

# **Welcome to Advisen's Executive Risk Insights Conference!**

# Welcoming Remarks



**David Bradford**  
Co-Founder & Chief Strategy Officer  
Advisen

# **Thank you to our Advisory Board**

**Thomas Deer, Ogletree Deakins**

**Ziad Kubursi, CNA**

**Kevin M. LaCroix, RT ProExec [2016 Conference Chair]**

**Phil Norton, Arthur J. Gallagher**

**Gregory Spore, Marsh FINPRO**

**Robert Wolfe, Chubb**

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# Opening Remarks

**Kevin M. LaCroix**  
Executive Vice President  
RT ProExec  
[2016 Conference Chair]



# Keynote Address



**Paul Schiavone**  
Regional Head of Financial Lines  
North America  
Allianz

# Emerging D&O Claims Risks

# Emerging D&O Claims Risks



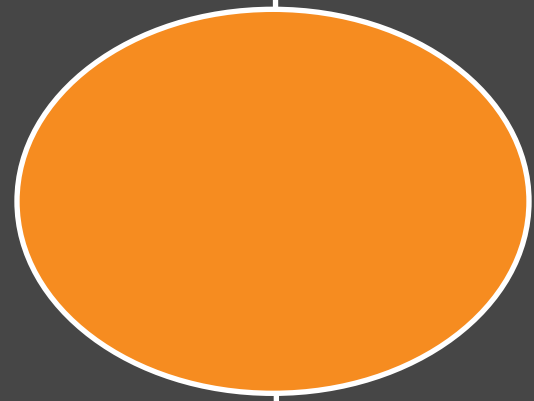
**Jim Blinn**  
EVP & Global Product Manager  
Advisen



# Emerging D&O Claims Risks

# Agenda

- **General D&O Claims Trends**
- **Emerging Claims Trends**
  - Foreign Corrupt Practices Act (FCPA)
  - False Claims Act
  - Patent Infringement

