

Directors and officers (D&O) insurance insights 2022

Boards of management are vulnerable to a litany of business exposures, any of which could potentially derail the financial health, continued service and reputation of any company. Following are five D&O mega trends companies should watch for and guard against in 2022, according to Allianz Global Corporate & Specialty (AGCS) financial lines and D&O experts.

About AGCS

Allianz Global Corporate & Specialty (AGCS) is a leading global corporate insurance carrier and a key business unit of Allianz Group. We provide risk consultancy, Property-Casualty insurance solutions and alternative risk transfer for a wide spectrum of commercial, corporate and specialty risks across 10 dedicated lines of business.

Our customers are as diverse as business can be, ranging from Fortune Global 500 companies to small businesses, and private individuals. Among them are not only the world's largest consumer brands, tech companies and the global aviation and shipping industry, but also satellite operators or Hollywood film productions. They all look to AGCS for smart answers to their largest and most complex risks in a dynamic, multinational business environment and trust us to deliver an outstanding claims experience.

Worldwide, AGCS operates with its own teams in more than 30 countries and through the Allianz Group network and partners in over 200 countries and territories, employing around 4,400 people. As one of the largest Property- Casualty units of Allianz Group, we are backed by strong and stable financial ratings. In 2020, AGCS generated a total of €9.3bn gross premium globally.

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1. Uncertain insolvency outlook continues to concern

Many different projections were made during 2020 about the impact Covid-19 would have on the global economy, particularly with regards to anticipating an increase in the number of insolvencies. Those predicting a decrease in the number of insolvencies by the end of 2020 were in the minority, but this is, in fact, what happened. The [Euler Hermes Global Insolvency Index](#)¹ ended 2020 with a -12% y/y drop, following a steady decline through the year.

At the end of 2021 the Euler Hermes index is expected to close at -6% y/y. From a US bankruptcy filing perspective, according to [Cornerstone Research](#)², in the first half of 2021 43 companies filed for bankruptcy, less than half of the number of bankruptcies filed in 1H 2020, but slightly above the 2005-2020 annual average of bankruptcy filings (based on Chapter 7 and Chapter 11 filings for private and public companies with over \$100mn in assets).

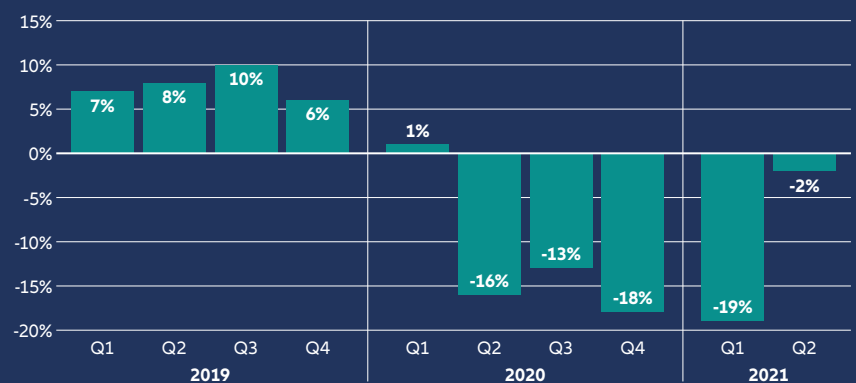
From a D&O underwriting standpoint, this recent trend on insolvencies could eventually lead underwriters or insurance buyers to expect a relaxing of terms and conditions next year compared with what the expectations were for 2022 a year ago. However, the reality is that large state interventions took place in many countries to support companies, preventing a liquidity crisis. Therefore the impact of the phasing out of these measures still remains a concern for D&O underwriters.

¹ Allianz Research, Euler Hermes, "Insolvencies: We'll be back", October 6, 2021

² Cornerstone Research "Trends in Large Corporate Bankruptcy and Financial Distress: Midyear 2021 Update"



Global insolvency index – quarterly changes y/y in %



Source: Euler Hermes, Allianz Research

While the first signs of this relaxation in governmental supporting measures are already underway around the world, significant uncertainty remains around potential new future virus dynamics, vaccination rates, the general macroeconomic environment and the response of central banks, and, equally, what the impact of these factors will be on capital markets.

The recent [Allianz Research/Euler Hermes](#) published report states that “Our Global Insolvency Index would post a +15% y/y rebound in 2022, after two consecutive years of decline (- 6% in 2021 and -12% in 2020), but business insolvencies would still remain below pre-Covid-19 levels in a majority of countries (by -4% in average).”

