

Seminar on Reinsurance

June 5–6, 2023

***Westin Philadelphia
Philadelphia, PA***

D&O Liability

What just happened / Where is it going

Concurrent Session, June 6

8:30 – 9:45 AM ET



Antitrust Notice

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Meet the Speakers

Marc Berner

SVP, FI, Allied World Ins Co

Marc Berner is SVP and Head of the U.S. Financial Institutions Division at Allied World where he has responsibility for all aspects of underwriting executive liability lines for financial services firms brokered in the U.S.

Marc has more than 24 years of insurance industry experience as an underwriter and broker. Prior to joining Allied World in 2016, he was Department Head for the Financial Institutions Practice at Hartford Financial Products.

Marc holds a BA in Political Science from Binghamton University and a JD from Albany Law School where he was Associate Editor of the Albany Law Review.

Rick Ramotar, FCAS

VP, QBE Re

Rick is a VP and Senior Actuary at QBE Re with expertise in Professional Lines insurance pricing.

Rick has more than 20 years of actuarial experience dealing with a variety of lines of businesses. Rick has held prior roles at Swiss Re, Hiscox, the PMI Group, Aon, Trans Re, and Farmers.

Rick holds a BS in Statistics from UC Santa Barbara.

Brian Sabia, ARe, ASLI, RPLU

EVP CUO, TOA Re

Brian is a EVP and Chief Underwriting Officer at Toa Reinsurance Company of America.

Brian has over 20 years of experience in Professional lines underwriting, from positions within PartnerRe, Berkshire Hathaway, and Executive Risk.

Brian holds a MBA in Finance from Sacred Heart University and a BA in Economics from the University of Connecticut

Lon Chang, FCAS

VP, Ascot Group

Lon is the head of US Pricing at Ascot Group. He has 13 years of actuarial experience and has been with Ascot since Dec 2018.

Lon holds a BS in Finance from New York University.

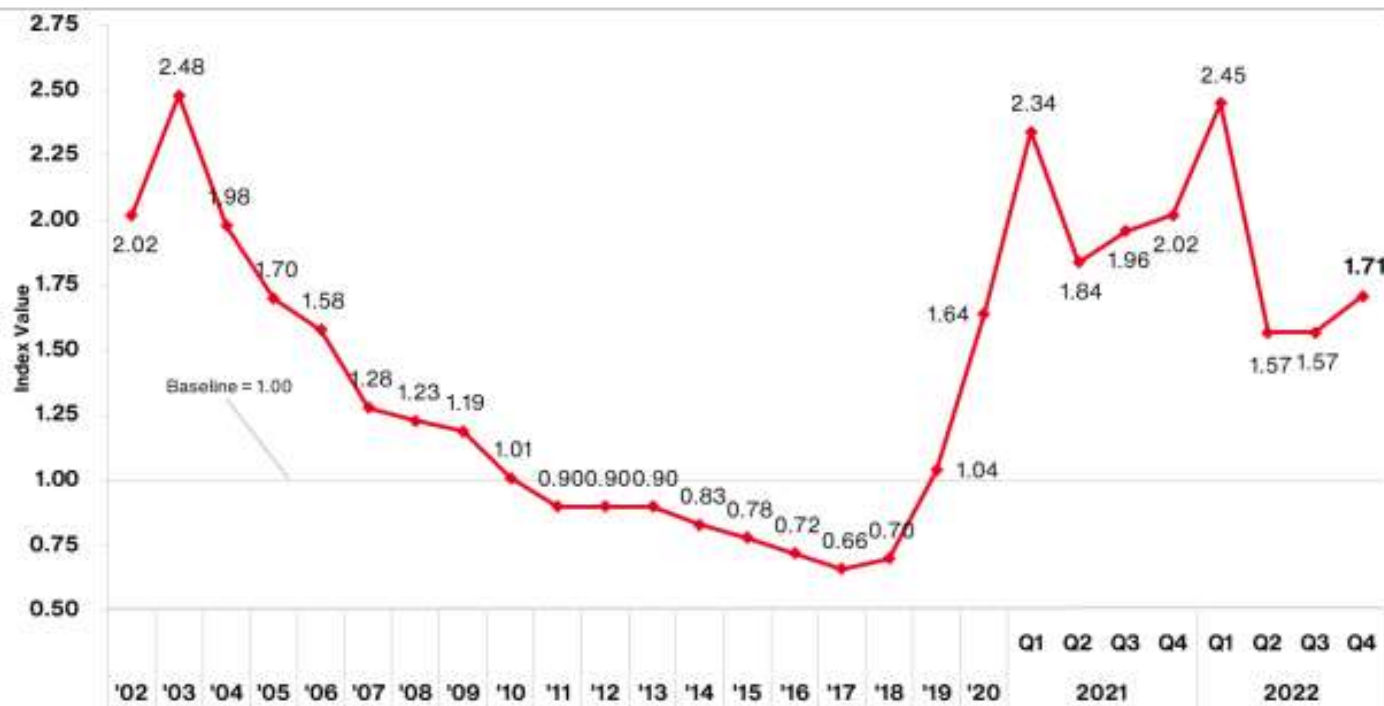
Lon will be your Moderator for this session.



D&O Rating Index from 2002

- Qtrly Index
- Last 2 Yrs are broken down by Qtr

- Mix of different types of D&O
 - Public
 - Primary
 - Excess
 - FI
 - Primary
 - Excess
 - Side A
 - Private
 - Not for Profit