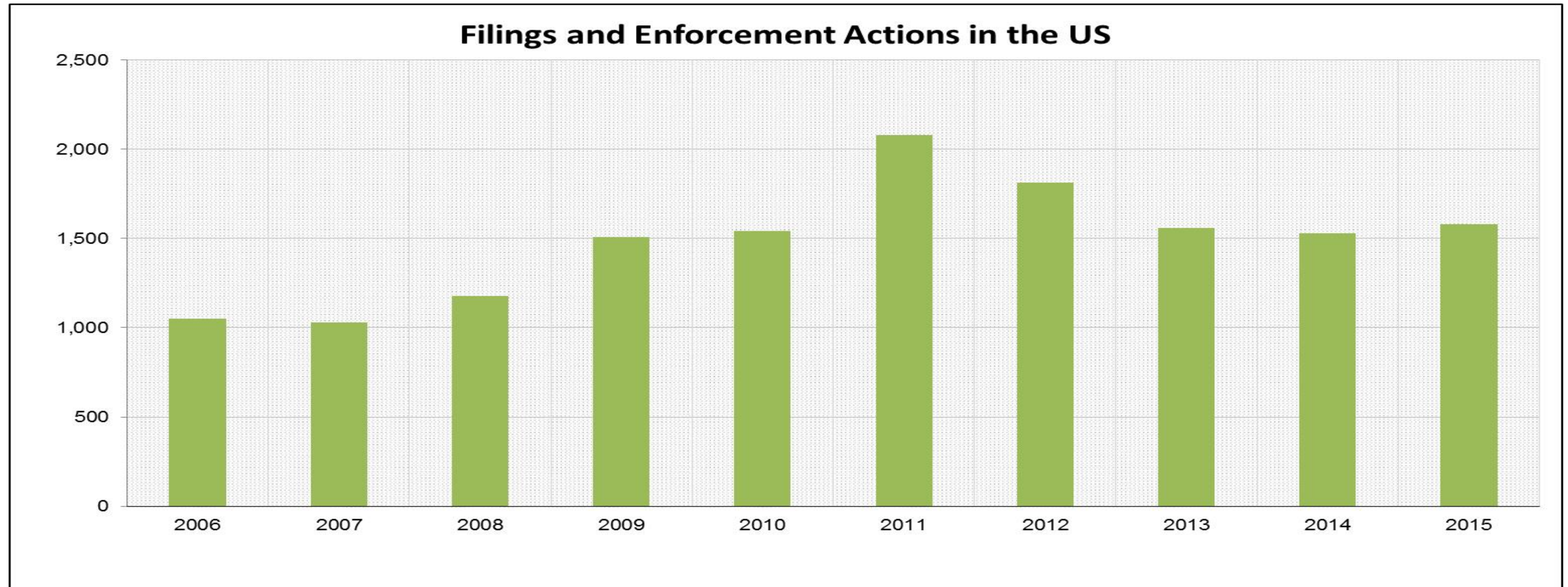


# D&O CLAIMS TRENDS

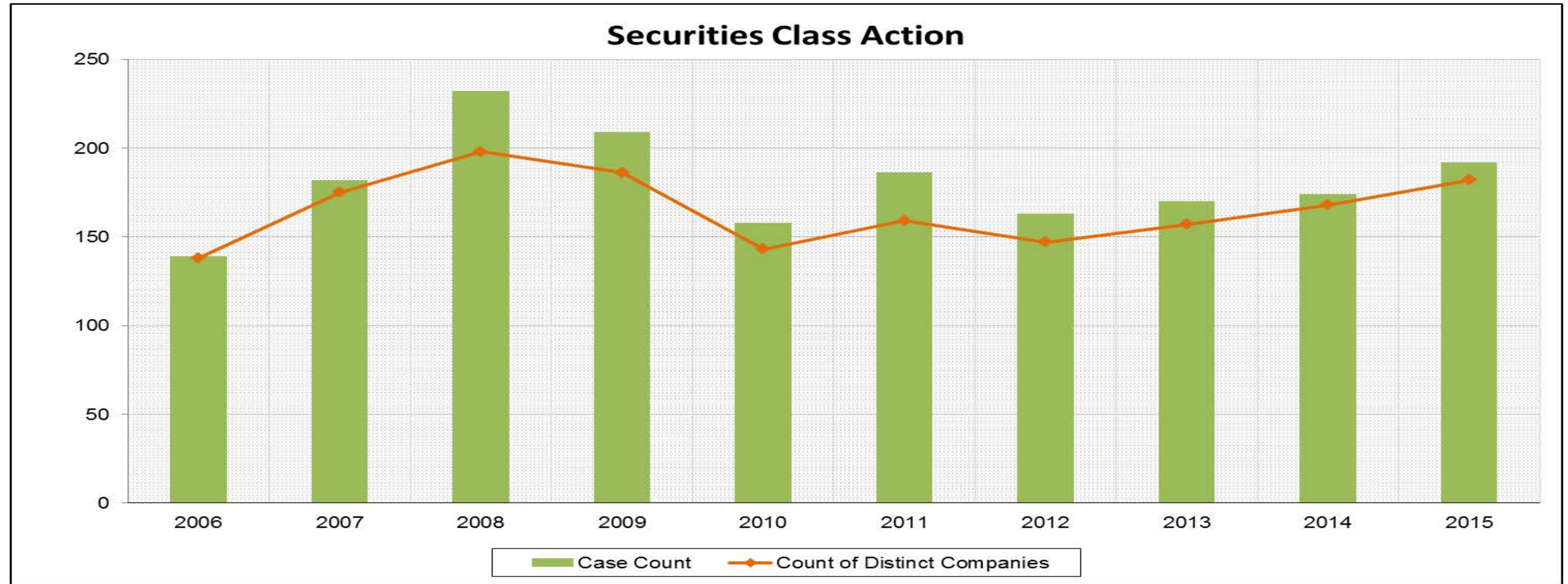
General



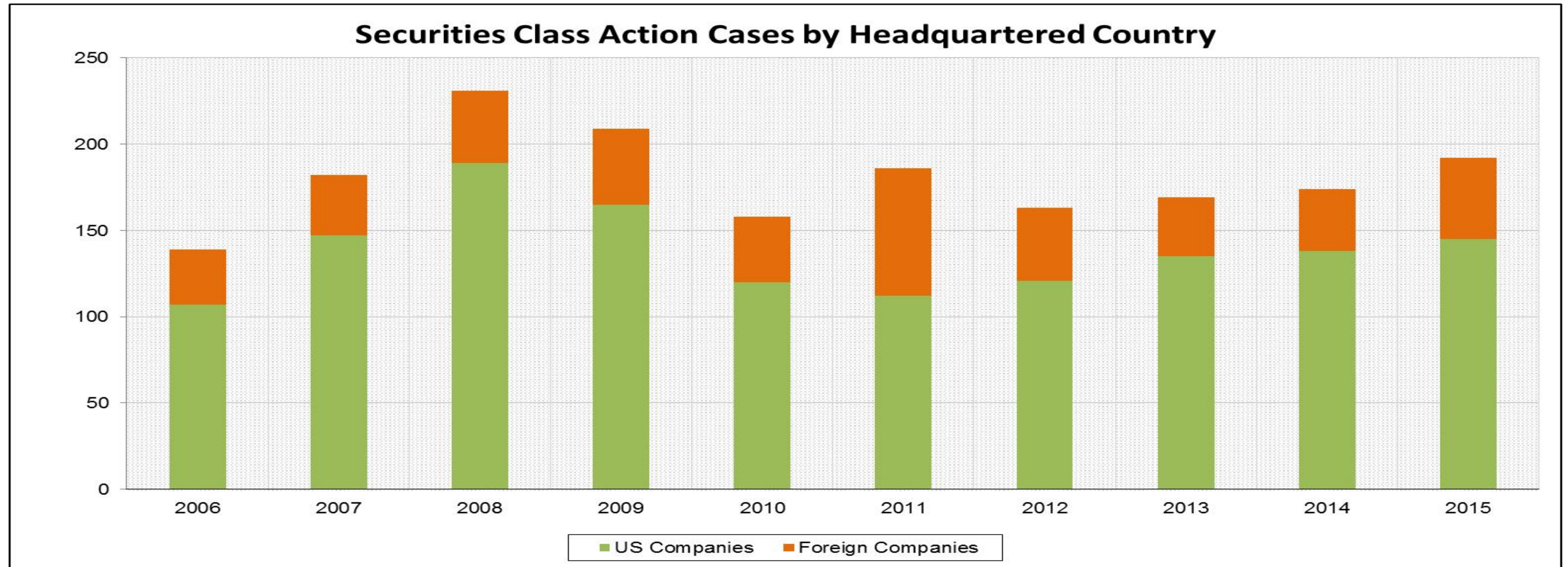
# D&O Filings in the US



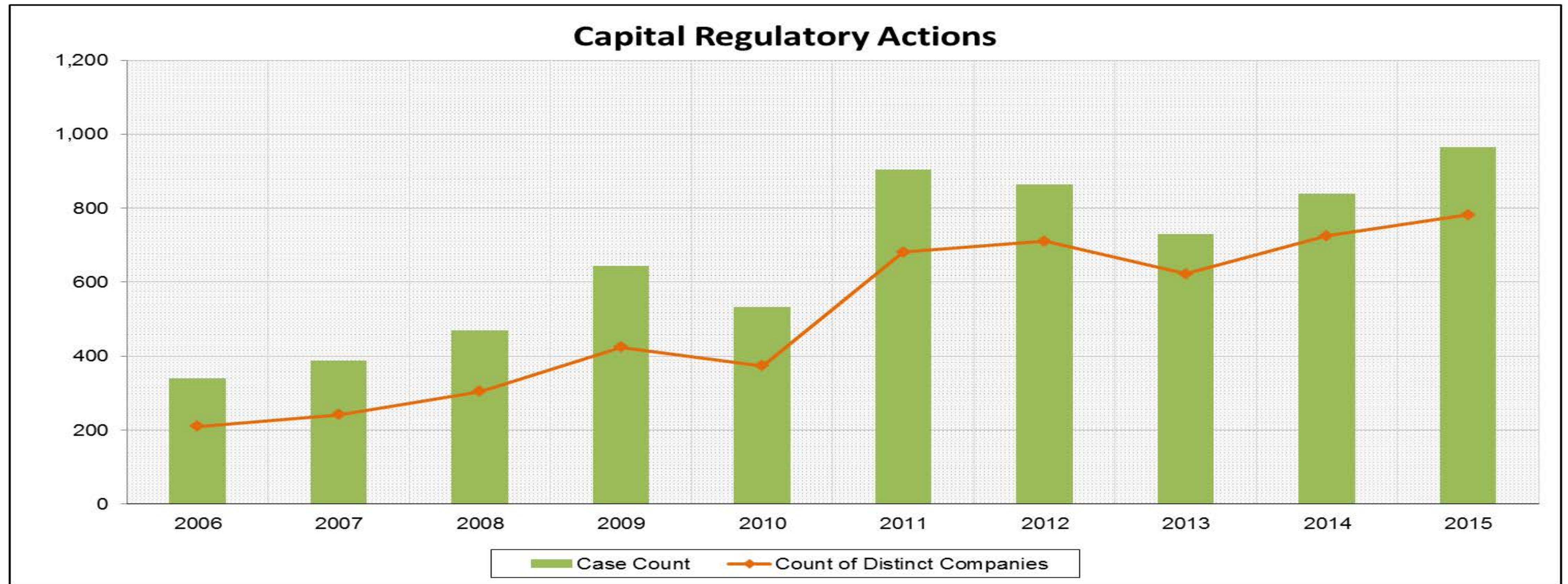
# Securities Class Action



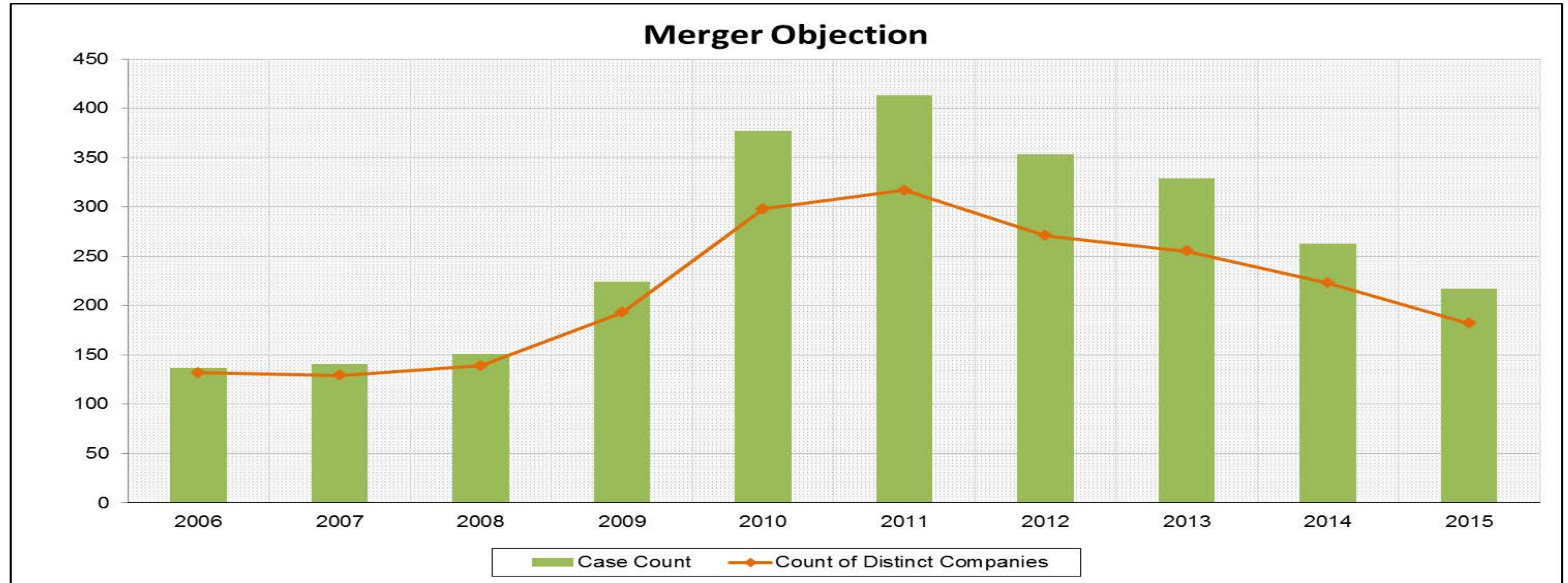
# Securities Class Actions by Country



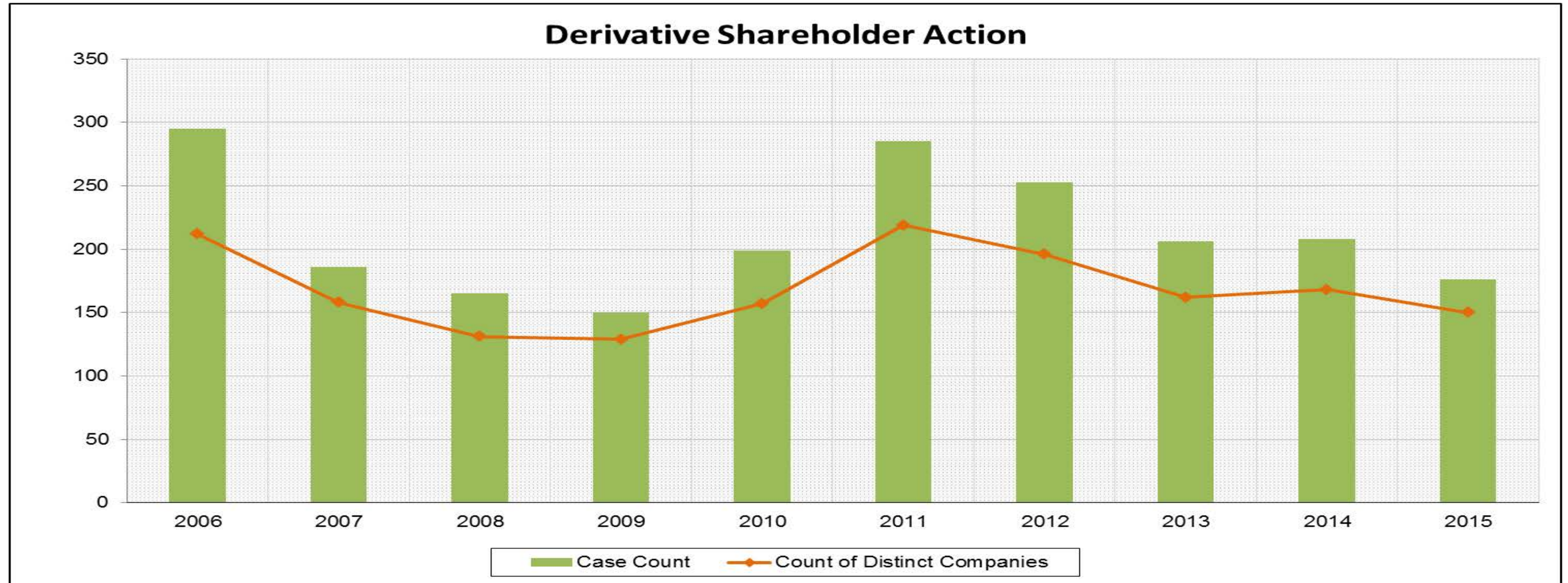
# Capital Regulatory Actions



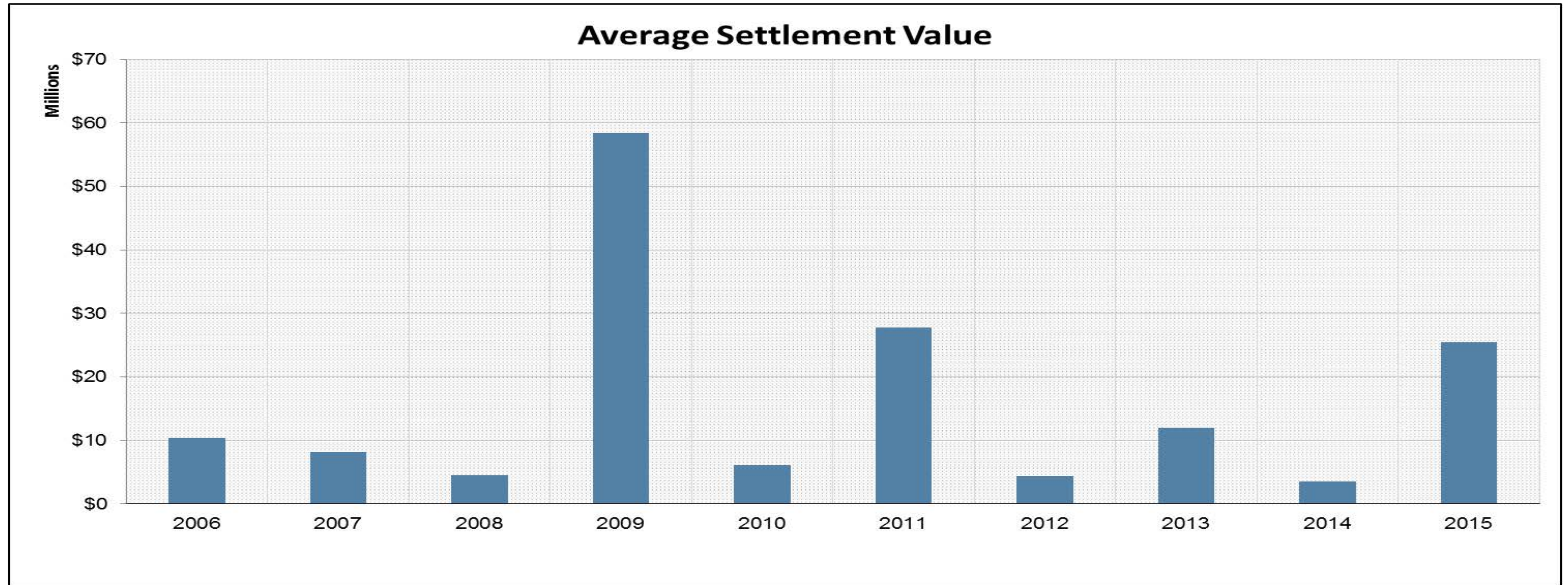
# Merger Objection Cases



# Derivative Shareholder Action



# Average Settlement Value – Derivative Shareholder Actions





# D&O CLAIMS TRENDS

Emerging



# Drivers

- Regulatory changes
- Plaintiff's bar identifying new sources of revenue
- Response by corporate defense bar



# EMERGING CLAIMS TRENDS

Foreign Corrupt Practices Act (FCPA)



# • Foreign Corrupt Practices Act

- Prohibits businesses based or operating in the US from gaining an unfair advantage in foreign territories through bribes
- Extends to:
  - Companies and their directors
  - Employees
  - Agents
- Often gives rise to shareholder litigation

# Case Study

## Hyperdynamics

- Subsidiary paid \$130K for public relations and lobbying services in Republic of Guinea
- Lacked sufficient documentation to identify the recipients of funds and to substantiate whether services were actually provided
- Fined \$75K by DoJ
- Gave rise to
  - Securities Class Action Suit - pending
  - Two Books & Records Demands
  - Two Derivative Shareholder lawsuits - dismissed

# Case Study

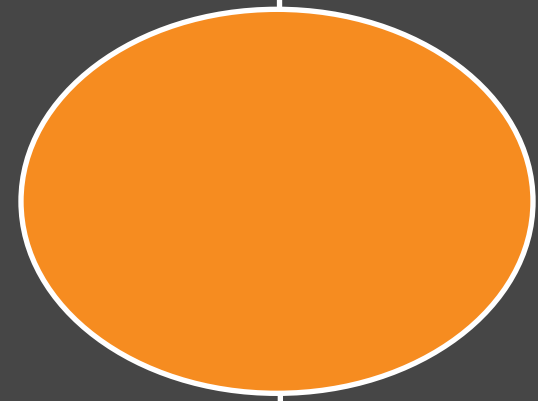
## Hewlett Packard

- Subsidiaries in Russia, Mexico and Poland had made improper payments to government officials over 10 year period
- Retained or obtained public contracts
- Settlement includes:
  - \$32M in disgorgement and prejudgment interest
  - \$76M in fines and penalties
- Three derivative shareholder cases filed

# Case Study

## Avon

- Concealed more than \$8M in improper payments to Chinese government officials to obtain and retain business benefits
- Settlement includes:
  - \$67M in disgorgement/prejudgment interest
  - \$68M in fines and penalties
- Gave rise to
  - Securities Class Action Suit - \$62M Settlement
  - One Books & Records Demand
  - Three Derivative Shareholder lawsuits
  - ERISA Class Action Suit - \$6.25M Settlement



# EMERGING CLAIMS TRENDS

False Claims Act



# False Claims Act

- Imposes liability on persons and companies (typically federal contractors) who defraud governmental programs
- Recent amendments have significantly expanded the role of whistleblowers
  - Increased financial incentives
  - Reduced number of barriers to bring actions
- Largest recoveries related to healthcare fraud

# • Anti-Kickback Statutes

- Prohibits the exchange of anything of value in an effort to induce the referral of federal health care program business
- Protects federal healthcare programs and patients from fraud or abuse
- Government has been actively pursuing violators of the statute, focusing particularly on **merging healthcare entities and how their fees are being structured post-merger**

