

A person is seen from behind, climbing a steep, snow-covered mountain slope. The climber is wearing dark gear and using trekking poles. The mountain peak is visible in the distance, partially obscured by a light blue mist or snow. The sky is a deep, clear blue. The overall scene conveys a sense of challenge and achievement.

2009 Securities litigation study

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2009's class action lull may signal a shift in focus from financial services to other industries, and abroad.

The heart of the matter

Fallout from the financial crisis continues, as legislators and enforcement agencies sharpen their swords.

The financial crisis dominated events for yet another year, although to a lesser degree than in 2008. The number of private securities litigation matters fell, as did the number of such matters filed against financial services companies—perhaps signaling a change of focus by the plaintiffs’ bar to other industries as the new decade begins.

During 2009, the full extent of the Madoff shock was assessed at around \$65 billion, and a slew of lawsuits were filed both directly against Madoff and against feeder funds that had channeled investors’ money into Madoff funds. In April 2009, yet another doozie was uncovered in the form of the Stanford debacle. The Securities and Exchange Commission (SEC) alleged that Robert Allen Stanford and his accomplices operated a “massive Ponzi scheme...misappropriated billions of dollars of investor funds and falsified SIB’s¹ financial statements in an effort to conceal their fraudulent conduct.”² Then in October, Galleon Group co-founder Raj Rajaratnam and others were charged by a federal grand jury in what authorities called the biggest prosecution of alleged hedge fund insider trading in US history.

As the financial crisis continued, governments worldwide remained focused on regulatory overhaul, stimulus plans, and investigations into the “who, what, when, where, why, and how” of alleged wrongdoings related to the financial crisis. Many changes were set in place to improve and expedite fraud enforcement activities for regulators and government prosecutors. In May, the Fraud Enforcement and Recovery Act of 2009 was enacted to improve fraud enforcement. Congress also increased funding for both the SEC and the Department of Justice (DOJ). These changes were passed against a backdrop of much criticism leveled at the SEC over its handling of the Madoff scandal. In response, the SEC’s Enforcement Division committed to pursuing investigations aggressively in the year ahead and laid plans to implement organizational changes and additional initiatives to expedite its investigative efforts. One such initiative was the new cooperation program, which provides incentives to secure the testimony of witnesses to securities fraud.

Congress also put forward several legislative proposals in 2009 that could substantially expand the population of potential defendants and thus cause a potential increase in securities litigation filings. The proposals include Senator Arlen Specter’s Liability for Aiding and Abetting Securities Violations Act of 2009, which seeks to allow a private right of action for aiding and abetting liability in securities cases. Two other proposals, the Notice Pleading Restoration Act of 2009 and the Open Access to Courts Act of 2009, would potentially relax pleading requirements and increase litigation exposure.

¹ Stanford International Bank, an Antigua-based affiliate of Stanford’s US investment firm.

² Fifth Circuit 09CV0298 (February 27, 2009).

An in-depth discussion

Could financial crisis filings be taking their final bow?

2009 overview

The plaintiffs' bar was less active in 2009, with the total number of federal filings dropping along with the number related to the financial crisis—perhaps signaling a refocus of efforts onto other issues. Toward the end of 2009, a notable number of non-financial-crisis-related filings were made that shared the common trait of having substantially longer time lags between the end of the class period and the filing date.

Despite the drop in financial-crisis-related filings, financial services continued to be the most frequently sued industry for the second year running. Since the beginning of the financial crisis in 2007, seven of the ten largest³ US banks have fallen victim to the crisis by being sued in a federal securities class action lawsuit. A total of 51 financial-crisis-related filings were made during 2009 compared to 99 in 2008. Across all industries, the total number of federal class actions filed fell to 155 in 2009 from 210 in 2008. The Second Circuit continued to see the greatest amount of filing activity.

The number of settlements was two lower in 2009 than in 2008, though the total remained slightly higher than the average annual number of settlements recorded since the passage of the Private Securities Litigation Reform Act of 1995 (PSLRA). A total of 93 settlements were made in 2009 compared to 95 in 2008. The total value of settlements agreed in 2009 decreased when compared to 2008. Total settlement value in 2009 was \$3.1 billion compared to \$3.9 billion in 2008—a decrease of 21 percent. The average settlement value in 2009 was 20 percent less than in 2008, though it remained 10 percent above the average settlement value over the last ten years.

Relative to total federal filings in 2009, the percentage of accounting-related filings decreased again, marking the lowest level since passage of the PSLRA. Disclosure cases were the basis for most filings. Senior officers and directors continued to be named in the majority of filings.

