mature Companies have seen rate decreases— but pricing remains high.

Source: Woodruff Sawyer Annual Client Renewals

*Companies that have been public for 5+ years

Declines in total D&O costs at renewal thus far in 2023 continue to reflect the magnitude of change in premiums for mature companies versus newly public ones. As demonstrated in the graphic below, during the 2022–2023 cycle, the median drop in pricing was 21% for mature companies as compared to a drop of 45% for recent IPO companies. This is not a surprise given how high premiums had become for IPO companies in 2021.

Median Cost Change Trend for New Public and Mature Public Companies*



Annual Cost Reduction Experience Varies by Public Company Maturity

Source: Woodruff Sawyer Annual Client Renewals
 *Companies that have been public for 5+ years

As we move into the second half of 2023 and look ahead to 2024 and beyond, 63% of underwriters predict that D&O rates will stay the same, with another 30% expecting that rates will continue to fall. Our own forecast is that public companies will continue to see savings—but on a more moderate basis—compared to the sizeable savings achieved in the second half of 2022 and so far in 2023. Given recent rate trends, an underwriter from our survey warns:

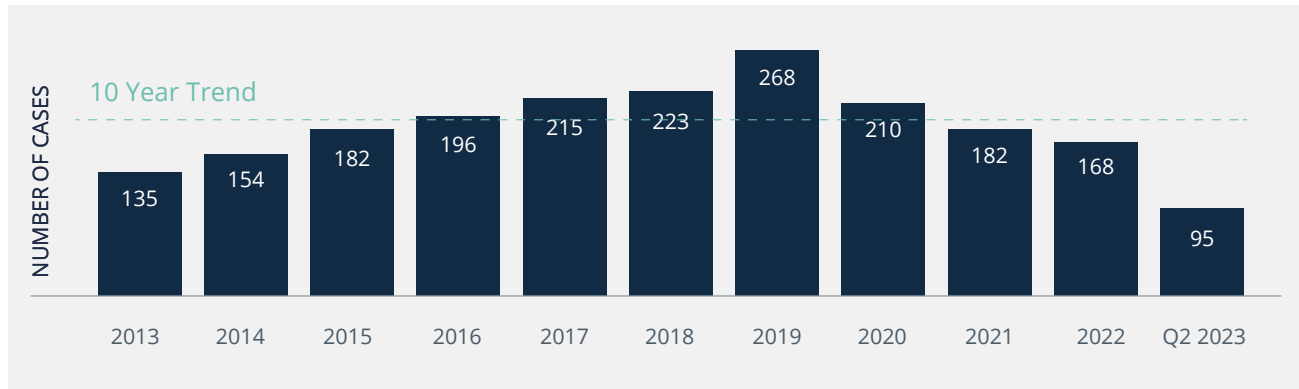


If they [D&O premiums] fall further, we're just going to see a more violent whipsaw back in a couple of years as management at carriers demands remediation once again. →

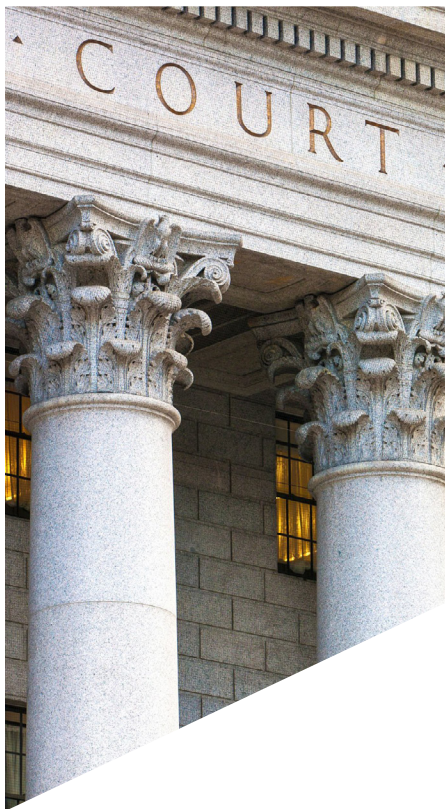
Securities Class Action Lawsuit Trends

Securities class action suits are a core risk factor impacting the D&O market. SCA filings peaked in 2019 with 268 cases filed but have declined every year since then. In 2022, there were just 168 cases filed—a 37% decrease in three years.

The Last Decade: Filings Peaked in 2019 and Are Trending Down



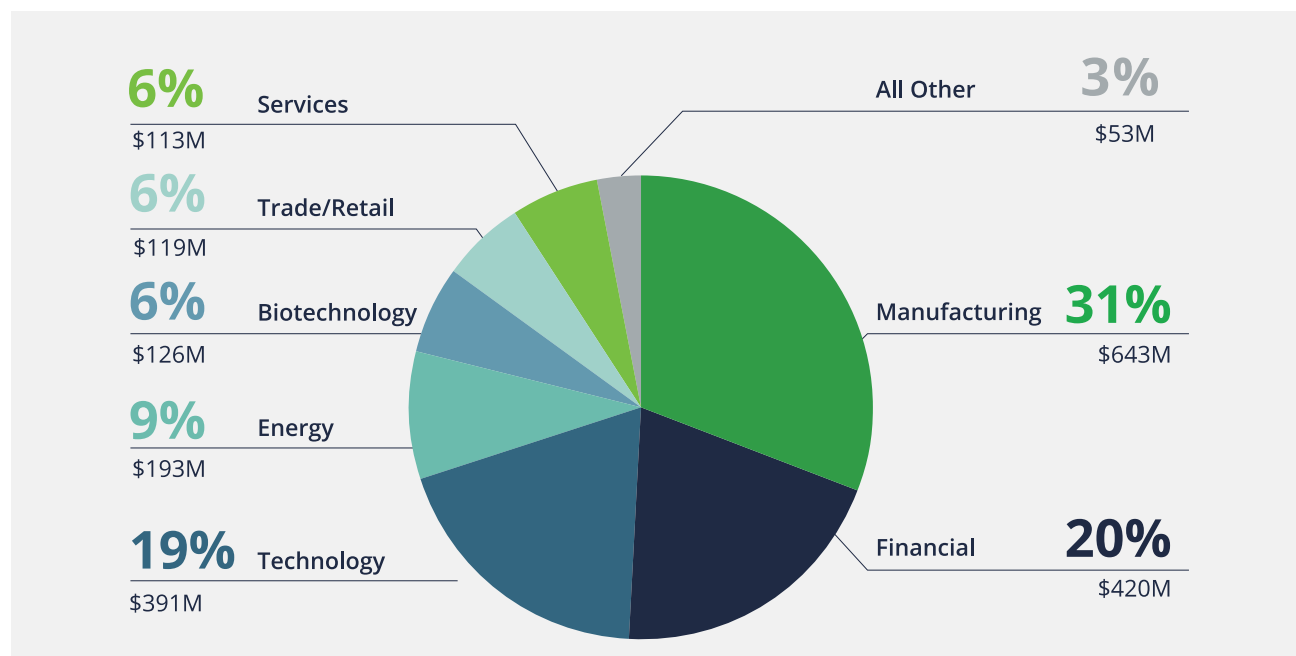
Note: Data current as of June 30, 2023. Does not include M&A or derivative cases.



The downward trend was at least in part the result of the Delaware Supreme Court decision in *Sciabacucchi v. Salzberg*, in which the court affirmed that Delaware corporations could insert **federal forum selection provisions** in company charter documents to prevent duplicative Section 11 suits. The decision curtailed plaintiffs' ability to bring Section 11 suits against IPO companies in both state and federal courts. Consequently, IPO companies began adopting federal forum provisions, and Section 11 suits in state court dropped significantly.

In the first half of 2023, there have been 95 securities class action suits filed as compared to 89 in the first half of 2022. If historic trends continue, we project a total of around 190 filings in 2023. If we examine the numbers by industry, technology companies represent 19% of filings in the first half of 2023. Financial institutions have averaged 10% of suits filed over the last five years, but this increased to 20% in the first half of 2023 as companies dealt with the impacts of a high interest rate and inflationary environment.

% of Settlement \$ by Industry (1H 2023)–Excluding \$1B+ Settlements

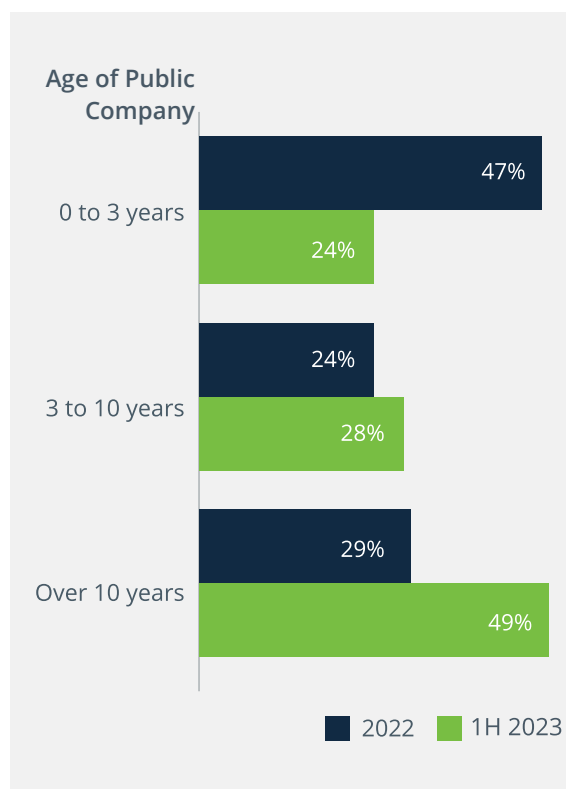


Many of the companies being sued today are large and established names, including Adidas, Alphabet, Disney, Honda, Target, and Tesla. The significant slowdown in IPO, SPAC, and de-SPAC activity in 2022 and so far in 2023 means there are fewer IPO, SPAC, and de-SPACs for the plaintiffs’ bar to target. As a result, mature companies are facing greater scrutiny by the plaintiffs’ bar.

In the first half of 2023, total settlement dollars are up significantly versus historical levels. Total settlement dollars paid out in all of 2022 were \$2.4 billion, and in the first half of 2023, that total is already at \$3.1 billion. Even with a \$1 billion settlement excluded from the data set, the settlement figure for the first half of 2023 is the highest it has been in the last 10 years.

