A Newsletter from Chicago Underwriting Group, Inc.
Underwriters of D & O and Professional Liability Insurance

Issue 96 **January 2015**

In this issue … *we start the year with a selection of different items.*

TRIA RENEWED

On Tuesday December 16, 2014, retiring U.S. Senator Tom Coburn, in what may have been his final act as Senator, objected to the legislative package that contained renewal of the Terrorism Risk Insurance Act (TRIA). In doing so he abruptly derailed what had been a widely supported bipartisan movement to keep the federal backstop for terrorism insurance in place for another six years. He also plunged the American insurance market and much of the insurance-buying community into near panic. Renewal of the act, mentioned in this newsletter in July 2014, had come to be seen as both necessary and almost inevitable. Following Sen. Coburn's refusal to endorse the measure, time ran out and TRIA expired at December 31.

Even as insurance companies, lenders, and other businesses struggled to adjust to a world without TRIA, the returning Congress was working hard to rectify matters. In its first action of the new session, a revived and substantially similar measure quickly passed through both chambers of Congress, and was signed into law by President Obama on January 12.

Minor changes to the structure of the TRIA program reflect a feeling that while TRIA is still needed, the financial participation of the federal government should be reduced. Accordingly, the aggregate-loss coverage trigger is set to rise by $20 million each year from the current $100 million to $200 million by 2020. Once triggered, and after all private insurers' deductible thresholds are passed, the government's quota-share of losses will decrease by 1% a year from the current 85% to 80% by 2020. The full details can be found here.

One positive byproduct of the legislation was that it included enactment of the national broker and agent licensing mechanism, known as NARAB, which essentially opens the way to a one-stop non-resident state licensing system. This initiative was discussed in this newsletter in September 2013, and while it may take time to become fully operational, agents and brokers needing multistate licenses will eventually reap the benefits in significantly reduced administrative requirements.

DERIVATIVE SETTLEMENTS

The previous issue of this newsletter introduced our new lead Side A-only policy,
A-Sure. Recent settlements of derivative investor lawsuits serve to underline the value and importance of a separate Side A insurance program. Judgments and settlements of derivative actions, which are brought against executives by shareholders on behalf of the company rather than for the benefit of the plaintiffs, are generally not indemnifiable under most state laws. So executive defendants must largely rely upon the individual D&O protection available under coverage agreement 'A' in the standard D&O policy. As noted in the newsletter, the dependability of that standard policy may become compromised, and individual protection can be better secured through a separate Side A program.

The Activision Blizzard, Inc. derivative settlement, reported as $275 million in December 2014, and the January 2015 Freeport-McMoran, Inc. derivative settlement, reported as $137.5 million, vaulted these cases into the top three all-time derivative awards, as compiled by the D&O Diary, and subject to its criteria. Most readers of this newsletter will already subscribe to the necessity of Side A-only programs, and these two big awards should reinforce that belief.

THE FIO ISSUES ANOTHER REPORT

The delays in publishing the reports required of the Federal Insurance Office (FIO) under the 2010 Dodd-Frank Wall Street Reform and Protection Act have been a steady source of material for this newsletter. In December 2014 the FIO released its report on the Global Reinsurance Market (originally due no later than September 30, 2012).

For readers with a working knowledge of reinsurance and its basic forms (treaty; facultative; pro-rata; excess of loss), the critical role that reinsurance plays behind "primary" insurers, and an awareness of the global reach of reinsurance, the report offers few new insights. But for anyone looking for a quick primer on the subject, the report provides a readable, straightforward, unbiased introduction. Perhaps equally instructive is the overview on how the capital markets are encroaching on reinsurers' turf through the employment of alternative financial vehicles (catastrophe bonds; sidecars; industry loss warranties; collateralized securities).

The report may not contain groundbreaking or controversial material, but its forty or so pages provide a useful reference tool for insurance industry veterans and newcomers.

SHAREHOLDERS AGAINST EXECUTIVES: ANOTHER ROUND

Basic public-company theory holds that shareholders are the owners, and the employed team of executive managers runs the company for the benefit of the owners. In reality, the professional managers can develop a strong sense of their own identity, whose interests might not always coincide with those of the shareholding owners. Also in strict theory, the non-executive members of the board of directors are supposed to look out for the interests of the far-flung shareholders.

But in practice most "independent" directors are handpicked by the CEO, creating an environment where criticism of executive actions can be somewhat muted.

For years shareholders —often those with sizable holdings— have tried to infiltrate this closed world and have a greater say in the direction of the company they jointly own. Occasionally a large "activist" shareholder will succeed in gaining board representation, but usually not without a struggle.

A recent decision by the Securities and Exchange Commission (SEC) interpreted the [Exchange Act Rule 14a-8(i)(9)] in a way that would have permitted a public company (Whole Foods Market) to exclude from its annual meeting agenda a shareholder proposal allowing large shareholders (in this case, those owning 3% or more of the company for at least three years) to nominate directors. This decision, released on December 1, 2014, was seen as a setback for shareholder activism, a victory for Whole Foods —and by implication a victory for corporate management in general: shortly after the ruling, eighteen other public companies requested similar consideration.

But some six weeks later, on January 16, 2015, the SEC performed a rare about-face. Citing "questions that have arisen," SEC Chair Mary Jo White issued a brief statement that withdrew the SEC's earlier endorsement. "The Division of Corporation Finance," said Chair White, "will express no views on the application of Rule 14a-8(i)(9) during the current proxy season." Further, Chair White instructed SEC staff to review the rule and report back to the Commission.

Institutional investors were generally pleased with these developments; Scott M. Stringer, the New York City Comptroller with $160 billion in assets under his supervision, commented:

> *While I believe a reversal of the Commission's decision on Whole Foods' proposal was entirely warranted, it is my hope that as a result of this review, shareowners will soon have the right to cast votes on meaningful proxy access and other proposals.* ❖

Chicago Underwriting Group:
A D&O market-maker for more than 30 years

Past issues of CUG.COMments are available.

Chicago Underwriting Group, Inc.

Web: www.cug.com
Email: info@cug.com
Phone: (312) 750-8800
Fax: (312) 750-8965

You are welcome to forward this newsletter to colleagues, clients or other interested parties.