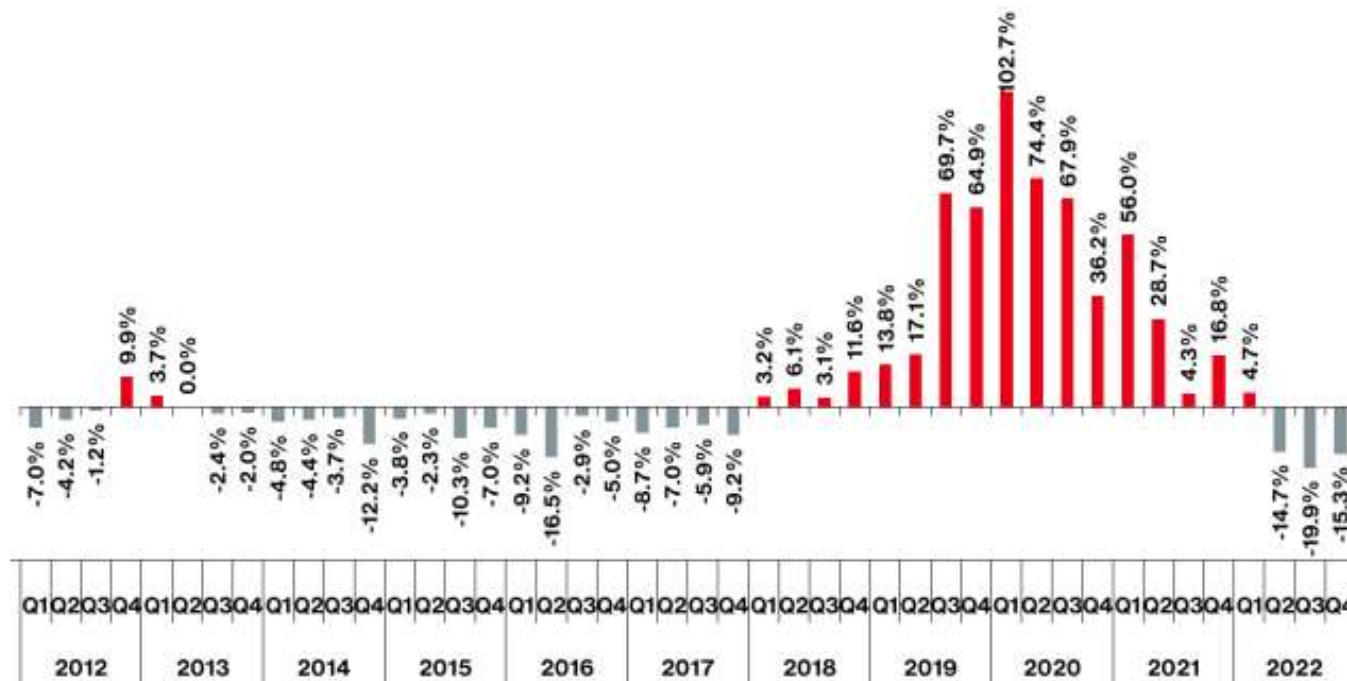


From AON Quarterly D&O Pricing Index Report, Fourth Quarter 2022



Quarterly Year-Over-Year Change

Q1-2012 Through Q4-2022



From AON Quarterly D&O Pricing Index Report, Fourth Quarter 2022



What Happened

- 2018 rates increased and kept going thru 2021
- Why?
 - Rates had been low for a long time
 - Concerns about profitability
 - Social Inflation
 - Increasing Security Class Action Claims
 - New Events i.e. Sexual Harassment
 - Outside of D&O, there were large casualty and property losses
- D&O had large exposures – limits up to \$50m



Fear is good for rates

- Exit market – didn't happen this time
- Reduce / Tighten capacity
 - Non-renew riskier business
 - Tighten terms and condition
 - Increase deductibles
 - Reduce Capacity deployment
 - Max limits: \$50m → \$15m → \$5m

Hard markets occur when capacity reduces, leading to increasing rate as insureds pay more to entice insurers to offer cover



2022... Rate reversal

- Higher rates attracted more capacity
 - Existing companies had increased budgets
 - New entrants – a lot of new start-up capacity came online
- Special Purpose Acquisition Corporations (SPACs)
 - High rate / low limit risks – disappeared from the market
- Companies had high budget targets
 - Existing were aggressive defending books to hit targets
- 2022 Delaware law passed to allow captives to cover D&O but impact so far unknown



Where are we now

- “Rates have fallen but are still above target rating levels”
- Rates are only half of the story
 - SCA claims – frequency & severity
 - Prior Year development including potential pipeline claims
 - Banking Crisis II
 - SPACs / deSPACs and runoff
 - Regulatory / Political Environment / Increasingly Aggressive SEC
 - ESG
 - Cryptocurrency / Opioids
 - Reinsurance



Recent Financials Make D&O Look Good....

Calendar year loss ratios for largest D&O writers

Directors and Officers Insurance				
Direct Loss and DCC Ratios				
Premium Rank	Loss Ratio Rank	Group	2022	Three-Year Average 2020–2022
6	1	Fairfax Financial Holdings Limited	54	52
7	2	W. R. Berkley Corp.	54	71
1	3	AXA XL	62	62
2	4	Chubb Limited	63	64
3	5	Berkshire Hathaway	63	66
10	6	Sompo Group	65	67
8	7	CNA Financial Corp.	67	63
9	8	Zurich North America	68	64
5	9	Tokio Marine U.S.	70	67
4	10	American International Group, Inc.	116	83
Source: Fitch Ratings Mar 23, 2023 Special Report, "U.S. Directors and Officers Liability Market Update"				
Fitch analysis uses data from S&P Global Market Intelligence				



....But Industry Forecasts are Bearish

“My gut tells me that the new competitors jumping into public D&O and excess liability are going to get burned, a lot of them are going to get burned, and this is more of a short-term phenomenon on rate being below prospective loss ratio trend.”

-Carl Lindner, co-CEO American Financial Group

“We are one of the very few lead markets in large account public D&O where primary rates have remained relatively flat year over year. In contrast, high excess public company D&O saw rate declines greater than 20 percent.”