Large outlier settlements always have the potential to skew the data, but the rising frequency of settlements greater than \$10 million cannot be ignored. According to Woodruff Sawyer’s proprietary Databox™ model, from 2011 to 2014, an average of 26 settlements per year

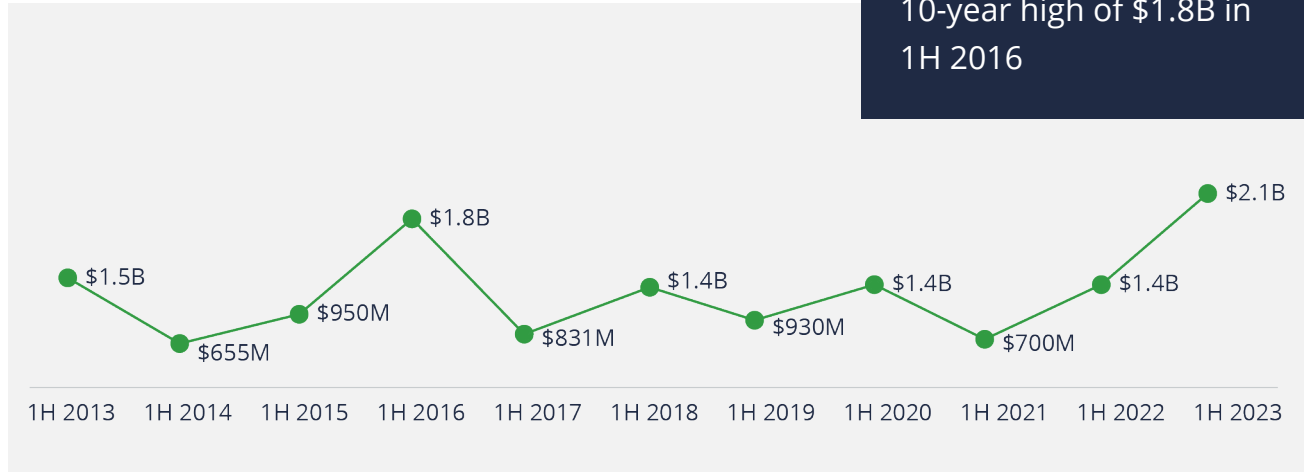
Plaintiffs’ Bar Shifts Focus to Mature Public Companies



exceeded \$10 million in value. That average figure increased to 36 from 2015 to 2018 and swelled to almost 48 per year during the 2019 to 2022 timeframe. This trend is certainly a focus for D&O underwriters and will likely have a deleterious impact on the duration of the current soft market pricing cycle.

\$ Paid out in First Six Months of Each Settlement Year (1H 2013 to 1H 2023)–Excluding \$1B+ Settlements

1H 2023 payouts exceed 10-year high of \$1.8B in 1H 2016



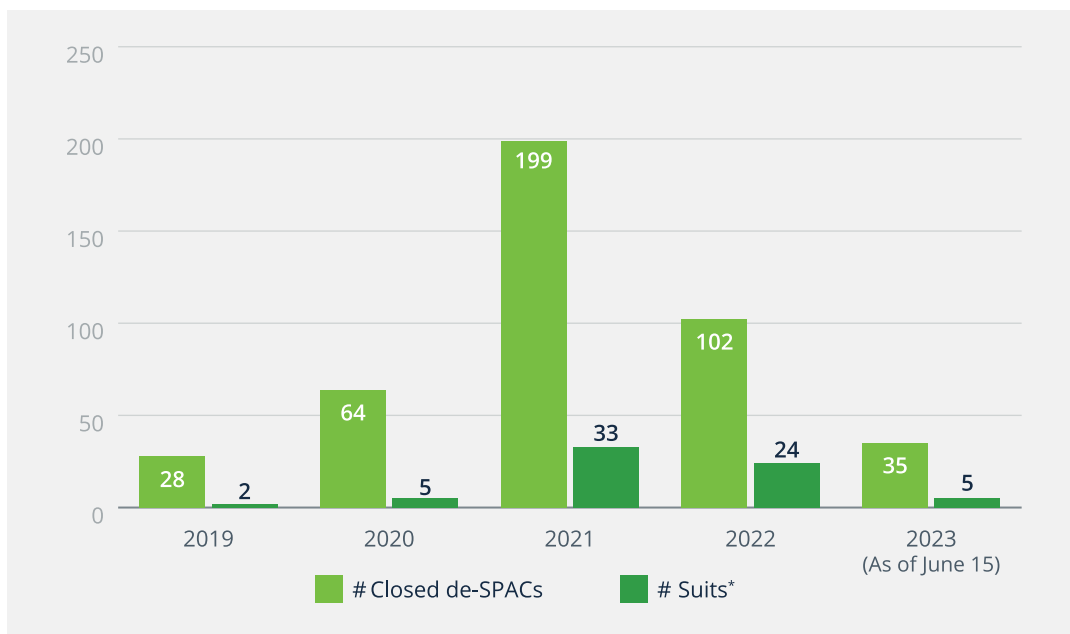
SPAC IPOs & De-SPAC Transactions: Competition Drives Down Premiums

The number of SPACs hit a record high in 2021 when, according to *SPAC Insider* data, there were 613 SPAC IPOs. That figure dramatically fell back to earth in 2022, when only 86 were successful in going public. In 2023 through May, there were only 14 SPAC IPOs—a figure consistent with normal levels.

While the SPAC IPO party is over, de-SPAC transactions continue at a steady pace. The pricing pressure on carriers in the overall public D&O insurance market has been good news for de-SPACs. More carriers are interested in the tails, extensions, and go-forward programs of these companies than before. The competition is driving premiums and self-insured retentions down.

After reaching a record high in 2021, the rate of litigation against de-SPAC companies may be lapsing back to normal rates. This rate, however, is still higher than that of mature public companies. **Underwriters are continuing to keep a close eye on each new relevant court decision and enforcement action.** Through June 15, 2023, only five SPAC-related securities class actions have been filed.

De-SPAC Litigation May Be Lapsing Back to Normal Levels



*Excludes SCAs that were not related to the company's former business combination with a SPAC

Source: SPAC Research and Woodruff Sawyer

What the SCA data does not show, however, is the growing number of direct-action breach of fiduciary duty suits being brought in Delaware. These suits are a progeny of the *MultiPlan* case in which the Delaware Chancery Court denied the defendants' motion to dismiss. The parties subsequently settled for \$33.75 million in November 2022. This large settlement may be motivating plaintiffs' attorneys to trade their SCA strategies for direct fiduciary duty suits against Delaware SPACs.


Notwithstanding these concerns, however, SPACs have enjoyed a period of reasonable D&O insurance pricing so far in 2023, [as we predicted at the end of 2022](#). That will likely continue into 2024.

1.2 Self-Insured Retention Trends

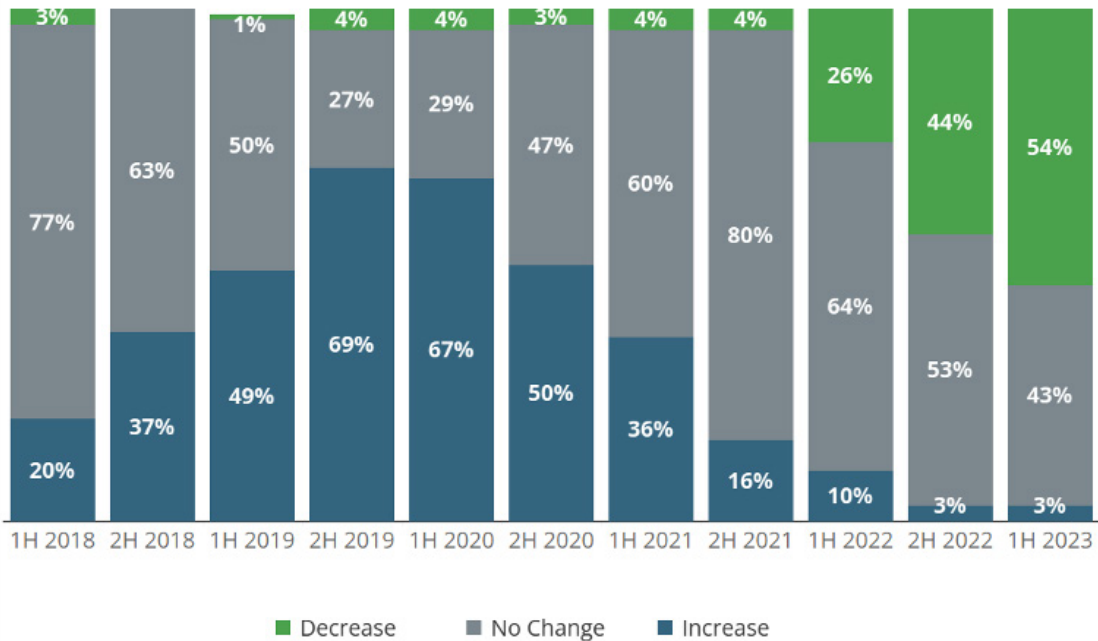
In 2022, insureds experienced the first significant relief in self-insured retention amounts in years. In the first half of 2022, 26% of Woodruff Sawyer public company D&O clients renewed with a lower retention. From 2018 through 2021, only 4% or fewer were able to achieve a lower retention at renewal.

In the second half of 2022, 44% of public company clients achieved a decrease in their SIRs. That number increased to 54% in the first half of 2023. In a complete reversal from recent years, only 3% of companies received a larger retention.

Self-Insured Retentions Have Eased Over the Past 12 Months



Public D&O Annual Renewal Results for Retention Changes Over 5 Years*



*Data shows percentage of clients who experienced flat or change in retention and does not indicate percentage retention increase or decrease.

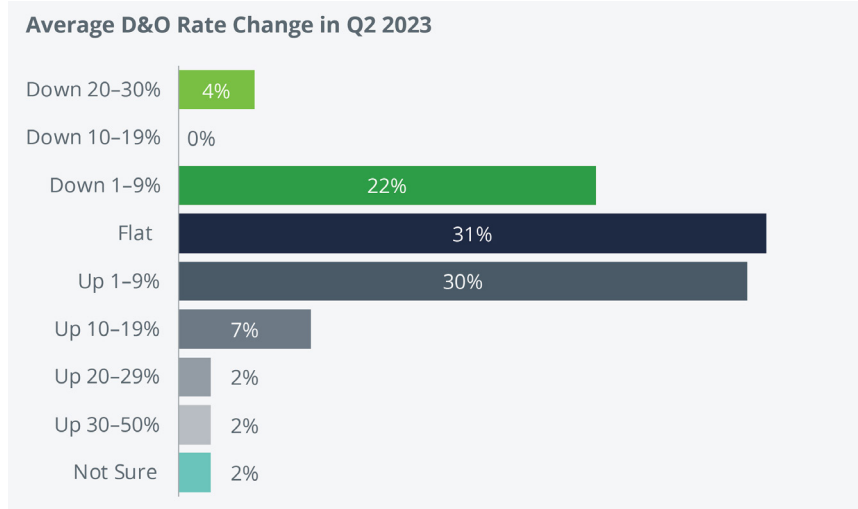
Source: Woodruff Sawyer Program Renewal Analysis

1.3 Pricing Trends from CIAB

The Council of Insurance Agents & Brokers' Commercial **Property/Casualty Market Survey** reports that the second quarter of 2023 was the 23rd consecutive quarter of increased premiums when looking at overall P&C premiums. Respondents reported an average increase of 8.9% across companies of all sizes. Notably, some survey respondents mentioned that they believed carriers were more willing to compete for accounts by pulling back on premium increases and lowering retentions.

