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COUNTING

LOOKING AHEAD TO 2022

D&O Considerations for the Next Calendar Year



TABLE OF CONTENTS

3	D&O Market Update
12	Hot Topics
19	Underwriters Weigh In™: The D&O Market Survey
30	Expert Insights
39	Concluding Perspective
42	About Woodruff Sawyer

Expert Insights

Click below and see what advice our experts have for you as you plan for 2022.



Sean
Optimize D&O insurance renewals



Michael
D&O insurance for de-SPAC transactions



Dan
D&O insurance for SPAC IPOs



Susan
D&O insurance, self-insuring, and ultra large companies



Jane
Foreign filers and derivative suits



Dan
Prepare for a ransomware event



Emily
Properly insure your unusual tax situations



Priya
DataBox: Purchasing the right amount of D&O insurance

1.0 D&O MARKET UPDATE



[Return to Table of Contents >>](#)

1.1 US Markets

As predicted in last year's *Looking Ahead*, D&O insurance rates continued to rise in 2021. However, there are early signs that the market is in transition and that some relief may be on the way. As documented in this year's *Underwriters Weigh In™* survey, 54% of underwriters think D&O premiums will go up over the next year. While high, 54% is so much better than the unanimous response last year when 100% of underwriter respondents predicted continued rate increases. When thinking about what is in store for 2022, it is useful to drill into some of the trends we are seeing and why, despite some room for optimism, many D&O buyers will continue to face pricing challenges.

Renewal Pricing Trends for Public Companies

The pace at which rates were increasing during the last three years peaked during Q2 of 2020. Since then, D&O rates have continued to rise, but there has been a deceleration in this rate of increase. During 2019, the median change in premium (total program cost) was 31% and in 2020 it rose to 38%. For the first half of 2021 that figure has come down to 26%.

Of course, D&O insurance programs vary by size and structure. Looking at comparable year-over-year renewals, the percentage increases on excess layers are still outpacing

the primary layer. As shown in the chart in Section 1.4 [here](#), the median change in premium on the primary layer was 24% in 2019, 25% in 2020, and for the first half of 2021 stands at 21%. On excess layers, rate increases are higher. The median change in premium increase went from 37% in 2019 to 41% in 2020. It is now tracking to 26% so far in 2021.

Carriers are adding costs on excess layers in an attempt to correct years of these layers being under-priced relative to the risk. In the past, those layers had become commoditized through heavy competition even as suit severity and costs increased. This meant that these excess layers were contributing to settlements too often compared to the price being charged for them.

New Capacity

Starting in late 2020, new D&O insurance facilities have been launched and are being led by respected D&O insurance veterans—a welcome sign that much needed capacity and competition is finally on the way. Today, a dozen new entrants are now active in the D&O insurance market. The strategies each will deploy to establish themselves as credible alternatives is expected to bring much needed energy to the D&O marketplace.

Domestic markets account for eight of the new entrants, followed by three in London and one in Bermuda.

Traditionally, new carrier entrants have entered the D&O marketplace and have opportunistically jumped on D&O insurance programs as rates increased. In the past, this dynamic has helped to right-size pricing, saving D&O buyers significant premium. We're hopeful this trend starts to take hold once again in 2022.

Litigation Environment

Over the last three years, the number of traditional securities class action suits filed reached historic highs. According to Woodruff Sawyer's proprietary DataBox, the likelihood of a public company being sued reached a record high of 5% in 2019 when 268 lawsuits were filed. The total number of suits dropped to 210 in 2020, and for the first half of 2021 there have been 91 cases filed. This is a 13% drop in filings compared to the number filed in the first half of last year, a positive trend if this means that the final count for the year will end up more in line with historic averages.

COVID-19 Impact

A year ago, there was justifiable concern from carriers around the pandemic's economic impact and the resulting COVID-19-related securities filings. Since March 2020, there has been a steady stream of 31 COVID-19 cases filed. In the first half of 2021, COVID-19-related cases represent 12% of all cases filed. While the early cases were for the

Woodruff Sawyer's **DATABOX**[™]

Based on our ongoing analysis of all federal securities class action suits, Woodruff Sawyer's premier database and analytic tool, DataBox, allows clients to model securities class action claim scenarios based on their own criteria and see predictive loss modeling that is based on accurate, real-life settlements.

Using this actionable information allows our clients to more confidently consider cost-trade-offs when it comes to choosing how much insurance to purchase. To learn more about DataBox, talk to your Woodruff Sawyer representative.

most part brought against cruise lines and immunotherapy companies, the pandemic's second-year suits have been brought against biotech, technology, manufacturing, and even a trade/retail company, among others.

Although the number for COVID-19-related D&O cases has been significant, fears of a huge wave of COVID-related litigation have not borne out. However, much like the event-driven litigation trend of recent years, we predict that we'll continue to see the plaintiff's bar target companies that are knocked back by surprising events.

A trend to watch over the next year is whether there will be a round of supply chain disruption suits.

With business operations disrupted due to COVID-19 and so much pent up demand for products and services, companies that set expectations with the market and then underdeliver because of a failed supply chain will likely find themselves in the crosshairs of the plaintiff's bar.

COVID-19 Return-to-Work Resource Center >>

As businesses continue to reopen and transition to onsite, workplaces are grappling with what the "new normal" may look like. Find a host of resources on Woodruff Sawyer's COVID-19 Return-to-Work Resource Center, from sample return-to-office plans to risk management blog insights.

IPO and Direct Listing D&O Insurance Marketplace

The most prominent D&O insurance news for the last few years has been the massive increase in D&O costs for IPOs and companies going public through a direct listing. *The Supreme Court's 2018 decision in Cyan* allowed plaintiff's attorneys to file Section 11 suits concurrently in federal and state court. The frequency and severity of suits that followed sent shock waves throughout the D&O marketplace. In less than two years, the average price of the first \$10 million of D&O insurance for an IPO

company more than quadrupled, and the average securities retention went from \$2.5 million to \$10 million or more.

As a countermeasure, IPO and direct listing companies began to add a **federal forum provision** to their charter documents in order to keep Section 11 suits in federal court. In March 2020, The Delaware Supreme Court determined those provisions are valid in the *landmark case, Sciabacucchi*. In early 2021, California- and Utah-based public companies that had adopted the provision started winning motions to dismiss in state court. The result has been a significant drop in parallel filings.

In 2019 and 2020, more than 50% of Section 11 IPO filings had parallel cases brought in both state and federal courts. In the first half of 2021 that percentage has dropped to 18%.

While a drop in parallel filings is certainly a positive development, the rate of filings for Section 11 IPO cases has not seen a significant drop. In 2020, those suits represented 15% (31 of 210 cases) of all securities suits. So far in 2021, they represent 12% of filings (11 of 91). So, there are some positive developments on the IPO and direct-listing front, but other market factors will need to come into play before pricing takes a material turn.

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

Woodruff Sawyer's annual *Guide to Going Public* walks you through each step of coordinating your D&O risk management with your IPO or direct listing.

SPAC IPOs & De-SPAC Transactions

The first half of 2021 saw an unprecedented number of [Special Purpose Acquisition Company \(SPAC\)](#) IPOs. From January 1st, 2020 through the first half of 2021 there have been 606 completed SPAC IPOs—a remarkable 308 of those were done in just the first 3 ½ months of 2021 alone. An enormous number of additional SPAC IPO registrations are currently pending. With the recent surge of SPAC IPOs and the scarcity of insurers willing to cover this type of risk, SPAC IPO D&O premiums have increased significantly. According to Woodruff Sawyer's proprietary client data, SPAC D&O premiums increased by four to five times between Q1 of 2020 and Q2 of 2021.

With the recent surge of SPAC IPOs and the scarcity of insurers willing to cover the risk, SPAC IPO D&O premiums have increased significantly.

A SPAC is a blank check company that merges with a private company, resulting in the private company becoming a publicly listed company. For a private company, going public via a de-SPAC transaction may be a faster and slightly less costly process than the traditional IPO or direct listing route. With the large number of SPACs looking to identify a merger partner, the obvious question looming over the D&O market is whether there are that many private companies ready for the scrutiny that comes with being a public company. A host of high profile de-SPACs have stumbled out of the gates. Carriers are pricing their risk concerns into their D&O premiums for de-SPACing companies.

D&O insurance rates for companies post de-SPAC transaction are "often 20% to 30% more compared to a similar company going public through an IPO."

— Priya Huskins, quote from Wall Street Journal article, "[SPACs Are Having Their Day—in Court](#)," August 25, 2021

For more on SPACs and de-SPACs, refer to our [Hot Topics](#) section.

1.2 Self-Insured Retention Trends

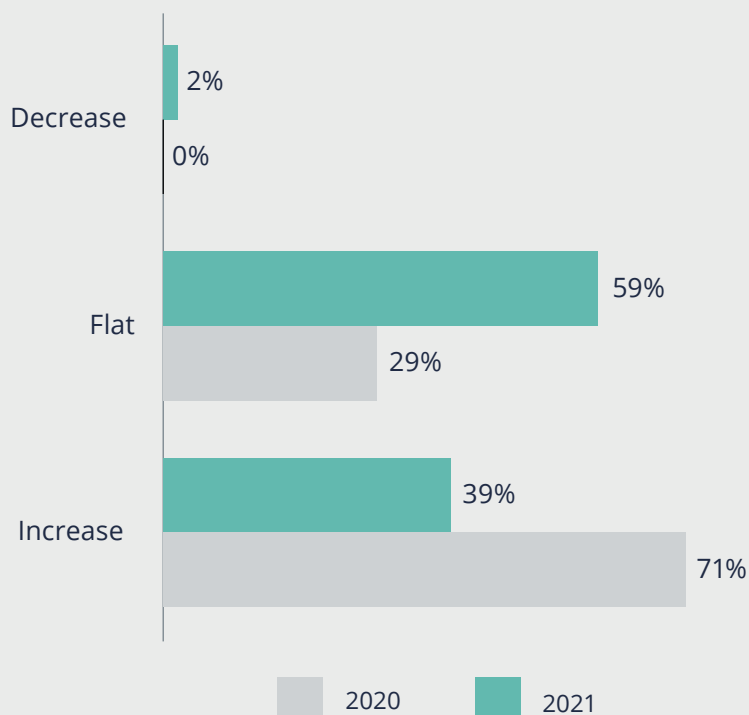
Similar to the D&O rate environment, securities retentions (like deductibles) have experienced significant changes over the last three years. The average retention for an IPO company in Q1 2018 was \$2.5 million; by Q1 2021 that average figure had jumped to \$13 million.