-Peter Zaffino, CEO AIG

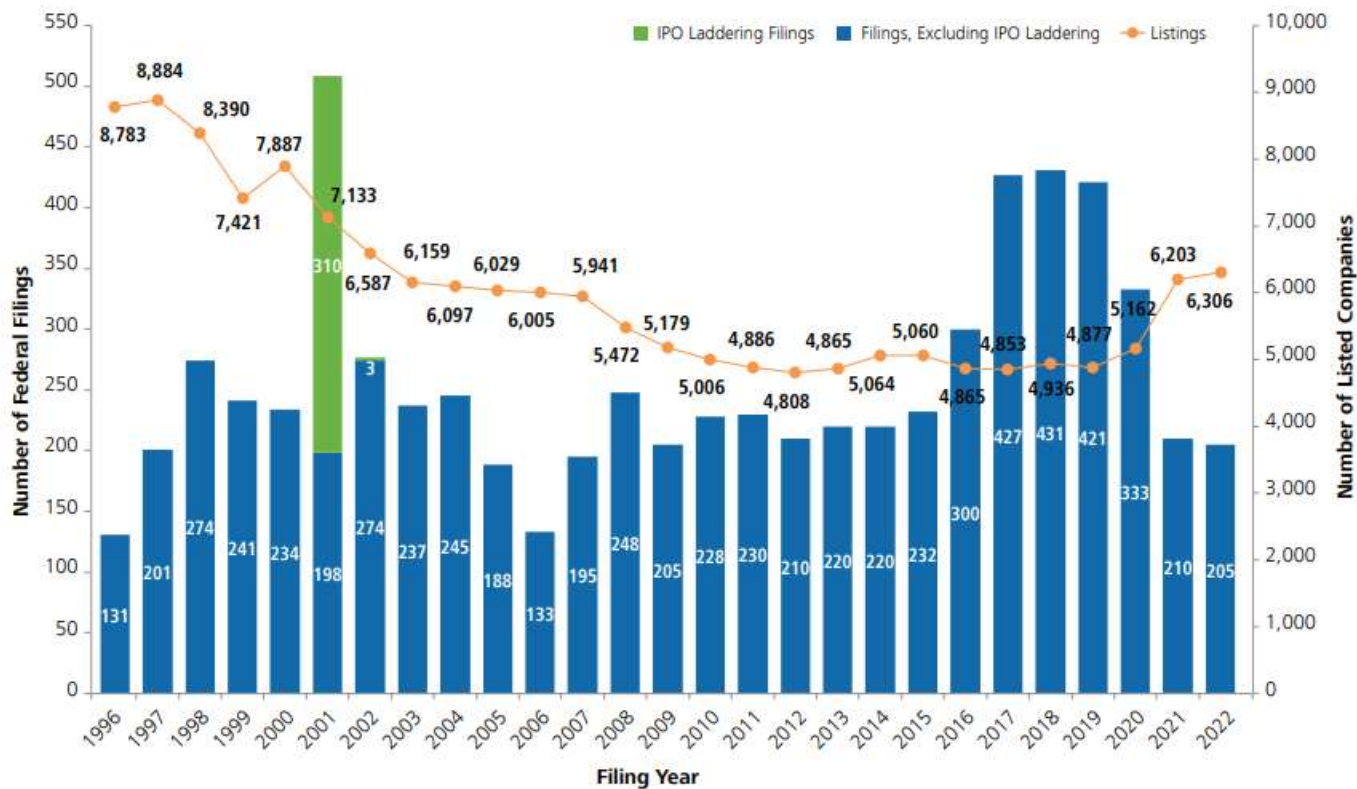
“One example [of our risk discipline] is the reduction of our public commercial D&O business where we found pricing insufficient for the risks we see in this line.”

-Vince Tizzio, CEO Axis



Security Class Action Claims

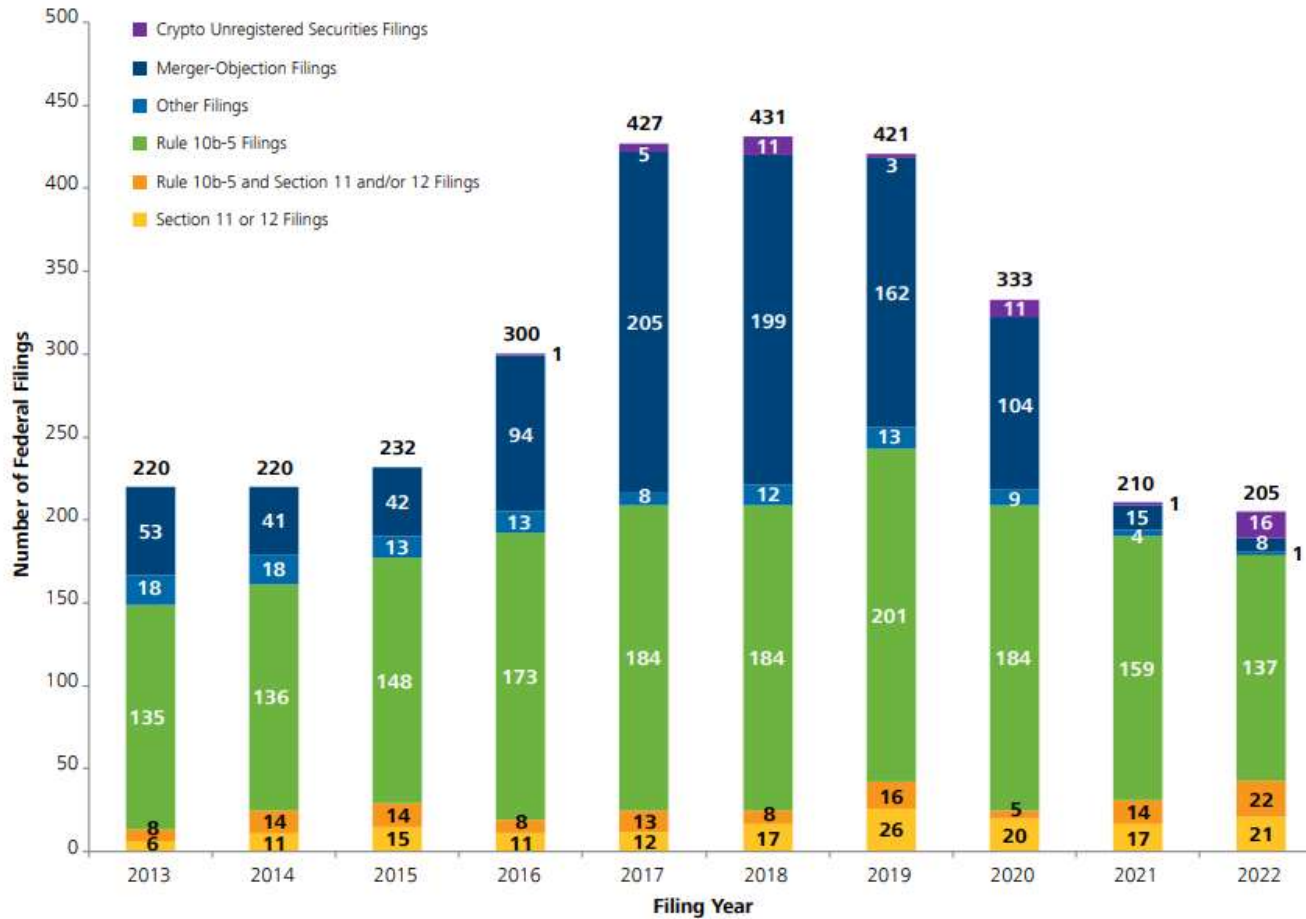
Figure 1. **Federal Filings and Number of Companies Listed in the United States**
January 1996–December 2022