# Coverage Issues

- Qui Tam actions excluded under Regulatory Exclusion – Huron Consulting Group (public)
- Fines & Penalties exclusions

# Case Study

## Omeros Corp

- Richard J. Klein, former CFO, filed wrongful termination suit for whistle blowing
- Added qui tam allegations under False Claims Act (no government intervention)
- Omeros agreed to pay Klein nearly \$4M
- Carolina Casualty paid \$12.5 million

# Case Study

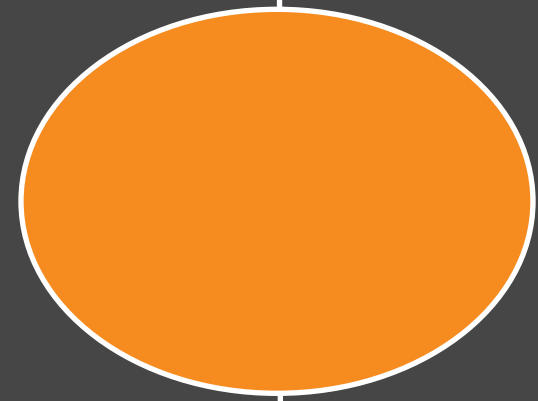
## Community Health Center of Buffalo

- Renee Ifrah sued for:
  - Discrimination in employment practices
  - False statements in application for Federal grant assistance as well as retaliatory discharge
- Settlements:
  - \$50k for employment discrimination
  - \$135k for false statements/retaliation
- Paid by RSUI Indemnity Company

# Case Study

## DaVita Healthcare Partners

- Offered joint-venture deals to doctors and practices to not refer patients to DaVita's competitors
- Kickbacks offered were masked as profits from joint-venture deals
- Resulted in a **\$389M settlement** triggered by a whistleblower
- Derivative shareholder lawsuit - \$7.3M settlement



# EMERGING CLAIMS TRENDS

Patent Infringement



# Patent Infringement

- Covered under Title 35 of the United States Code
- Prohibits the unauthorized use of a patented invention

# • Relevance to D&Os?

- D&Os usually not liable
- **UNLESS** there is evidence of deliberate acts by a director and officer leading to the alleged infringement

# Case Study

- **Nanogen v. CombiMatrix**
  - Former employee of Nanogen was accused of misappropriating Nanogen technology and filing patent application for said technology under his name after moving to CombiMatrix
  - CombiMatrix eventually settled for \$20M in 2002
- **CombiMatrix v. National Union**
  - CombiMatrix's D&O carrier National Union denied coverage
  - CombiMatrix sued and National Union was ordered to reimburse CombiMatrix for the full value of settlement, in addition to \$2M in legal fees

## Other Cases

- American Century Services Corp - Patent Infringement (American International Specialty Lines Insurance Co.)
- MedAssets – Tortious Interference and Trade Secret Misappropriation (Federal Insurance Company)



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and more **efficient**  
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the ***right information*** into  
the ***right hands*** at  
the ***right time***  
to **power performance.**

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# The Buyer's Perspective

# The Buyer's Perspective



**Phil Norton**

Vice Chairman, Midwest Region  
Arthur J. Gallagher



**Stephanie Fisher**

Director of Risk Management & Insurance  
Quanta Services



Arthur J. Gallagher & Co.  
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# Risk Management Perspectives on D&O

Stephanie Fisher, Quanta Services – Panelist  
Phil Norton, Gallagher – Moderator