It is more difficult to generalize the trend for renewal retentions for mature public companies other than to note that they have generally risen. However, in this year's

Underwriters Weigh In™ survey, there is a positive development in insurance carrier sentiment compared to how the carriers were viewing retentions last year. In 2020, 95% of underwriters expected retentions to increase—this year that figure has dropped to 62%.

Traditionally, taking a larger retention was a strategy used to obtain a flat or decreased premium on the primary layer of insurance. This strategy is still a valid approach, but it is now more commonly used to mitigate premium increases, not to drive reductions in the cost of the entire expiring program.

Retention Trends: All Renewals



Largest Increases

- Retentions below \$1M
- Significant stock volatility
- Recent IPO

Typical Increases

for 2020 & 2021

50%–100%

Source: Woodruff Sawyer

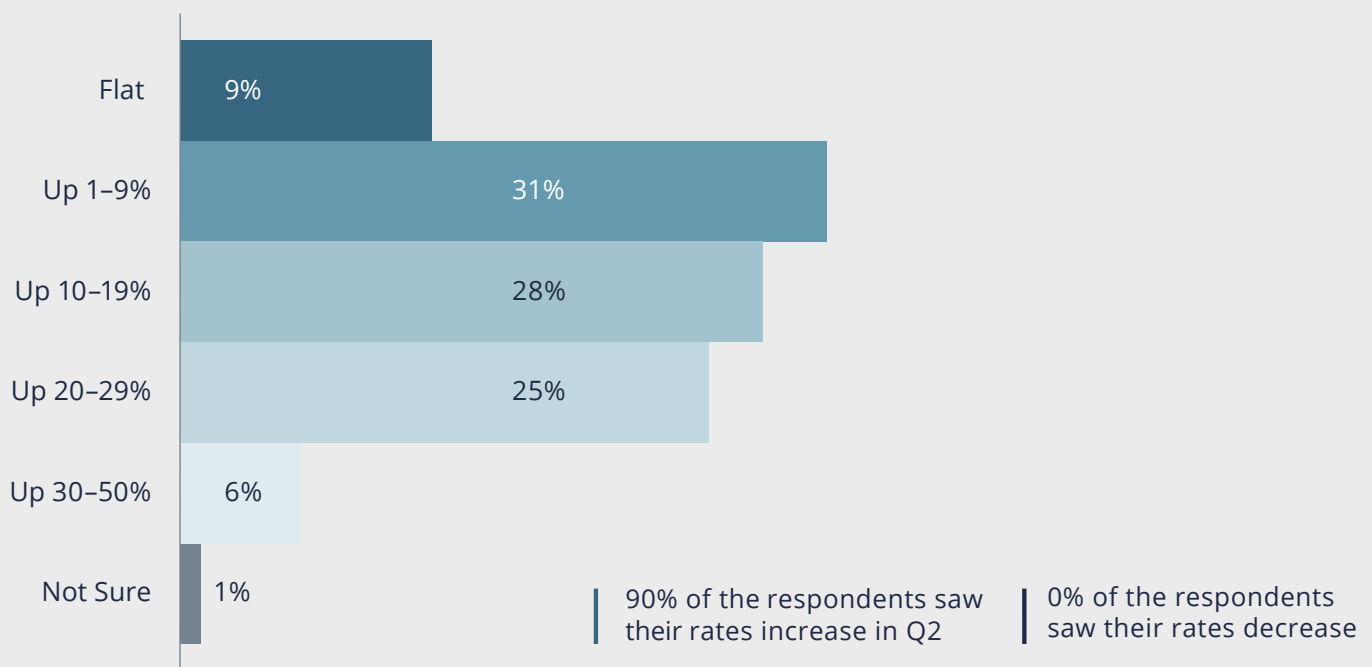
1.3 Pricing Trends from CIAB

The Council of Insurance Agents & Brokers' Commercial Property/Casualty Market Survey reports that the second quarter of 2021 was the 15th consecutive quarter of increased premiums, with respondents reporting an average increase of 8.3% across all-sized companies.

Premiums increased for all lines of business for the fifth consecutive quarter, though price increases for all lines moderated in Q2 2021 compared to previous quarters.

The average D&O rate increased 13.4% over the prior quarter. Ninety percent of the respondents saw rate increases in Q2, with 59% of respondents experiencing a rate increase of at least 10%. No respondents saw a decrease in rates.

Average D&O Rate Increase in Q2 2020



Source: CIAB Q2 2021 P/C Market Survey



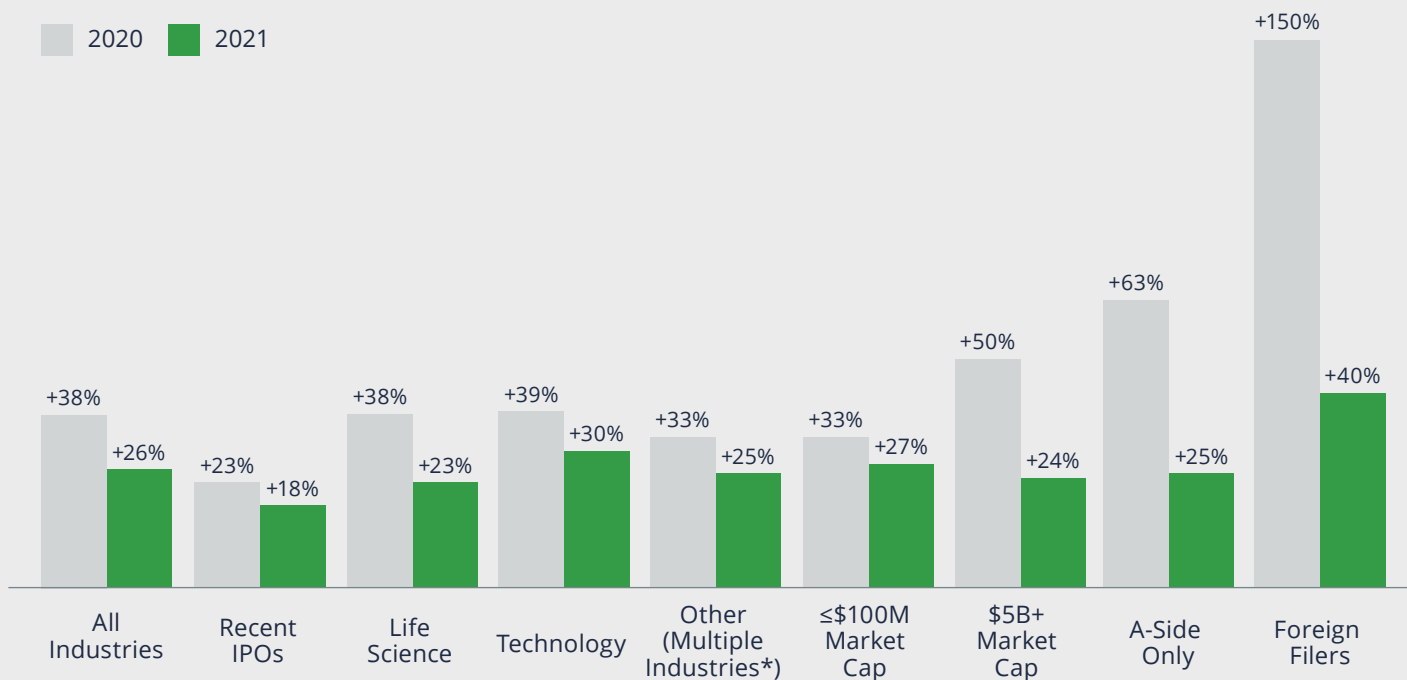
1.4 Woodruff Sawyer Client Renewal Pricing

All of our clients benefit from the fact that Woodruff Sawyer is a leader when it comes to brokering D&O insurance for companies in the life science and technology industries, including companies that are aggressively disruptive not to mention engaged in IPOs or direct listings. Our clients that fall on the higher end of the risk spectrum will, inevitably, be more impacted by market changes.

In 2021, most companies continue to experience increases in total cost and retention on their D&O programs. However, after suffering through several years of severe increases, there is indication that this level of severity is starting to taper off. We are even seeing a modest uptick in decreased pricing and flat renewals. This *Guide* focuses on what the data reveals concerning trends in the increases.