*NERA Recent Trends in Securities Class Action Litigation: 2022
Full-Year Review



Federal Filings By Type

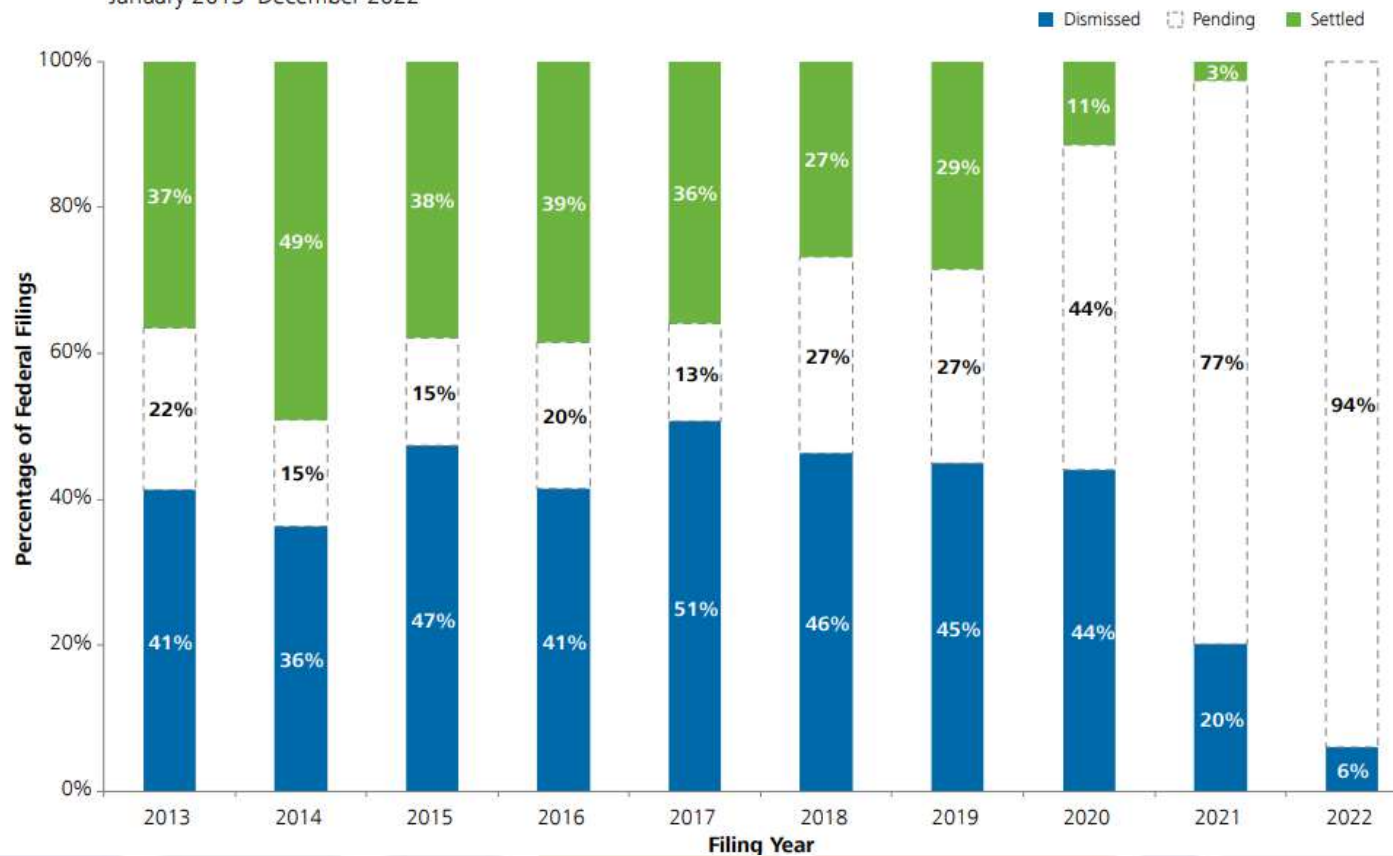


*NERA Recent Trends in Securities Class Action Litigation: 2022 Full-Year Review



Claim Status by Filing Year

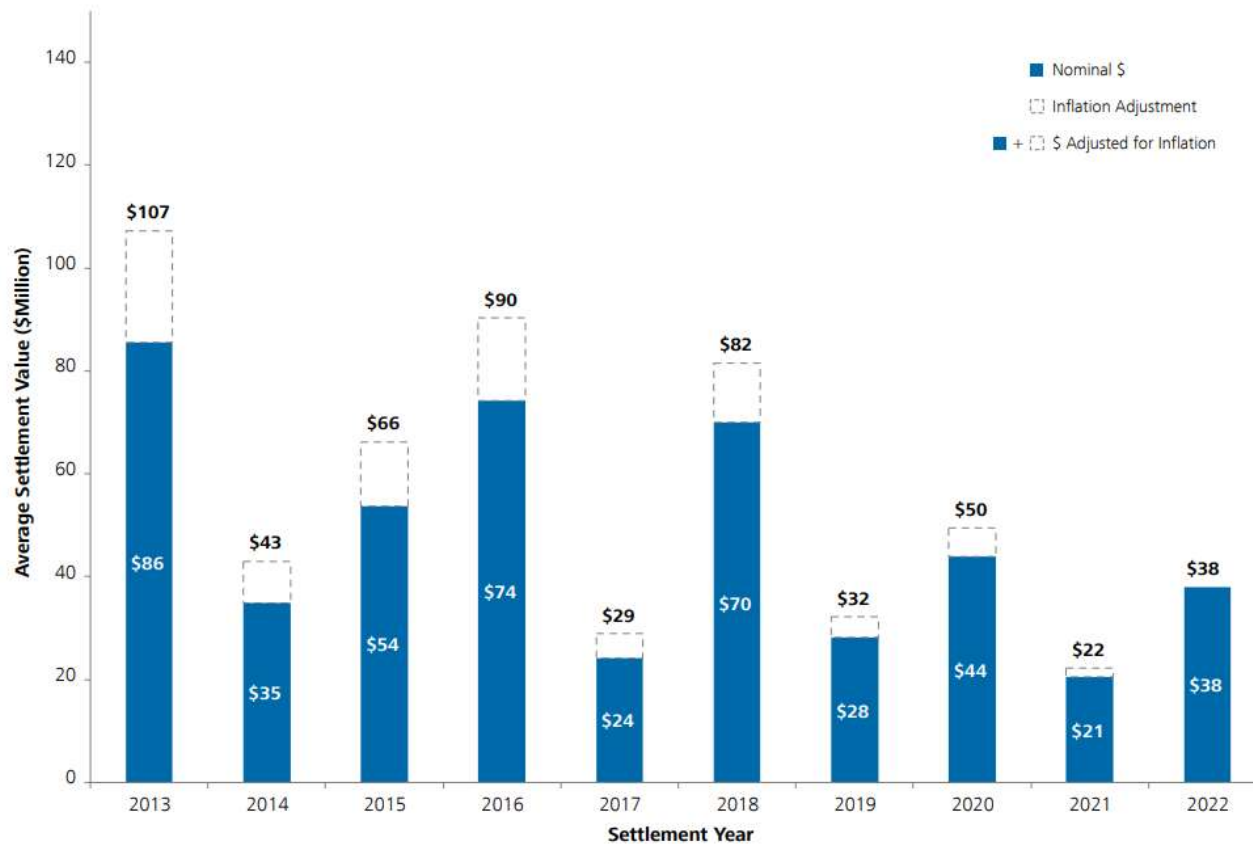
January 2013–December 2022



*NERA Recent Trends in Securities Class Action Litigation: 2022 Full-Year Review



Average Settlement Value



*NERA Recent Trends in Securities Class Action Litigation: 2022
Full-Year Review



Average Settlement Value

Table 1. **Top 10 2022 Securities Class Action Settlements**

Ranking	Defendant	Filing Date	Settlement Date	Total Settlement Value (\$Million)	Plaintiffs' Attorneys' Fees and Expenses Value (\$Million)	Circuit	Economic Sector
1	Twitter, Inc.	16 Sept 16	11 Nov 22	\$809.5	\$185.7	9th	Technology Services
2	Teva Pharmaceutical Industries Ltd.	6 Nov 16	2 Jun 22	\$420.0	\$109.3	2nd	Health Technology
3	Luckin Coffee Inc.	13 Feb 20	22 Jul 22	\$175.0	\$31.3	2nd	Consumer Non-Durables
4	BlackBerry Ltd.	4 Oct 13	29 Sept 22	\$165.0	\$59.5	2nd	Technology Services
5	Granite Construction Inc.	13 Aug 19	24 Feb 22	\$129.0	\$21.7	9th	Industrial Services