Institutional investors remained active as lead plaintiffs during 2009, although to a lesser extent than in previous years. The percentage of total 2009 filings naming an institutional investor as lead plaintiff fell to 48 percent from a high of 60 percent in 2005, and an average of 52 percent since 2002.

By the end of 2009, the DOJ reported that it had some 189 major corporate fraud investigations in process, 18 of which have losses over \$1 billion.⁴ The SEC claimed to have opened 54 more investigations than in the previous year.⁵ The SEC continued to reach substantial settlements in matters related to auction rate securities (ARS) with companies including Deutsche Bank, Bank of America, and RBC Capital Markets, in addition to reaching settlements in other financial-crisis-related cases that included Evergreen Investment Management Company and UBS AG.

³ http://www.msnbc.msn.com/id/29619236/ns/business-economy_at_a_crossroads

⁴ http://www.justice.gov/oig/challenges/2009_challenges.pdf

⁵ <http://www.sec.gov/about/secpar/secpar2009.pdf>

Federal cases: A lull after the storm

The number of federal securities class action filings fell 26 percent in 2009 from the previous year. A total of 155 cases were filed in 2009 compared to 210 in 2008.

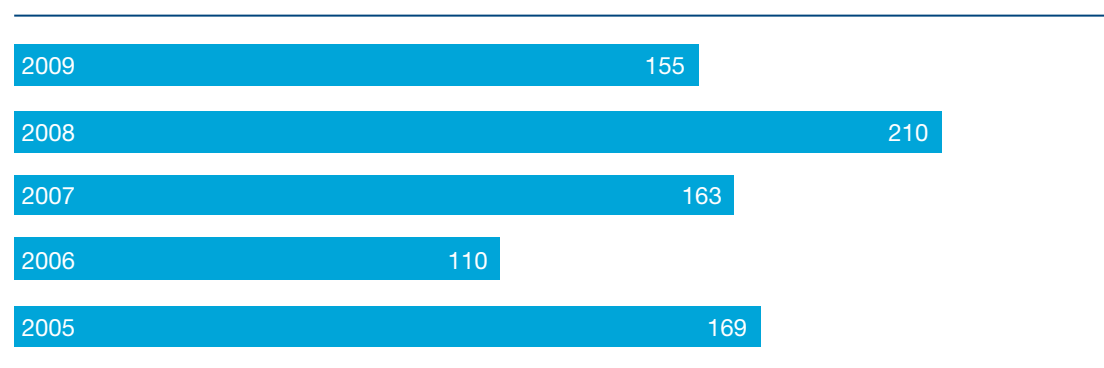
The drop was principally attributable to the 48 percent decline in financial-crisis-related cases filed during 2009—to 51 filings in 2009, from 99 in 2008. Total filings during 2009 also fell below the annual average

(182) filed since the enactment of the PSLRA and the annual average (179) filed since the Sarbanes-Oxley Act (SOX) in 2002. In percentage terms, 2009 filings were 15 percent below the average annual filings since the PSLRA and 13 percent below the average annual filings since SOX. The number of filings in 2009 (155) represents the third lowest annual filings total since the PSLRA was passed in 1995.

Figure 1. Number of US federal securities class action lawsuits, 2005–2009

Year filed	Federal cases	Mutual fund cases	State-only/stock options backdating (derivative) cases	Total cases
2009	155	–	–	155
2008	210	–	–	210
2007	163	4	2	169
2006	110	–	110	220
2005	169	4	–	173
Avg since PSLRA	182			