While Rates Continue to Increase, the Rate of Increase Is Moderating

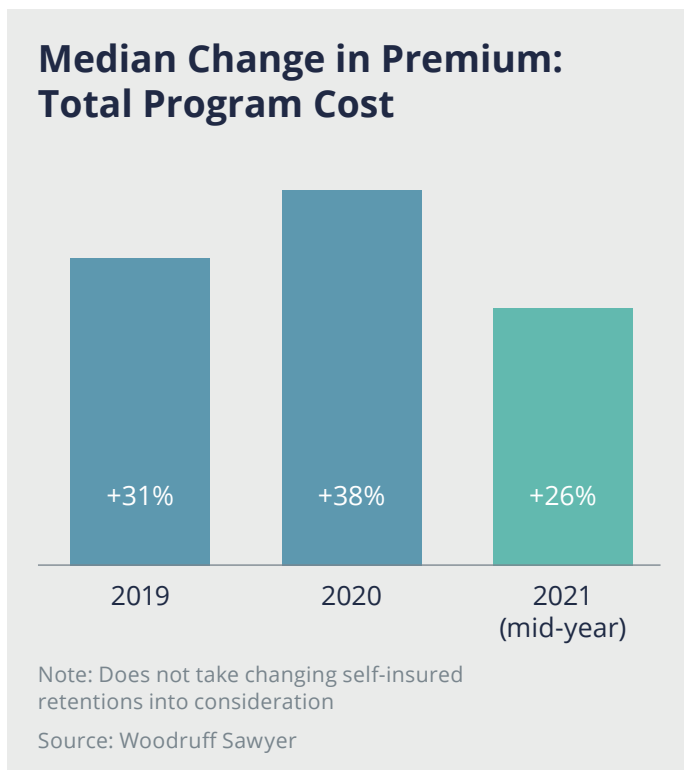
2020 2021



*All Market Caps, excludes Life Science & Technology

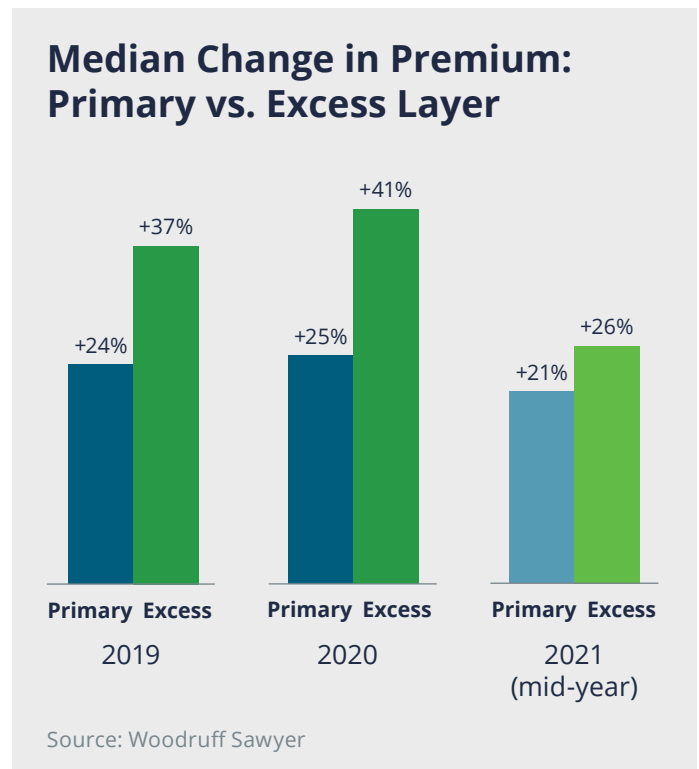
Source: Woodruff Sawyer

Companies continue to experience increases in their premiums on top of past increases. However, the rate of these increases seems to be decelerating. While flat or decreased pricing at renewal is still rare, we saw this happen twice as often in the first half of 2021 as we did in all of 2020, providing further encouraging signs of a change in the market. The median total D&O program cost increase for all clients regardless of size or industry for the first half of 2021 is 26%.



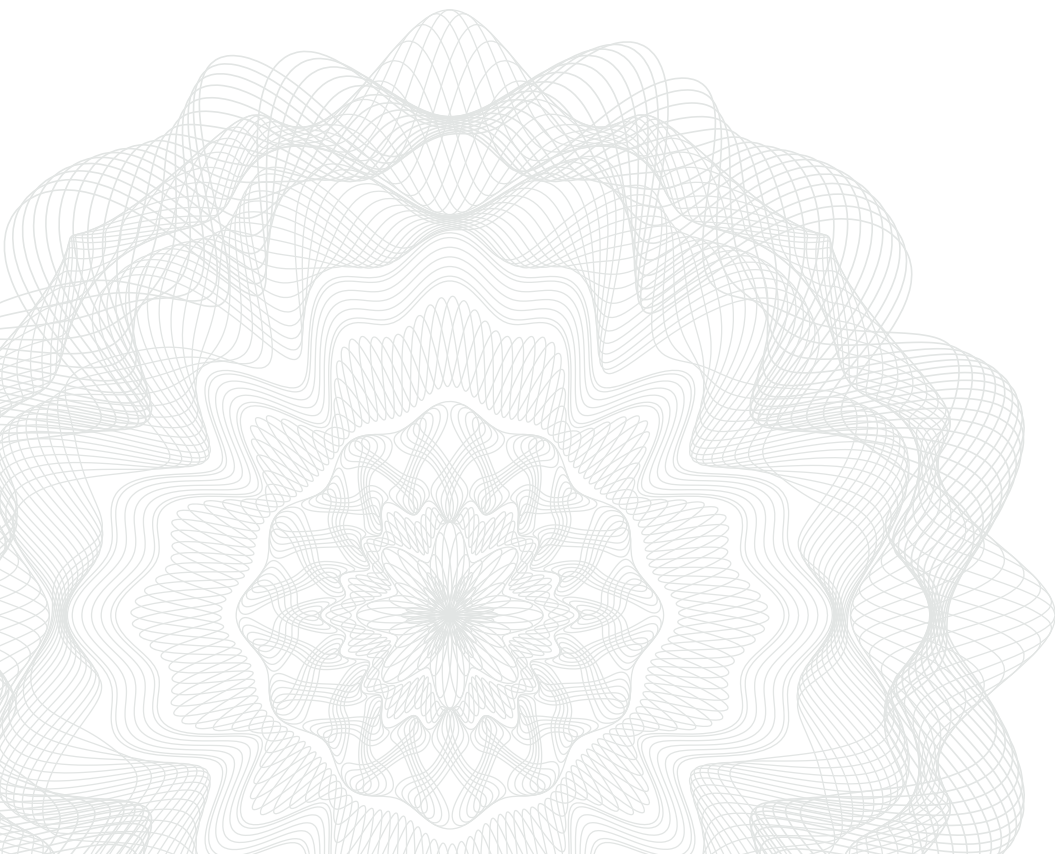
One of the dramatic renewal trends in the past few years has been the lack of alignment between primary and excess layers when it came to premium increases. Traditionally, excess layers would follow whatever price increase or decrease that the primary layer dictated. In recent years, however, pricing has

diverged with excess layer rates increasing faster than the primary layer rate. In 2021, this trend appears to be changing. Excess rates are moving towards re-alignment with primary layer pricing, providing good news for the future and helping us better estimate excess pricing.



The trends that we are seeing in 2021 provide encouraging signs that the hard market is beginning to moderate. D&O premiums are still high, but the volatility and unpredictability of the past few years is starting to stabilize.

2.0 HOT TOPICS

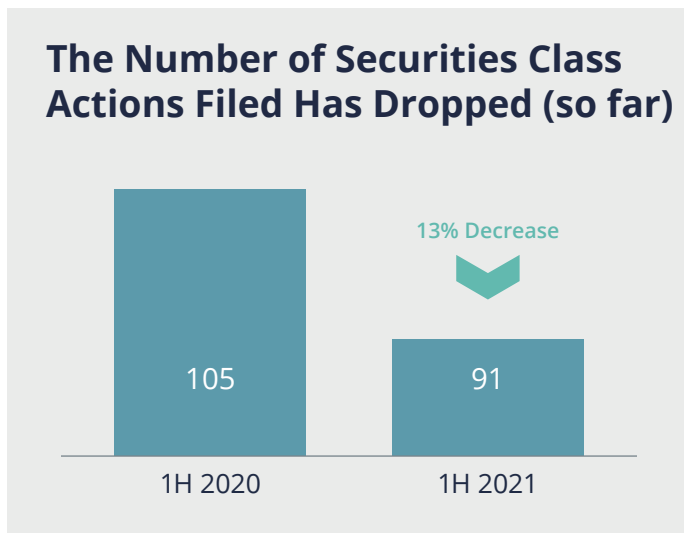


[Return to Table of Contents >>](#)

Often this “Hot Topics” section reads like a parade of horrors, so it is with much relief that we are able to predict some positive trends in 2022 for D&O litigation... and there remains plenty for directors and officers to consider.

2.1 Good News: The Overall Rate of Securities Class Action Suits is Down and Parallel Filings are Dissipating

It is heartening to see the decline in the overall rate of securities class action lawsuit filings in the first half of 2021, something we discuss at length in our 2021 [DataBox Mid-Year Update](#).



This 1H 2021 decline follows the 2020 decrease in the rate of securities class action lawsuit filings, which saw a drop down to 4% of public companies being sued from a high of 5% in 2019. One hopes that this downward trend continues.

A serious area of D&O exposure for the last several years has been parallel cases against IPO companies, with issuers being sued in both state and federal court. In a reversal of this trend, we saw plaintiffs start to withdraw from the state litigation field of battle in 2021. Note that all the cases filed in 1H 2021 against IPO companies in state court involved issuers that failed to include federal forum provisions in their charter documents.

Parallel Cases Filed Against IPO Companies Since 2019

Time Period	Parallel Filings (% of Section 11 IPO filings)
2019	51% of 71 cases
2020	52% of 31 cases
1H 2021	18% of 11 cases

This victory for the defense is the result of several state court rulings finding exclusive federal choice of forum provisions to be valid, resulting in the dismissal of state-filed IPO cases¹. We expect this trend to continue in 2022 for Delaware-incorporated companies that have federal forum provisions in their certificates of incorporation or bylaws.

1. Woodruff Sawyer can rightly take some credit for helping end the scourge of parallel state court filings against IPO companies given its lead role in organizing the funding group that paid for the Sciabacucchi appeal, without which no company would have access to federal forum provisions.

2.2 More Good News: Breach of Fiduciary Duty Suits and Recent Affirmation of State Choice of Forum Provisions

Breach of fiduciary duty suits, especially those [brought derivatively](#), remain a serious issue for directors and officers, particularly given that the settlements often cannot be indemnified by companies. This prohibition puts substantial pressure on a company's D&O insurance program as the only protection for directors and officers in the face of a financial settlement.

There are two pieces of good news on this front. The first is that while duty of oversight claims have [gained more traction](#) with Delaware Courts recently, these [remain difficult](#) cases for plaintiffs to win.