May 10, 2016

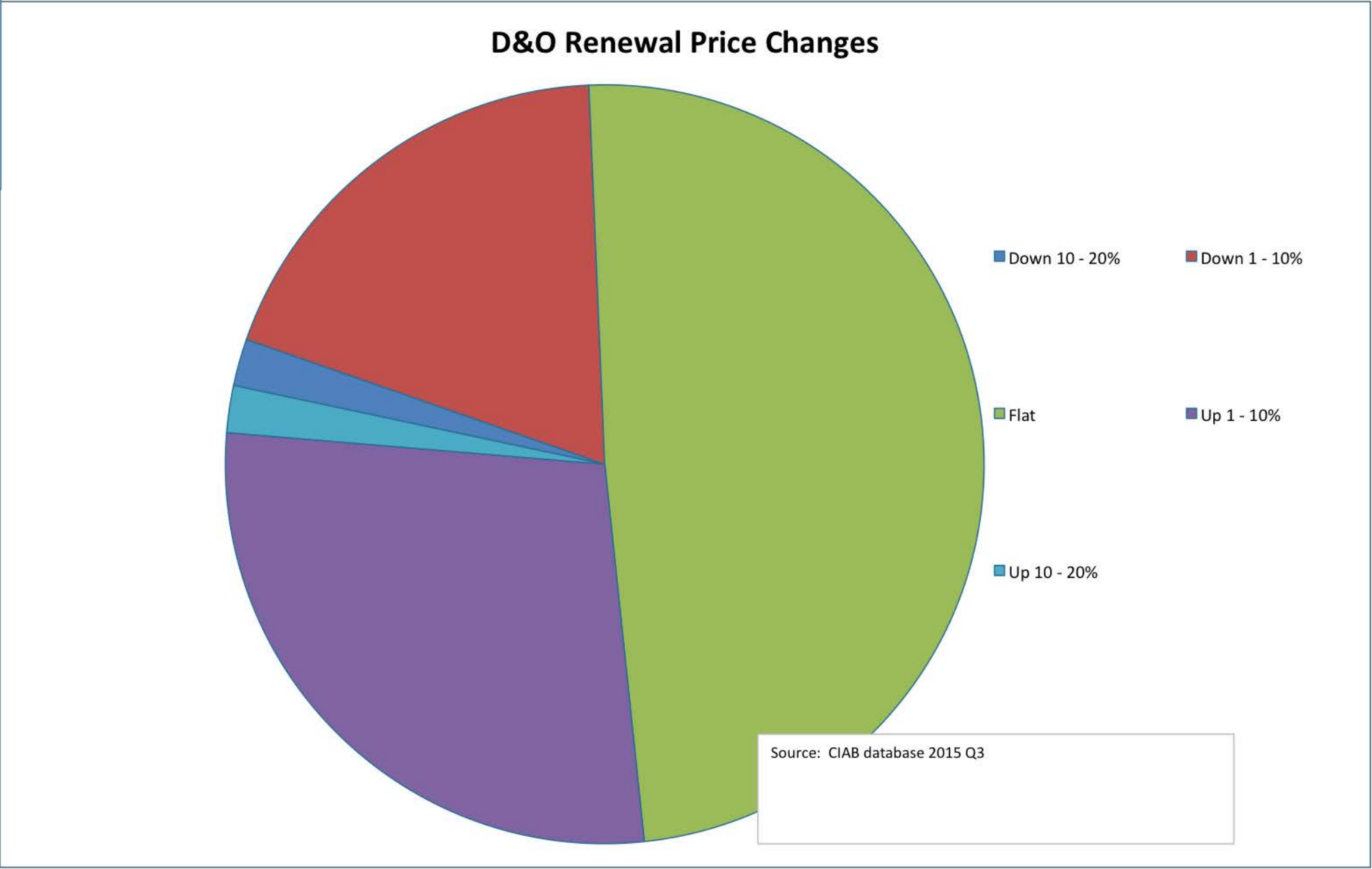
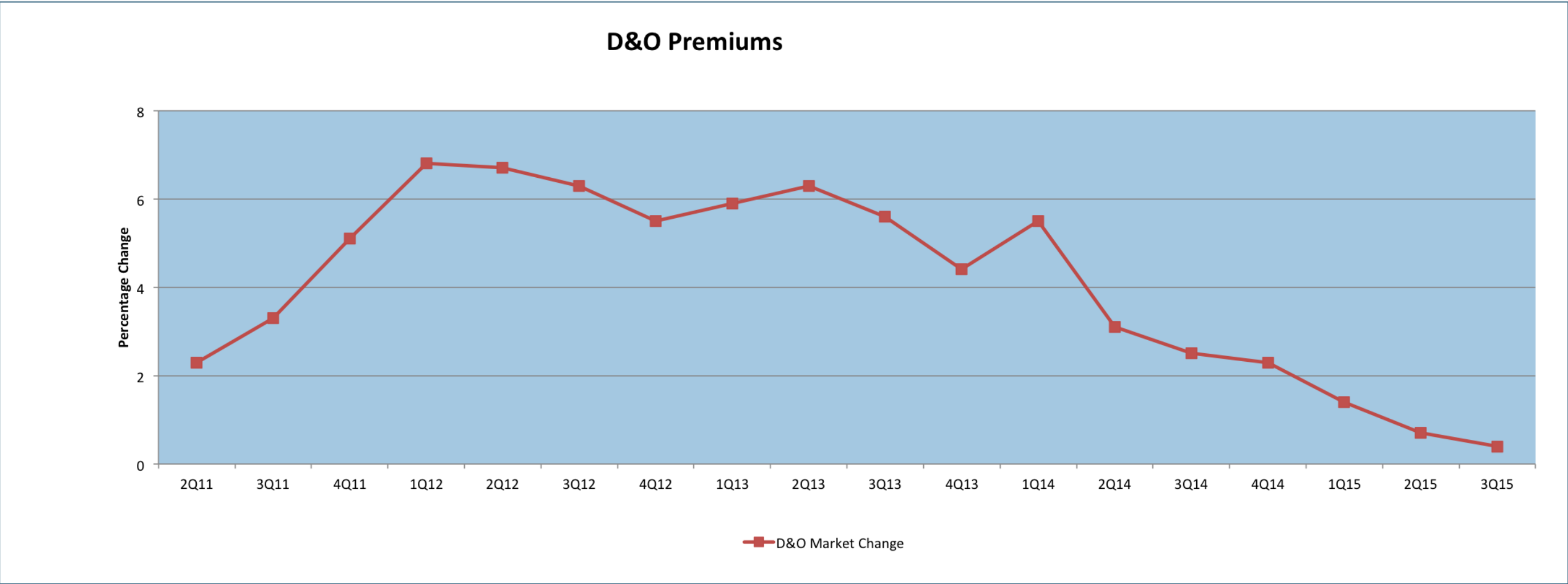
# Strategic Planning



- |   |   |  |  |  |
|---|---|--|--|--|
| <ul style="list-style-type: none"> <li>• Financial and business review</li> <li>• Corporate policies and procedures</li> <li>• Cash on Balance Sheet</li> <li>• Employment Issues</li> <li>• Inventories</li> <li>• Acquisition Strategy</li> </ul> | <ul style="list-style-type: none"> <li>• Loss control practices and procedures</li> <li>• Claim analysis for internal trends</li> <li>• Claim reporting procedures to carriers</li> <li>• Use of outside law firms / panel counsel</li> <li>• Role of Risk Mgmt Department in the D&amp;O claims process</li> </ul> | <ul style="list-style-type: none"> <li>• Critical Tools:               <ul style="list-style-type: none"> <li>➤ Loss Benchmarking</li> <li>➤ Limits Analysis</li> <li>➤ Historical Loss Analysis</li> <li>➤ Exposure Modeling</li> </ul> </li> </ul> | <ul style="list-style-type: none"> <li>• Policy Audit               <ul style="list-style-type: none"> <li>➤ Identify available enhancements</li> </ul> </li> <li>• Gap Analysis</li> <li>• Terms / Conditions</li> <li>• Program Updates</li> </ul> | <ul style="list-style-type: none"> <li>• Contract Language Customization</li> <li>• State of the Market Design</li> <li>• Manuscript Wording</li> <li>• Analysis of program structure</li> </ul> |
|---|---|--|--|--|

# Market Conditions

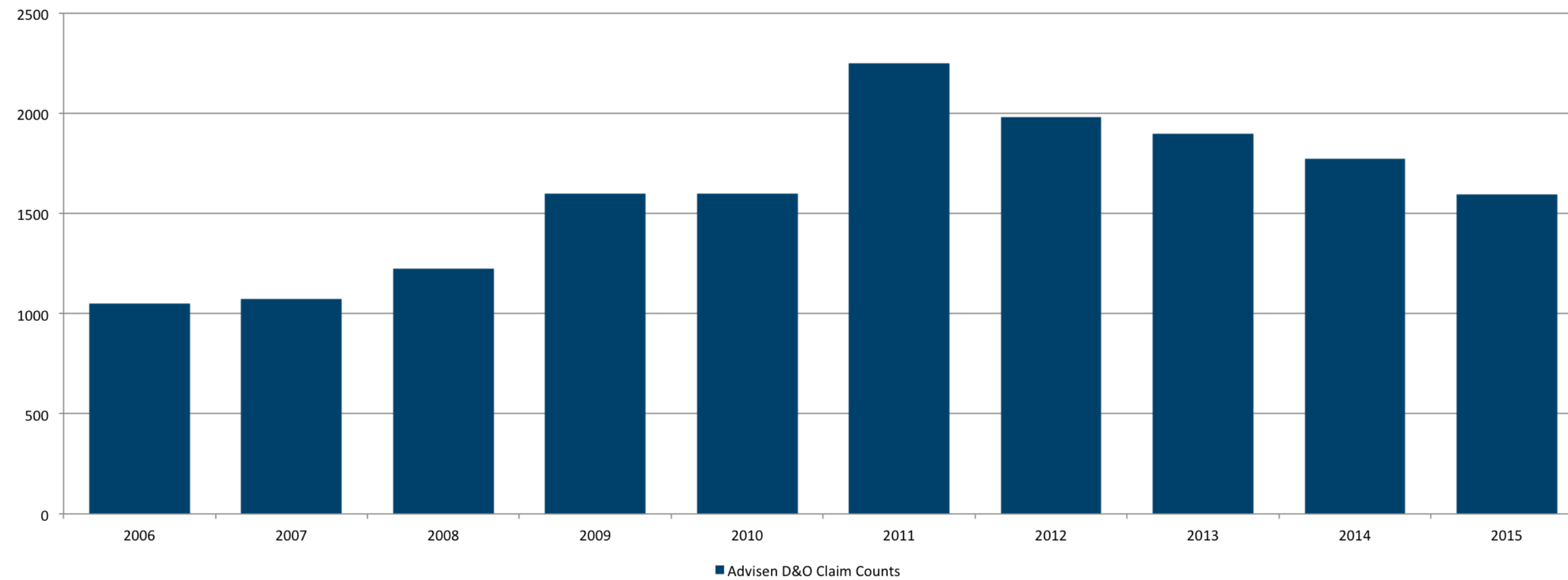
## Where do you look for Pricing Trends?