For D&O insurance, the average rate increase in Q2 2023 was 1.6% over the prior quarter, down significantly from 7.9% in Q2 2022. Most respondents renewed flat or with a change of 9% or less. The number of respondents that experienced an increase continued to decline (41% in Q2 2023 down from 76% in Q2 2022). Survey results showed 26% of respondents saw rate decreases in Q2 2023, with 4% of respondents experiencing a rate decrease of 20–30%. The year-over-year increase in the percentage of respondents that experienced a reduction in premium to 26% in Q2 2023 from 2% in Q2 2022 is sizable. For reference, we have included the survey results for Q2 2023 as well as Q2 2022.

CIAB Q2 2023 Survey

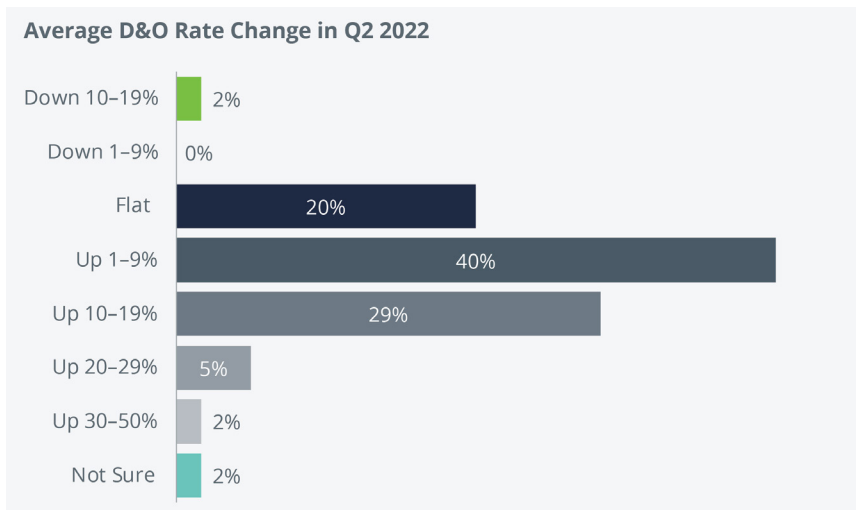


Most respondents renewed flat or with a change of 9% or less in Q2

26% of respondents saw their rates decrease

Source: CIAB Q2 2023 P/C Market Survey

CIAB Q2 2022 Survey



76% of respondents saw their rates increase in Q2

2% of respondents saw their rates decrease

Source: CIAB Q2 2022 P/C Market Survey



2.0

Hot Topics

Inflation, ongoing global conflicts, domestic cultural discord, intense regulatory rulemaking, and an upcoming national election coalesce to create uncertainty for corporate boards looking ahead to 2024. But there is also quite a bit of good news—especially coming out of courts in Delaware. Having said that, there is plenty of reason for caution as we look forward to next year and beyond.

2.0 Hot Topics

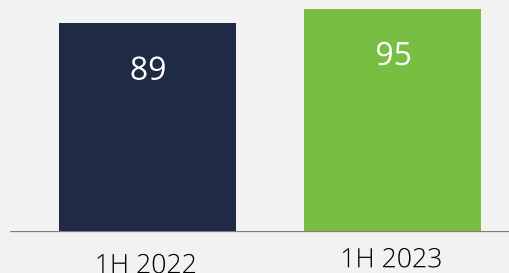
2.1 Good Securities Class Action News: The Overall Rate of Suits Continues to Moderate

A review of securities class action litigation through the first half of the year reveals good news: total securities class action filings for 2023 are likely to fall well below the 10-year peak of 268 cases in 2019. Unfortunately, it does look like filings in 2023 will end up being higher than in 2022 by about 13%.

It's excellent news that the rate of securities class action suits filed continues to moderate for the fourth year in a row. The current litigation landscape, combined with a stock market still struggling to exit correction mode, has challenged many plaintiffs' ability to differentiate individual company stock drops. We may well see this trend continue into 2024.

Woodruff Sawyer's [Databox Mid-Year Update](#) provides more details about the rate of securities class action lawsuit filings, including by industry, market capitalization, and vintage.

Filing Activity 1H 2022 vs. 1H 2023 A 7% Increase



Projected Number of Cases for 2023: 190

A **13% Increase** from 2022*

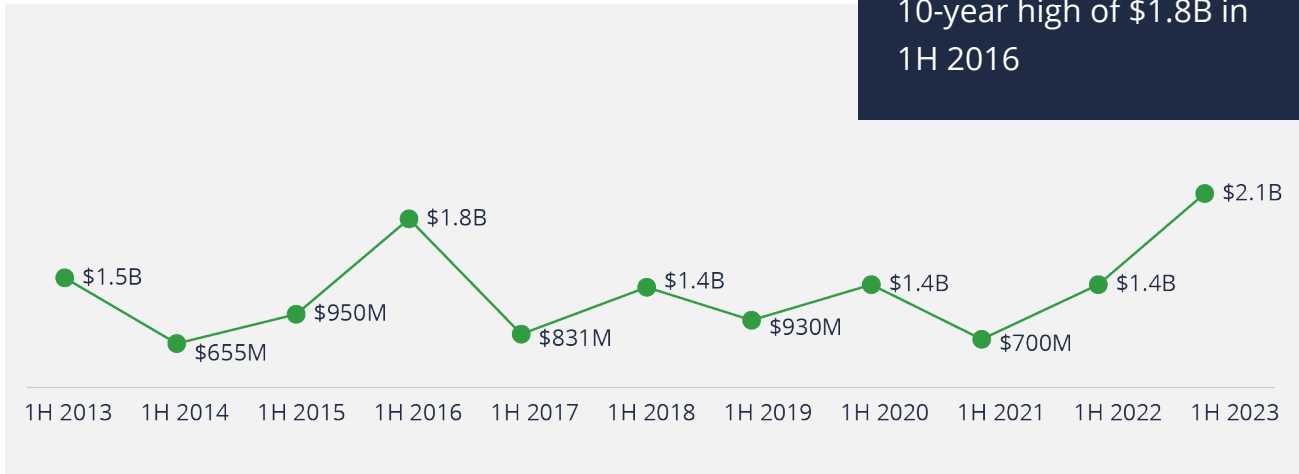
*168 cases filed in 2022

2.2 Not Good Securities Class Action News: Settlements in 1H 2023 Are Setting Records

Compared to the first six months in each of the last 10 years, the first six months of 2023 **set records** when it comes to securities class action settlements. This is not welcome news for carriers.

**\$ Paid out in First Six Months of Each Settlement Year
(1H 2013 to 1H 2023 – Excluding \$1B+ Settlements)**

1H 2023 payouts exceed 10-year high of \$1.8B in 1H 2016



In addition, a review of the securities class action settlements announced in the first half of 2023 shows that one-third are over \$20 million. This tracks fairly closely to what we saw in the first half of 2022.

Taken together, these are also signs that the current soft market for D&O insurance may be relatively short-lived.

**2.3 Good Federal Court News:
Dismissals of Derivative Securities Exchange Act Claims**

Companies first started adopting state choice of forum provisions to cut down on duplicative fiduciary duty litigation, whether direct or derivative. The thinking was that it was certainly appropriate for shareholders of Delaware-incorporated companies to bring breach of fiduciary duty litigation against directors and officers in Delaware Chancery Court—the court most qualified to hear this litigation. However, there is no need for shareholders to bring duplicative litigation in additional state and federal courts.

These efforts to cut down on duplicative litigation have been very successful. That success expanded in 2023, when the [Ninth Circuit Federal Court of Appeals](#) agreed it was improper for plaintiffs to bring claims alleging violations of the Securities Exchange Act of 1934 by filing derivative fiduciary duty suits in federal court. The company being sued, Gap, Inc., had state choice of forum provisions in its bylaws, which prompted the dismissal. This may not yet be settled law given that the Seventh

Circuit came to a different conclusion in another case. However, most scholars think that the Ninth Circuit got this right, so this is likely going to go in the right direction if the question makes it up to the United States Supreme Court.

2.4 Good Delaware News: Chancery Court Continues to Respect M&A Process

M&A can be high stakes for companies, both from a financial and a litigation perspective. Sometimes, a business visionary can see things no one else can, leading to deals that seem ill-advised from an outside perspective but ultimately garner the support of a company's board. Sometimes, however, the vision turns out to be an illusion.

Unfortunately, the latter was the case when Block acquired Jay-Z's music streaming company Tidal.

The bright side? [The shareholder litigation against the Block board](#) provided the Delaware Chancery Court with an opportunity to demonstrate that boards that engage in even just a baseline of due diligence can sleep well knowing that they will not be second-guessed.

2.5 More Good Delaware News: Expansion of Exculpation Provisions for Officers

Delaware is a favorite state for companies to incorporate for many reasons, including the pro-business stance of its legislature. Adding to the roster of benefits that accrue to Delaware corporations is the ability of companies to include provisions in their certificates of incorporation that expand the protections offered to officers when it comes to direct fiduciary duty suits.

[Officer exculpation provisions](#) are still relatively new—and companies will want to consider adopting them. While these are narrower than what Delaware offers corporate directors, these new provisions are still an important expansion when it comes to protecting corporate officers.



2.6 Still More Delaware Court Good News: Fewer Mootness Fees

Delaware has long since turned its back on [plaintiffs attempting to extract huge legal fees](#) in exchange for small disclosure changes in the context of corporate mergers and acquisitions (M&A). This change in the economics of litigation has succeeded in reducing the impact of frivolous litigation brought against normal M&A activity—but it hasn't ended all of it.