The second piece of good news is that adopting [state choice of forum provisions](#) is an easy way (at least for Delaware corporations) to ensure that such suits are brought in the Delaware Court of Chancery and not also duplicatively in many other courts at the same time.

In contrast to the drop in SCA suits in 2021 so far, SPAC-related litigation has gone up. Read more in this [CNBC story](#) from August 9th, 2021.

2.3 SPACs Take Up All the Oxygen

If you were to look at all sources of D&O litigation information in 2021, including the [D&O Notebook](#), it has felt like it is all SPACs all the time. Why? Because that has been largely true. Few new financing phenomena in modern financial markets have captured as much attention—or have been the subject of more controversy—than SPACs. Regulators are paying close attention, as is the plaintiffs' bar.

As a result of unprecedented demand for D&O insurance coupled with insurance carrier concerns about SPAC-related litigation, the cost of D&O insurance for SPAC IPOs has skyrocketed approximately four to five fold compared to pricing in the second quarter of 2021.

High prices for D&O insurance for SPAC IPOs will continue to be the norm in 2022. And, [no, captives will still not](#) be a solution to the problem of high prices for D&O insurance for SPAC IPOs.

Guide to D&O Insurance for SPAC IPOs >>

Our *Guide to D&O Insurance for SPAC IPOs* will help you take a sophisticated approach when it comes to securing the right D&O insurance coverage for your SPAC.

2.4 De-SPAC Transactions: The Other Side of the SPAC Coin

As we predicted, [more SPACs are leading to more litigation](#). The plaintiff's bar is focused on de-SPAC transactions as evidenced by the numbers. There were two post-combination securities class action suits filed in 2019 against companies that went public through a de-SPAC transaction. That number increased to five in 2020. In the first half of 2021, the number had reached 15—including one novel case filed before the business combination even closed.

We examined the situation closely in a webinar featuring Woodruff Sawyer, Cooley, and Nasdaq. Without question, de-SPAC transactions will be an area of focus for both the plaintiff's bar—not to mention the Securities and Exchange Commission (SEC)—in 2022. We may even see some [congressional activity](#) related to de-SPAC deals.

[Watch the Webinar >>](#)

SPAC Litigation Update

Woodruff Sawyer's Priya Huskins, Cooley's Shannon Eagan, and Nasdaq's Jeff Thomas discuss this rapidly evolving area of litigation.

When it comes to staving off breach of fiduciary duty claims alleging a lack of due diligence by the SPAC board in 2022, [Reps & Warranties Insurance](#) will become increasingly accepted as a way to demonstrate the robustness of the SPAC's diligence process.

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

If you plan to go public through a de-SPAC transaction, prepare to navigate the complicated and expensive process of obtaining D&O insurance.

2.5 Increased Focus on Regulatory Enforcement

Regulatory enforcement activity will likely be up in the second half of 2021 and into 2022.

This is not to say that it has been lacking recently. [Foreign Corrupt Practices Act \(FCPA\) enforcement actions](#)—not to mention settlements—have continued apace. We have even had a Regulation FD enforcement action in 2021.

The current administration has made it clear that the [False Claims Act](#) is an area of serious focus, which is no surprise given all the government payments made to private companies to address the COVID-19 pandemic.

The focus of the Biden administration on [anti-trust issues](#) is something directors and officers of companies will want to watch, especially directors and officers of large public companies. If executed poorly, these companies' strategies for handling the administration's anti-trust posture are likely to lead to troublesome breach of fiduciary duty suits.

And have we mentioned SPACs? The SEC has been vocal about its SPAC and de-SPAC concerns. By publishing the [Ability Software de-SPAC transaction](#) enforcement action, the SEC helpfully provided a roadmap of its concerns. When it published [SPAC-related disclosure guidance in December 2020](#), the SEC turned this roadmap into a blueprint for the enforcement actions we are likely to see later in 2021 and into 2022.

2.6 COVID-19 Fallout Persists

As much as the US economy has opened up, serious hot spots of infections persist, as do company concerns about the impact of COVID-19. D&O litigation related to COVID-19 continues to pop up, and [existing claims](#) are likely to take years to resolve.

Back-to-work efforts will also bring their own challenges. Directors and officers will want to take navigating these rocky shoals seriously. It may also be helpful to take a look at the company's [Employment Practices Liability policy](#) sooner than later.

The New Normal: Post-Pandemic Workers' Comp Claim Challenges and Opportunities >>

Get an overview of both the positive and negative developments in workers' compensation claims, the impact on employers, and new claim strategies.

2.7 The "E" in ESG: Climate Change

In 2022, boards of directors will continue to focus on their company's environmental impact, or they will be forced to do so.

Take the example of [three climate activists](#) being elected to the board of ExxonMobil. This effort by a relatively small shareholder became wildly successful once it garnered the support of major institutional shareholders. Other climate activists have no doubt taken note. We will see more of this in 2022.

The effort to bolster a company's climate-related disclosures must be undertaken advisedly, however. The SEC has made it clear that it is watching and has even set up a [task force to examine climate disclosures](#) made by issuers. In 2022 boards will want to continue to monitor these disclosures to ensure that they are accurate and not just aspirational.

2.8 The “S” in ESG: Diversity and the Board

The boards tasked with facing all of the challenges listed above will be increasingly diverse in 2022 compared to in years past. While board diversity lawsuits are not getting much traction so far, regulators remain very interested in implementing diversity rules for public company boards.

Though their intensity will wax and wane somewhat, the events that pushed social issues into corporate board rooms—issues ranging from racial tensions after George Floyd to political donations after the January 6th US Capitol insurrection—are seismic. These issues are not going away. Boards will continue to have to make tough decisions on these matters in 2022.

2.9 Cyber Risk and the Board Room

In the past several years boards have become increasingly savvy about their role when it comes to the oversight of a company’s cyber risk.

Challenges on this front will continue in 2022. First among these will be companies’ vulnerability to ransomware. This situation is made all the more difficult by increasing

prices in the cyber liability insurance market as well as a pullback on coverage—especially when it comes to ransomware.



Ransomware Attacks and Your Cyber Insurance: A Complete Action Plan >>

What is ransomware and how does it work? Read more for the answer and to learn about the process of reporting, how insurance responds to ransomware claims, and three rules to ease friction with your carrier during a ransomware incident.



Three Things to Consider Before Paying the Ransom from a Ransomware Attack >>

Get the answer to the question on the minds of many CISOs and company executives: If we are the victim of a cyber attack, should we pay the ransom?

2.10 D&O Risk Landscape and D&O Insurance

Considering the long list of “Hot Topics” we are presenting this year, it is straightforward to predict that in 2022 we will see boards of directors continuing to take pains to keep themselves informed. A basic understanding of [D&O insurance](#) policy terms coupled with knowledge of how D&O insurance responds in [different litigation scenarios](#) will help boards understand the cost-benefit tradeoffs when it comes to selecting an appropriately protective D&O insurance program for themselves and the companies they serve.

Now is the time to determine what is the right amount of D&O insurance to purchase for 2022. Having the right D&O insurance program and larger risk management strategy in place are the keys to navigating the current complex market. Watch our [D&O Looking Ahead webinar](#) for expert analysis on the D&O landscape in 2022.



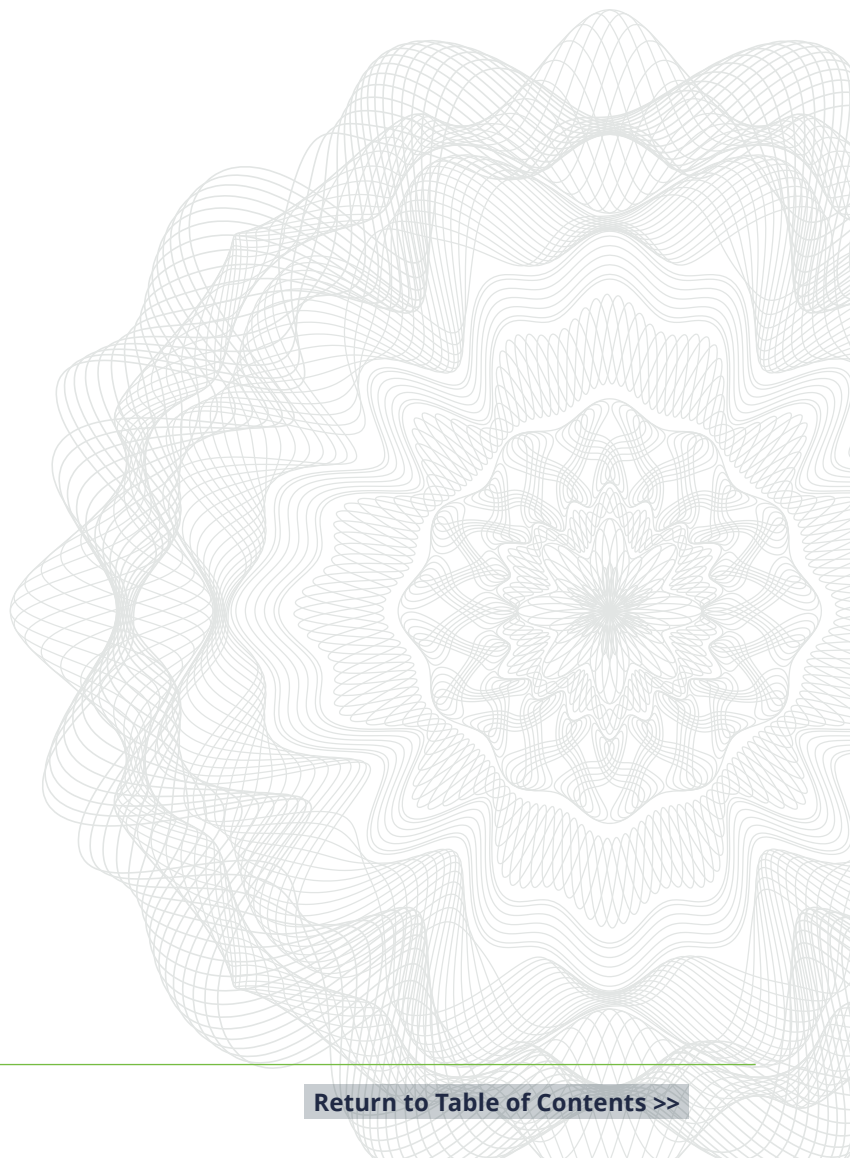
For insights into issues critical to directors and officers, subscribe to the [D&O Notebook](#) >>

3.0 UNDERWRITERS WEIGH IN™: THE D&O MARKET 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 37 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.

