In this quarter’s Newsletter, we look briefly at:

- Two important management liability cases currently before the Supreme Court.
- A new whistleblower protection provision applicable to most employers.
- The SEC’s recent cybersecurity roundtable.
- The timing of 401(k) matches and enforcement attention.

U.S. SUPREME COURT TO DECIDE TWO IMPORTANT MANAGEMENT LIABILITY MATTERS

Most in the D&O community are aware that the U.S. Supreme Court is going to decide whether an important tenant in federal securities class actions will stand: the fraud-on-the-market theory.¹ If this legal theory is discredited by the Court, it will be much more difficult for groups of investors to bring securities class actions. While federal security class actions are no longer the largest group of claims facing public companies and their boards, they are still the most expensive.² Boards of directors and their D&O insurers are keenly awaiting the outcome of this decision.

Meanwhile, many may not be aware of a potentially equally important Fiduciary or Employee Retirement Income Security Act (ERISA) case also before the high Court. Here, the issue to be decided is the amount of assumed prudence afforded fiduciaries making pension investments in the company’s own stock in the company’s Employee Stock Ownership Plan (ESOP) in light of deteriorating financial conditions.³ A number of courts have held that fiduciaries are entitled to a strong presumption of prudence when it comes to investment decisions with respect to company stock. This presumption has acted as a strong shield against liability for fiduciaries in these cases and stands in sharp contrast to ERISA’s usual prudent expert standard for all other fiduciary decision.⁴

The ERISA decision will be important to both public and private companies and may determine the fate of a string of expensive ERISA tagalong cases that have been brought over the past 15 years, usually in relation to 401(k) pension plans – and which weigh heavily in the pricing of Fiduciary Liability insurance.⁵
NEW WHISTLEBLOWING PROVISIONS IN THE AFFORDABLE CARE ACT

In our December 2013 Newsletter we focused on topics relating to whistleblowers in the U.S. and around the world, but we didn’t mention the new provisions in the Affordable Care Act (ACA). While companies across the U.S. are still struggling to understand how the landmark health care law works, under the Act, employees are protected from retaliation for reporting alleged violations of the Act’s health coverage reforms (Title I) and for receiving a premium tax credit or a cost sharing reduction for enrolling in a qualified health plan.

Please keep in mind that these protections apply to almost all public and private employees and the protections under the Act and the regulations may be extensive.

THE SEC HOLDS A ROUNDTABLE ON CYBERSECURITY

On March 26, the U.S. Securities and Exchange Commission (SEC) hosted a roundtable in Washington, D.C., to discuss cybersecurity and the issues and challenges it raises for market exchanges and public companies. As the SEC Chair mentioned in her opening remarks, in the eyes of the Commission:

Cyber threats also pose non-discriminating risks across our economy to all of our critical infrastructures, our financial markets, banks, intellectual property, and, as recent events have emphasized, the private data of the American consumer.

This is a global threat. Cyber threats are of extraordinary and long-term seriousness.

The SEC’s jurisdiction over cybersecurity starts with their concerns about the integrity of the market systems and customer data protection, and then extends to the disclosures of the publicly traded companies themselves. This focus on public companies was first demonstrated back in 2010 when the Commission issued guidance to U.S. listed companies on disclosing their real and potential exposures from a cyber-attack in our November 2011 Alert: Radical New Cyber Exposure Disclosure Guidance For Public Companies.

From the perspective of the board of directors, the roundtable considered how far we had come since this guidance was first issued (and the prevalence of the dreaded boilerplate) as well as whether or not best practices should include a special committee of the board focused on cyber issues (it depends on the company’s operations). It also continued the rallying cry for a partnership between the government and private sector in sharing information, in real time where possible, and in establishing standards. For more detail on the roundtable, see the archived webcast and transcript which will shortly be posted on the SEC’s website as well as our WillisWire blog, 5 Key Themes from the SEC’s Cybersecurity Roundtable.
TIMING OF 401(K) MATCH DRAWS STATE ENFORCEMENT ATTENTION

When it comes to investments, timing can be critically important. With some plan sponsors moving their match of employee contributions to their 401(k) pension plans to the end of the year, perhaps it was inevitable that this move led to the attention of enforcement authorities.

The Massachusetts Securities Division recently launched an inquiry asking 401(k) plan administrators to report how many of their clients have shifted to a lump-sum matching contribution at year-end, when the move was made, and what workers were told about the potential consequences. While the position of the Massachusetts chief securities regulator is that he doesn’t suspect wrongdoing, in asking the service providers to rat out their clients, he is focused on what information has been communicated to the employees on the potential impact of the timing change, “[t]hese decisions have long-term consequences to employees. So the question is, are they being informed of the effect?”

This means that the focus of attention here, as is so often true, is on disclosure.

CONTACTS

For additional information, please contact your Willis Client Advocate® or FINEX_NA@willis.com. For past issues of our publications on other topics of interest, please visit the Executive Risks website.

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2. Advisen’s D&O Claims Trends: 2013 Wrap-Up & Possibilities For 2014, page 5: while the average settlement cost in 2013 for all types of D&O claims was $51.5M, the average settlement amount for federal securities class actions was $82M.
5. Both of these cases made our list of 2013’s the Top 10 Court Awards and Settlements in our January 2013 FINEX Alert.
7. OSHAFactSheet: Filing Whistleblower Complaints under the Affordable Care Act, http://www.google.com/url?q=https://www.osha.gov/Publications/whistleblower/OSHAFS-3641.pdf&sa=U&ei=9WwOU9QgLseROQ6nmYH4Dg&ved=0CB0QFjAA&usg=AFQjCNGFL0Pt_GIuw4rJXqKxbu8LS3B1C4A