Delaware courts were still willing to award smaller “mootness” fees when plaintiffs could demonstrate that their efforts resulted in some benefit to stockholders. The result? Plaintiff firms continued to file frivolous suits.

Help may be on the horizon, however, with [the recent decision in *Magellan*](#). The Delaware Court of Chancery is now requiring that plaintiff-inspired additional disclosures provide a [material benefit](#) to stockholders. There is a real chance that this enhanced standard will [discourage future frivolous suits](#).

2.7 Not All Delaware News Is Good News

Before anyone starts to mistake Delaware for being nothing but a party for corporations, consider the recent [McDonald's Corporation](#) case. At issue was whether an officer can be held personally liable for breaching *Caremark* duties of loyalty.

The answer? Yes.

The facts of this case were particularly egregious, and there can be no excuse for the conduct at issue. However, it's easy to see how the ruling may be weaponized by plaintiffs looking to expand their ability to sue corporate officers. For example, expect a direct through line from the decision in this case and future cases involving chief information security officers (CISOs) of companies that have the misfortune of being harmed by a particularly bad cyberattack.

2.8 SEC Rulemaking: 10b5-1 Trading Plans

After threatening to do so for years, the Securities and Exchange Commission (SEC) finally released updated rules for [10b5-1 trading plans](#). The bad news: The rules are more prescriptive. The good news: The rules are more prescriptive. The SEC's efforts to squeeze out the more obvious opportunities for abuse only enhance the world's faith in US public markets.

Moreover, the SEC's new rules are fairly reasonable and include items that have long been considered best practices, such as cooling-off periods. It is certainly still worthwhile for executives to trade pursuant to a 10b5-1 trading plan, as opposed to buying and selling their companies' stock without one.

2.9 SEC Rulemaking: New Clawback Rules

Dodd-Frank clawback rules have been on a slow train in recent years, but that train has finally arrived. Companies have work to do to implement the new rules.

Implementing rules that comport with Dodd-Frank alone, however, may not be sufficient. A recent unpublished opinion involving the former CEO of Hertz, dismissed after accounting errors led to a restatement, provides a cautionary tale about the perils of forgetting the importance of state contracts law.

2.10 SEC Rulemaking: So Much Activity, and So Much More to Come

Publication schedules wait for no man or beast—not even the SEC. At the time of this writing, the SEC has threatened to publish final rules on a wide variety of topics by the end of the year. The proposed rules on climate change disclosures, just to name one example, were massive, so we are all waiting—dreading?—the final rules. There is plenty to do while we are waiting for new rules, however. For example, in late July, the SEC used 186 pages to release and explain its final rules on cyber risk management, strategy, governance, and incident disclosure.

2.11 Artificial Intelligence: No Turning Back

Public company board members were quick to read papers, attend live events, talk to peers, and generally do everything they could to get smart about artificial intelligence in 2023. Predictive and generative AI both promise tremendous opportunities—and peril—for companies. Boards will do well to use good corporate governance to address AI directly and decisively in 2024, mindful that the alternative is to be surpassed by other companies that have harnessed the promise of AI more quickly.



3.0

Underwriters Weigh In™ Survey

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.

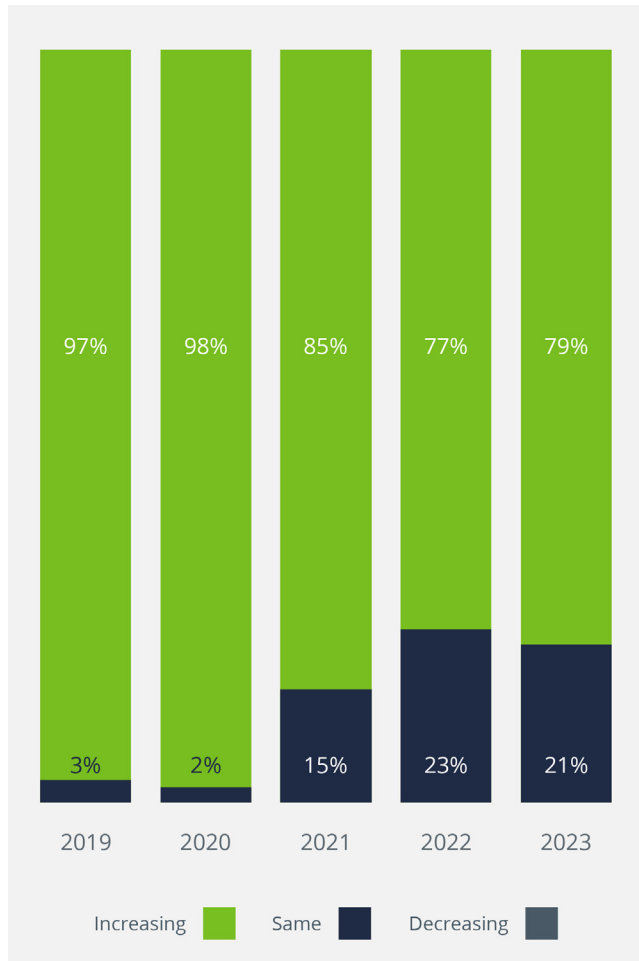
Woodruff Sawyer is in conversation with insurance carriers every day. For this section of Looking Ahead, we surveyed more than 40 insurance carriers with whom we place D&O insurance around the world. We asked questions regarding the current risk environment, risk appetite, and future pricing expectations.

As we did last year, we provided underwriters with a chance to share their thoughts in narrative form as well. We are delighted that so many took us up on this offer.



Q1 Is D&O risk going up?

2023 Survey Results: **No underwriters think D&O risk is decreasing.**



Woodruff Sawyer Commentary

79% of underwriters believing that the risk is increasing is actually less than what we saw in 2018–2021, but still shows broad concern by underwriters. However, no underwriters think that D&O risk will decrease in 2024.

Underwriter Comments

SCAs rebounding, derivative settlements increasing in value and *Caremark* being eroded, most aggressive SEC in history all at the same time.

Access to credit markets has become increasingly difficult which creates a strain on all companies and pressures the most on financially challenged ones.

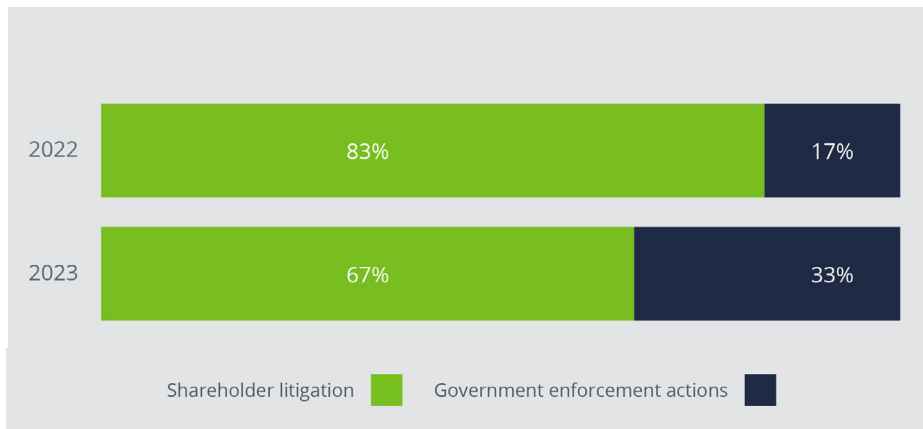
...the number of “core” suits has remained relatively flat.

As communities return to office, so do the plaintiff firm associate pools/bullpens.

Q2

As you look out into 2024, should companies be more worried about shareholder litigation or government enforcement actions?

2023 Survey Results: **Two-thirds of underwriters think that companies should be more worried about shareholder litigation in 2024.**



Woodruff Sawyer
Commentary

Underwriter concern about government enforcement actions has almost doubled.



Underwriter Comments



These [government enforcement actions] are more unpredictable and are targeting individuals. As such, the Side A is exposed and the risk of running out of insurance is a real possibility—especially if the company is a Chapter 11 risk.



Increasing regulatory exposure is a true risk, but ultimately shareholder litigation (would arise as a result possibly) would be a byproduct of that risk as well and will be more frequent.

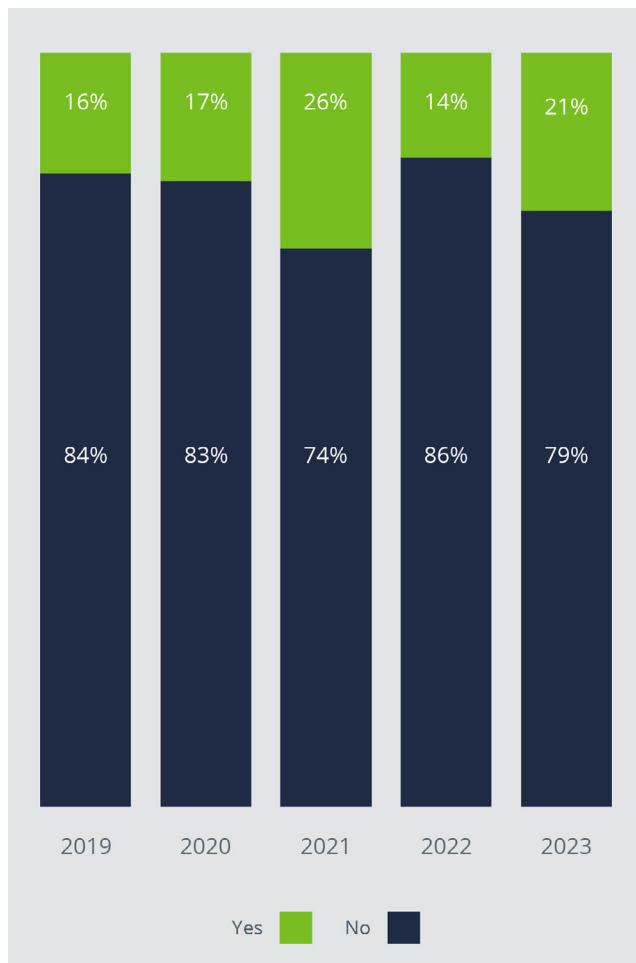


[Neither answer option selected] It's really impossible to say which is riskier because it depends on the nature of the insured.

Q3

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

2023 Survey Results: **79%** of underwriters think that companies are not as aware of the frequency, risk, and cost of litigation as they should be.



Woodruff Sawyer Commentary

Life is graded on a curve, and underwriters do see some improvement in their insureds' calculation of their own risk. However, underwriters overall continue to maintain a level of skepticism about companies being able to calculate their own risk.

Underwriter Comments

[Yes] For the well informed.