# Market Conditions

## Are Claim Trends part of the Risk ID Process?

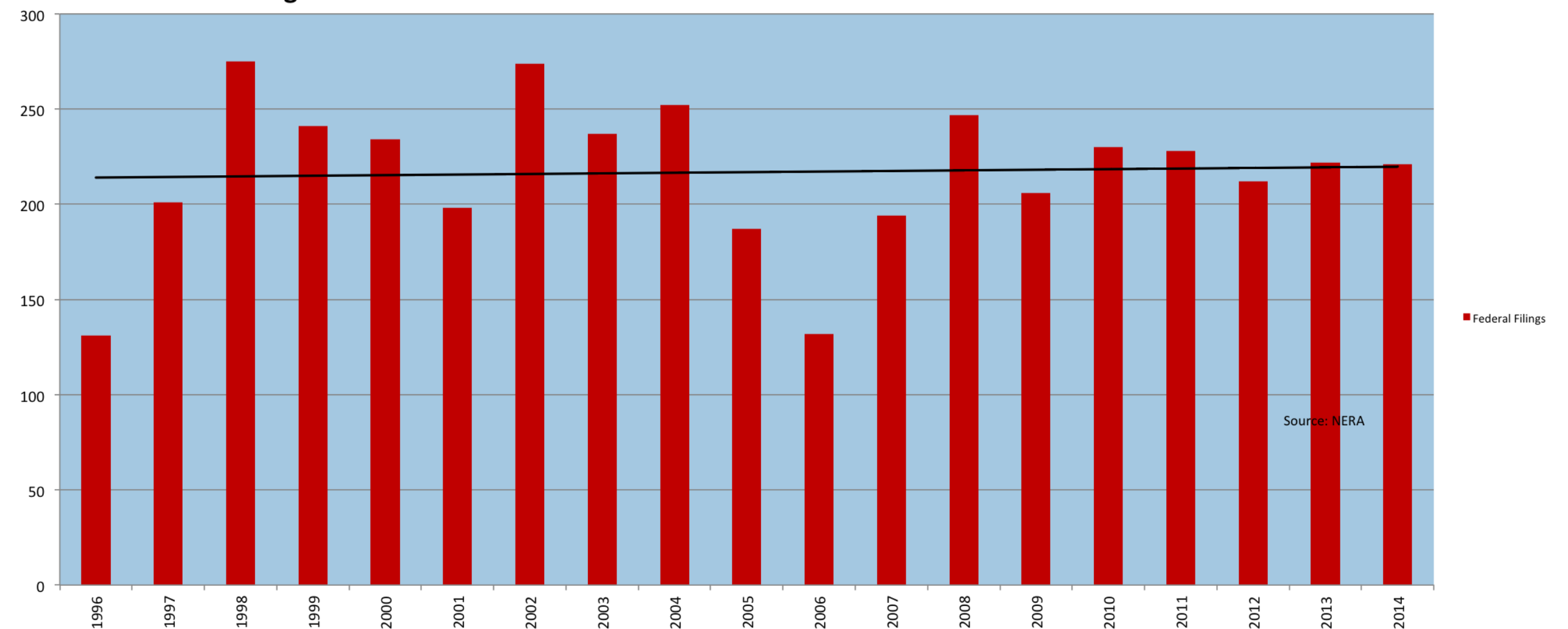
D&O Claims Frequency



*Overall claim frequency is trending down since 2011*

*220 Class Actions per year is the apparent “capacity” for the D&O plaintiffs bar.*

Tracking D&O Class Actions



# Market Conditions

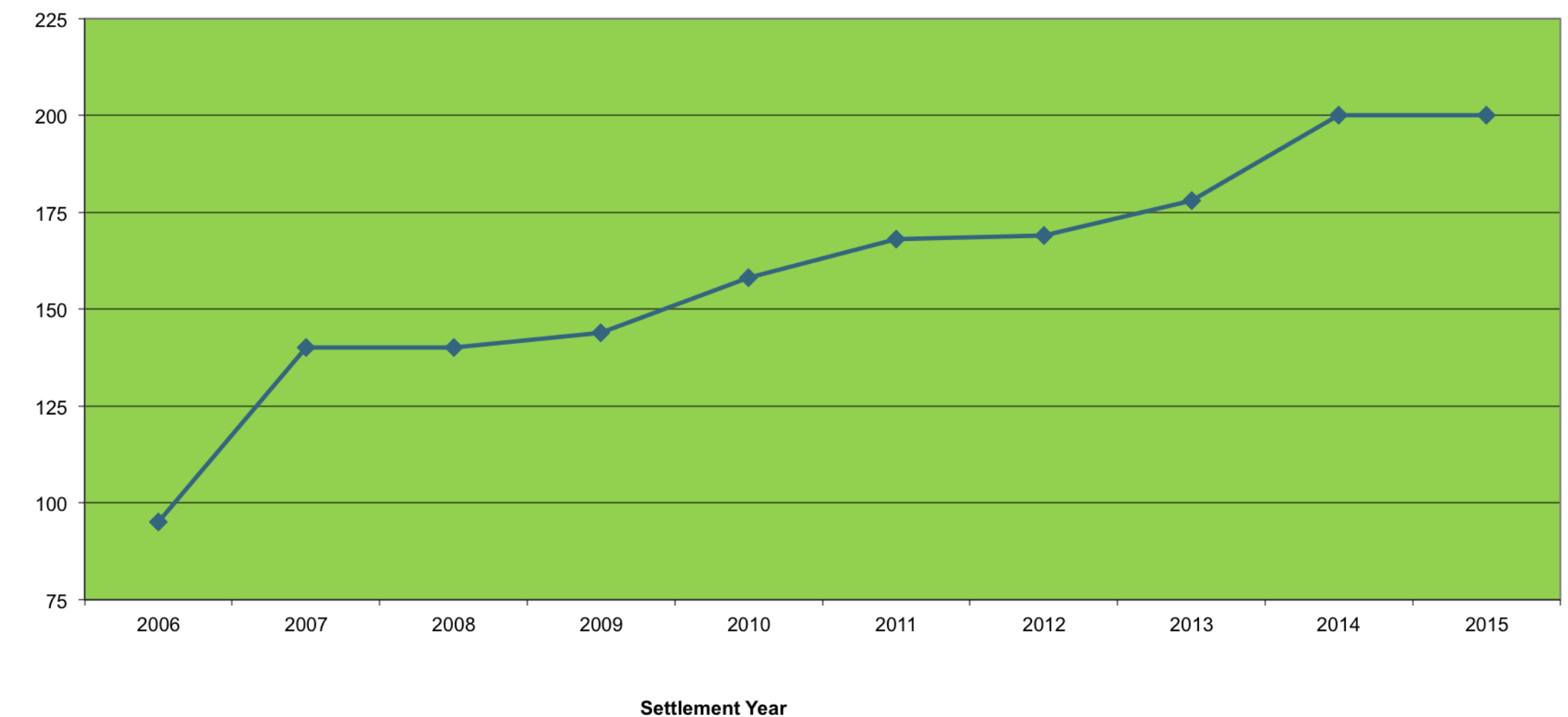
## Claim Trends – What can we learn from Mega Claims?

### Recent Large D&O Settlements

COMPANY	VALUE	YEAR
American International Group	\$960 million	2015
Bear Stearns	\$505 million	2015
Pfizer	\$400 million	2015
JP Morgan Chase	\$388 million	2015
General Motors	\$300 million	2015
Activision Blizzard, Inc.	\$275 million	2014
Golman Sachs Group	\$270 million	2015
Google	\$250 million	2015
Morgan Stanley & Co.	\$230 million	2015
Bank Of America	\$225 million	2015
Computer Sciences Corp.	\$190 million	2015
Puda Coal [China]	\$183 million	2015
Bank of New York Mellon Corp.	\$180 million	2015
Barclay's	\$178 million	2015
Fannie Mae	\$170 million	2015
Diversified Lending Group	\$163 million	2015
Duke Energy	\$146 million	2015
Freeport-McMoran	\$138 million	2015
Sprint Nextel	\$131 million	2015
Hewlett-Packard Company	\$100 million	2015

