THE US FINANCIAL AND PROFESSIONAL MARKET IN 2017: OUR TOP 10 LIST

The year ahead could be full of surprises. Financial and professional risks can be like a good movie or television show, complete with twists and turns, danger and cliffhangers. From cyber risks and directors and officers liability to employment practices and mergers and acquisitions, it may be hard to know what's coming next.

To prepare you for 2017, here are 10 trends — sorry for any spoilers — that you should keep your eyes on.

1. SWEET AND LOWDOWN: D&O RATE DECREASES TO CONTINUE

Public directors and officers (D&O) liability insurance rates are expected to keep falling in 2017, continuing nine straight quarters of rate decreases. However, as seen in the third quarter of 2016, the rate of decline will likely continue to moderate incrementally. There was a notable spike in federal filings in 2016 — the most since 2002. However, the impact from those claims will take months, perhaps years, to be reflected in insurance rates.

2. THE NEGOTIATOR: BROADER D&O POLICIES

The days of "pure" individual D&O coverage are gone. Insurers will likely continue to broaden and differentiate their D&O offerings to remain competitive. These include:

- Providing or improving entity investigation cost coverage, possibly to include non-formal investigations.
- Adding reinstatement of limits for full coverage.
- Excess insurers reimbursing an insured a percentage of their retention if able to successfully obtain an early securities class action dismissal with prejudice.
- Continuing increases in excess derivative investigative cost sublimits.

3. ALL THE PRESIDENT'S MEN: CHANGING SECURITIES REGULATIONS

Securities regulations and resulting enforcement/claims will likely change under President Donald Trump's administration and a Republican-controlled Congress. There will likely be some type of deregulation for financial institutions and other organizations. This could come in the form of fewer corporate penalties while continuing to hold culpable individuals accountable. It is also likely that the US Securities and Exchange Commission (SEC) whistleblower program will continue in some form — possibly requiring whistleblowers to first report purported wrongful conduct internally. Although deregulation may ease the regulatory burden on businesses in an effort to stimulate growth, it could lead to a rise in resulting claims due to a potential decrease in transparency and mandated corporate guidelines.

4. LIGHTS, CAMERA, ACTIVISM: ACTIVISM IS ON THE RISE

Shareholder activism has become one of the most important issues confronting corporate officials. Shareholder activism in the US and abroad is increasing as shareholders continue to influence corporate conduct and decision making. However, activism is not just limited to shareholders. For example, with recent environmental activism in the energy sector, shareholders and regulators are targeting companies and directors for purported failures to accurately disclose climate-change-related risks to investors. Regardless of the type of activism involved, the result will likely be an increase in litigation and regulatory activity globally.

5. THE ENFORCER: NEW LABOR CHIEF

Andrew Puzder, CEO of CKE Holdings (the parent company of Carl's Jr. and Hardee's), has been nominated to head the US Department of Labor (DOL). If confirmed, Mr. Puzder could impact the frequency and severity of employment, wage and hour, and fiduciary liability litigation. This is in part because:

- Mr. Puzder has been an outspoken critic on several federal employment initiatives, including the regulation expanding overtime protection, according to public reports. The regulation was supposed to go into effect December 1, 2016 but was blocked on a nationwide basis by a Texas district judge just days before its effective date. As many companies had already planned to take action in preparation for its implementation, this wait-and-see position creates a significant amount of uncertainty.
- The Trump administration's potential anti-regulation perspective may also mean strong opposition to the DOL's new fiduciary rule, which expands the scope of who acts as a fiduciary. The rule is expected to take effect in April 2017.

6. THERE WILL BE BLOOD: M&A ACTIVITY

Merger and acquisition (M&A) activity — in the US and abroad — is expected to remain robust in 2017. Companies will likely be eyeing smaller, more tactical M&A opportunities. This may fuel continued interest in representations and warranties (R&W) insurance to help facilitate the deal close and differentiate a bidder's proposal.

From a D&O perspective, it is expected that beyond traditional M&A, companies will seek alternative structures such as joint ventures, partnerships, and alliances. It will be increasingly important to review the D&O policy to ensure that any unique structure is properly covered. Additionally, issues with integration can present an increased risk for shareholder claims if expectations are not met and a stock drop reflects that.

7. MR. ROBOT: CYBER INSURANCE EVOLVES

Cyber insurance was once thought of as a way to protect your company against losing customers' credit card, personally identifiable, and/or health information. Organizations in 2017 are increasingly considering the threat of business interruption as a result of a security breach. Risk professionals will need to address evolving cyber risks across multiple platforms, as the business interruption may be caused by both physical and nonphysical perils. As a result, organizations will need to work with their insurance advisors to bridge financial and professional and property insurance programs to prevent potential gaps in coverage.

Also, look out for big data analytics to play a larger role in underwriting. Cyber insurance has suffered from a lack of statistically significant actuarial data; however, insurers have begun to explore alternative sources of analytics to aid in their evaluation of an applicant. As underwriters look to issues of threat environment, resiliency, and the general digital hygiene of the applicant, they also look to the interconnectivity of organizations and worry about the possible aggregation of risk across their book.

8. AND JUSTICE FOR ALL: EXCESSIVE FEE CLAIMS INCREASING

The trend is clear: Employee Retirement Income Security Act (ERISA) fee litigation settlement amounts are rising. With the increased pool of plaintiffs law firms now focusing on excessive fee litigation — some of which are advertising via Facebook and LinkedIn in search of new participants — the worrisome potential exists for volume filings of claims with the goal of getting a quick payout for the plaintiffs and their law firms. Given the large dollar amounts that are held in 401(k) plans today, and the recent successes of plaintiff firms, fee cases remain sufficiently attractive for plaintiffs' lawyers to pursue.

9. METROPOLIS: FINANCIAL AND TECHNOLOGY RISKS

Financial and technology (FINTECH) industries are converging at an increasing pace. Traditional players in both industries are looking at new revenue opportunities and ways to improve their current offerings and systems. And new firms are emerging with inventive and disruptive business models designed to reshape the financial services industry and meet changing consumer demands.

Although these shifts spark innovation, defensive positioning, and competition, they also have changed the risk landscape for financial and technology organizations. Moving into 2017, financial companies will increasingly see exposures that were historically the domain of the technology industry; technology companies will continue to move into highly regulated areas that they may be unfamiliar with. This has left financial regulators — including the Federal Deposit Insurance Corporation, Federal Reserve, Office of the Comptroller of the Currency, Consumer Financial Protection Bureau, and state agencies — struggling to classify new players whose risk profiles combine the two sectors.

10. THE MATRIX: AN INTERCONNECTED WORLD

Global enforcement agencies are cooperating with one another and pursuing what they believe to be wrongful conduct around the world. Often they are jointly sharing information and tactics in real time, which can lead to increased D&O and errors and omissions (E&O) insurance claims as measured by both frequency and severity.

One such tactic — referred to as "a game changer" by the SEC — is rewarding whistleblowers. In what may be a meaningful development, the Ontario Securities Commission in Canada has now opened its own Office of the Whistleblower capable of paying bounties of up to $5 million, and Australia is considering doing so as well.

Marsh will continue to monitor these and other trends that could affect your financial and professional insurance programs in 2017. As always, we welcome your thoughts and feedback on these topics, and remember to check back to www.marsh.com for additional analyses and insights on the risk and insurance issues that matter to you most.

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