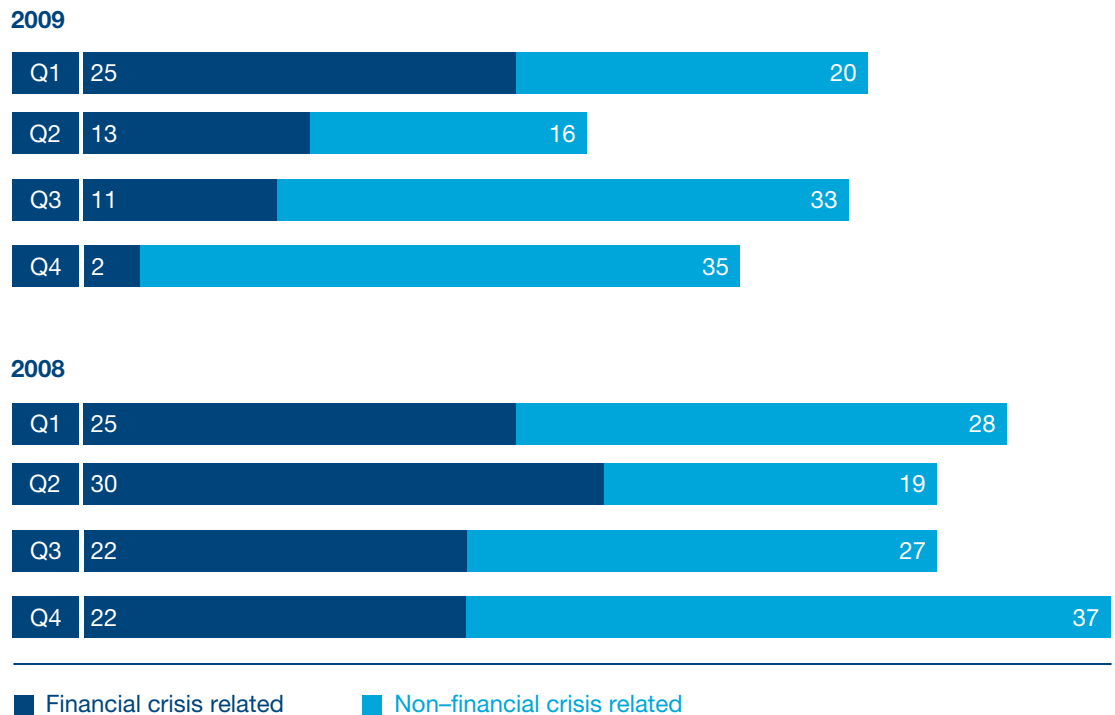
Figure 2. Number of US federal securities class action lawsuits filed per year, 2005–2009



The spread of filing activity across quarters in 2009 was more varied than in 2008, when filing activity was more or less consistent across quarters. Despite the consistency, filing activity in the last quarter of 2008

(59 filings) as well as 2007 (57 filings) was moderately higher compared to earlier quarters in those same years. Filings in Q4 2009, however, represented the second lowest total (37 filings) among the year's quarters.

Figure 3. Number of US federal securities class action lawsuits, Q1 2008–Q4 2009



A noteworthy trend observed during 2009 was the incidence of long delays between the end of the class period and the filing date of the case. The average time lag of 218 days in 2009 was almost double the average of 114 days observed since the PSLRA and more than 71 percent higher than the average lag of 127 days measured in 2008. A total of 34 cases were filed one year or more after the end of their stated

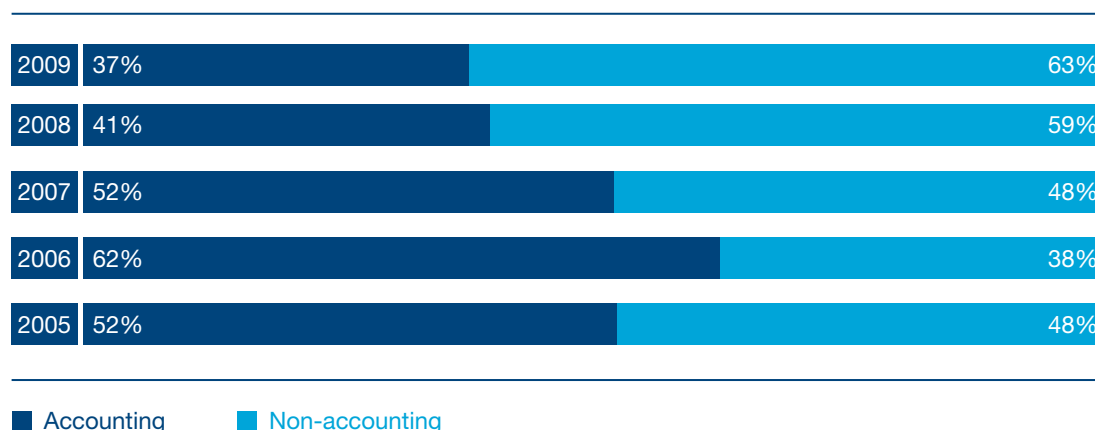
class periods, more than double the annual average (14 cases) over the last five years. Interestingly, most of the cases were not related to the financial crisis and were filed in the latter part of 2009. This suggests that plaintiffs' attorneys may now be returning to where they left off before the financial crisis began—refocusing on the non-financial-crisis matters in their basket of potential opportunities.