Mixed trends are expected across the world. In less developed markets, such as Africa or Latin America, the number of insolvencies is expected to increase quicker compared to more developed economies, such as France, Germany and the US, where the impact of the governmental support is expected to last for longer.

Historically, insolvency is a major cause of D&O claims as insolvency practitioners look to recoup losses from directors. There are many ways that stakeholders could go after directors following insolvency, such as alleging that boards failed to prepare adequately for a pandemic or for prolonged periods of reduced income.

At the same time recent bankruptcy cases can remain in D&O underwriters’ memories for a long time. Prominent examples in 2021 are US bankruptcy filings, such as drillship owner Seadrill Limited and retail property owner Washington Prime Group, Inc. Meanwhile, the near-collapse of Chinese property giant Evergrande generated headlines.

“Insolvency exposures remain a key topic in the D&O space and underwriters are increasingly looking into forward-looking key performance indicators and predictive modeling tools,” says **Shanil Williams, Global Head of Financial Lines at AGCS**. As part of a broader Allianz data and expertise sharing collaboration, D&O underwriters at AGCS are actively using the Euler Hermes Insolvency Grade. “This provides a one-year probability of bankruptcy and is an integral part of the D&O risk assessment at AGCS,” adds Williams.



2. SPACs exposure grows for D&Os

Although Special Purpose Acquisition Companies (SPACs) have been around for decades, 2020 was a breakout year. This surge grew into a high-octane investment in early 2021, accounting for more than 50% of newly publicly-listed US companies. During the first half of 2021, the number of SPAC mergers, both announced and completed, more than doubled the full year total of 2020 with 359 SPAC filings, garnering a combined US\$95bn [raised](#)¹. In Q1 2021 alone, there were 298 SPAC filings raising up to \$82.8bn. However, in Q2 2021, the number plummeted to 61 filings in the US with only \$11.9bn raised. The slowdown is considered mainly a result of pronouncements by the Securities Exchange Commission (SEC) to increase scrutiny on SPACs, for example, by issuing new accounting rules now classifying SPAC warrants as liabilities instead of equities.

It is a different story across the rest of the world. The growth of SPACs in Europe may not match the scale of the US boom, but there is still a growing expectation that it will increase. There are only limited obstacles presented by EU capital market laws, even though SPACs in the EU face some challenges because of strict company law requirements. In the Asian financial hub, the market is slowly gaining momentum with a significant uptick in companies in China, Hong Kong and Singapore as a new route to accessing capital markets.

SPACs, also known as 'blank check companies', represent a faster track to public markets with a less arduous path for companies looking to go public. Advantages and conditions fueling the growth of SPACs over traditional Initial Public Offerings (IPOs) include smoother procedures, less regulatory and process burdens, shorter timelines to complete a merger with target companies (60 to 90 days versus six to 12 months between the initial filings and the public offering for traditional IPOs), low interest rates and an increased availability of capital sources.

So far the SPAC boom has been largely concentrated in high-growth industries such as technology, financial services and healthcare. Since 2019, in the US, 82 SPACs have formed into target companies in [technology](#)² – far more than in any other sector.

As the playing field is still flooded with pursuant SPACs and the demand for targets remains strong, the increased momentum of SPAC activity is expected to remain the same through 2022 outside of the US. It is also key to watch the sustainability and longevity of merger activities over the medium- to long-term horizon.



Offering a new, more efficient route to public markets, SPACs also carry a set of specific 'insurance-relevant' risks

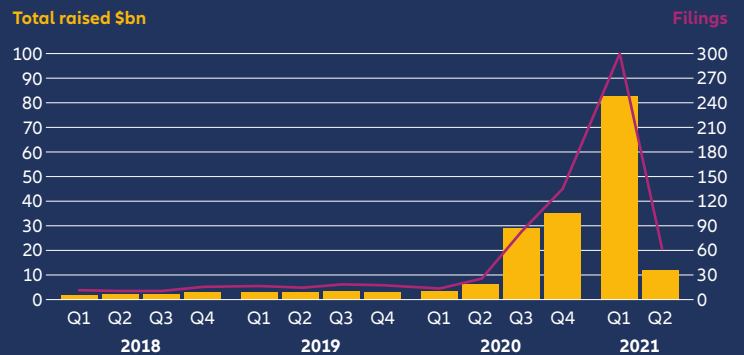
As the SPAC market develops, the insurance market also changes and adapts coverage solutions to provide adequate protection for the key participants (sponsors, directors and shareholders) in a SPAC deal.

