

# CLIENT ADVISORY

## New Regulations for Publicly Traded Companies May Increase Litigation

Due to uncertainty in the economy, the regulatory environment in the U.S., and the commercial insurance market, the exposure to litigation faced by publicly traded companies and their directors and officers continues to grow. The slew of new regulations that are imposed on publicly traded companies can lead to more investigations and violations which draw the attention of the plaintiff's bar. New regulations have historically led to additional litigation, which can be costly as new precedents must be set and new regulations tested. The following list of market trends are useful points of discussion for your publicly traded clients and can help outline why it makes sense to purchase additional limits of the currently inexpensive public D&O coverage.

### Passing of the Dodd-Frank Act

- Established 13 new regulatory agencies (and the elimination of one)
- Significant discretion given to regulators to write detailed additional rules in the future
- Whistleblowers are eligible to get awards up to 30% of sanctions for \$1M+ securities cases. The "bounties" that can be collected by whistleblowers will increase disclosure of issues that might have otherwise been suppressed.
- Effective January 2011, all but the smallest of publicly traded companies must, pursuant to Section 951, put their executive compensation practices to an advisory shareholder vote this proxy season (non-binding)
- "No" votes on compensation have been followed by unfavorable publicity, derivative demands and/or lawsuits alleging a breach of fiduciary duty (eight companies in first proxy season saw "no" votes – e.g. Black & Decker and Umpqua Holdings)

### New SEC Enforcement Policy – Enforcement Manual

- SEC recommends use of separate counsel by directors and officers in SEC actions, which will have a significant impact on defense costs
- Whistleblower issues – incentives/cooperation credit for individuals who voluntarily confess violations to SEC

### Frequency of Securities Claim Still High

- 1,196 securities lawsuits filed in 2010, slightly more than 2009's 1,171 suits (Source: Advisen)
- This is a staggering number considering 2009 was a record-setting year due to the credit crisis and Madoff-related filings
- 730 securities lawsuits were filed in the first half of 2011

### Average Securities Settlements

- Average settlement amount in 2010 and 2009 was \$42 million (Source: NERA)

### Derivative Lawsuit Surge

- 2010 was a year of large derivative settlements with solvent insureds (increases value of A-Side policies)

### M&A Litigation Surge

- In 2010, there were 353 suits filed in state and Federal court challenging corporate mergers, representing a 58% increase over 2009 (Source: Advisen)
- In the first half of 2011, 176 merger objection suits were filed, keeping the year on par with 2010
- Mergers and acquisitions objection suits based upon acquisitions, transactions involving going private, management buyouts and proxy violations are anticipated to continue to trigger litigation from parties unsatisfied with the terms of the transaction

### SEC and DOJ Enforcement of Foreign Corrupt Practices Act (FCPA)

- In 2010, the number of suits nearly doubled from 2009's count of 40 to a new high of 74 cases
- Settlements for FCPA-related lawsuits have also reached record highs
- Eight of the top 10 biggest settlements in FCPA's 34-year history occurred in 2010

### Impact of Subprime and Credit Crisis on Insurers

- 29 total settlements collectively representing almost \$3.4 billion to be paid by Insurers with many

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cases pending

- Are the insurers adequately reserved? Impact on D&O limits capacity into 2012 is yet unknown

#### **New Target for Class Action Attorneys – U.S. Listed Chinese Companies**

- As of September 2011, there have been 32 cases filed against U.S. listed Chinese companies, mainly for accounting scandals and mostly by reverse merger entities
- In 2010, many for-profit educational entities were targeted – what industry will be the target in 2012?

#### **Soft Market Continues**

- With the exception of struggling banks, the public D&O market continues to be very competitive with more than 30 insurers vying for clients
- Some firming of the market has been seen in primary layers due the multiple years of decreases with a continued frequency of securities claims
- Excess capacity, seen as a commodity layer, is still seeing downward pressure

It is as important as ever to be certain that the D&O policies you provide to your customers take these emerging issues into account. Your Financial Services brokers at AmWINS are here to assist you place this critical coverage.

*This article was authored by Kevin Dorse, a broker at AmWINS Brokerage of Georgia and leader of AmWINS' Public D&O Specialty Practice Group.*