6	Endo International plc.	14 Nov 17	23 Feb 22	\$113.4	\$20.9	3rd	Health Technology
7	Walgreen Co.	10 April 15	7 Oct 22	\$105.0	\$31.1	7th	Retail Trade
8	Novo Nordisk A/S	11 Jan 17	27 Jun 22	\$100.0	\$31.7	3rd	Health Technology
9	Stamps.com, Inc.	13 Mar 19	24 Jan 22	\$100.0	\$17.3	9th	Commercial Services
10	Mattel, Inc.	24 Dec 19	2 May 22	\$98.0	\$14.8	9th	Consumer Durables
Total				\$2,214.9	\$523.4		

**NERA Recent Trends in Securities Class Action Litigation: 2022 Full-Year Review*

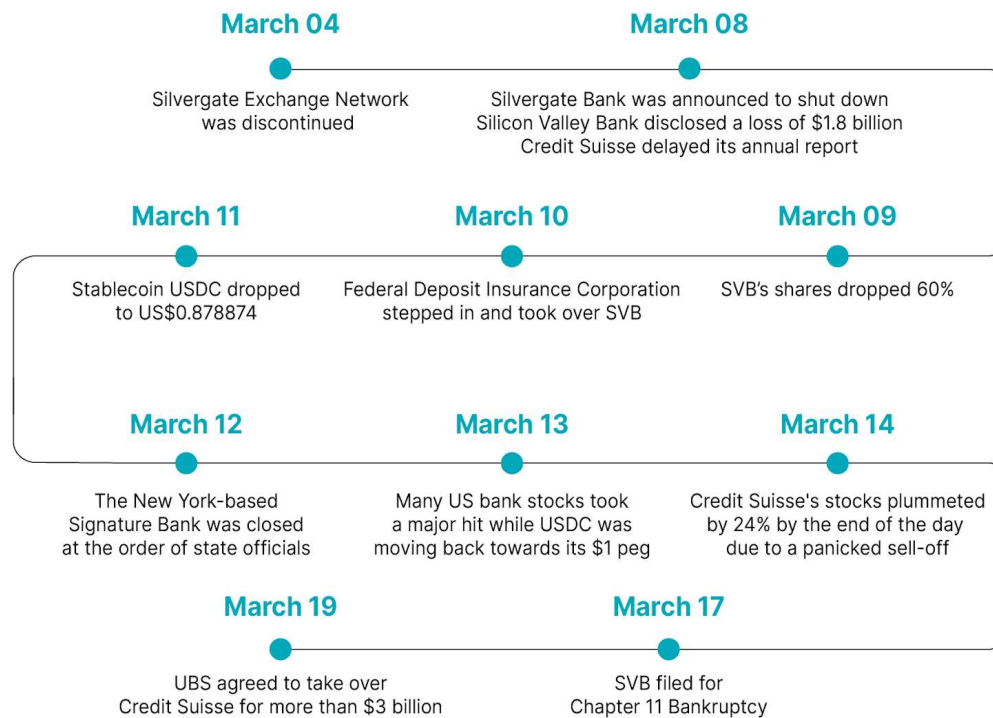


Banking Sector Under Stress



March Madness

A TIMELINE OF THE CRISIS



Source: Bitget Academy



April & May

April 21

Moody's downgrades 11 regional banks due to higher interest rates

April 24

First Republic releases alarming Q1 earnings and is "pursuing strategic options," triggering steep stock declines

May 1

First Republic is sold to JP Morgan. Second largest bank failure in US history

May 4

First Horizon and TD Bank call off proposed merger

April 24

Federal Reserve says it failed to take forceful action on SVB in its postmortem

May 3

PacWest announces intention to sell itself. PacWest and other regional banks have steep stock declines

June
Gloom??