While being able to use a new more efficient route to public markets, SPACs carry a set of specific 'insurance-relevant' risks, and losses are already reported to be flowing through to the D&O market. "Depending on the type of insurance for each stage of their lifecycle, inherent exposures could potentially stem from mismanagement, fraud or intentional and material misrepresentation, inaccurate or inadequate financial information or violations of SEC rules or disclosure duties," explains **Lydia Miller, Global Underwriting and Product Analyst at AGCS.** "In addition, a failure to finalize the transaction within the two-year period, insider trading during the time a SPAC goes public, a wrong selection of a target to acquire or the lack of adequate due diligence in the target company could also come into play."

Post-merger the risk of the go-forward company to perform as expected or failure to comply with the new duties of being a publicly-listed company are among the other emerging risks on the SPACs radar that need to be considered.



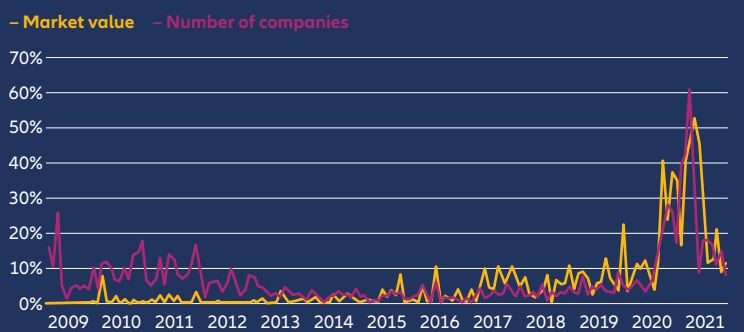
SPAC filings and total raised Q1 2018 to Q2 2021



Source: CB Insights



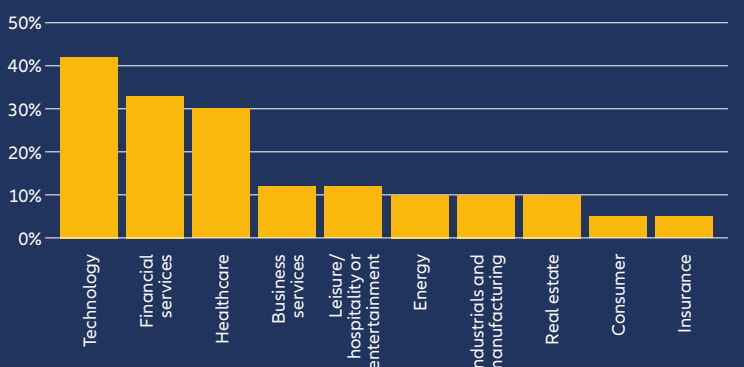
US SPACs as % of IPOs by market value and number of companies



Source: Bloomberg



Industries to experience uptick in SPAC activity



Source: Katten 2021 SPAC survey report

3. Market, **climate change** and digital issues for financial services companies



More and more banks and insurers are expected to assign individual responsibility for overseeing financial risks arising from climate change

The financial services industry continues to face multiple challenges in terms of risk management. On the financial side, markets are likely to become more volatile with the increased risk of asset bubbles and inflation rising in different parts of the world.

The general assumption is that monetary policies will harden, while there remains uncertainty regarding economic recovery levels in view of rising energy prices and supply chain disruptions. The impact of China, with its struggling real estate market and its regulatory interventions in sectors such as technology, should not be underestimated.

At the same time, important international initiatives are underway to develop more sustainable, resilient and circular economies in response to the challenges posed by climate change and global warming.

The financial services sector has a critical role to play in achieving this aim by helping to ensure that capital flows toward sustainable projects and assets with consideration of environmental, social and governance (ESG) factors, according to **David Van den Berghe, Global Head of Financial Institutions at AGCS.**

As such, an increasing number of financial institutions have already committed to aligning their lending and investing portfolios to this goal, while management tools that allow for active measurement of the exposure are being developed.

Recent natural catastrophe events such as wildfires in Southern Europe and California and floods in Germany, the US and China have emphasized the importance for regulators to focus on climate change and the impact on credit risk (including stress tests).