Accounting-related cases drop further

Accounting-related cases filed in 2009 represented 37 percent of total federal filings, compared to the 41 percent noted in 2008 and an average of 59 percent since passage of the PSLRA in 1995. The 2009 figure represents the lowest percentage in the post-PSLRA era, and was only the third year in which accounting-related cases

represented less than 50 percent of total filings. Besides 2008, when accounting-related cases hit a low of 41 percent, the only other year to fall below 50 percent was 1996, when accounting-related cases represented 48 percent of total cases filed. After 1996, the percentage increased gradually to a high of 77 percent in 2002 before declining to its lowest point in 2009.

Figure 4. Percentage of accounting and non-accounting US federal securities class action lawsuits filed per year, 2005–2009[†]

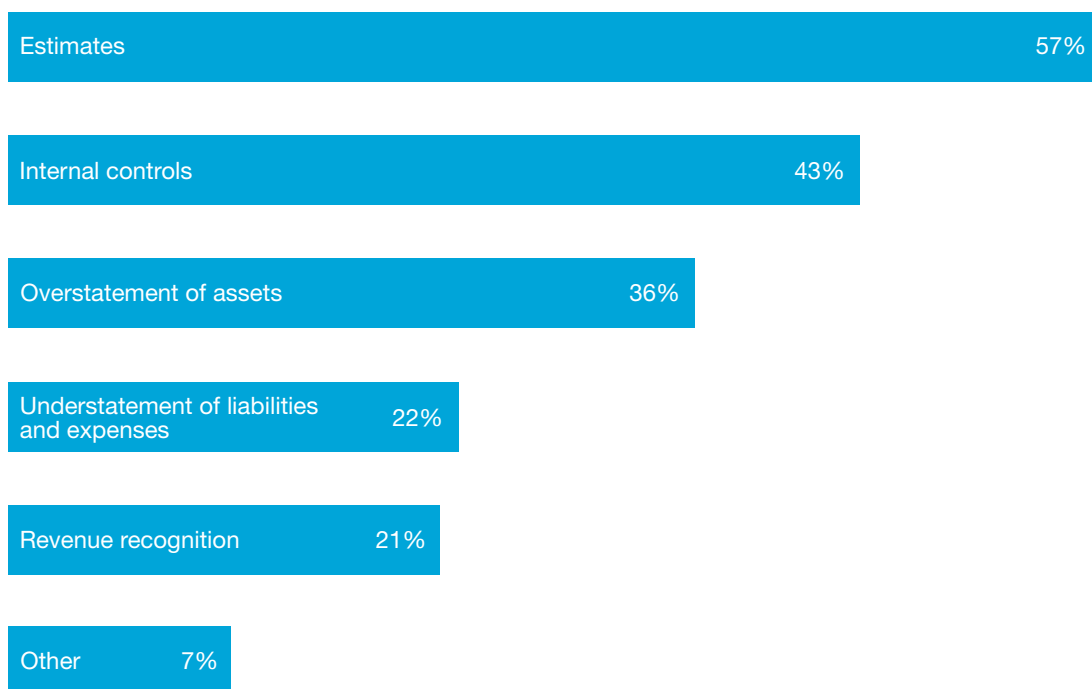


[†] Cases filed between 2005 and 2008 may have been updated with accounting allegations if the amended complaints alleged accounting violations not previously recognized. Numbers for 2009 cases reflect initial case complaints.

Undoubtedly, the nature of the financial-crisis-related filings—with disclosure (or non-accounting-related) allegations dominating—contributed to the low percentages of accounting-related matters observed in 2008 and 2009. Over the past three years, the number of disclosure cases filed across various industries has grown markedly as a percentage of total cases filed, rising from 48 percent in 2007 to 59 percent in 2008 and 63 percent in 2009.

For the most part, the types of allegations central to 2009’s accounting-related cases remained consistent with those observed in 2008. Estimates-related allegations continued to be the most commonly cited, appearing in 57 percent of all accounting-related 2009 filings (compared to 52 percent in 2008 and 47 percent in 2007). Specific allegations included “[failure] to adequately reserve for mortgage-related exposure” and “goodwill...impaired to a greater extent than...disclosed,” and were made mostly in connection with financial-crisis-related filings such as those against ING, Royal Bank of Scotland, and Triad Guaranty.

Figure 5. Percentage of accounting cases citing specific issues, 2009[†]



[†] Some cases allege multiple accounting issues.

Consistent with 2008, allegations related to internal controls were cited in 43 percent of accounting-related complaints. Specific allegations included “[failure] to maintain effective internal controls” and that “internal controls were inadequate to prevent the Company from improperly reporting its debt securities.” These were included in filings against *Zale Corporation*, *R.H. Donnelley*, and *Regions Financial Capital*.