Banks – Under Stress

- Bank and banking failure have been in the news a lot this year
 - Silvergate, SVB, Signature Bank, Credit Suisse, First Republic
- Some early failure tied to crypto but a big driver is higher interest rates and changes in the economy
 - Fed is being proactive
- While some banks are going under, the drivers are different from what happened 10 years ago
- What does this mean for Financial D&O?
 - Rates / Claims
- What role has the media played? Does it even matter?
 - Traditional media, Twitter, Peter Thiel
 - Western Alliance denying it was exploring a potential sale
- Bank officials who served as Fed officials. Does this matter?
 - Greg Becker, CEO SVB + SF Fed board member



Cyber related D&O claims

- D&O claims as a result of Cyber incidence or failure to disclose
- Failing to meet business plan due to impact of Cyber events
- Claims related to cyber related penalties
 - Loss of reputation
 - Losses due to fines
 - Restriction of future business
 - Restatement of results



Emerging issues and trends for Private D&O

- EPLI exposures remain at the forefront for underwriters
 - Diversity and Inclusion policies and actions are important underwriting concerns
 - #MeToo, Higher retentions and separate retentions for California risks.
 - Covid-19 layoffs causing rise in discrimination, harassment and ADA claims
- Bankruptcy/Insolvency
 - While initially increasing in the wake of Covid-19, bankruptcies declined toward the end of '20 government stimulus (around 25 in '21- and '22) before increasing to levels seen at the start of Covid pandemic (71 in March of '23 vs Covid high of 74 in July of '20)
 - Interest rate increases/inflation, labor force and supply chain issues contribute to economic uncertainty
 - Trends indicating that private companies are becoming a bigger slice of corporate bankruptcy pie (60% in 1H'22 vs 40% from '05-'21)
 - Less access to capital markets than public companies
- Merger and Acquisition risk
 - Complex SPAC litigation results in multiple policies being tapped to contribute to losses; i.e., private company run-off, public company go forward, and SPAC D&O
- Emerging Industries (cannabis, crypto, AI)
- Increase in Regulatory vigilance



SPAC/deSPAC

- Impact on rate from disappearance of SPACs
- Distribution/winddown
- Recent tax confusion
- Post-merger bankruptcies
- SPAC-SPAC mergers



SPACs / de-SPACs

- SPAC
 - A special purpose acquisition company, also known as a "blank check company", is a shell corporation listed on a stock exchange with the purpose of acquiring a private company, thus making it public without going through the traditional initial public offering process. (Wikipedia)
- De-SPAC transaction
 - When a SPAC identifies a potential match, they'll begin the acquisition process through a formal letter of intent, which is followed by a due diligence phase and the execution of a merger agreement. (Donnelly Financial)



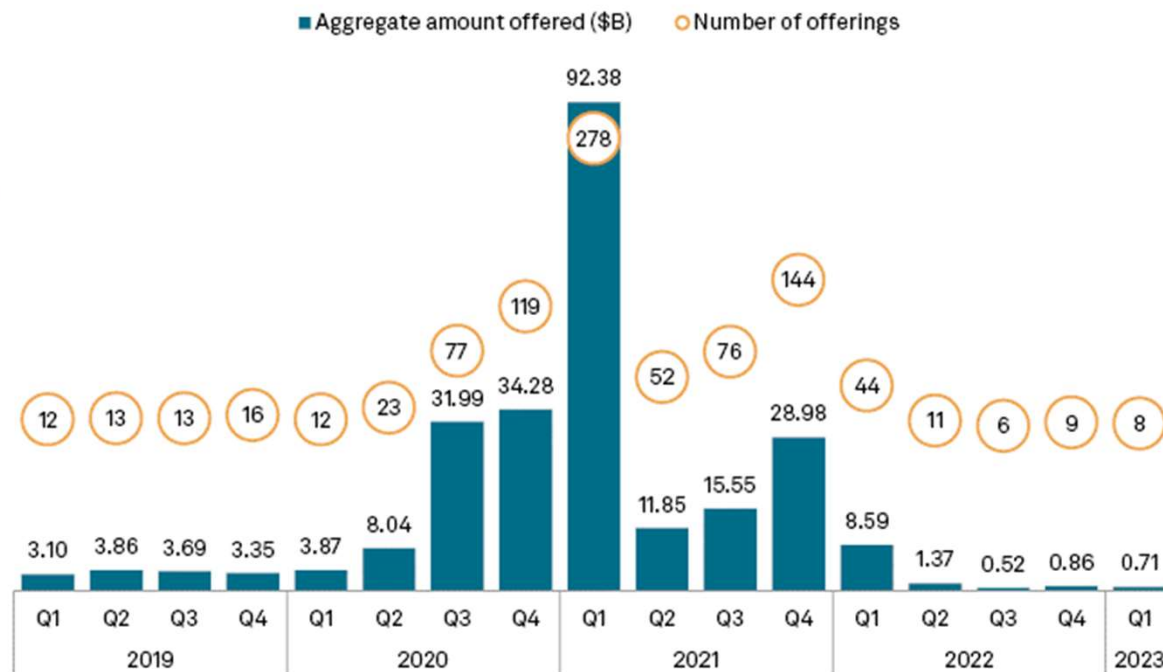
SPAC/deSPAC Basics

- Special Purpose Acquisition Vehicle (SPAC): vehicle for taking a company public, alternative to IPO, often referred to as “blank check company” i.e. a shell company with no physical assets
- SPAC (blank check company) raises money in an IPO to be merged with private company, usually 2-year deadline for SPAC to invest. Combination referred to as **de-SPAC transaction**
- SPAC sponsors granted significant consideration, usually 20% of the SPAC’s equity in the merged company
- SPAC IPO investors have the choice of redeeming shares or investing in the now public company. Private Capital in form of Private Investment in Public Equity (PIPE) can be raised to supplement company’s capitalization.
 - Redemptions have increased and PIPE financing have dried up
- SPACs have been in existence for decades but increased exponentially in 2020-21 with 248 in 2020 and 613 in 2021, 2022 has slowed 65 (through May). Average of 20 per year from (2009-19)
- 92 de-SPACs closed in 2020, 213 in 2021 and 16 in thru March of ‘22; over 350 SPACs looking for partners. Many have returned capital to investors



Why are SPACs Important

US SPAC IPO activity since Q1 2019



Data compiled April 18, 2023.

