

WS&Co. D&O DataBox Flash Report

March 2015

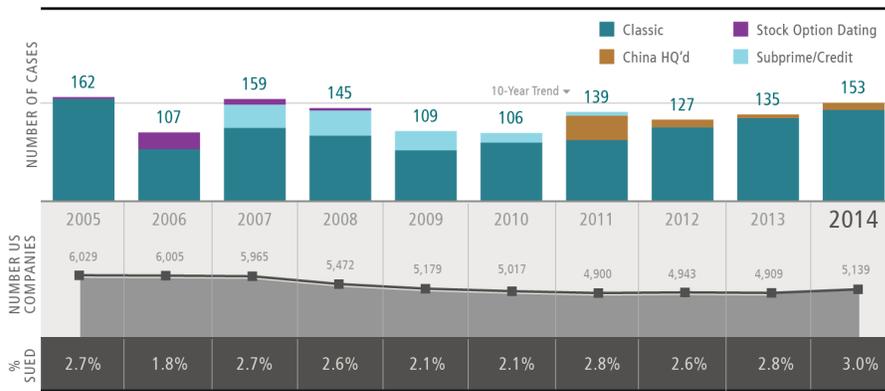
DATABOX™ Year-End Securities Class Action Report As of December 31, 2014

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 December 31, 2014. The DATABOX™ tracks securities class action litigation filed against public company issuers and their directors and officers.¹

2014 Filings Lands In the Top 3

2014 was a notable year for its total number of filings. A total of 153 cases were filed in 2014 making it the third largest year for annual filings in the last 10 years. 2005 and 2007 had more filings than 2014 with 162 cases and 159 cases filed, respectively.

Federal Shareholder Class Actions by Year of Filing



NOTE: DATA CURRENT AS OF DECEMBER 31, 2014. HISTORIC PUBLIC COMPANY DATA FROM WORLD FEDERATION OF EXCHANGES AND INCLUDES NYSE AND NASDAQ LISTED COMPANIES.

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Before we delve into this subject further, it is important to note that this count only pertains to securities class action lawsuits. Other reports in the news have indicated that total filings are down from 2013. The difference between the Databox numbers and these other reports lies in the parameters used for counting lawsuits. Other agencies/firms include in their count other types of actions such as M&A objection suits, certain derivative suits, and government regulatory actions. This report's

focus is mainly on securities class action filings against public companies issuing common or preferred stock for which such suits historically have been and continue to be the most likely and costliest personal liability risk for directors and officers that D&O insurance will typically respond to.

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.

In looking back at 2014, the foremost question that comes to mind is: What was the reason for this increase? When we look back at the spikes in 2005 and 2007, the main reasons for upswings were:

In 2014, the increase might be attributable to the large number of companies that went public in the last few years. 23.5% of the companies sued in 2014 were companies who went public within three years of their IPO. This is an increase from 2013 and 2012 in which 16.3% and 16.5% were sued, respectively.

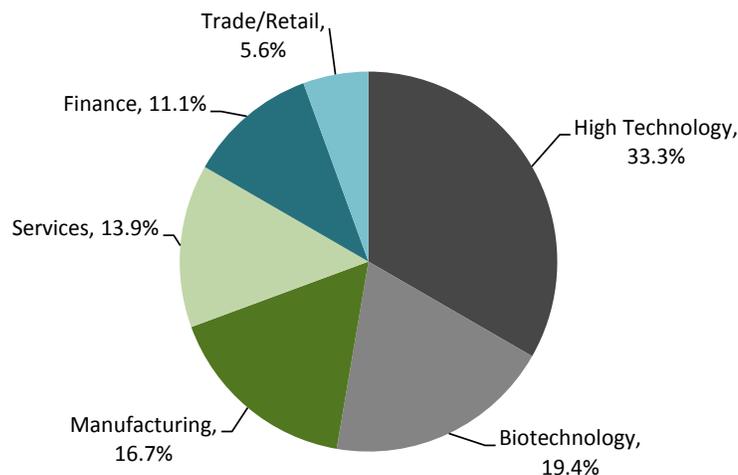
Top Three Annual Filings		
Year	Total Cases Filed	Notable Event
2005	162	Sarbanes-Oxley Act Compliance
2007	159	Financial Crisis
2014	153	??