50th Largest Claim (\$M) - Last 8 years

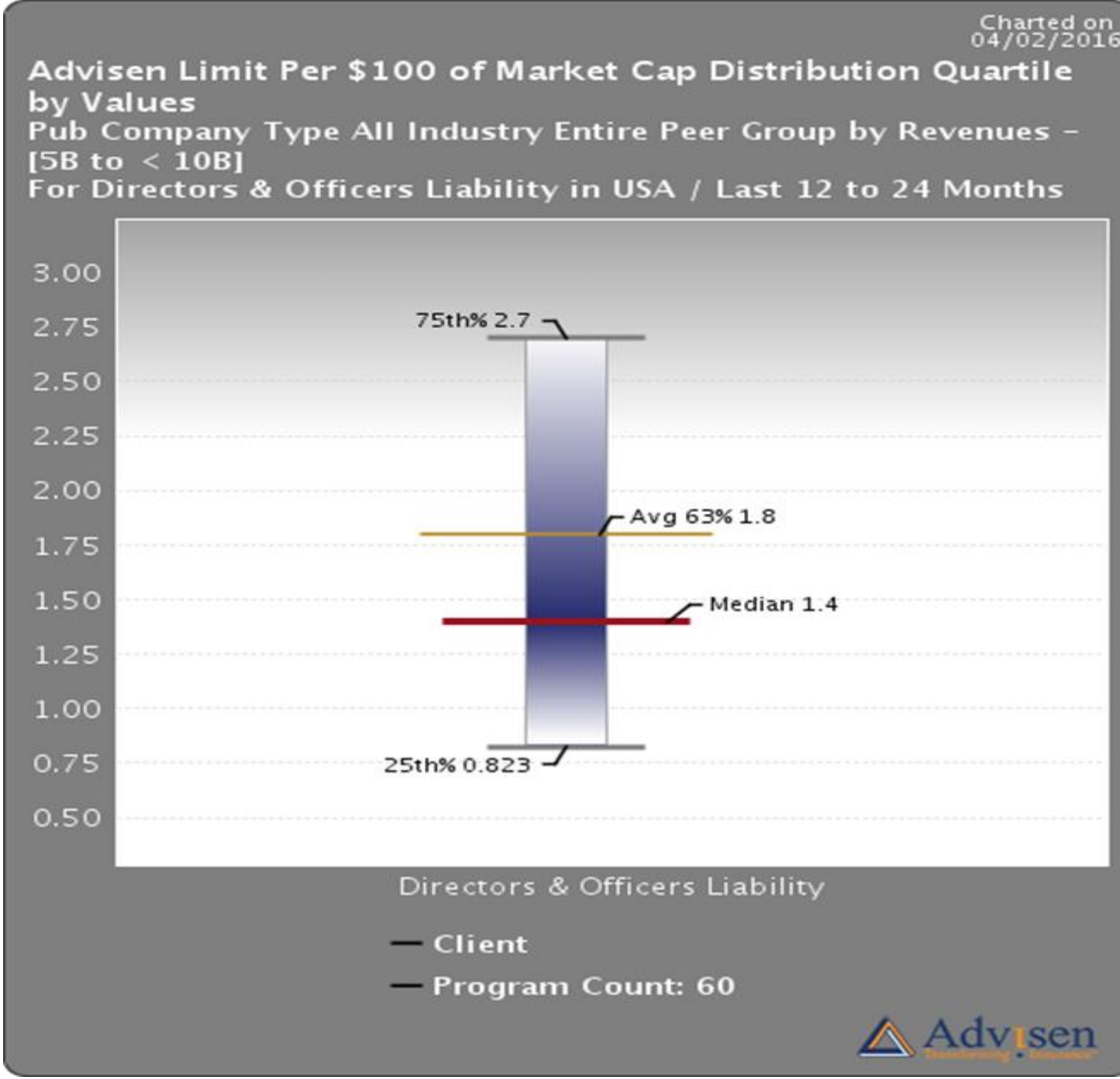
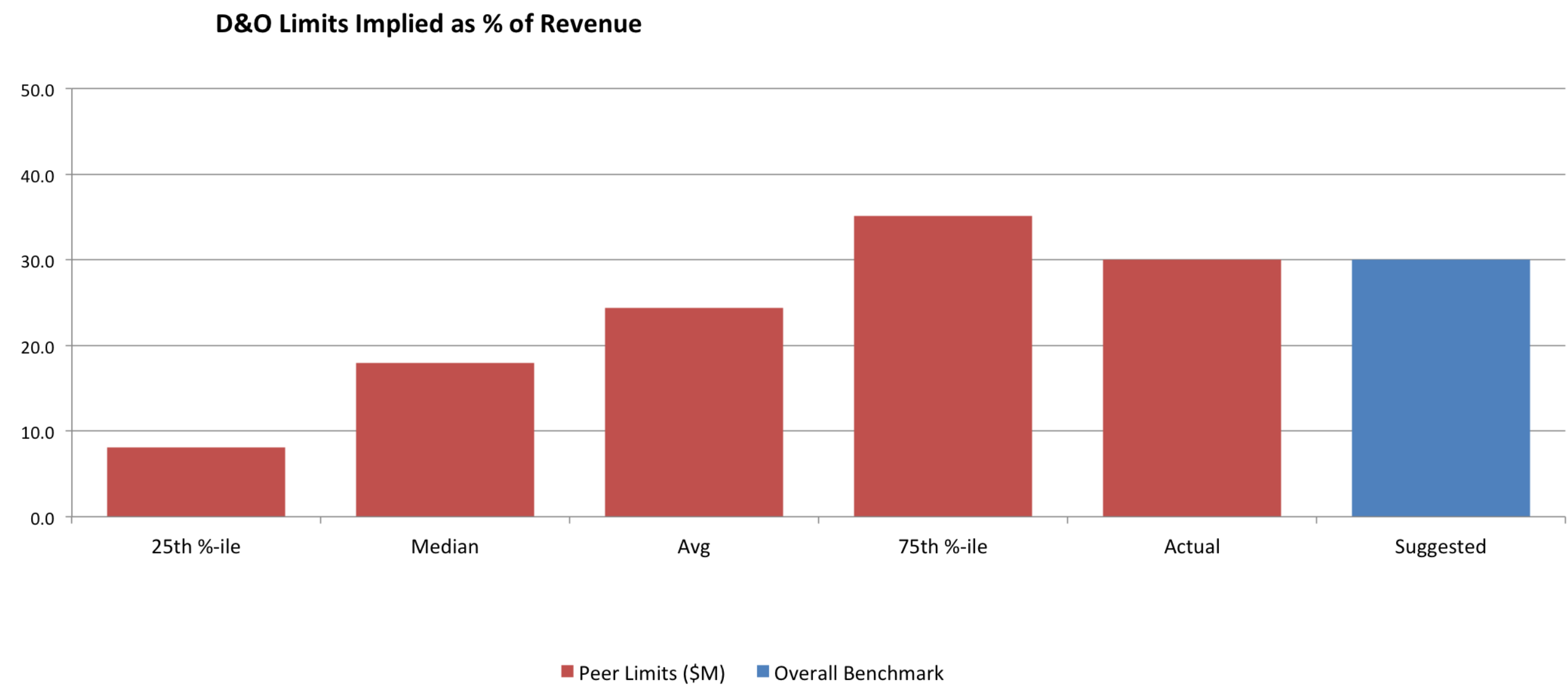
### D&O Mega Claims Leveling Off?



Advisen & Gallagher data

# D&O Limits Analysis – Benchmarking

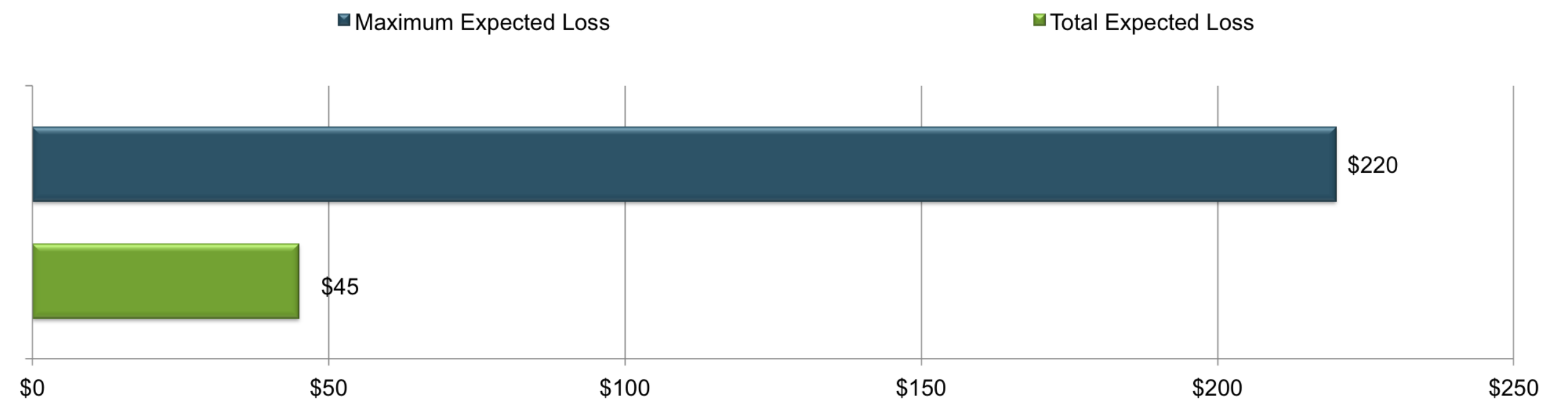
- Peer Analysis based on Advisen data



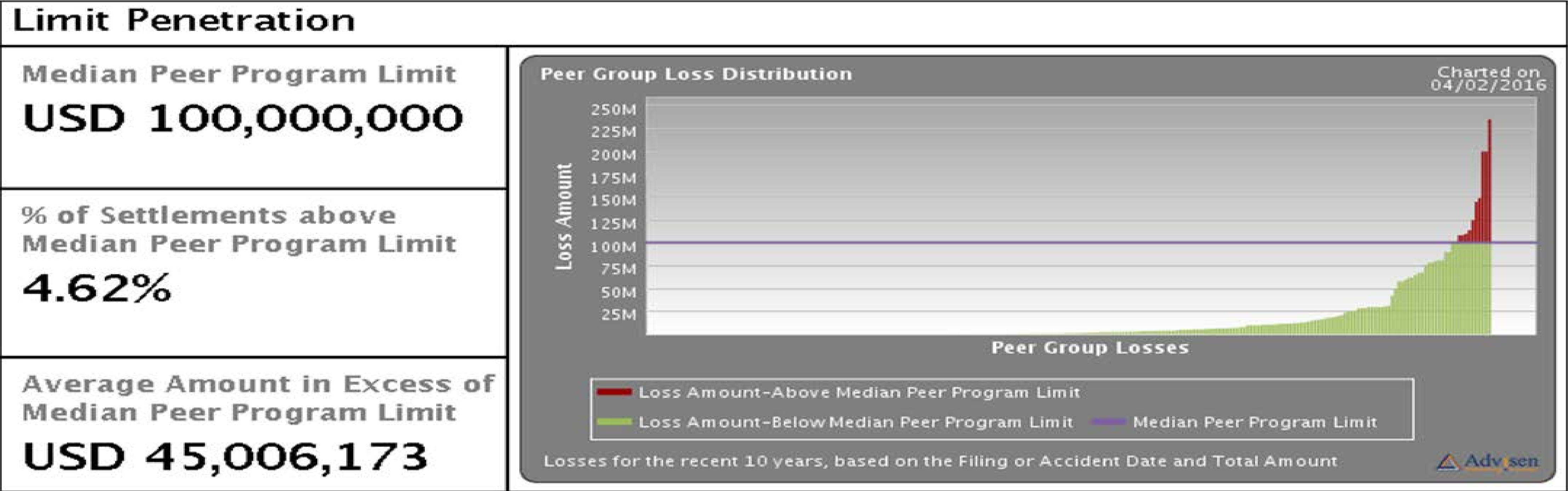
# Modeling Traditional D&O Securities Risk

**Maximum Expected Loss:** The maximum expected loss calculation attributes alleged loss to all shares traded during a given time period based on share volatility. This is an extremely conservative calculation, as it would assume a company's willingness to pay an unfavorable jury verdict rather than work toward a much less costly settlement.