More and more banks and insurers are expected to assign individual responsibility for overseeing financial risks arising from climate change, while investors are paying closer attention to the proper disclosure of the risk that it poses for the company or financial instrument they invest in, as demonstrated by a number of recent actions (*see column, page 7*).

Regulatory change to suitability rules are on their way to ensure that investors' ESG preferences are taken into consideration during the investment advice process.



“Therefore firms will face a number of challenges, from obtaining clients’ ESG preferences to reducing regulatory risk including the risk of ‘greenwashing’, where companies make false or misleading ESG claims, all of which could impact D&Os,” says Van den Berghe. “Businesses should ensure they have clear processes in place for managing and disclosing the impact to their business of ESG risks such as climate change.”

Meanwhile, following the Covid-19 pandemic, digitalization has further accelerated – by as much as seven years according to a McKinsey [survey](#)¹ – and information and communications technology (ICT) plays an indispensable role in the operation of the daily functions of financial institutions. Digitalization covers not only payments, but also lending, securities clearing and settlement, trading, insurance underwriting, claims management and back office operations.

Finance has not only become largely digital, but digitalization has also deepened interconnections and dependencies within the sector and with third-party infrastructure and service providers.

For firms’ senior management this requires them to maintain an active role in steering the ICT risk management framework. This encompasses the assignment of clear roles and responsibilities for all ICT-related functions, a continuous engagement in the control of the monitoring of the ICT risk management, as well as an appropriate allocating of ICT investments and trainings.

All these aforementioned developments create additional challenges for the risk professional. If ICT risks are not properly managed the company may experience service disruptions which could result in increased operating expenses resulting from a variety of causes including customer redress, additional consultancy costs, loss of income and regulatory fines.

Brand reputation would also likely be affected as well, particularly if the company has been targeted by cyber criminals as a result, which could ultimately impact on the company’s stock price.

“AGCS regularly engages in open dialogues with the banking, insurance and asset management segments to discuss risk trends and challenges,” says Van den Berghe. “We are investing heavily in our network and expertise, both on the underwriting, claims and operations side, so we can best respond to customers’ needs and contribute to a better management of risks in a complex environment that constantly evolves.”

Pressure increasing to disclose climate risk

Climate change litigation is beginning to target financial institutions. Cases have tended to focus on the nature of investments, although there is a growing use of litigation seeking to drive behavioral shifts and force disclosure debate. In November 2020, a case was settled involving a \$57bn superannuation fund in Australia, [Rest](#)². The claimant alleged Rest’s failure to disclose and address climate risk breached legislation. The fund committed to a raft of new disclosure and climate change-related initiatives in response. In July 2020, a [claim](#)³ lodged in the Federal Court of Australia alleged Australian investors trading in Government bonds would face “material risks” because of the Australian Government’s response to climate change and this was not disclosed to investors. This case is ongoing.

¹ McKinsey & Company, *How Covid-19 has pushed companies over the technology tipping point – and transformed business forever*, October 2020

² Clifford Chance, *Climate Change test case settles: \$57bn Australian super fund responds to pressure on climate change policy*

³ MinterEllisonRuddWatts, *2021 Litigation Forecast – Climate change litigation: New risks for companies and directors*

4. Heightened US litigation risk for non-US domiciled companies



A surge of new lawsuit filings, the recent openness of certain courts to extending long-arm jurisdiction, and a possibly record-breaking settlement announced in October 2021, point to heightened US litigation risk for directors and officers of non-US domiciled companies.

In recent years shareholders increasingly have sought to avail themselves of US courts to bring derivative actions on behalf of non-US domiciled corporations. In particular, since early 2020, a group of plaintiffs' firms has brought around a dozen derivative lawsuits in New York State courts on behalf of shareholders of non-US companies seeking to hold directors and officers legally and financially accountable for various breaches of duty to the corporations they have been engaged to serve.

While not without precedent, such suits were uncommon previously. Even when filed, derivative suits brought on behalf of non-US companies generally met resistance from US courts and were dismissed on jurisdictional and other grounds. However, certain recent court decisions make clear that under the right circumstances, US courts are willing to entertain such lawsuits.

Among the reasons given in the past by US courts to dismiss a derivative suit against a non-US company was the failure of plaintiffs to comply with a requirement in the subject company's home jurisdiction – that the plaintiffs first apply for, and be granted, leave from a local court before pursuing a derivative claim. Such requirements typically don't exist in the US. However, in a series of decisions over the past four years, courts in New York have ruled that such requirements are procedural rather than substantive.