The following table sets forth within the three-year period from IPO to 2014 lawsuit, how many companies were sued by time period:

Time Lapsed from IPO	No. of Companies	Percentage of 2014 Suits
Year 1 (within 12 months)	17	11.1%
Year 2 (within 24 months)	11	7.2%
Year 3 (within 36 months)	8	5.2%
Total:	36	23.5%

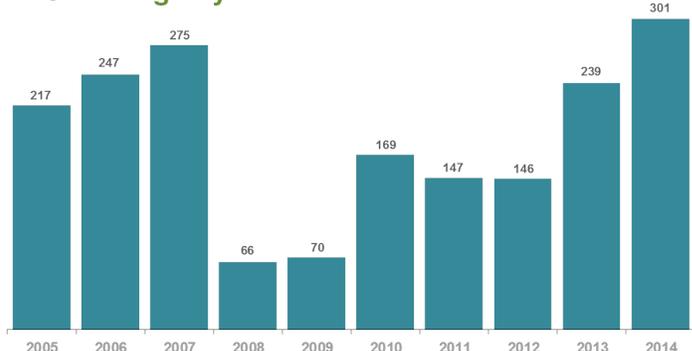
11 of the 17 companies that were sued in Year 1 were alleged to have made either inaccurate or misleading statements or to have omitted material facts in their Registration Statements—allegations that are classified as violations of Section 11 of the 1933 Securities Act (a “Section 11 Claim”). In Years 2 and 3, the numbers drop down significantly to 3 and 1 cases, respectively, for Section 11 Claims. This is to be expected as reliance on a misstatement or omission must then be established once an earnings statement covering a 12-month period from the registration statement has been publicly issued. On the other hand, 58% of these companies were sued for non-IPO related matters.

The following are the type of IPO companies that were sued by industry:



Considering the increased activity in the IPO market over the last several years as set forth in the chart below, the increase in IPO lawsuits is to be expected, particularly in the High Technology and Biotechnology industries. Looking to the future, it’s worth noting that 2014 ranked the highest in total number of IPO filings in the last 10 years (see chart below). Thus, it is highly probable that IPO companies will continue to be targeted for class action lawsuits in 2015 and beyond.

IPO Pricings by Year



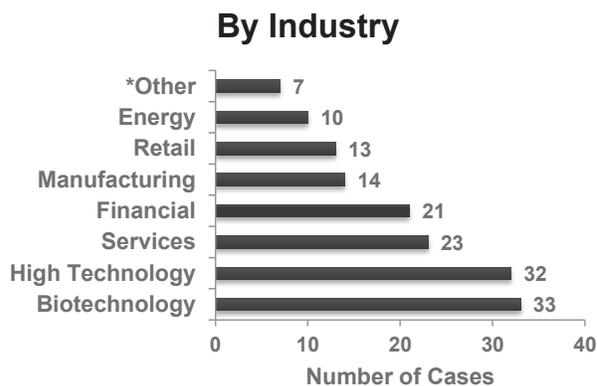
For all other securities class action cases, established companies that have been publicly trading their stock for over 10 years made up for 44% of the 2014 cases (67 companies). An interesting side note—approximately 25% of these companies did not enter the public market via an initial public offering process. In other words, they became a public company by other regulatory means such as registering as a small business issuer that had no initial trading activity but later began OTC trading and subsequently applied for listing on AMEX, NASDAQ or the NYSE. Or as a foreign public company that registered shares for listing on a U.S. stock exchange. Or as companies that commenced trading as the result of a merger or a spin-off.

Industries that Experienced Increased Activity

Industries that were sued and showed a marked increase over 2013 were the Biotechnology and Financial industries.