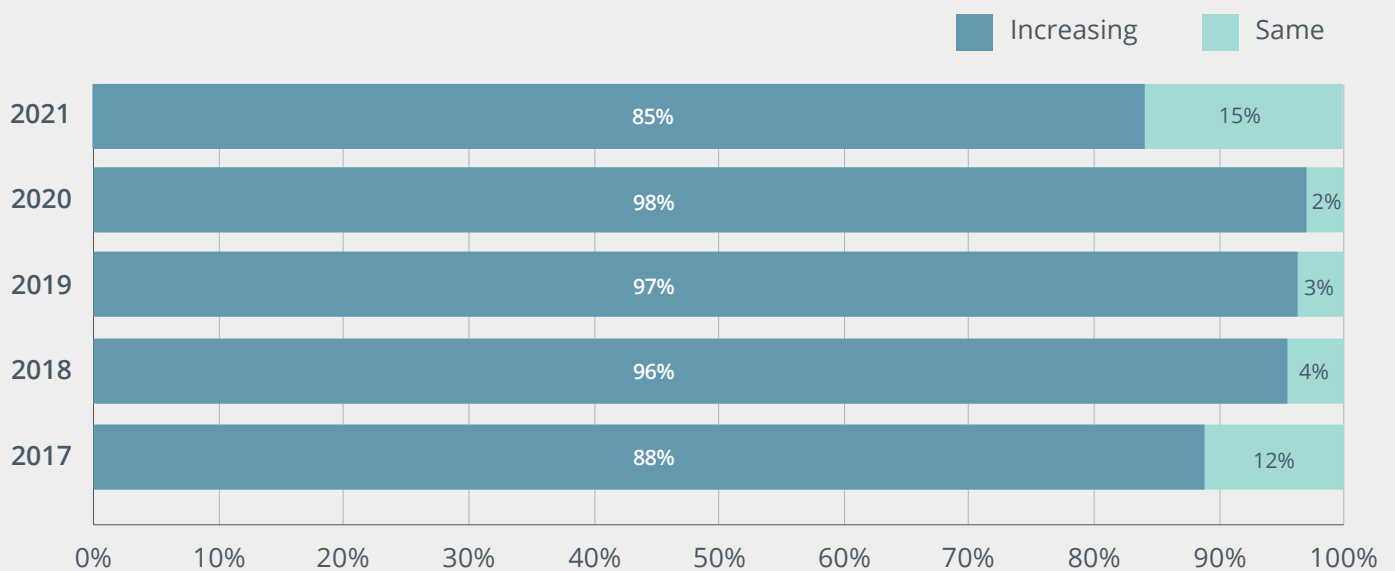
Our survey includes responses from top D&O carriers including: AIG, AXA XL, Great American, Lloyd's, Old Republic, and Tokio Marine HCC.



Q1: Is D&O risk going up?

2021 Survey Results:

85% of underwriters say risk is going up.



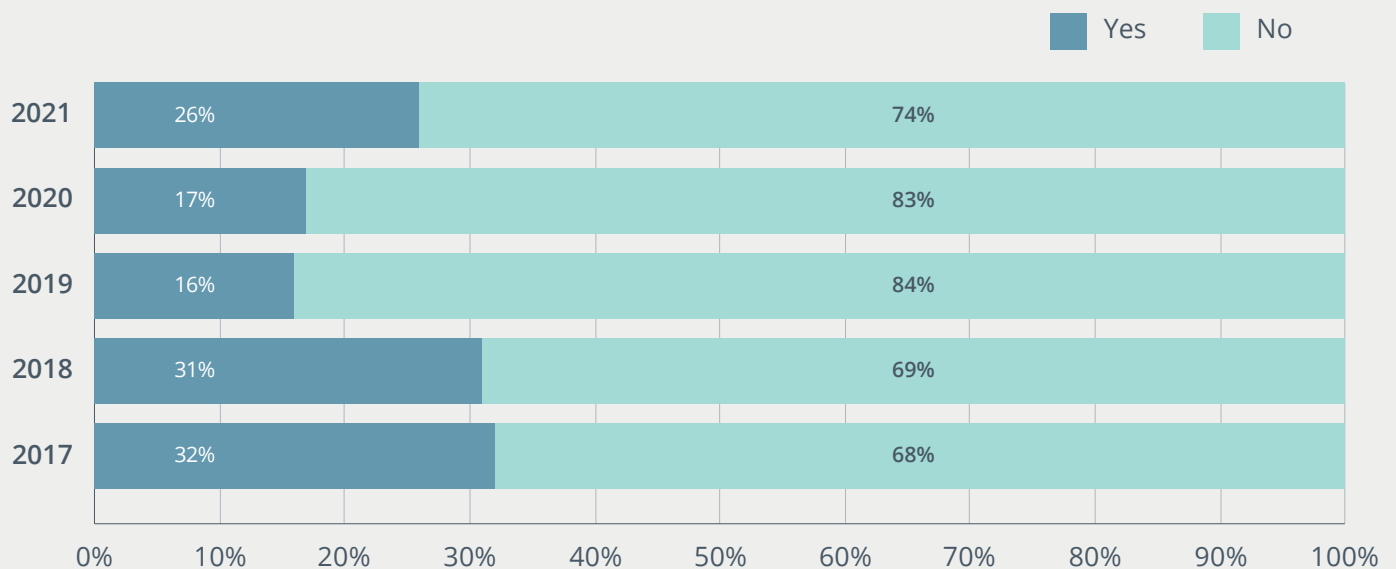
Trends We're Seeing

Good news: This is the first time in five years that any real number of insurance carriers think that the risk environment is stable, as opposed to getting riskier. However, no underwriters think that the risk is diminishing.

Q2: Are companies as aware as they should be about the risk and cost of D&O litigation?

2021 Survey Results:

74% of underwriters think that companies are not as aware of the risk and cost of litigation as they should be.



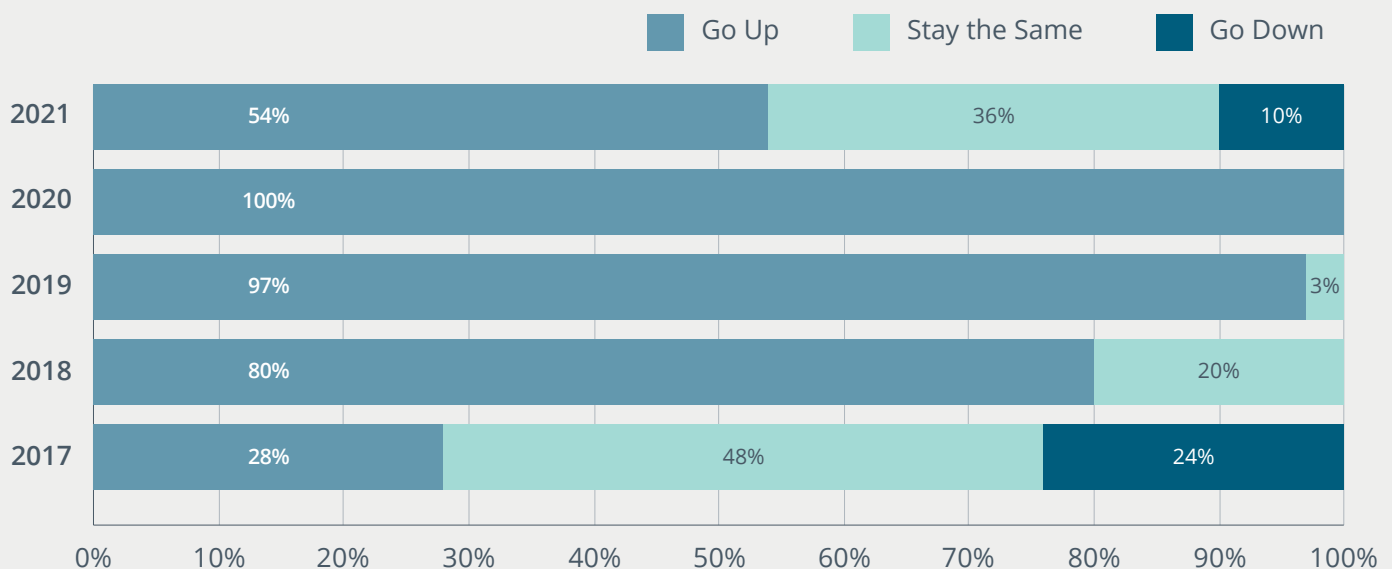
Trends We're Seeing

More good news: While a significant number of underwriters continue to believe that Ds and Os underestimate their litigation risk, several insurance carriers believe that Ds and Os have become more educated in the past few years and now better understand their risk.

Q3: Industry-wide, do you expect D&O insurance premium rates for mature public companies to go up, stay the same or go down?

2021 Survey Results:

54% of underwriters expect D&O premiums to go up.