While courts may be required to apply the substantive law of the place where a company is incorporated when adjudicating the duties and liabilities of directors and officers, New York courts have ruled that their ability to hear a dispute should not be constrained by procedural rules inconsistent with New York law and practice. See, for example, [Davis v. Scottish Re Grp. Ltd., \(2017\)](#)¹; [Mason-Mahon v. Flint \(2018\)](#)².



Litigating in the US, derivative plaintiffs may obtain advantages not available should they attempt to bring suit in the company's home country, not the least of which is possibly being the right to bring suit at all. The US permits contingency fee arrangements for legal expense but, with limited exception, does not permit the winning party to recover its litigation expense from the losing party. As a result, the financial hurdles to bring suit in the US are significantly lower than in many other countries. In addition, US courts (and juries) are considered more plaintiff-friendly than courts in many other jurisdictions around the world.

"The consequences to directors and officers forced to defend themselves in derivative litigation before US courts can be severe," says **David Ackerman, Global Claims Key Case Management at AGCS**. In what may turn out to be a record-setting settlement for a US derivative lawsuit, in October of this year defendants agreed to pay a minimum of **US\$300mn³** to settle litigation brought in New York State court by shareholders of Renren, a social media corporation based in China, and incorporated in the Cayman Islands, after allegations of corporate misconduct.



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This settlement followed the decision of a New York intermediate court of appeals affirming the rejection by the trial court of jurisdictional challenges to bringing the suit in New York. Of note, the court found that it had personal jurisdiction over the defendants due to their significant activities in New York, including conduct of an IPO of Renren shares on the New York Stock Exchange and the engagement of New York legal and banking advisors for this purpose, as well as the repeated consent of Renren to be governed by New York law in regard to contractual matters. See [In re Renren, Inc. \(2021\)⁴](#).

³ Financial Times, US-listed Chinese group Renren settles investor complaint for \$300mn, October 10, 2021

⁴ Reid Collins, In re Renren Inc. Derivative Litigation, Index No. 653594/2018

5. Increased risk of shareholder derivative suits under Caremark

In 1996, in *In re Caremark Int'l*¹, the Delaware Chancery Court in the US set the standards for claims against corporate directors for lack of board oversight.

In a derivative action, shareholders of health services company Caremark International Inc., alleged that the company's directors, in neglecting to effect sufficient internal control systems, had breached their duty of care.

It was because of this, the civil action alleged, that Caremark employees were able to commit criminal offenses that resulted in the company having to make reimbursements to various private and public parties of more than \$250mn².

The court determined that boards of directors have a duty to ensure that the corporation's reporting system is adequate to assure that appropriate information comes to the board in a timely manner. Failure to do so can mean that individual directors have liability for corporate failures.

Until recently there was a very high standard for shareholders to prove that a board had breached this duty. They had to either show that:

1. the directors utterly failed to implement any reporting or information systems or controls or:
2. having implemented such a system or controls, they consciously failed to monitor or oversee its operations.

Either of these theories required a "showing that the directors knew they were not discharging their fiduciary obligations.", as in *Stone v Ritter*, 2006.³, which saw a group of shareholders bring a derivative suit against AmSouth bank's directors for failure to engage in proper oversight of its Bank Secrecy Act and anti-money laundering policies and procedures, after it had been fined \$50mn for failing to report suspicious financial activity. Applying the *Caremark* standard, the Delaware Chancery Court dismissed the shareholders' complaint.

Very few cases have survived Motions to Dismiss *Caremark* claims; therefore, they have had a low settlement value. Those that have survived have settled for increasingly higher amounts however. For example, the *Wells Fargo shareholder derivative suit*⁴, filed in response to bank employees creating millions of unauthorized customer accounts, settled for \$240mn after denial of the Motion to Dismiss (based on \$2.5bn in alleged loss); the *McKesson derivative litigation*⁵, which alleged the board had breached its fiduciary duties with respect to oversight of its opioid drug operations, settled for \$175mn after denial of the Motion to Dismiss (based on \$3.95bn in alleged loss).