I believe they understand the frequency and risk aspect but not the impact of social inflation on overall costs and loss remediation efforts.

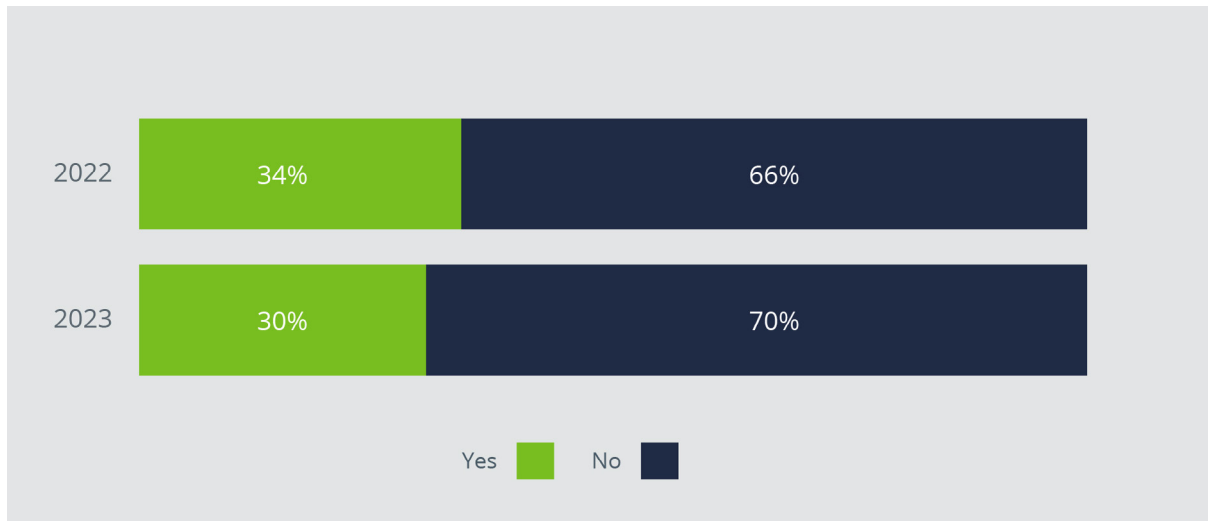
...the majority of companies believe they are above-average risks...

I think the current low in SCAs have given the C-Suite a false sense of security.

Q4

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

2023 Survey Results: **Slightly less than one-third of underwriters think that companies are willing to go to trial (and not settle) in the right circumstances.**



Woodruff Sawyer Commentary

In the second year we have asked this question, the answer has essentially remained the same. If carriers want to see their insureds go to trial, they have more work to do to persuade them to do so.



Underwriter Comments



[Yes] Only those companies that are presented no reasonable path to settlement will consider the uncertainty of trial currently. If the incentives and alternatives to settlement (i.e., insurers would put companies in a more favorable pricing light for taking case to trial) then maybe trials would increase. The risk aversion by public boards is too high currently.



[No] Scared of the runaway jury/social inflation.

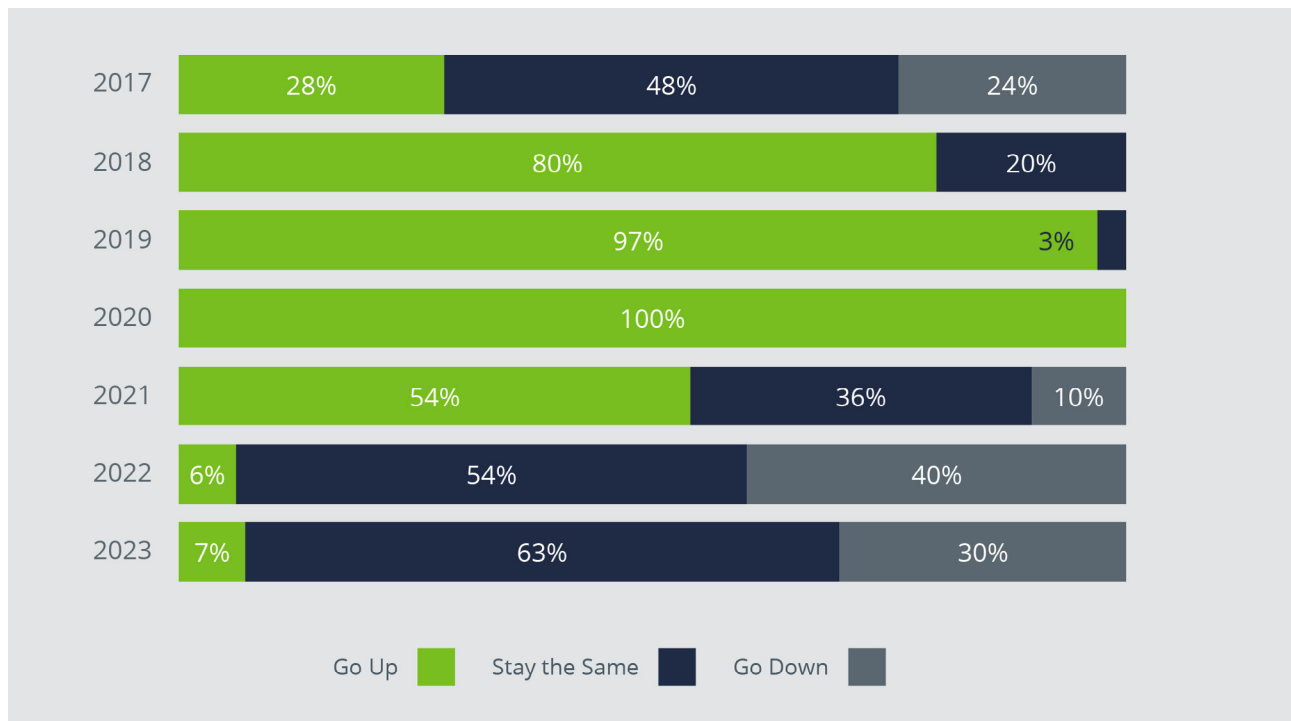


Seems that companies continue to want to settle fast even if facts are on their side.

Q5

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

2023 Survey Results: **93% of underwriters expect D&O premiums to stay the same or go down.**



**Woodruff Sawyer
Commentary**

The 2021 answer to this question predicted the break in the hard market. In 2022, 40% of carriers predicted decreases in premiums, and the percentage for 2023 is still sizeable at 30%.



Underwriter Comments



[Stay the same] They need to stop going down or we're all doomed....If they fall further, we're just going to see a more violent whipsaw back in a couple of years as management at carriers demand remediation once again.



Feel that rates have bottomed out for mature public companies, so should be staying the same for companies not looking to downgrade on carrier quality.



[Go up] The new entrants to the market missed the pricing boat, and that capacity may go away sooner than we think.



[Go down] Too much capacity and not enough inventory.



[Stay the same] We are seeing pockets of stabilization following a very aggressive period.



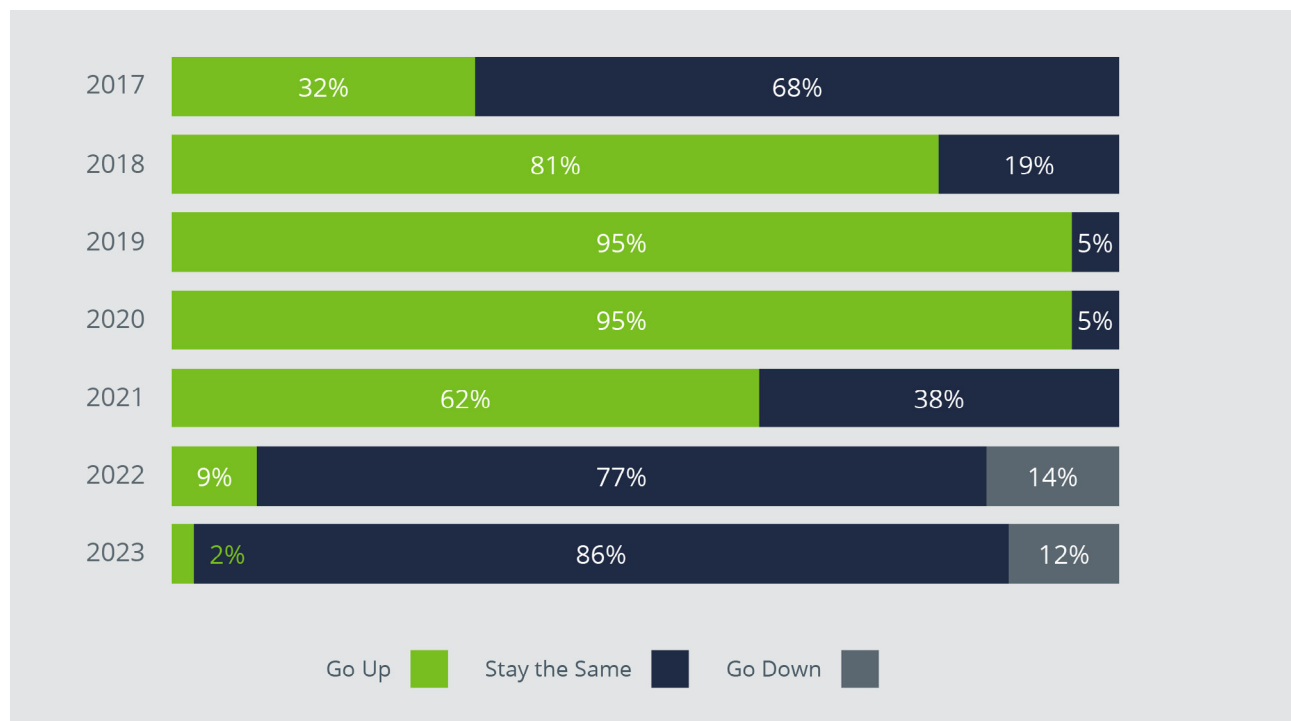
[Stay the same] I expect pricing to start flattening out in 2H FY'23.



Q6

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

2023 Survey Results: **98% of underwriters expect D&O self-insured retentions (SIRs) for mature public companies to stay the same or go down.**



Woodruff Sawyer
Commentary

Underwriters have essentially given up on attempting to increase SIRs for mature public companies. This answer forecasts stability for SIRs in 2024.

Q7

Industry-wide, do you expect D&O SIRs for newly public companies to go up, stay the same, or go down?

2023 Survey Results: **40% of underwriters expect D&O SIRs for newly public companies to go down (versus 12% for mature public companies).**



Woodruff Sawyer Commentary

New public company SIRs have reached such catastrophically high levels that some programs have become almost non-sensical. So, it's no surprise that a significant percentage of underwriters anticipate lowering these SIRs.