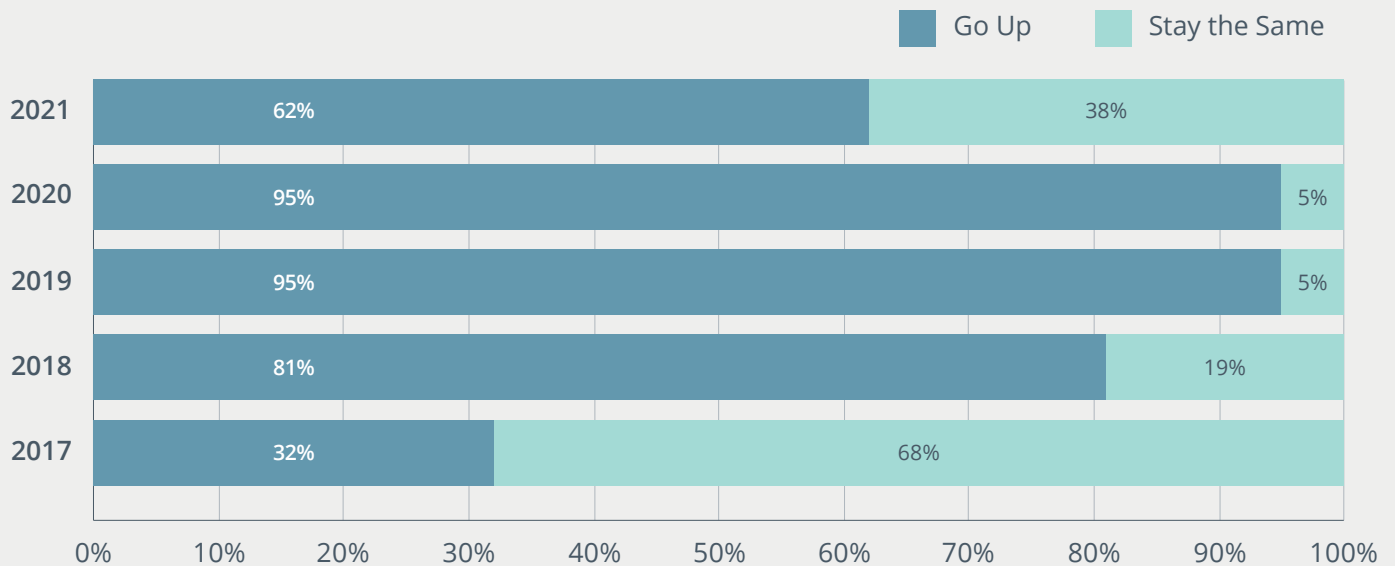
Trends We're Seeing

The ultimate good news: Our survey is showing early signs of a break in the hard market fever. While a significant number of insurance underwriters continue to believe they are being undercompensated for their risk, it's not the 100% we saw in last year's survey. Competition creates the opportunity for insurance prices to go down, and there are clearly some insurance carriers who will look to compete 2022.

Q4: Industry-wide, do you expect D&O SIRS for mature public companies to go up, stay the same or go down?

2021 Survey Results:

62% of underwriters expect self-insured retentions to go up.



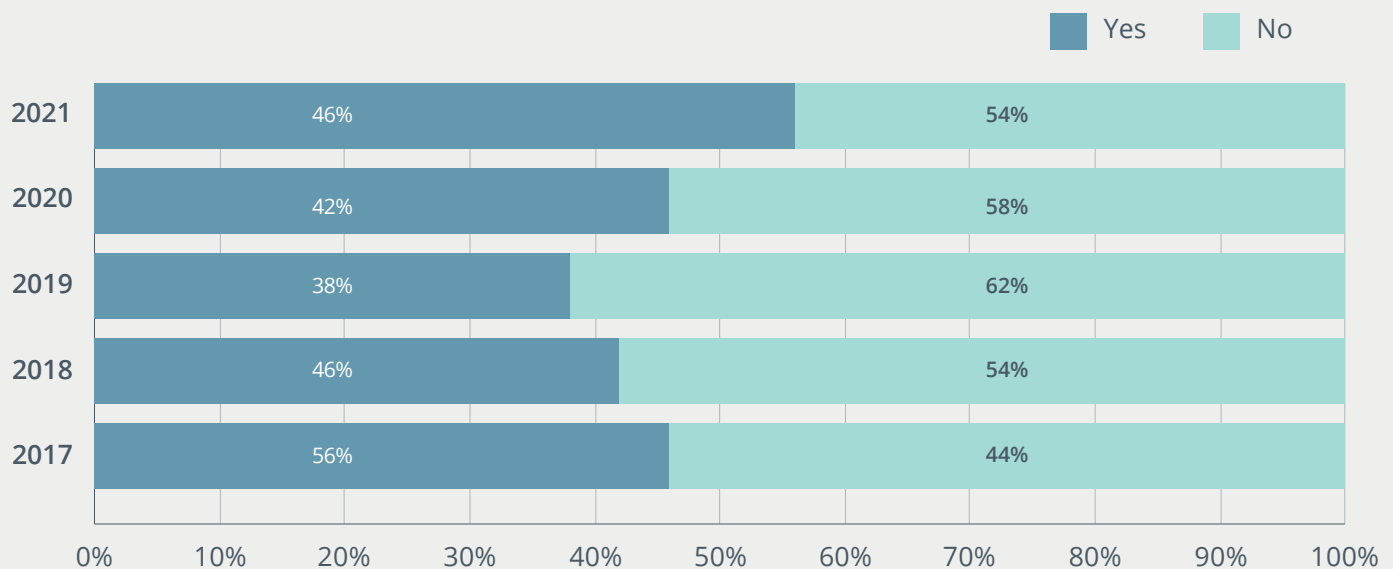
Trends We're Seeing

It's hard to imagine that SIRS could be any higher than they are right now. The good news, particularly as compared to the past few years, is that a significant percentage of underwriters think that SIRS will be the same in 2022. However, it is also clear that a majority will continue to look to manage their own risk by attempting to continue to increase SIRS.

Q5: Will you quote the primary layer for most public companies?

2021 Survey Results:

54% of underwriters will not quote the primary layer.



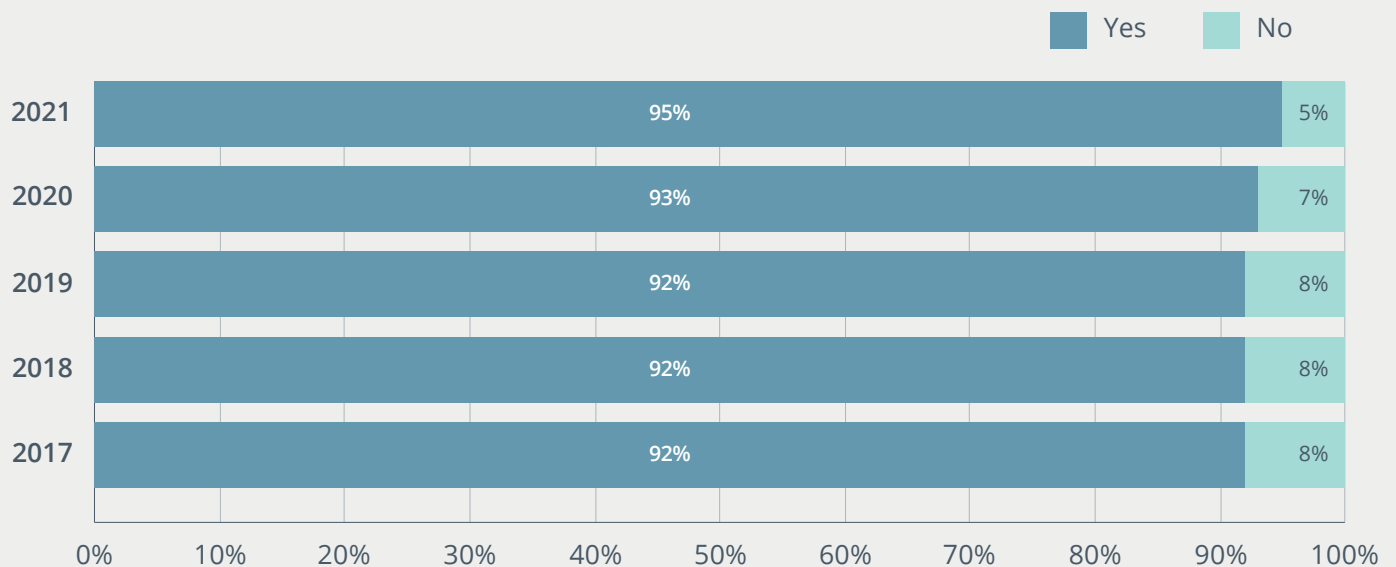
Trends We're Seeing

To the extent other survey answers indicate that the hard market fever may break soon, this answer tells us that the temperatures will not come down swiftly in 2022. We hope to see more carrier competition at the primary layer in 2023.

Q6: Will you quote excess layers for most public companies?

2021 Survey Results:

95% of underwriters will quote excess layers.



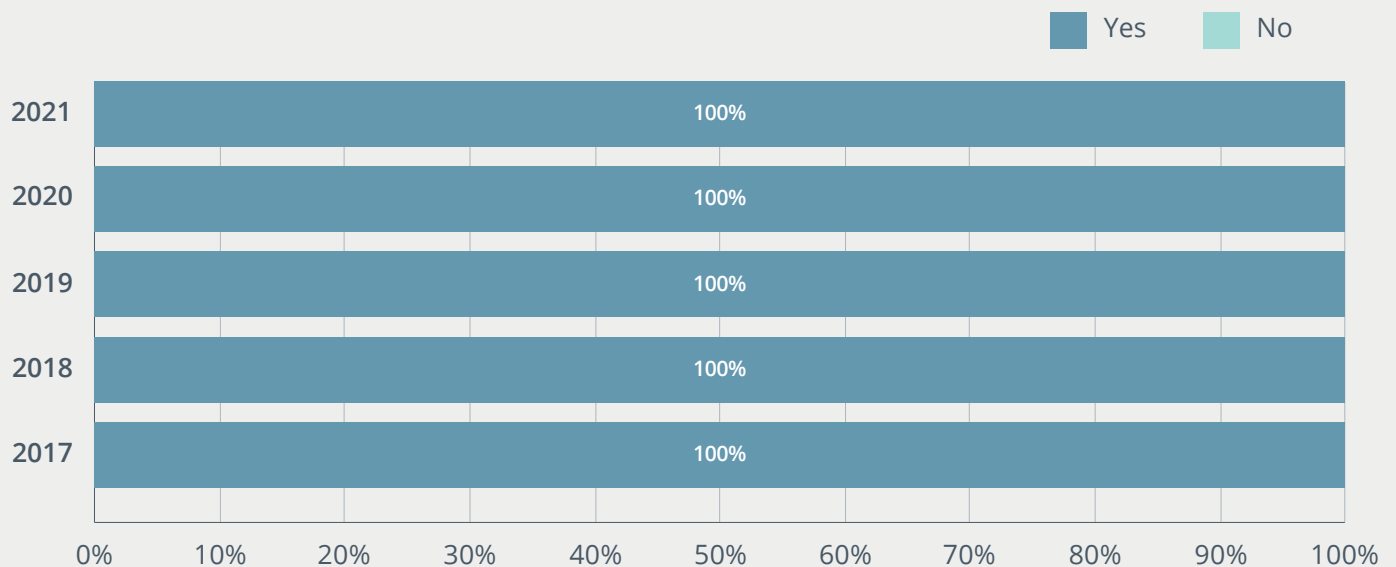
Trends We're Seeing

As we have observed in the past, insurance carrier enthusiasm for any client increases the further away they are from the primary layer.