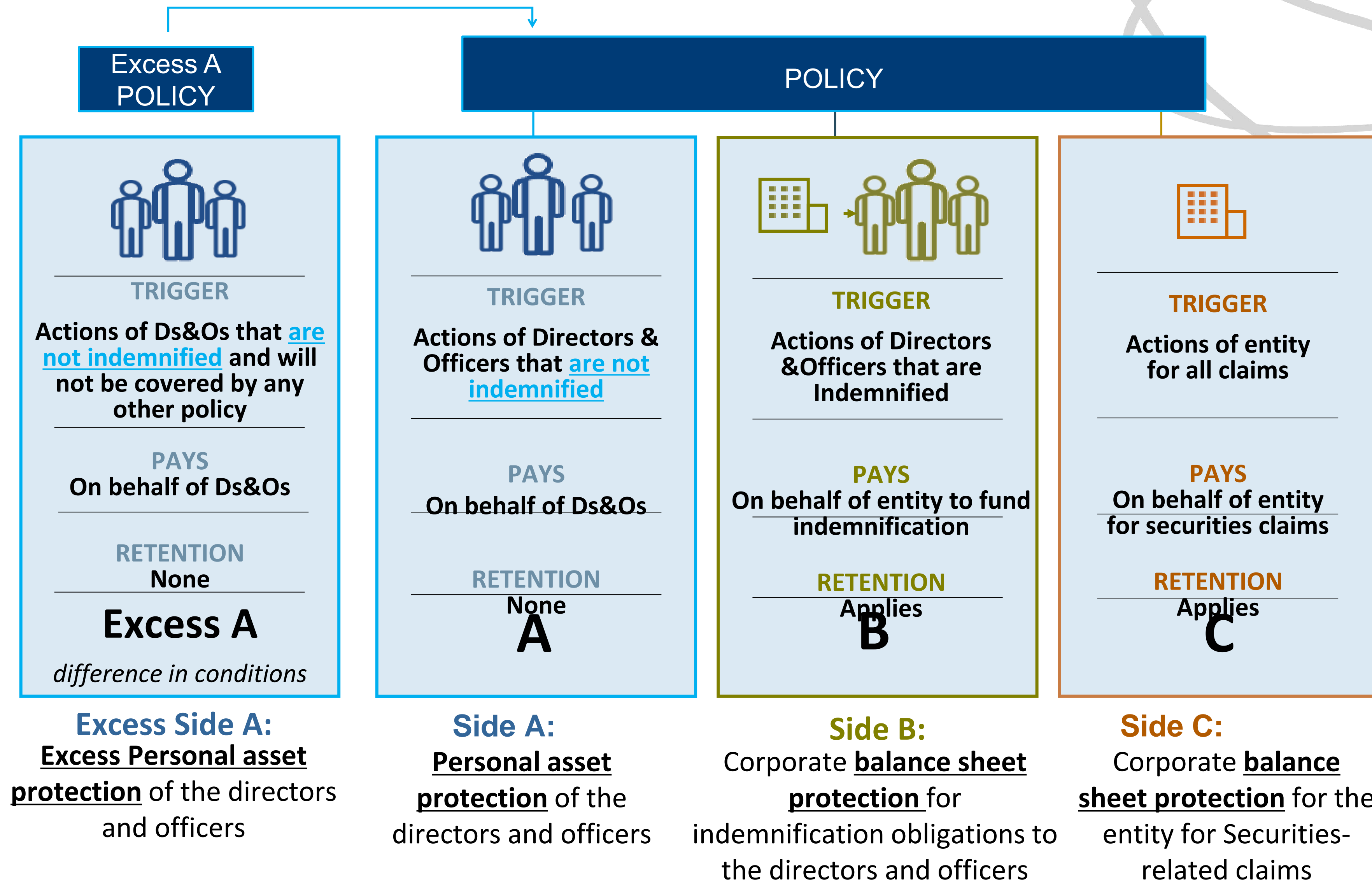
**Total Expected Loss:** The total expected loss calculation takes into account how much of the share value volatility should be attributed to the alleged wrongful act. It also takes into account that any settlement achieved will probably be a small percentage of any likely jury awards, and that a high percentage of these claims will be settled.



# Historical Claims Analysis – How much does actual claims data matter to you in thinking about what D&O policy total limits to consider?



# How important is Side-A? And how do you balance the purchase of Side-A limits versus total D&O Limits?

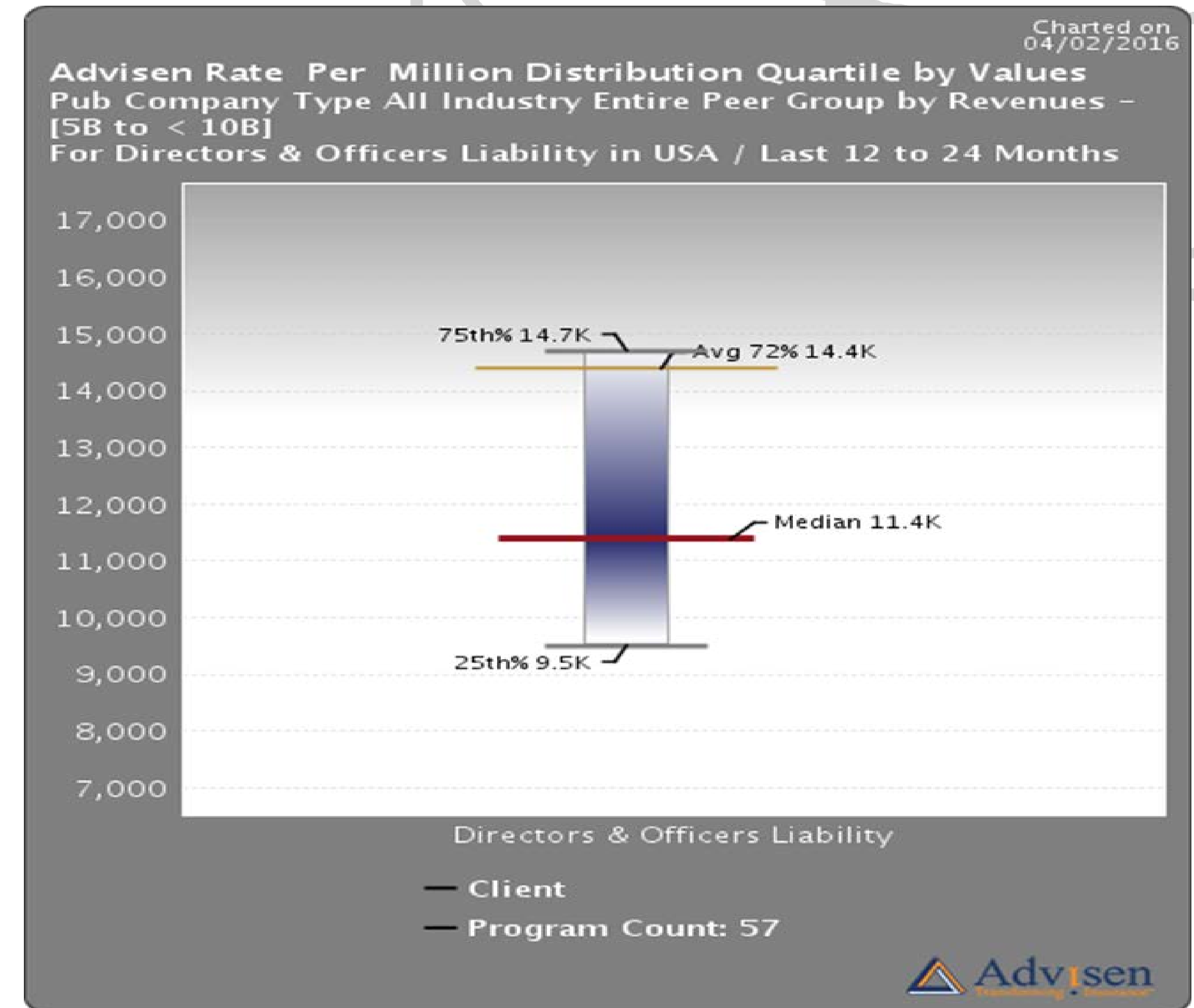
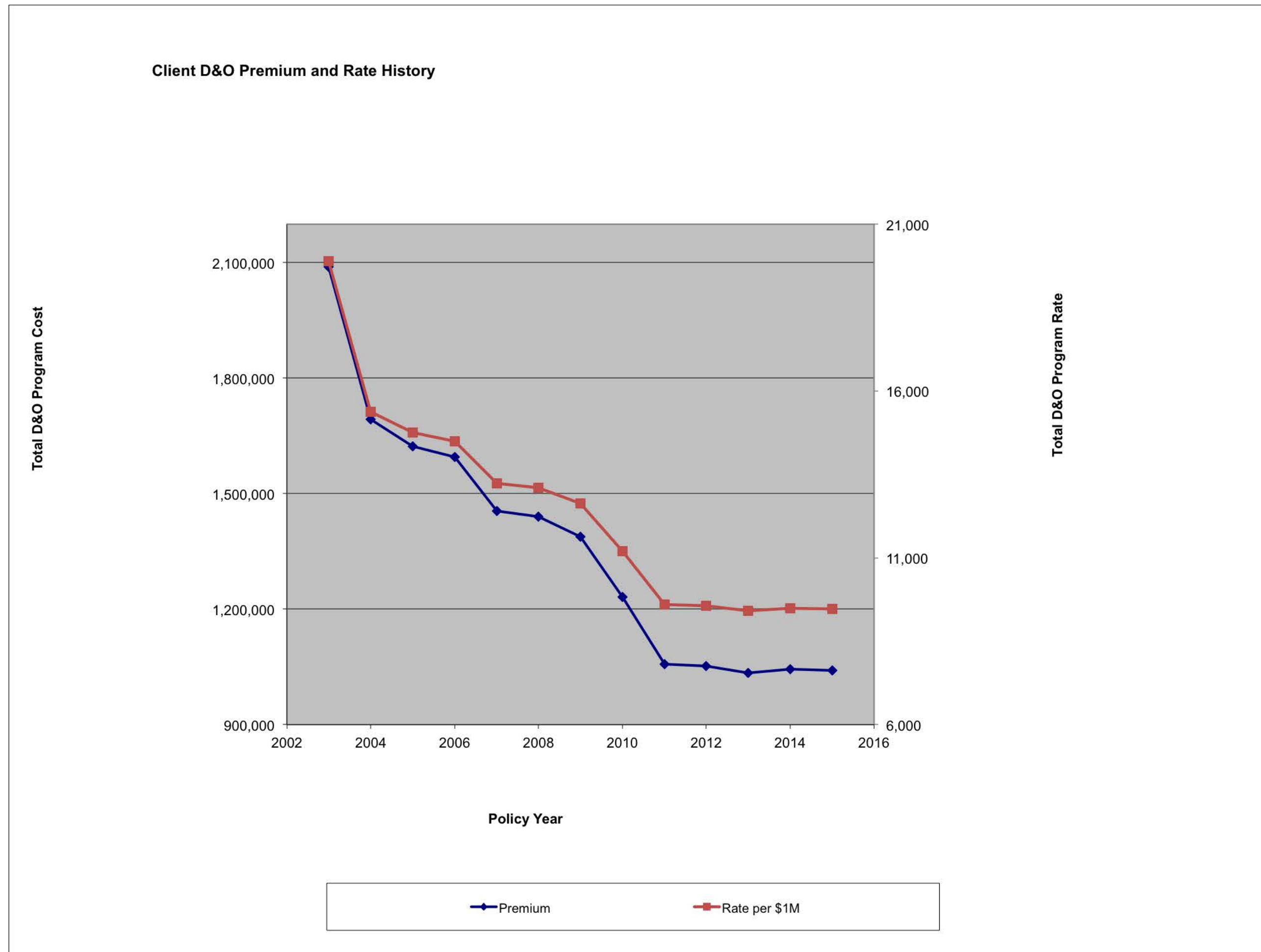