Analysis includes initial public offerings completed by blank-check companies that are either headquartered in US or listed on the major US exchanges between Jan. 1, 2019, and March 31, 2023.

Aggregate amount offered includes overallotments.

Source: S&P Global Market Intelligence.

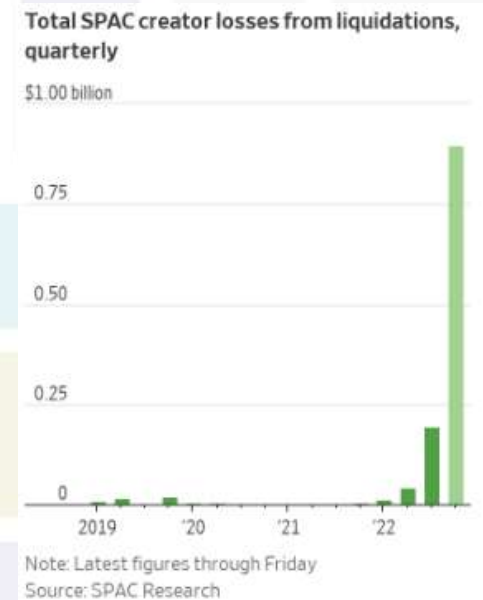
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- Massive increase in SPACs in 2021 but has come back to earth due to economy and heightened regulation
- Viewed as an easier and cheaper alternative to IPO Process
- Wasn't as heavily regulated
- Was a fringe vehicle but its use exploded in 2020



SPAC Liquidation and Follow-on Issues

- SPACs are liquidating now that suitable merger partners cannot be found within the SPAC lifespan (typically 2 yrs)
- Market conditions have not been favorable to IPOs and SPACs since 1H 2021
- Many SPACs wound down at the end of 2022 to avoid a 1% federal buyback levy—IRS released clarification on Dec 27, 2022 that the levy will not apply to SPAC liquidations
- SPAC sponsors have attempted to keep break-up fees and other (limited) sources of revenue instead of returning to shareholders



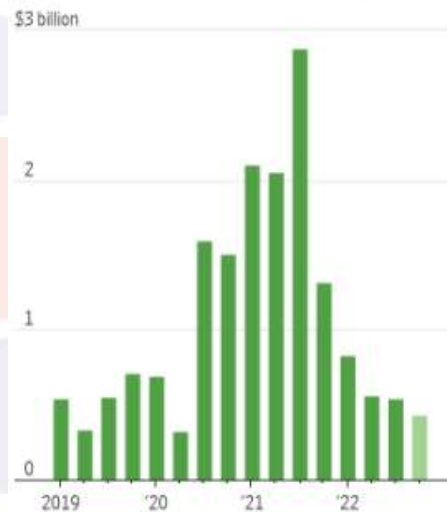
Src: Wall Street Journal 2022



Goodwill Write-downs and Bankruptcies

- Recent SPAC mergers targeted smaller, more speculative companies
- 2022 Fed tightening made financing for speculative companies difficult with no relief in sight
- Write-downs occurring now as goodwill created in the merger evaporate
- Boxed, Virgin Orbit, and Pear Therapeutics are latest SPAC deals to go bankrupt
- Arrival, after going public via a SPAC in 2021, is attempting to raise money by merging with another SPAC in 2023 to avoid bankruptcy

Average valuations of companies going public in announced SPAC mergers, quarterly



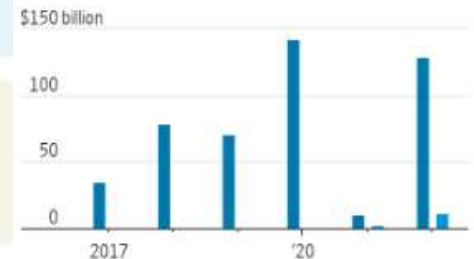
Notes: Latest figures through Friday; not all announced deals get completed
Source: Dealogic

Src: Wall Street Journal 2022

Writing It Down

Goodwill impairments soared in 2022 as companies contended with inflation and supply-chain disruptions.

■ Impairments by U.S. public companies
■ Impairments by U.S. companies that went public via SPAC



Note: 2022 figures are based on a review of filings through Tuesday.
Source: Kroll LLC



The Fall Out

- Wave of SPAC related litigation: 78 Securities Class Action Cases filed between January of 2019 and May of 2023.
- Claims differ from traditional core SCA suits because in addition to being brought against the surviving public company, also brought against the SPAC, and its sponsor and principals. **Multiple Insurance policies in play**
- SEC Vigilance:
 - Proposed rule changes that **may add significant D&O exposure**; i.e., (1) required disclosures; (2) private company subject to liability under Section 11 of the Securities Act of 1933; (3) elimination of safe harbor for forward looking statements under the PLSRA
 - Enforcement Division activity for misleading statements
- **Industry is prepared** by making rate adjustments for these exposures. Though new market entrants and other factors have caused recent rate deterioration; e.g., Primary pricing for de-SPAC companies typically exceeded \$200k/mil from mid '20 to Q1'22. Primary pricing, while still historically strong, is closer to \$100K/mil on average.
- To Be Continued...