Underwriter Comments



[Go up] Already too low



Still at healthy levels, expect to see these continue to bottom out over the next year

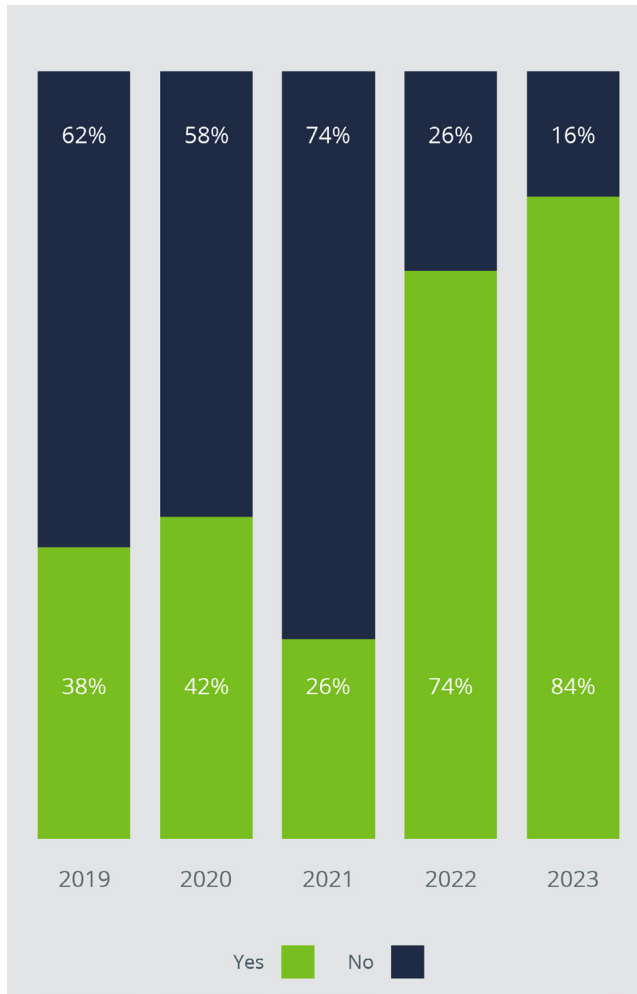



SIRs for IPOs in 2020 through 2022 (hard market) were coming in at about \$10M. While the *Cyan* decision has not had as big of an impact due to **federal forum provisions**, we have seen IPO retentions come down.

Q8

Will you quote the primary layer for most public companies?

2023 Survey Results: **84%** of underwriters will quote the primary layer of D&O insurance.

**Woodruff Sawyer
Commentary**

Here in a nutshell is a major driver of the soft market. The continued increase in the percentage of underwriters willing to quote the primary layer is great news for D&O insurance buyers. However, the underwriter comments tell us that some of the more consistent players may be less willing to engage in unfettered price competition.

 **Underwriter Comments**

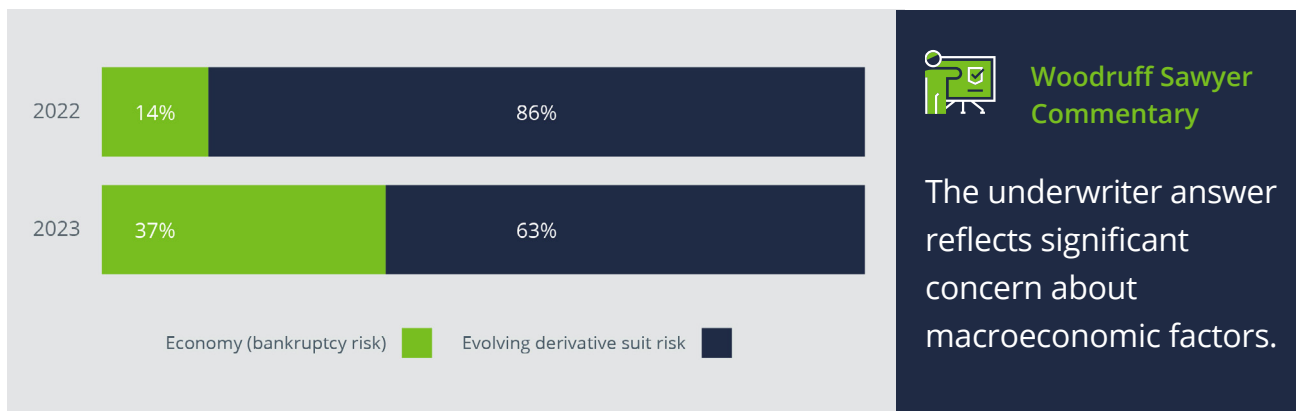
“A large number of carriers (15+) will quote primary, although only a small handful (four to six) are properly equipped to do so.”

“Only 30% to 50% would qualify for primary terms.”

Q9

As you think about quoting Side A in 2024, do you anticipate being more concerned about the economy (bankruptcy risk) or evolving derivative suit risk?

2023 Survey Results: **63% of underwriters anticipate being more concerned about evolving derivative suit risk when they think about quoting Side A in 2024.**



Underwriter Comments

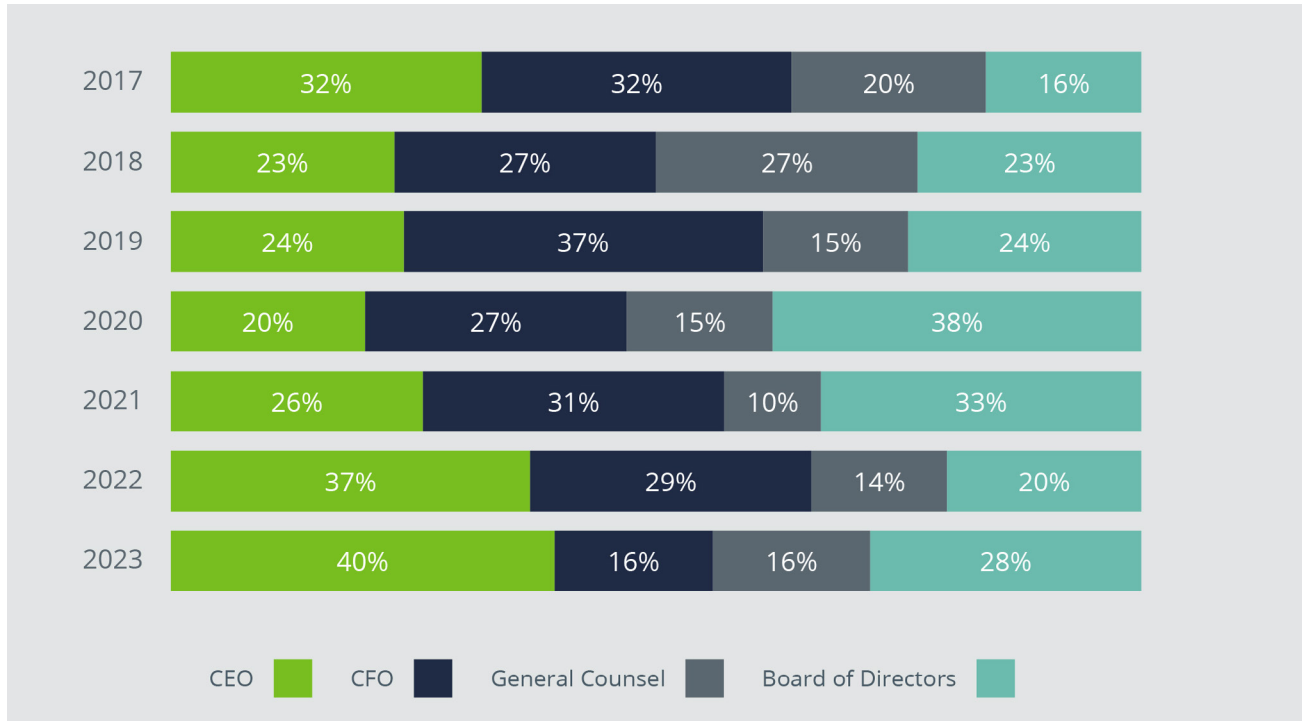
[Economy (bankruptcy risk)] I want to write 'it depends.' Big companies face **much** higher derivative risk than they did a decade ago. Eight of the 10 largest derivative settlements have occurred in the last five years and all 10 since 2010. However, for smaller companies that are struggling to refinance (think de-SPACs that are ultimately pretty rubbish and everyone now realizes it), they are very exposed to SEC enforcement actions and bankruptcy claims. So both. And they're bad. A Side is a terrible write for the next three years at these prices.


[Evolving derivative suit risk] We are concerned about both.

Derivative risk is more frequent and concerning due to the human behavioral risk associated with breach of fiduciary duty claims. Bankruptcy risk is more predictable and can be underwritten.


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


2023 Survey Results: **40% of underwriters think the CEO is the most critical person at a company when they think about mitigating D&O risk.**