- Cases against Biotechnology companies jumped from 20 cases in 2013 to 33 cases in 2014, a 35% increase. There were 13 companies sued in 2014 versus four companies sued in 2013 that had gone public within the previous four years of being sued. As discussed above, the IPO market in the last few years is impacting these securities class action filings.
- The Financial industry cases had a sizable increase in suits compared to 2013—an increase of 133% from nine cases to 22 cases in 2014. In 59% of the 2014 cases (13 cases), federal and/or state regulatory authorities such as the FDIC, the SEC, the New York Attorney General, the Consumer Financial Protection Bureau and the Commodities Futures Trading Commission were involved prior to being sued. The remainder of the cases had various problems related to accounting irregularities and inadequacies that did not involve outside investigations. While the cases related to the financial crisis are winding down, financial companies are continuing to receive heightened scrutiny for financial missteps or fraudulent behavior.

The following are the breakdowns by industry and market cap for 2014 cases:



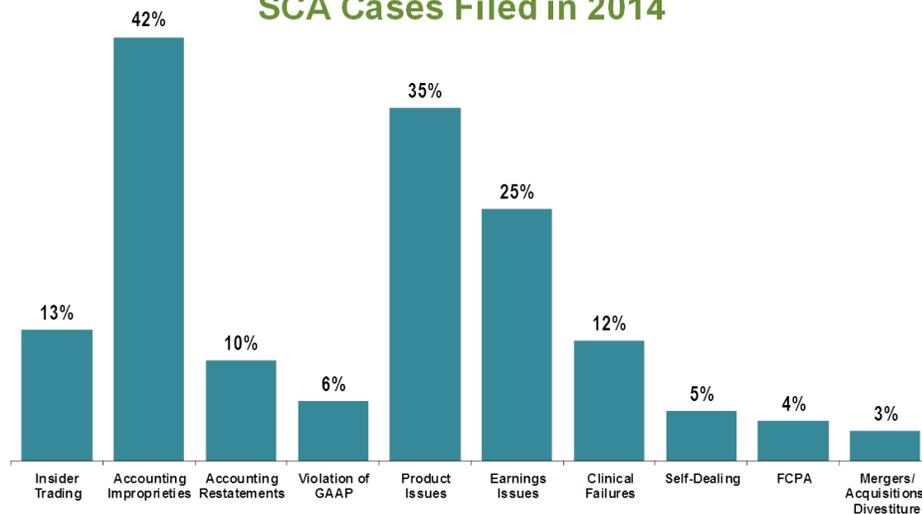
*Other: Basic Materials (1), Construction (1), Mining (3), Transportation (2)

Allegations

Accounting, product and earnings issues continue to be the top three allegations that get most of the attention.

A note about FCPA: In the past ten years there have been only a few cases brought against companies because of an alleged FCPA violation. As a reminder, there is no private right of FCPA enforcement per se; these cases are all about FCPA issues, but are styled as disclosure issues. From 2005 thru 2009, there were five such cases. However, from 2010 thru 2014, there were 12 cases—six of which occurred in 2014—over a two-fold increase in the last five years. The companies affected were across all industries: Biotechnology (Sanofi); Energy (Petrobras); Finance (Och-Ziff Capital Management); High Technology (Juniper Networks); Retail (Wal-Mart); and Manufacturing (Avon Products). Further insight on FCPA trends can be found at the

Occurrence of Allegations SCA Cases Filed in 2014



following link to our D&O Notebook Blog: [FCPA Trends: Individual Liability, Enforcement Actions and the SEC.](#)

Settlements in 2014: A Move in a Different Direction?

There were 65 settlements totaling \$2.1 billion in 2014, 63 of which involved settlements made by companies for a total of \$2.0 billion. Two of the 65 settlements were with an auditor (\$10.5M) and an underwriter (\$74.0M).