ESG

- What are E, S, G?
- ESG lawsuits – not doing what you said
- Anti-ESG lawsuits
- Anti-ESG investing bills
- FL vs Disney



ESG claims

- Environmental, social, and governance (ESG)
 - Set of standards for a company's behavior used by socially conscious investors to screen potential investments. Environmental criteria consider how a company safeguards the environment, including corporate policies addressing climate change, for example. Social criteria examine how it manages relationships with employees, suppliers, customers, and the communities where it operates. Governance deals with a company's leadership, executive pay, audits, internal controls and shareholder rights. (Investopedia)
- Evolving area
- Is this a severity or frequency issue?
- What's the biggest concern? E, S, or G?

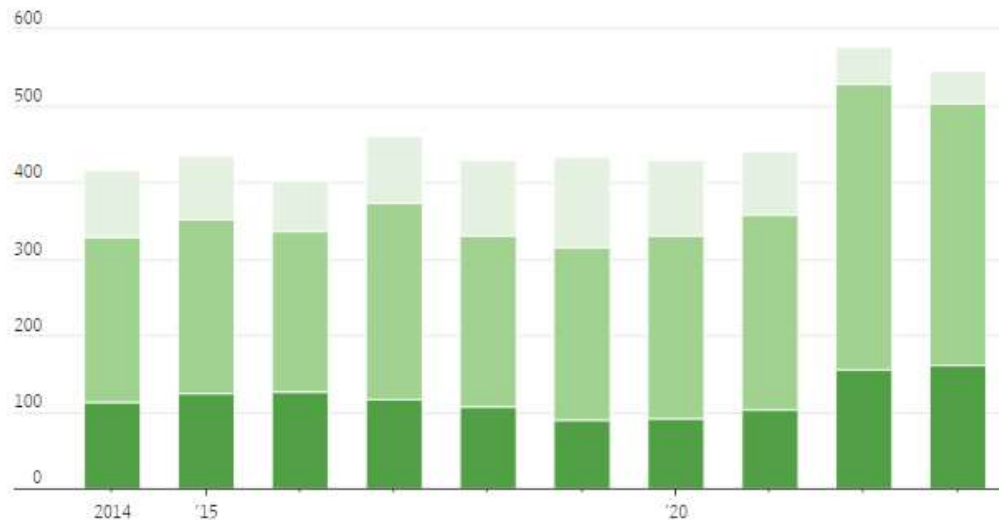


Sustainability proposals are popular...

Sustainability Proposals

Filings are trending down this year compared with 2022, but more are expected to surface

■ Environmental ■ Social ■ Sustainability Governance



Note: Proposals filed by March 20 for U.S. public companies with annual general meetings in the first six months of the year.

Source: Sustainable Investments Institute



...but anti-ESG measures are growing

State	Bill	Status	Type (i.e., Investment Restriction Targeted)
<i>Information Current as of August 15, 2022</i>			
Texas	S.B. 13	Enacted 05/21	Boycott Bill – Fossil Fuel Energy
Texas	S.B. 19	Signed 6/21	Boycott Bill – Firearms
West Virginia	S.B. 262	Enacted 03/22	Boycott Bill – Fossil Fuel Energy
North Dakota	S.B. 2291	Enacted 03/21	No Social Investment Bill
Oklahoma	H.B. 2034	Enacted 05/22	Boycott Bill – Fossil Fuel Energy
Oklahoma	H.B. 3144	Passed House, Read in Senate 05/22	Boycott Bill – Firearms
Kentucky	S.B. 205	Enacted 04/22	Boycott Bill – Fossil Fuel Energy
Kentucky	H.B. 123	Introduced 01/22	Boycott Bill – Firearms
Utah	H.B. 312	House Filed 03/22	Boycott Bill – Fossil Fuel Energy
Minnesota	H.F. 4574; S.F. 4441	Introduced 03/22 and 04/22	Boycott Bill – Energy, Mining, Production Agriculture, Production Lumber
Idaho	H.B. 737	Introduced 03/22	Boycott Bill – Energy, Mining, Production Agriculture, Commercial Timber
South Carolina	H.B. 4996	Referred to Committee 02/22	Boycott Bill – Energy
Louisiana	H.B. 25	Referred to Committee 03/22	Boycott Bill – Energy
Louisiana	H.B. 978	Engrossed in House 06/22	Boycott Bill – Firearms
Wyoming	H.B. 0236	Signed 4/21	Boycott Bill – Firearms
Arizona	H.B. 2473	Engrossed in House 2/22	Boycott Bill – Firearms
Indiana	H.B. 1224 S.B. 397	Introduced 01/22	Boycott Bill – Energy
Indiana	H.B. 1409 S.B. 397	Introduced 01/22	Boycott Bill – Firearms
Missouri	S.B. 1048	Introduced 04/22	Boycott Bill – Firearms
Ohio	H.B. 297	Referred to Committee 5/21	Boycott Bill – Firearms
South Dakota	S.B. 182	Introduced 2/22	Boycott Bill – Firearms

Florida Governor Rick DeSantis announced in July 2022 that he plans to propose an anti-ESG bill in the 2023 legislative session that we would classify as a No Social Investment Bill.

Src: Reuters 2022



Environmental

- This has been around in different forms for a while
 - Climate change lawsuit
 - Pollution
- Now, it's more on the forefront
 - Greater disclosure brings greater scrutiny
 - Did you do what you said?
 - Carbon credits
 - Dueling science
- SEC is coming out with guidance



Societal

- Hard to define
 - Not everyone agrees... hot button issues – politics / abortion / etc.
- Hard to measure
 - Not all goals are quantifiable
 - Societal norms change
- Once you put it to paper, it opens the door to claims
 - Not doing what you said
 - Actions hurting corporate results and thus stockholders
- Corporate duty
 - Stockholders
 - Workers
 - Society



Governmental

- SEC has gotten much more active
 - Empowered / Aggressive
 - Increased fines
 - Increasing reach to target companies' clients and vendors
 - Going after companies around disclosure
 - Crypto regulation is far from settled
 - Coinbase claims SEC's review of IPO rules out SEC's ability to say operations are unlawful
 - Lawyer defending ex-OpenSea worker for frontrunning listings claims NFTs are not securities and are not technically insider trading
- Will the tax man cometh?



Other ESG Questions

- Regulatory approach may lead to more ESG claims in state than federal courts—see current energy sector Environmental D&O suits
- Is there a time limit for ESG claims? Can this turn into D&O's reviver statute?
- Can net-zero be measured?
- How do companies balance ESG without running into antitrust issues?