Q7: Will you quote stand-alone for Side A for most public companies, assuming a stable balance sheet?

2021 Survey Results:

100% of underwriters will quote standalone Side A.



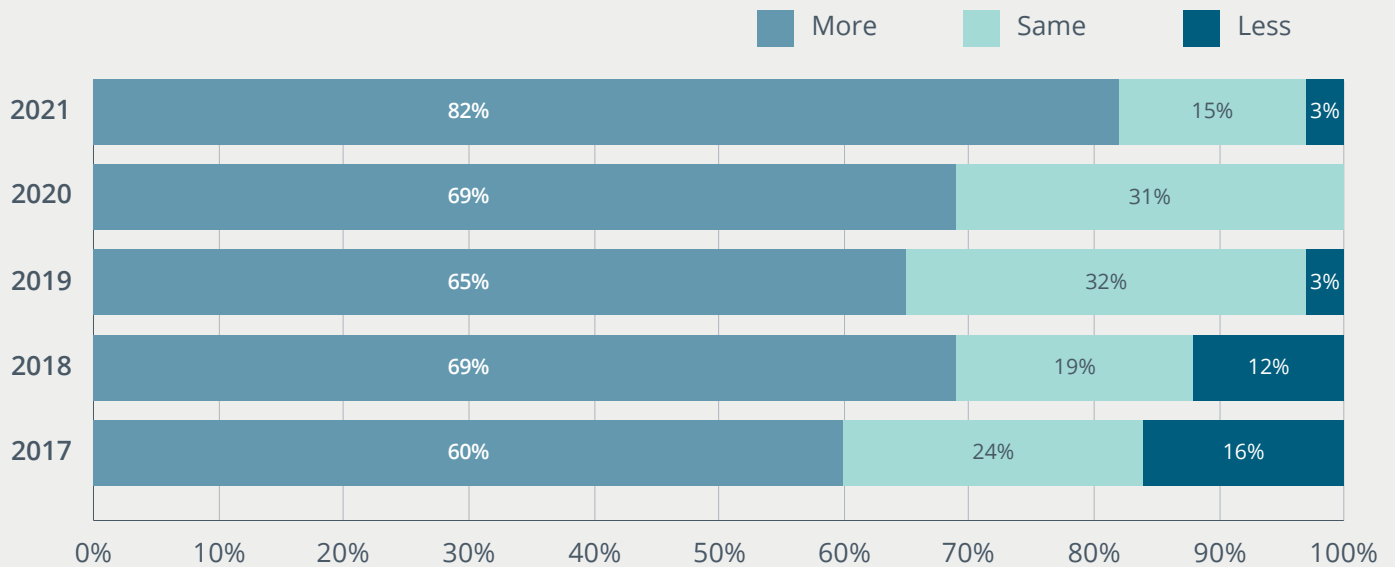
Trends We're Seeing

Notwithstanding carrier concerns in the community about large breach of fiduciary duty suit settlements, carriers continue to embrace the Side A portion of D&O insurance programs. No doubt the support is easier to provide given the recent spikes in the cost of D&O insurance.

Q8: Is the governmental regulatory environment getting more or less difficult for public companies and their Ds and Os?

2021 Survey Results:

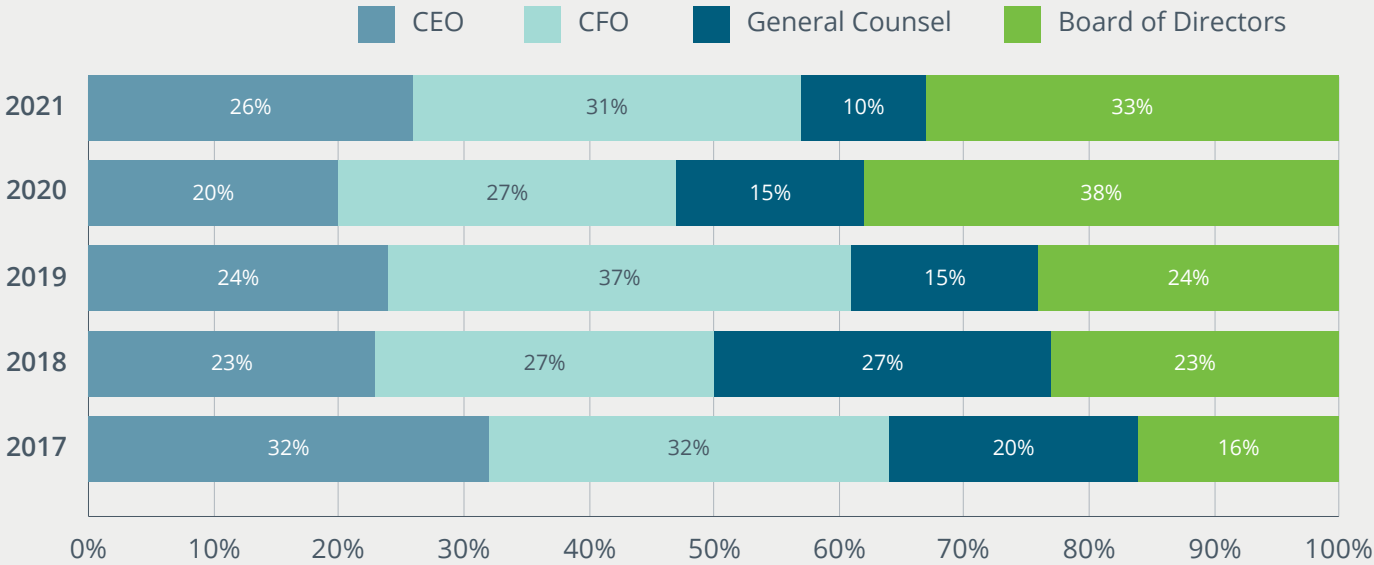
82% of underwriters say the environment is becoming more difficult.



Trends We're Seeing

Red alert! This is a major change in insurance carrier sentiment compared to previous years.

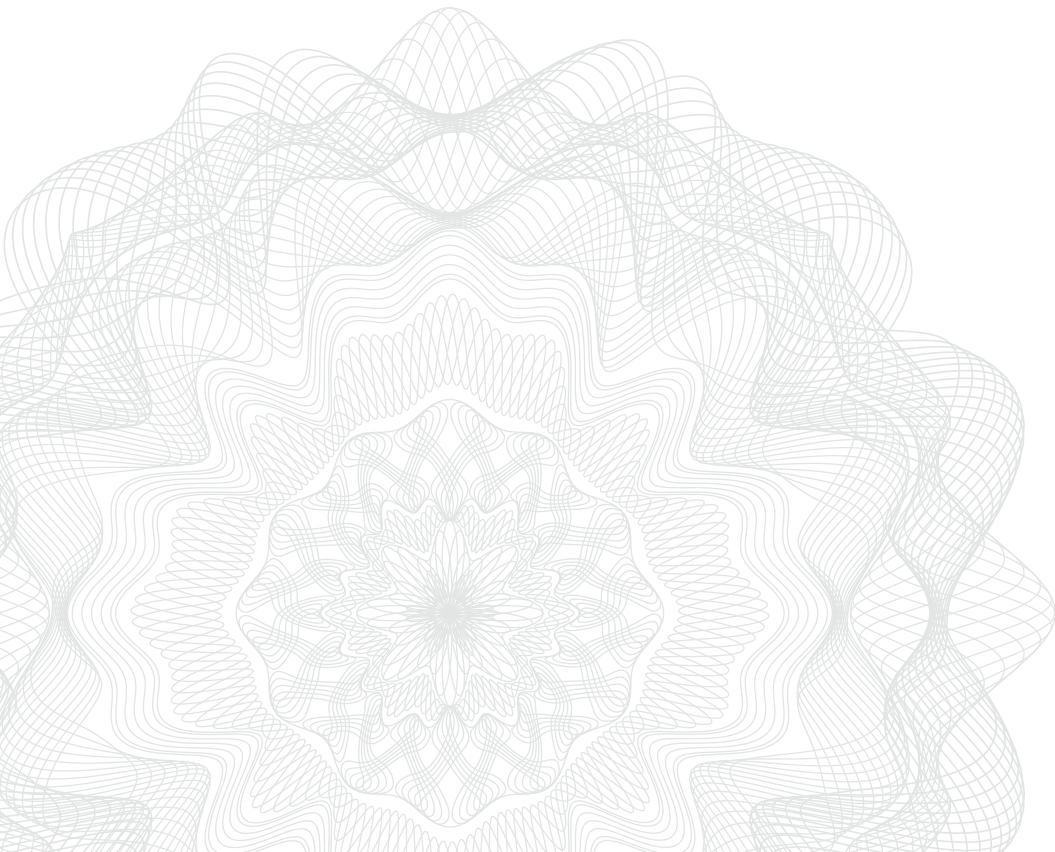
Q9: Who is the most critical person at a company when you think about mitigating D&O risk?