Settlements by Financial companies accounted for the majority of the settlement dollars in 2014. Delving further into the numbers reveals that several large settlements over \$50M accounted for the majority of the amounts settled in most of these industries:

- **Financial:** 86% of the \$1.3B was for two settlements (AIG - \$960M and Fannie Mae - \$170M).
- **Energy:** 73% of the \$364.4M was for one settlement by Massey Energy (\$265M).
- **Services:** 52% of the \$124.9M was for one settlement by Psychiatric Solutions (\$65M).
- **Technology:** 54% of the \$104.8M was for one settlement by Hewlett-Packard (\$57M).
- **Biotechnology:** 71% of the \$84.3M was for one settlement by Hospira (\$60M).

Total Cash Settlements by Industry



Note: Settlement amounts do not include settlements made by third parties.

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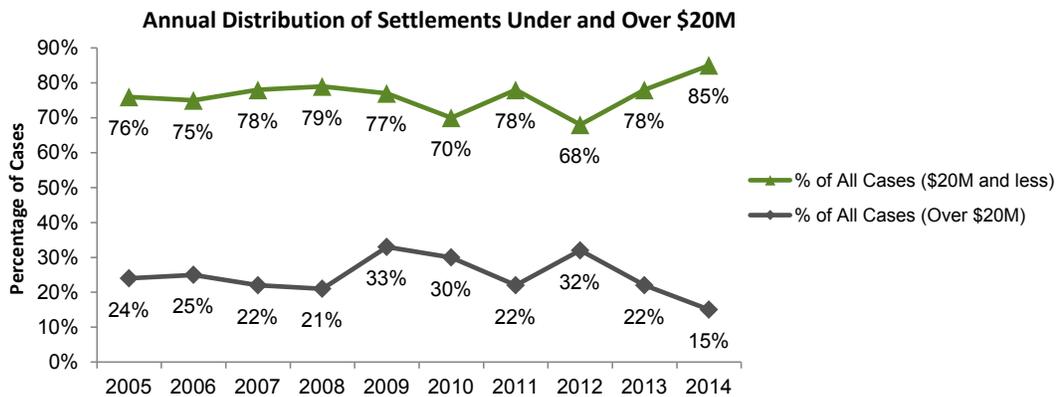
The aggregate cash settlement amount for eight of the 63 settlements last year amounted to **85%** of the 2014 total cash settlement amount (\$1.7B of \$2.0B). The following were the top 10 settlements of 2014:

Issuer	Suit Year	Industry	Settlement Amount ⁽¹⁾	Case Details
American International Group (AIG)	2008	Finance	\$960.0	Massive loss exposure associated with credit default swaps
Massey Energy Company	2010	Mining	\$265.0	Unsafe mining operations—2010 explosion causing 29 deaths
Federal National Mortgage Association (Fannie Mae)	2008	Finance	\$170.0	Subprime mortgage exposure and federal government bailout
Psychiatric Solutions, Inc.	2009	Services	\$65.0	Deficiencies and unsafe conditions at patient facilities
State Street Corporation	2009	Finance	\$60.0	Markups of foreign currency trades
Hospira, Inc.	2011	Biotech	\$60.0	Quality control deficiencies of its infusion pumps
Hewlett-Packard Co.	2011	HiTech	\$57.0	Discontinued production of webOS devices (tablets/ smartphones)
Weatherford International Ltd.	2011	Energy	\$52.5	Improper accounting for income taxes and financials restatement
Autoliv, Inc.	2013	Mfg	\$22.5	Price fixing of automobile parts
Bankrate, Inc.	2013	Services	\$18.0	Misleading information about the quality of its insurance leads

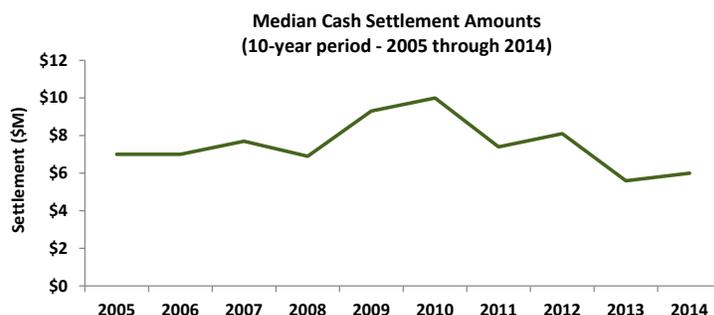
NOTE: Data current as of December 31, 2014

⁽¹⁾ Settlements do not include any defense costs or expenses.