# Carrier Selection – what metrics matter and how do you employ them in choosing carrier partners?

		AM Best Financial Strength			
		A++	A+	A	A-
Financial Size	XV	Berkshire Hathaway Chubb Philadelphia Travelers	Allianz Arch AXIS Berkley Everest Hartford HCC Munich Re Nationwide Swiss Re Zurich	AIG Aspen AWAC CNA Endurance Liberty Mutual Lloyd's of London Markel XL	
	XIV		Great American	C.V. Starr Ironshore QBE	
	XIII		RSUI	Argo Crum & Forster	
	XII		Old Republic	Beazley	
	XI		RLI	Hiscox Navigators	
	X			OneBeacon	
	IX				
	VIII				
	VII				
	VI				
	V				

# Premium Analysis, Appetite and Fairness of Retention

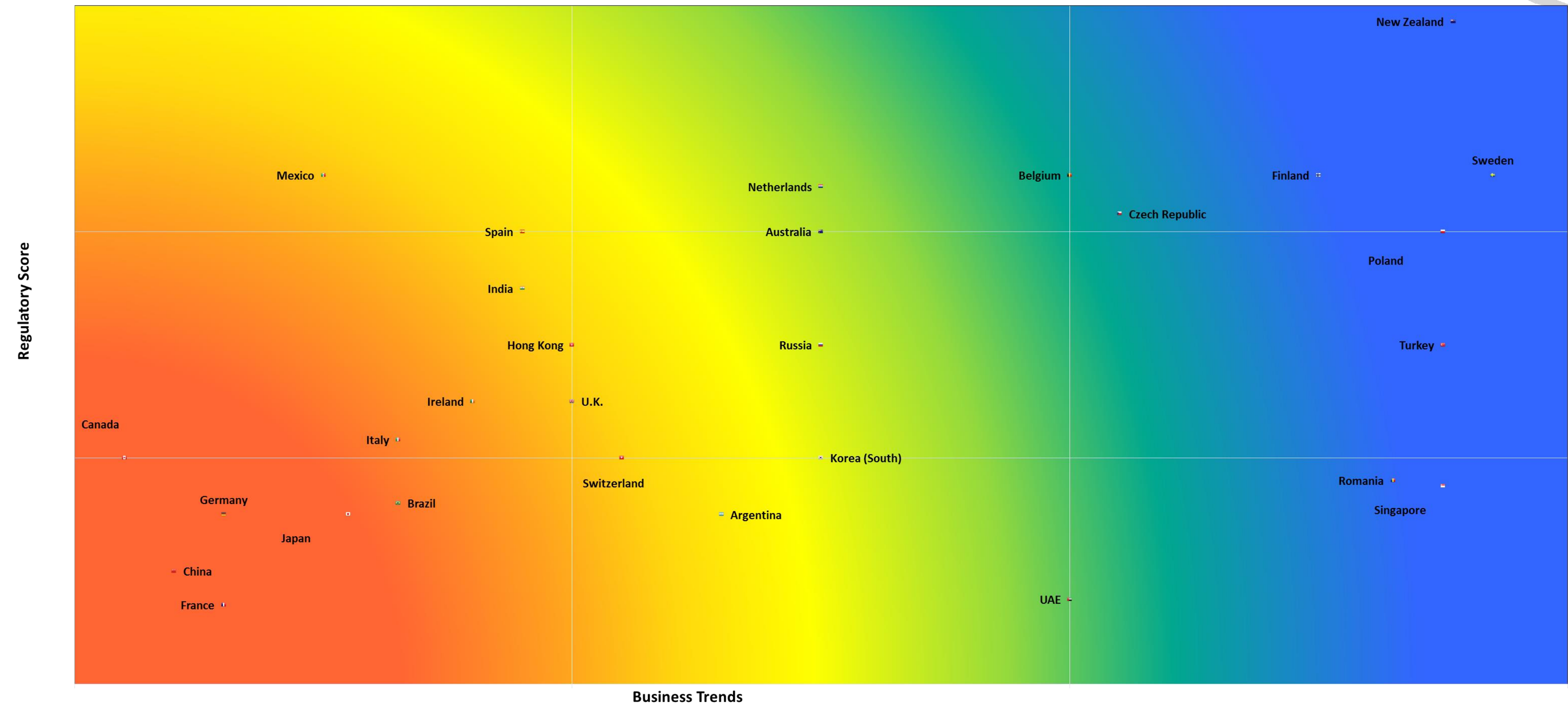
## Change in Program Cost vs. Rate per \$Mil



# Sample Foreign Local D&O Risk Assessment

- **Regulatory Score** = summarizes indemnification, admitted paper, tax, compulsory, enforcement, local marketplace and claims.
- **Business Trends** = reflect the propensity of multi-nationals to have significant operations and buy local policies in the country.

Foreign Country Local D&O Policy Risk Assessments



# The Buyer's Perspective



**Phil Norton**

Vice Chairman, Midwest Region  
Arthur J. Gallagher



**Stephanie Fisher**

Director of Risk Management & Insurance  
Quanta Services

# Globalization of D&O

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**Jennifer O'Neill**  
Regional Head of International  
Insurance Programs  
Allianz  
(Moderator)

# Globalization of D&O

- **Jennifer O'Neill**, Regional Head of International Insurance Programs, Allianz (Moderator)
- **Brian Botkin**, Head of Multinational, Global Financial Lines, AIG
- **Nick DeStefano**, VP - Underwriting Counsel, Argo Pro
- **Jeroen van Kwawegen**, Partner, Bernstein Litowitz Berger & Grossmann LLP
- **Carol Zacharias**, Senior Vice President, Underwriting Counsel, QBE

# Globalization of D&O



# Afternoon Break

Coming up next...  
“EPLI Spotlight”

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# EPLI Spotlight

# EPLI Spotlight

**Thomas Deer**  
Shareholder  
Olgetree Deakins  
(Moderator)



# EPLI Spotlight

- **Thomas Deer**, Shareholder, Ogletree Deakins (Moderator)
- **Carrie Kurzon**, Claims Consulting Director, CNA
- **Phil Rhodes**, Senior Vice President, Financial Lines, AIG
- **Kelly Thoerig**, SVP, EPL Coverage Leader, Marsh

# EPLI Spotlight



# Privacy and Network Security Issues

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**Chris Rafferty**  
Senior Vice President  
Aon  
(Moderator)

# Privacy and Network Security Issues

- **Chris Rafferty**, Senior Vice President, Aon (Moderator)
- **Nick Economidis**, Underwriter, Beazley
- **Mickey Estey**, Senior Vice President, E&O/Cyber/Media, RT ProExec - RT Specialty
- **Douglas Greene**, Partner, Lane Powell

# Privacy and Network Security Issues



# Closing Remarks & Reception



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