April 2015

Databox First Quarter Securities Class Action Report

As of March 31, 2015

Woodruff-Sawyer & Co. is pleased to present the latest information concerning securities litigation filed against public companies in the United States. The information below comes from the Databox as of March 31, 2015. The Databox tracks securities class action litigation filed against public company issuers and their directors and officers.[1]

Securities Class Action Cases

While it is too early in the year to report on trends, here is the data for first quarter activity in 2015:

- **36 Cases filed (as compared to 32 cases filed in First Quarter of 2014).**
  - Technology is leading the pack with 13 cases while Biotechnology has dramatically dropped since the previous quarter (Biotechnology had 2 cases in 1Q2015 which compares to 12 filed in 4Q2014).
    - 36% – Technology
    - 17% – Financial
    - 5% – Biotechnology
    - 42% – All Other (Retail, Services, Manufacturing, Mining and Transportation)
- **9 Cases settled for an aggregate of $515M.**
  - Top 3 Settlements accounted for 94% of $515M.

	COMPANY	ALLEGATIONS
$400M	Pfizer, Inc.	Off-label marketing and payment of kickbacks (*$2.3B settlement with DOJ in Sept 2009*)
$50M	St. Jude Medical, Inc.	Heavy discounting of products to boost financials
$33M	Kinross Gold Corporation	Production issues and accounting inadequacies

  - The remaining six cases were settled for amounts in the $900k - $9.75M range.
- **14 Cases dismissed (as compared to 21 cases in First Quarter of 2014).**

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[1] For purposes of tracking issuer-related securities litigation, the D&O Databox focuses exclusively on securities class action lawsuits filed in federal courts against public companies by holders of common or preferred stock.

A Note about IPO Companies

As discussed in the last Flash Report, the increase in 2014 IPO activity has contributed to the increase in the annual filings for securities class action lawsuits. A further review of the companies that have gone public between 2010 through 2012 shows that, on average, 18% of IPO companies are sued within the first three years of their going public. We expect this rate will stay within a 10%-20% range as IPO filing activity has been very active since 2010 and shows no signs of abating. In fact, in the first quarter of 2015, 47% of the companies that were sued were companies that have gone public within the last three years indicating that suits against IPO companies are not slowing down. 38% of the lawsuits filed against the 2010-2012 IPO companies were not directly related to misrepresentations made in their registration statements/prospectuses, but were related to activities that occurred after the company went public – further indicating that companies in their early stages of being public are susceptible to being a target for securities class actions lawsuits as they are settling into the routine of making their quarterly and annual financial disclosures.

SEC Involvement on Accounting Issues Heats Up

As we have been reporting on over the last couple of years, the Securities and Exchange Commission has been strengthening its capabilities in detecting financial fraud, which would likely result in more SEC investigation and enforcement activity. This has now become a reality as a recent report issued by Cornerstone Research has indicated that the number of lawsuits alleging accounting fraud jumped 47% in 2014 and that the increase is due in part to a rise in accounting fraud enforcement cases brought by the SEC.[2] A review of our data bears that out, showing a 44% increase from 2013 to 2014:*

- 2013 Cases: 9 of the 50 cases alleging accounting issues had SEC investigations (18%).
- 2014 Cases: 17 of the 66 cases alleging accounting issues had SEC investigations (26%).

**Note: SEC investigations were ongoing when the lawsuit was initially filed. Our figures differ from Cornerstone Research in that we focus our count solely on securities class action lawsuits filed against public companies that were sued by holders of common or preferred stock.*

What can a company do to avoid SEC scrutiny? John Sikora, a former Assistant Director of the SEC Enforcement Division for 16 years, and who joined Latham & Watkins LLP as a partner in 2014, is on record with the following advice:[3]

How can public companies stay off the SEC's enforcement radar screen?

One of the easiest things a company can do to avoid attracting the SEC's attention is to avoid making mistakes in XBRL filings and revisions/restatements. A company could look like an outlier by the mere fact that its XBRL coding was incorrect. So "foot faults" can count against a public company.