 **Woodruff Sawyer Commentary** For a second year in a row, underwriters think it's the CEO.

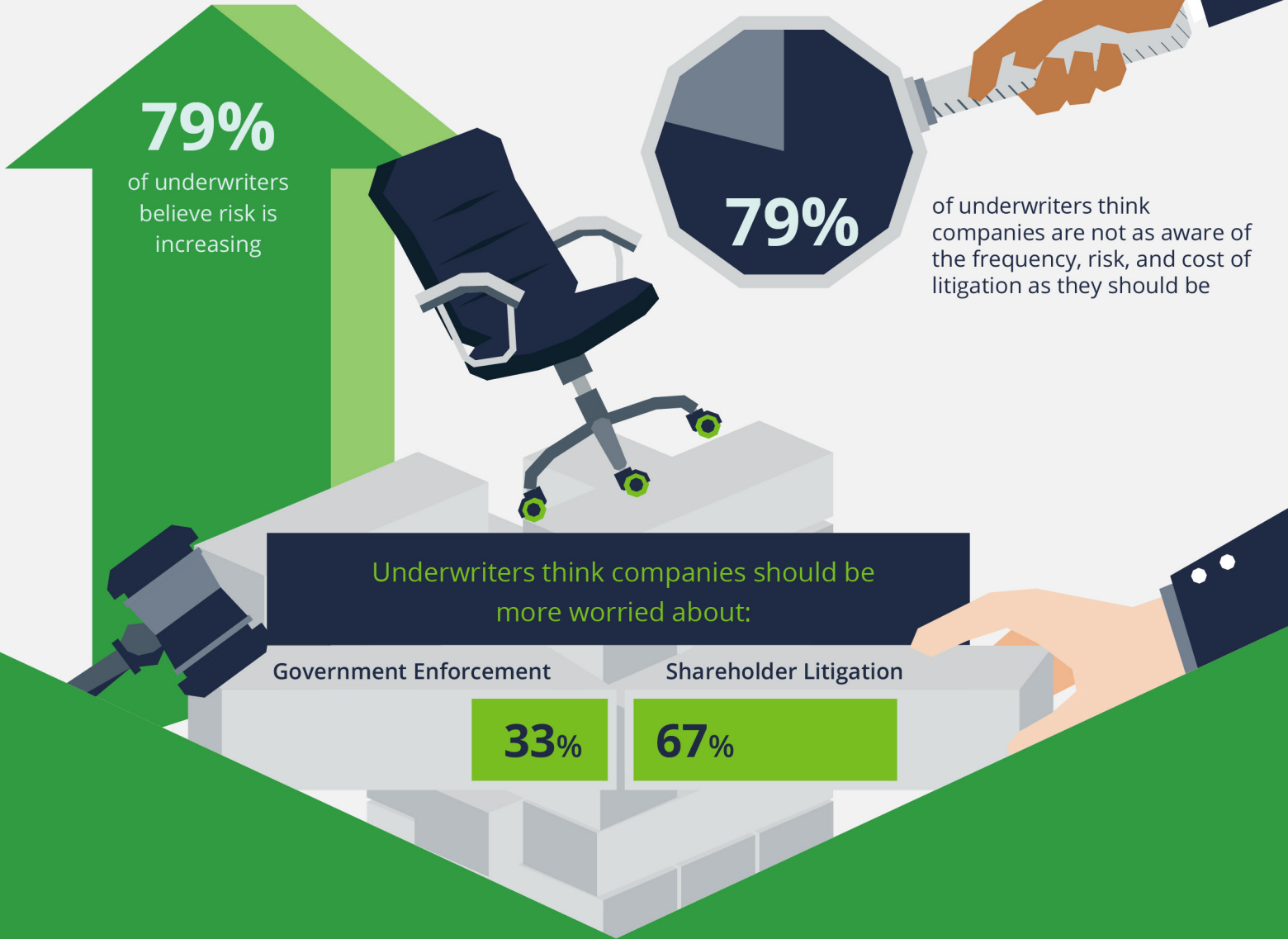
 **Underwriter Comments**

 The CEO has so much overall power unless there is a dominant major shareholder. The Board has responsibility for reigning them in but in practice, we don't see it happen too often. As such, the CEO really does call the shots.

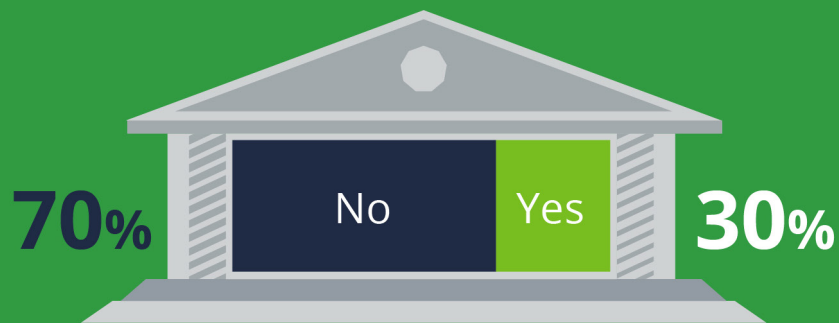
 They are all very important in mitigating risk—the CEO sets the tone and culture, which is key to how the company operates throughout the entire company.

D&O Looking Ahead 2024

Underwriters Weigh In Survey



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



93%

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

- 7% Go Up
- 63% Stay the Same
- 30% Go Down

Underwriters expect D&O self-insured retentions to:

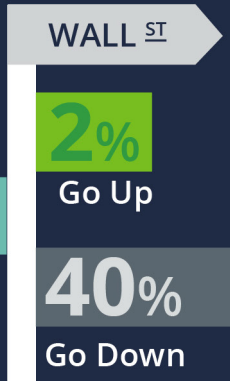
Mature public companies

- 2% Go Up
- 86% Stay the Same
- 12% Go Down



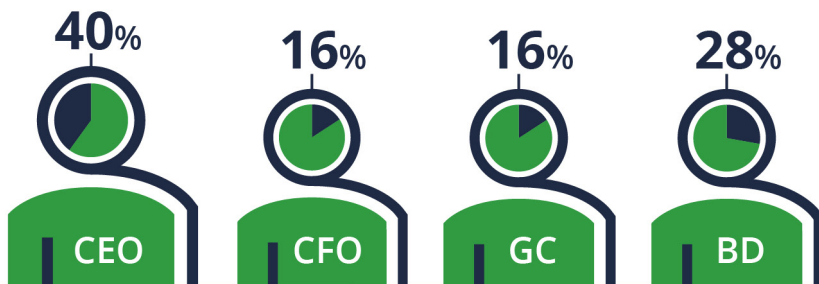
Newly public companies

58%
Stay the Same



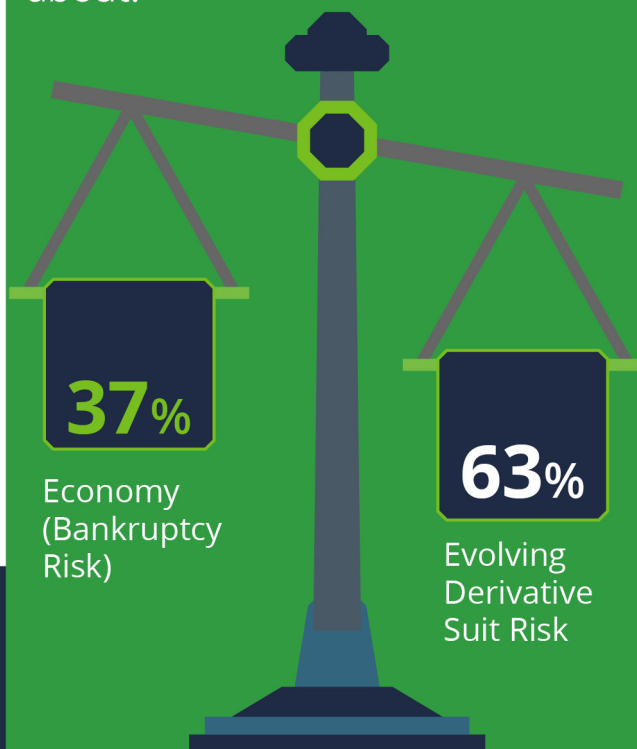
84%

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



40% of underwriters think the CEO is the most critical person at a company when they think about mitigating D&O risk.

When quoting Side A in 2024, underwriters are more concerned about:



4.0

Expert Insights



4.0 Expert Insights

4.1 D&O Insurance Coverage Resets in a Soft Market

Q:

Is it possible to get broader coverage in the current down market?



Susan Miner

Senior Vice President,
Management Liability

[Read Susan's Bio >](#)

A:

Given the oversupply of D&O capacity, carriers are hungry and will absolutely compete on coverage as well as price and retention. The key is starting early and knowing what to ask for.

For example, something as simple as derivative demand investigation coverage is actually quite nuanced. Plaintiffs typically send Section 220 books and records demands as a precursor to making an investigation request of a company's board or filing a derivative suit. Where possible, you may want to expand your D&O insurance coverage to also extend to these Section 220 books and records demands. Ask whether your coverage is structured as full policy limit excess of the retention, or a first dollar sublimit. If the latter, ask if excess layers supply additional limit on a drop-down basis. Seek expertise from your broker and/or outside counsel to form a coverage game plan concerning this and other nuances of your D&O insurance policy.



Read Now

[Section 220 Books and Records Requests: Keeping Up with Case Law Trends and Optimizing Response Strategies](#)

A books and records request is a tool used by stockholders to gather information in advance of filing a derivative lawsuit. Read more about the growing range of challenges, including increased litigation risks and costs associated with having to respond.

4.2 D&O Insurance for Newly Public Companies

Q:

My company's current market cap is well below the market cap at our IPO (or at the last renewal). Can we consider lowering our D&O limit?



Rob Vanderheyden

Senior Vice President,
Management Liability

[Read Rob's Bio >](#)

A:

Since you considered your company's valuation when purchasing your current D&O limits, it would only make sense to consider lower limits with a lower market cap, right? Possibly, but not necessarily. If your company's stock price has dropped recently, your exposure is likely still tied to your higher stock price because plaintiffs can point to the loss of market cap as their theoretical damages. Some stock drop suits have a two- or three-year statute of limitations, depending on the situation.

Having said that, if your company has sustained a lower market cap for a prolonged period and doesn't expect to bounce back, reducing limits—and redeploying the premium savings elsewhere in the business—may make sense. However, you'll need to convince your board of directors that a lower D&O limit is the right decision. If you're working with a data-driven broker, they should be able to arm you with the appropriate data to make that case. If your board still isn't sure about a lower overall D&O limit, you could consider converting some of your higher excess limits from full ABC coverage that includes balance sheet protection for the company to dedicated Side A coverage. This strategy will allow you to save on your budget while at the same time maintaining personal coverage for your directors and officers.

4.3 Cyber Insurance

Q:

What do I need to know about the SEC's new cybersecurity disclosure rules?

A:

After an unusually long comment period during which issuers, legal advisors, and cybersecurity experts raised alarm bells about the SEC's proposed cybersecurity rules, the final rules came out in late July. Unfortunately, the new rules are about as difficult as we feared. Issuers will have four business days from the time they determine that a cybersecurity event is material before they are required to file an 8-K disclosing the nature, scope, timing, and impact or "reasonably likely" impact. The only exception to this is if the United States Attorney General determines that immediate disclosure would pose a risk to national security or public safety.

While the SEC's initial proposal went a little further, asking for details on remediation status and whether data were compromised in the attack, the "reasonably likely" impact part is still difficult to define. Even the decision of if/when an event becomes material will be a challenge for issuers, and potentially easy for plaintiffs to question in hindsight. In short: Expect more securities class action claims alleging inadequate disclosure when a cybersecurity event worsens over time, as often happens.

The rules also beef up proactive cybersecurity disclosures, requiring that companies describe their assessment and management of cybersecurity risks as well as the board's oversight role. Evaluating cyber insurance will be a key piece of that process and can help demonstrate that management is taking an active role in managing cybersecurity risks.