¹ Case Briefs, *In re Caremark International Inc. Derivative Litigation*

² Justia US Law, *In Re Caremark Intern. Inc. Deriv. Lit.*

³ Quimbee, *Stone v. Ritter Delaware Supreme Court*, 2006 WL 302558 , 911 A.2d 362 (Del. 2006)

⁴ The D&O Diary, *Massive settlement in Wells Fargo bogus account scandal derivative suit*, March 3, 2019

⁵ The D&O Diary, *McKesson opioid-related derivative suit settles for \$175mn*, February 6, 2020

⁶ Lexis Nexis, *Marchand v. Barnhill* - 212 A.3d 805 (Del. 2019)

The very high standard for *Caremark* claims was apparently lowered in 2019 when the Delaware Supreme Court decided [*Marchand v. Barnhill*](#)⁶. In this case, shareholders of food company Blue Bell brought a derivative claim under *Caremark* after a listeria outbreak resulted in the death of three customers, a nationwide recall, a liquidity crisis and emergency credit facility that diluted shareholders' control of the company.

The *Marchand* court focused on the fact that Blue Bell manufactured only one product, ice cream, and therefore food safety was mission critical to the corporation. Despite this, Blue Bell had no board committee to address food safety, had no regular discussion of safety issues, and apparently did not receive certain negative reports about food safety.

Following the denial of the Motion to Dismiss, the Bluebell shareholder derivative suit settled for \$60mn (based on \$453mn in alleged loss). This settlement was 13% of the alleged loss as opposed to 4.4% for McKesson and 6.9% for Wells Fargo.

"Since the *Marchand* decision, an increasing number of *Caremark* claims are surviving Motions to Dismiss, potentially leading to greater exposure for individual corporate directors," says **Angela Sivilli, Global Practice Group Leader, Commercial Management Liability and Financial Institutions, Chief Claims Office at AGCS.**

"Board members must accordingly re-examine whether there is sufficient Side A cover (which covers liabilities incurred by an individual in their capacity as a director or officer) in their D&O insurance program."



Market dynamics the state of the D&O insurance sector



Find out more about the virtual captive market www.agcs.allianz.com/news-and-insights/expert-risk-articles/virtual-captives.html

Billions of dollars of premiums are collected annually for D&O insurance but the profitability of the sector has suffered in previous years because of increasing competition, the growing number of lawsuits and rising claims frequency and severity. Underwriting results have been negative in many markets around the world, as event-driven litigation, collective redress developments, regulatory investigations and higher defense costs have taken their toll.

Therefore, the overall market hardening trend has continued through past quarters, with generally higher premiums, tighter terms and selective deployment of capacity for both primary and excess layers.

Global insurance pricing for D&O has previously showed double-digits increase in all key markets in 2021, according to third party data. However, as the year has progressed it has been reported that there was some deceleration in the premium increases compared to the “Covid” year 2020.

¹ Marsh Global Insurance Markets: Pricing increases moderate in second quarter, July 2021



D&O Insurance Structure

The structure of a D&O insurance policy depends on which of three insuring agreements are purchased (**ABC** policies are generally chosen, as these are standard form policies for publicly listed companies; for private or non-profit companies, only **AB** policies would be useful).

| Cover | Description | Who is the insured? | What is at risk? |
|--------|--|---------------------|-------------------------|
| Side A | Protects assets of individual directors and officers for claims where the company is not legally or financially able to fund indemnification | Individual officer | His/her personal assets |
| Side B | Reimburses public or private company to the extent that it grants indemnification and advances legal fees on behalf of directors/officers | Company | Its corporate assets |
| Side C | Extends cover for public company (the entity, not individuals) for securities claims only | Company | Its corporate assets |

Regionally there are some important differences to observe. Financial and professional lines rates increased 25% in the US, driven by D&O liability and cyber pricing, according to Marsh¹, whereas financial and professional lines in the UK saw pricing up by 57%, largely due to D&O. Continental Europe, Latin America and Asia followed by respectively 20%, 22% and 24%.

US-listed companies (including Initial Public offerings), as well as pharma, tech, life science and retail organizations are still experiencing considerable rate pressure and retention levels for side B and C coverages.

From an insurance-purchasing perspective, capacity levels are still not at the soft market levels seen prior to 2018, despite the fact that a number of new insurers have entered the D&O market. This means there is still an imbalance between supply and demand and many companies would like to purchase more limits than the industry can currently offer.

The hard market conditions are prompting more discussion around alternative risk transfer and finance and companies are increasingly exploring solutions such as the utilization of (virtual) captives for the side C portion of the coverage.



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