Knowing that the SEC is looking for aberrations and outliers, it is important for companies to benchmark themselves relative to their industry and peers and make sure the company knows where it fits. In terms of performance and filings, companies should double check all calculations in marketing materials and quarterly reports; be aware of the performance of peer companies, as well as peer companies' accounting policy choices and risks disclosures. Public companies should consider disclosing additional details when deviating from the industry, and document and be prepared to explain any differences from their peer group. And lastly, companies should document and be prepared to explain discretionary accrual accounting policies.

For internal controls, companies should identify and analyze high-risk areas, including instances of multiple revisions or errors; promptly investigate reports of improper conduct through robust internal compliance programs; and ensure adequate communication among management, audit committee members and auditors.

On the books and records front, companies should keep in mind the importance of being on top of how accountants and other personnel communicate with each other and with management, the board of directors and auditors. During an investigation, the SEC staff will look carefully at internal communications, which generally will include not just emails but instant messages, text messages and chats.

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[2] "Securities Class Action Filings with Accounting Allegations Jump 47 Percent in 2014" dated March 31, 2015 by Cornerstone Research
[3] "Q&A with John Sikora – SEC Increases Focus on Accounting and Financial Fraud at Public Companies" dated September 11, 2014 issued by Latham & Watkins LLP

A link to this timely article that also discusses the "re-tooled" SEC and its use of data can be found here: "SEC Increases Focus on Accounting and Financial Fraud at Public Companies."

Enforcement Trends in 2015

Government regulators, in particular, the Securities and Exchange Commission and the Department of Justice, have also stepped up their activities with regard to their oversight of white-collar activities. A trend towards tougher actions on their part has been making the news lately:

- **Open Season: Boards and directors in the crosshairs of regulators:** An Inside Counsel report dated April 1, 2015 highlights the DOJ's push to hold individuals personally accountable for illegal acts and the impact of a company's level of cooperation in their investigation as to fines and penalties imposed.

  Link to the article:
  http://www.insidecounsel.com/2015/04/01/open-season

- **White Collar and Regulatory Enforcement: What to Expect in 2015:** A report issued by Wachtell, Lipton, Rosen & Katz dated January 28, 2015 discusses the points raised in the previous article in further detail and other key issues that the DOJ/SEC will be focusing on:
  - **The Pendulum Swings Back Toward Indictments of Corporate Entities** – Since the collapse of Arthur Andersen in 2002, the DOJ has been cautious about criminal indictments against corporate entities, but the financial crisis has altered their stance on this matter such that for entities engaging in fraudulent behavior, the DOJ has chosen to indict rather than enter into deferred prosecution agreements with these entities.
  - **SEC Enforcement Developments** – Increased use of administrative proceedings; and a greater interest in incentivizing whistleblowers (Note: 80% of the 14 whistleblower award recipients reported their concerns internally before going to the SEC).
  - **Insider trading** remains a high priority despite shifting rules.
  - **Cross-border tax enforcement** activity is expected to continue unabated.
  - **FCPA/Anti-corruption enforcement** – an area that continues to be high risk for companies and where settlement costs are getting more expensive.
  - **Encouragement of robust M&A** due diligence and post-integration efforts as it relates to an inherent risk of acquiring compliance problems/issues that could lead to FCPA or other types of violations.

  Link to the article:
  http://www.wlrk.net/webdocs/wlrknew/WLRKMemos/WLRK/WLRK.23816.15.pdf

We also invite you to subscribe to our weekly blog as an additional resource for staying informed on current news and events as it pertains to director and officer liability. D&O Notebook: Directors & Officers Liability Blog focuses on D&O liability insurance and corporate governance matters, including ways to reduce exposure to shareholder lawsuits and regulatory investigations.

About the D&O Databox

D&O Databox is Woodruff-Sawyer & Co.'s proprietary director and officer litigation database. Included within the D&O Databox is information concerning every securities class action lawsuit filed against public company directors and officers since 1988. Woodruff-Sawyer uses the D&O Databox to help its client model their D&O litigation-related risk.

Woodruff-Sawyer is one of the largest independent insurance brokerage firms in the nation, and an active partner of Assurex Global and International Benefits Network. For over 95 years, we have been partnering with clients to deliver effective insurance, employee benefits and risk management solutions, both nationally and abroad. Headquartered in San Francisco, Woodruff-Sawyer has offices throughout California and the West, including Oregon, Washington, Colorado and Hawaii.

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