Trends We're Seeing

Insurance carriers continue to focus on the Board of Directors when it comes to managing D&O risk, with the CFO as the next most-important manager of risk. The unstated subtext here is the importance of credible public company executives who understand and can execute on implementing strong internal controls.

4.0 EXPERT INSIGHTS



[Return to Table of Contents >>](#)



Sean Coady

Senior Vice President,
New England Practice Leader

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4.1 Public Company D&O Renewals

Q. How can public companies maximize outcomes on D&O renewals in this challenging market?

A. You have likely heard the expression in real estate: Location, location, and location. The corollary in the public D&O market is preparation, preparation, and preparation. With the public D&O markets still facing significant headwinds, it is more important than ever to get an early start on your renewal process.

We recommend taking an early, deliberate, and thoughtful approach to the renewal process. This includes using a data-driven approach to reviewing risk exposure, and deciding early in the process if there is an openness to alternative program designs. Engaging stakeholders early in the process to ensure alignment before beginning in-depth negotiations with the markets is another critical step. Also, you should prepare with your broker in advance of the presentation to insurance underwriters so that your content is laser-focused on addressing underwriter concerns.



Michael Ferraro

Senior Vice President

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*Guide to D&O Insurance
for De-SPAC Transactions*

4.2 De-SPAC Transactions

Q. How is obtaining D&O insurance for a company going public through a de-SPAC transaction different than for a company going public through a traditional IPO or direct listing?

A. The main differences are two-fold: the treatment of prior acts and pricing. For a traditional IPO, there is typically no need to purchase a [tail policy](#) for your private company D&O insurance. By contrast, you may need to do this if you are going public through a de-SPAC transaction due to carrier concerns about avoiding litigation related to your pre-public company activities. There are nuances here that require the advice of a D&O broker with expertise in de-SPAC transactions.

Pricing is also different for companies going public through a regular IPO versus a de-SPAC transaction, with carriers typically imposing a higher self-insured retention (like a deductible) and charging 10% to 30% higher premiums for de-SPACing companies.



Dan Berry

Senior Vice President, National
SPAC/PE/VC Practice Leader

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*Guide to D&O Insurance
for SPAC IPOs*

4.3 SPAC IPOs

Q. What is going on with D&O insurance for SPAC IPOs?

A. The jump in pricing for D&O insurance for SPAC IPOs since 2020 has been almost startling, and that is not even considering how many carriers have simultaneously narrowed the scope of coverage they are willing to offer. Self-insured retentions have gone up five times from \$1 million to an average of \$5 million. Good process, however, will make a difference when it comes to optimizing pricing for your SPAC IPO. Starting early, being represented by credible outside counsel, clarity about the SPAC's investment thesis, and alignment between the SPAC management team, board, and the investment thesis are all examples of factors that a savvy broker will emphasize during a deliberate and comprehensive insurance marking process.

Also, remember that corporate governance matters for SPACs, even though they are not operating companies. If the SPAC is sued, having things like [federal forum provisions](#) and [state forum provisions](#) in the SPAC's charter document will help dispel frivolous litigation faster and for less money.



Susan Miner

Senior Vice President

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4.4 D&O Insurance for Ultra Large Market Cap Companies

Q. Given the cost of D&O coverage, when does it make sense to self-insure?

A. Larger companies, particularly those with strong balance sheets and consistent cash generation, can be good candidates for an “A-only” D&O insurance program. This approach involves self-insuring the balance sheet exposure for the majority of D&O claims that can be indemnified by the corporation. As a result, companies with deep pockets can enjoy notably lower D&O premiums.

Remember that directors and officers of issuers incorporated in most states (including CA and DE) can potentially face non-indemnifiable settlements in [derivative lawsuits](#). This makes it essential to have an appropriate amount of Side A insurance to protect individual D&O assets, and takes total self-insurance off the table.



Jane Njavro

Senior Vice President

[READ JANE'S BIO >](#)

4.5 D&O Insurance Market for Foreign Filers

Q. As a non-US company listed on a US exchange, am I still at risk for a derivative suit (and shouldn't my Side A insurance cost less)?

A. D&O carriers writing insurance for non-US companies have raised prices for [Side A insurance](#), the insurance that responds when indemnification is not available for individual directors and officers. There is a clear need for Side A insurance for US companies because of the prevalence of [derivative breach of fiduciary duty suits](#) since these settlements cannot be paid by the corporation.

In some jurisdictions, a derivative suit is technically possible; in some cases, there may be extra steps that make it harder for shareholders to sue on behalf of the company. For example, we are watching a [recent suit](#) for a Cayman Islands company where the Supreme Court of New York allowed a derivative action to proceed. Based on pricing for Side A insurance for non-US companies listed on US exchanges, insurance underwriters are certainly concerned that non-US issuers will be hit with derivative suit settlements that would trigger a Side A policy.

I recommend coordinating your company's posture on this point with outside counsel. Undertaking this exercise will also help you calibrate your risk as to what is an appropriate level of Side A insurance coverage for your directors and officers.



Dan Burke

National Cyber Practice Leader

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Cyber Insurance Buying Guide

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

4.6 Ransomware as a Board Issue

Q. How can a Board of Directors best prepare their management team for a ransomware event?

A. The recent increase in ransomware attacks continues to emphasize the extent to which cyber risk has to be a top [priority for board directors in 2022](#). Effective boards take steps to develop common language with management to facilitate the discussion of cyber risk [using a cybersecurity framework](#). Effective boards also establish a regular cadence for management to provide the board with updates on cyber risk.

The best-run boards have also insisted that their management teams prepare for a ransomware event by participating in a [tabletop exercise of the company incident response plan](#). These exercises create a stressful environment that tests a company management team's understanding of who is involved in which decisions, when to engage the board of directors, and where responsibility for various aspects of responding to a ransomware event falls.

It has proven difficult for many companies to prevent a ransomware event from occurring, but preparing for an efficient and effective response will limit the impact of this costly cyber event.



Emily Maier

Senior Vice President,
National Group Leader M&A

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Representations and Warranties Insurance Buying Guide

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

M&A Tax Liability Basics

Learn what's covered by tax liability insurance in M&A deals, and the process for getting coverage.

4.7 Reps & Warranties

Q. Basic tax representations and the pre-closing tax indemnity are covered under representations and warranties insurance, but what about more unusual tax situations?

A. Ordinary course representations and warranties are well-addressed by representations and warranties insurance, including ordinary tax representations. Tax opinion liability insurance, however, is best suited to address situations that fall outside of the standard representations and warranties given in the ordinary course of a merger or sale of a company.

As the name suggests, tax opinion liability insurance is designed to be triggered in the event the relevant tax authority disagrees with the historical tax position taken by either the seller or inherited by the buyer after the close of a transaction. In the right circumstance, tax liability insurance is critical to ensure that a buyer indeed receives the full benefit of the bargain struck.



Priya Cherian
Huskins, Esq.

Senior Vice President

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*D&O Insurance 101:
Policy Terms*

To protect board members from personal liability, learn the important policy terms and the structure of a D&O policy.

4.8 DataBox™ and Choosing Limits

Q. How much D&O insurance is enough?

A. Consider taking a data-driven approach to this question. Woodruff Sawyer clients have access to DataBox, our proprietary set of data analytics that helps clients calibrate their severity risk when it comes to large claim events such as securities class action lawsuits. The model uses settlement data informed by a number of data sources and curated by our D&O litigation experts. Clean data enhances modeling accuracy. Further, our D&O insurance expertise and experience allows us to help our clients take into account additional vectors such as breach of fiduciary duty suits and regulatory investigations that can lead to enforcement actions. This process allows our clients to consider real settlement scenarios and make informed D&O policy limit decisions.

In the current high-cost environment, one of the best ways to control the cost of your D&O insurance is by not over-buying D&O insurance. Emotion can drive the desire for higher insurance limits; data can be a welcome moderating influence that also drives a higher level of confidence in your D&O insurance program.

5.0 CONCLUDING PERSPECTIVE



[Return to Table of Contents >>](#)

A MESSAGE FROM

Carolyn Polikoff

National Commercial Lines Practice Leader

As we have discussed in this *Guide*, the volatile D&O litigation environment persists, leaving directors and officers with more challenges than ever. Having a knowledgeable, trusted D&O insurance broker in your corner is key to navigating the current complex market.

Risk in the D&O market remains elevated with regulatory scrutiny on the rise and carriers continuing to seek increases on rates and retentions, although the increases are decelerating and we are starting to see a shift away from the hard market. Given all that is going on, there is more pressure than ever to determine what is the *right* amount of D&O insurance to purchase. Woodruff Sawyer takes a data-driven approach to this question with resources such as DataBox, our proprietary historic settlement database of all securities class action litigation since 1988. Our DataBox 2.0 model is an analytic tool that accesses the database and allows client-customized, variable settlement scenario modeling. We then leverage our vast claims experience and expertise in the D&O marketplace to help our clients determine the right management liability insurance program for their size, industry, and level of risk tolerance.

This edition of the *D&O Looking Ahead Guide* is particularly special because it is the fifth anniversary of our Underwriters Weigh In™ survey, Woodruff Sawyer's annual D&O market survey. Our decision to create this survey five years ago was driven by our continued focus on being champions for our clients, which includes helping our clients better understand the macro D&O insurance environment. This five-year survey is an ongoing effort to draw our clients closer to the decision makers when it comes to D&O insurance. In a volatile environment, we think there is great value in being able to provide our clients with a peek around the corner into what the carriers themselves think about the future.

As we look ahead to 2022, we anticipate that securities class action suit frequency and severity will continue to retreat from historically high levels within a backdrop of economic restabilization. If this happens, it will indeed be welcome news. Whatever the future brings, Woodruff Sawyer will continue to help our clients navigate all types of D&O markets, whether they are calm or tumultuous.

Additional Resources

[D&O Notebook >](#)

[Cyber Insights >](#)

[M&A Insights >](#)

[P&C Insights >](#)

[SPACs >](#)

[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 >](#)

[Return to Table of Contents >>](#)



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.

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