When we review the settlements over the last 10 years, the distribution of larger settlements (over \$20M) vs smaller settlements (\$20M and under) significantly changed from 2013 to 2014. As set forth below the distribution of smaller and larger settlements moved from 78% and 22% in 2013 to 85% and 15% in 2014—a 7% increase in settlements in the \$20M and under settlement range. The 10-year median for the \$20M and under range is 76%.



This trend toward more cases settling for relatively lower amounts is further illustrated in the chart below where the median cash settlement amount has declined from a 10-year high in 2010 of \$10M. However, it is worth noting that the median cash settlement has mainly been in the \$6M-\$8M range for the last 10-year period.



The average and median settlement amounts for 2014 (excluding settlements over \$1B) were:

- Average settlement: \$33.4M (as compared to a 10-year average of \$32.4M)
- Median settlement: \$6M (as compared to a 10-year median of \$7.5M)

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Dismissals (& the Halliburton Decision)

In 2014 there were a total of 45 case dismissals by the court as compared to 46 case dismissals in 2013 (excluding withdrawals of 10 cases and 6 cases, respectively). The breakdown of cases dismissed in 2014 by suit year are as follows:

Year(s) of Suit	No. of Cases
2004 thru 2010	5
2011	5
2012	16
2013	17
2014	2

In a review of cases filed in the last 10-year period, particularly from the time period of 2005 through 2012, the average time elapsed from suit date to dismissal is 1.7 years as compared to an average of 2.5 years from suit date to cash settlement. There is a backlog of 156 open cases from 2009 through 2012 (30% of total cases) that have yet to be factored in which may be an indicator that case resolutions are coming more slowly.

Since the Supreme Court decision in June 2014 in *Erica P. John Fund Inc. et al v. Halliburton Co. et al.* (“Halliburton II”), there have been a few cases ruled upon by lower courts where the Halliburton II decision has been applied. The Halliburton II decision had opened the door for defendants to bring evidence in at an earlier stage of litigation to counter claims that a false statement impacted the price of a company’s stock. Thus far, the small number of decisions (five to date) have blunted expectations on the impact it would have in the defense’s favor. For example, the U.S. District Court for the Southern District of Florida granted class certification in *Aranaz v. Catalyst Pharmaceutical Partners*, a case in which event studies were submitted by both sides. For various reasons, the court rejected the defense’s price-impact arguments and cited Halliburton in its decision as follows:

“...once a plaintiff shows entitlement to a presumption on reliance, the defendant is burdened with the daunting task of proving that the publicly known statement had no price impact.”²

This ruling bears out the discussion among legal experts that determining what constitutes “price impact” is very complicated, and is an issue that was left unanswered by the Supreme Court. Given that each case has its own unique set of facts, and that there are additional costs and inherent risks of introducing event studies to rebut price impact, it is likely that most companies will take a “wait and see attitude” in 2015 while the courts address the application of Halliburton II on cases brought by a handful of defendant companies that are willing to take on this matter.

For More of the Latest News

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

Other recent blog posts that may be of interest to you:

- [Tech IPOs in 2015: What to Expect, How to Prepare](#)
- [Adviser’s Year-End Report and Thoughts about 2015](#)
- [Insider Trading May Be Harder to Prove After New Ruling, But Don’t Get Careless](#)
- [ISS Says No to Certain Corporate Bylaws in 2015](#)

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² *Law360 Article dated October 30, 2014 entitled: “2 New Cases Temper Post-Halliburton Expectations.”*