Lauri Floresca

Senior Vice President,
Management Liability

[Read Lauri's Bio >](#)



Read Now

Roadmap for Plaintiffs or Boon for Investors: The SEC's New Cyber Rules

Get a high-level understanding of the new disclosure requirements.

Cyber Mid-Year Market Update: Trends and Hot Topics

See how cyber insurance prices are trending downward.

7 Ways to Be an Adult in the Softening Cyber Insurance Market

Learn how to get the most leverage from a softening cyber market.



Watch Now

Whiteboard Breakdowns: Cyber Basics

This short video explains some of the risks cyber insurance covers and doesn't cover.

4.4 FI Insurance

Q:

What changes do we expect to see in the coming 12 to 24 months for financial institution insurance, given the dramatic shift in the macro environment from an interest rate standpoint?

A:

The financial institution insurance market is beset by conflicting forces. The dominant force so far in 2023 is the efforts of financial institution underwriters to grow aggressively. As a result, buyers are experiencing largely favorable year-over-year adjustments to premiums and coverage at their renewals. But there are storm clouds on the horizon.

The recent dramatic shift in monetary policy which started in Q1 2022 has resulted in much higher risks within the financial sector. We've already seen the impact in 2023 on the banking sector, with investment portfolios being marked down in value rapidly while depositors are swiftly moving assets to higher yield alternatives. The potentially significant impact of a prolonged higher rate environment on credit portfolio performance, cost of capital, and broad asset value repricing such as real estate has yet to be fully realized. Consumer credit is seeing cracks, with delinquencies surging to their highest levels since the great recession, and bankruptcies have surged as well.

Financial institution underwriters are well aware of all of this. To avoid being on the wrong side of underwriters' efforts to catch up to conditions on the ground, buyers will need to effectively communicate their strong financial positions and prudent strategies for managing through a challenging macro environment.



Jacob Decker

Senior Vice President,
Financial Institutions

[Read Jacob's Bio >](#)

4.5 D&O Insurance Market for Foreign Filers

Q:

What are you seeing for foreign filers?



Jane Njavro

Senior Vice President,
Management Liability

[Read Jane's Bio >](#)

A:

The D&O insurance market for foreign filers has been a wild ride the last several years. Indeed, the D&O insurance hard market—capacity constraints and escalating prices—was felt first in Europe. Now, however, we finally have some relief for buyers. Like in the US, new insurer capacity entered the market. However, demand has fallen off because of a depressed IPO market, resulting in fierce competition on renewals. The claims data points to increased regulatory activity and a higher rate of litigation for foreign filers. However, the dominant factor is that the balance of supply and demand has shifted to the buyer's favor.

All of this creates opportunities for foreign filers. Foreign filers can leverage carrier appetite to reduce premium rates and self-insured retentions. Competition in the market is also creating the opportunity to improve policy terms and conditions.



Read Now

[D&O Insurance for Foreign IPOs and Direct Listings](#)

Built for foreign filers, this guide goes through the critical steps for managing the D&O risk of the IPO or direct listing process.



Watch Now

[Whiteboard Breakdowns: Admitted vs. Non-Admitted Insurance](#)

This short video breaks down the jargon and explains how these different coverages apply internationally.

[Whiteboard Breakdowns: Why Would a Company Need a Local D&O Insurance Policy?](#)

Our short video explains key terms and why a company would need local insurance.

4.6 Representations & Warranties Insurance

Q:

What's new this year in Representations & Warranties Insurance (RWI)?

A:

Two major developments are worth noting. First, RWI underwriters responded to COVID-19 and Russia's invasion of Ukraine with a knee-jerk set of wide-ranging exclusions that varied depending on the carrier. This same methodology has also been applied to the recent bank failures. These are classic cases of "the devil is in the details." Some underwriters are excluding all three of these issues with extremely broad language. Others are only excluding one or more of the above depending on the deal, and some underwriters are genuinely willing to underwrite the risk. These changes underscore the importance of having a deep and nuanced understanding of the different carriers and the language they use. Insurance is tricky, and while you may think none of these issues are relevant, you could be unpleasantly surprised.

The second interesting development is a new RWI product with limits as low as \$1 million. This new product is available with Mio (which stands for Mergers and acquisitions Insurance Online) and does not require a diligence call or audited financials. The coverage is based on entirely synthetic warranties written by the underwriter. It's an inexpensive and simple alternative but doesn't allow for much customization. Also, some areas covered by traditional RWI are not covered by this product. Nevertheless, while this product isn't a good fit for many transactions, it may be viable for smaller transactions or very simple asset-based transactions.



Emily Maier

Senior Vice President,
Head of Transactional
Insurance

[Read Emily's Bio >](#)



Read Now

[Guide to Representations & Warranties Insurance](#)

As R&W insurance becomes increasingly mainstream, get this comprehensive breakdown of this facet of coverage.



Watch Now

[Whiteboard Breakdowns: How Reps & Warranties Insurance Protects an Acquisition](#)

This short video explains how reps and warranties insurance works during a merger or acquisition.

4.7 Derivative Claims

Q:

What exactly are derivative claims and why should I be worried about them?



Sean Coady, Esq.

Senior Vice President,
Management Liability

[Read Sean's Bio >](#)

A:

A derivative claim is a claim where a shareholder effectively steps into the shoes of the entity and sues individual directors and/or officers on behalf of the company—hence the term derivative. The important distinction between a direct claim and a derivative claim is that the corporate law of most states, including Delaware, may not indemnify directors and officers for derivative settlements. This exposes the individual directors and officers to personal liability if the company does not secure what is known as Side A coverage. Side A coverage applies to non-indemnifiable claims, including settlements of derivative suits. Over the last several years, derivative claim settlements have been increasing at an alarming rate. This swift increase in derivative claim settlements requires heightened attention to Side A limits as part of your insurance risk management analysis.



Read Now

Side A Insurance Overview for Directors and Officers

Learn the basics of Side A coverage, why it's essential for directors and officers, and how much Side A coverage to buy.



Watch Now

**Whiteboard Breakdowns:
Standalone Side A, Difference in
Condition Policies**

This short video breaks down the difference between a standalone Side A and the Side A that comes with a classic ABC policy.

4.8 Corporate Governance

Q:

What corporate governance steps can boards take to protect their companies?

A:

Now is the time for boards to take advantage of recent changes in corporate law that can reduce expensive litigation. Federal and state choice of forum provisions provide an opportunity for boards to ensure that their shareholders have redress for wrongdoing—but in an efficient manner.

The recent ruling by the US Supreme Court in the *Slack Section 11* case demonstrates the power of federal forum provisions and courts' willingness to enforce them even if the result, as was the case in *Slack*, makes it more challenging for plaintiffs to pursue their claims.

The recent ruling by the Ninth Circuit Court of Appeals in a case involving *Gap, Inc.*, also demonstrates the ongoing importance of state choice of forum provisions in company charter documents. Plaintiffs were attempting to pursue Gap's board for allegedly misleading shareholders in a proxy statement about the board's commitment to diversity. The Ninth Circuit ruled that Gap's state choice of forum provision means that plaintiffs cannot pursue a derivative securities law claim in federal court. This is a win for litigation efficiency, one that is likely to persist despite the circuit split with the Seventh Circuit on this point.



**Priya Cherian
Huskins, Esq.**

Senior Vice President,
Management Liability

[Read Priya's Bio >](#)



Read Now

[How to Review Committee
and Board Minutes: A Guide
for Directors](#)

Board and committee meeting minutes are an important part of a company's internal record-keeping process and critical in helping mitigate litigation risk for directors.

5.0

Concluding
Perspective



5.0 Concluding Perspective



A MESSAGE FROM

Seth Pfalzer, Esq.

National Management Liability Practice Leader

I'm excited about my new role leading our Management Liability practice at the national level. My commitment is to continue doing what we're good at and are known for—providing informed counsel, fierce advocacy, and excellent service. Now, more than ever, we're built to scale and are maximizing our national footprint and influence on the market to achieve even better results for our clients.

We're happy to report in this 11th annual *D&O Looking Ahead Guide* that the current soft public D&O insurance market has resulted in many of our clients seeing cost decreases when renewing this year. Our *Guide* predicted the break in the hard market in 2022, and we expect pricing relief to continue into 2024. As buyers rejoice, we also need to remember that the market is cyclical, and the soft market won't last forever.

As a brokerage firm founded more than 100 years ago, Woodruff Sawyer is optimized to deliver expert counsel and results for our clients in all market cycles. We're always ready for uncertain times. Our combination of stable service teams comprised of long-tenured, experienced specialists and the consistent addition of talented and proven industry professionals allows us to help our clients succeed and thrive in the complex management liability insurance marketplace—regardless of what challenges the D&O risk landscape may bring.

As a private company with an ESOP, all Woodruff Sawyer employees are owners, so our teams truly have a stake in client relationships and successes. This motivates all of us to put the best interests of our clients front and center.

Our values reflect our client-focused approach to business:



Do the right thing – always (integrity)



People powered (compassion)



Achieving excellence together (excellence)



Fierce advocacy (client focus)



Own it (stewardship)

In addition to our client-first focus, we also have deep and lasting relationships with underwriters. This is the seventh year of our Underwriters Weigh In™ survey, which has been a reliable predictor of changes in the D&O insurance market. This sort of engagement with both market-leading and new carriers is crucial in our industry, particularly when the D&O market shifts.

Any broker can look like a hero in a down market, but the real question is: Are you making smart and sustainable insurance decisions that will make sense during the next inevitable hard market?

With our deep expertise, distinct and prominent client focus, investment in data analytics, and entrenched firm values, Woodruff Sawyer is the insurance brokerage you want to be working with—regardless of what the insurance market looks like today or in the future.

Additional Resources



D&O Notebook

D&O Insurance, Corporate Governance, IPOs, Board Issues



SPAC Notebook

IPOs, Transactional Insurance, SPACs, de-SPACs,
Mergers & Acquisitions



Cyber Notebook

Cybersecurity, Market Trends, Privacy Laws and Regulations



M&A Notebook

Private Equity and M&A, Reps and Warranties Insurance, Litigation Trends



P&C Notebook

Premium and Risk Trends, Workers' Comp, Claims Volatility



Guide to D&O Insurance for IPOs and Direct Listings



Guide to D&O Insurance for Foreign IPOs and Direct Listings



Guide to D&O Insurance for SPAC IPOs



Guide to D&O Insurance for De-SPAC Transactions



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If you have any questions or comments regarding the *Looking Ahead Guide*, contact your Woodruff Sawyer Account Executive or email us at: LookingAhead@woodruff Sawyer.com.



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