Overstatement of assets was the third most common allegation, cited in 36 percent of 2009 accounting-related filings (a slight drop from its citation in 38 percent of filings in 2008). About half of the 2009 filings containing overstatement-of-assets allegations were financial crisis related.

Other categories of allegations included revenue recognition and understatement of liabilities and expenses, which appeared in 21 and 22 percent of accounting-related filings in 2009, respectively. Comparable percentages for 2008 were 21 and 19.

Despite the fall in both the number of accounting-related filings and the percentage they represent of total filings, settlements stemming from accounting-related matters remained higher than those from non-accounting-related filings.

Financial services: Still the main focus

For the second consecutive year—and for only the second time in the post-PSLRA era—financial services companies bore the brunt of federal private securities filings. Other industry percentages remained consistent with those recorded in 2008.

In 2009, financial services companies were named in 41 percent of total filings, or 63 cases. Although the percentage fell 7 percent (and by 37 cases) from 2008, the financial

services industry was still the most frequently sued industry group by far during 2009, and clearly continued to be the main focus of the plaintiffs' bar. The 41 percent of total filings aimed at the financial services industry in 2009 represented the second highest percentage of filings against a single industry since enactment of the PSLRA—second only to 2008, when 48 percent of total filings were aimed at financial services. No other single industry represented more than 14 percent of total filings for 2009.

Figure 6. Percentage of US federal securities class action lawsuits by industry, 2005–2009[†]

Industry	2005	2006	2007	2008	2009
High-technology					
Computer services	16	12	8	3	6
Electronics	9	13	7	6	1
Telecommunications	<u>4</u>	<u>6</u>	<u>9</u>	<u>4</u>	<u>5</u>
	30	31	25	13	12
Health services	7	7	4	1	3
Pharmaceutical	14	9	13	10	14
Business services	5	5	5	1	3
Retail	4	6	4	1	3
Financial services	13	5	21	48	41
Utilities: energy, oil, and gas	2	2	2	5	3
Other	27	34	26	21	20

[†] Totals may not add up to 100% due to rounding.

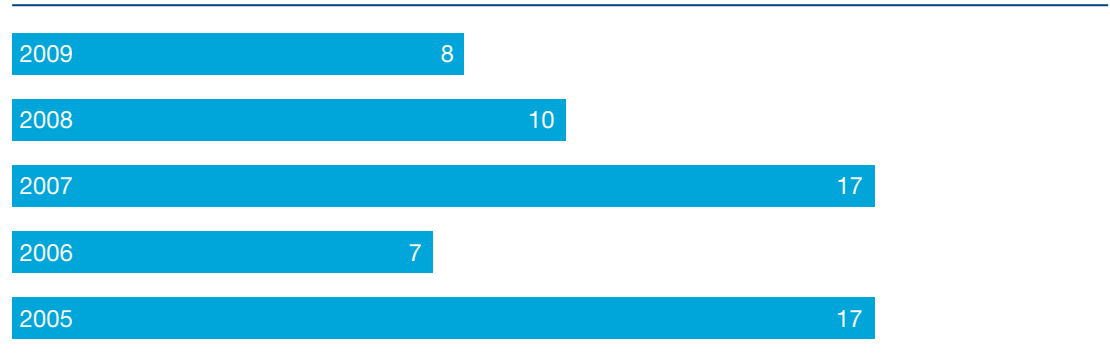
The financial crisis and the consequent focus on financial services has given a two-year reprieve to the high-technology⁶ industries, which until 2008 were the most sued industry group in the post-PSLRA era, in aggregate peaking at 55 percent of total filings in 2001. By contrast, high-tech was named in only 12 percent of total filings during 2009, or 19 filings—an all-time low for the industry since the PSLRA, both in the number of cases and the percentage of total cases filed for the year. In 2008, 13 percent of total filings (or 27 cases) were made against technology companies.

The annual percentage of pharmaceutical industry filings, on the other hand, has remained more consistent. The pharmaceutical industry has averaged 8 percent of

annual filings since the PSLRA, and since 2002 has tended to hold in the double digits. For 2009, the pharmaceutical industry was named in 14 percent of total filings, or 22 cases. In line with prior years, the allegations made in these filings focused on disclosure issues involving efficacy and declining market share and involved companies such as Roche and Matrixx Initiatives, both of which have had filings made against them in the past. Additional companies affected in 2009 included Accuray, Avanir Pharmaceuticals, Immucor, and CardioNet.

Federal filings against all other industry groups—including health services; business services; retail; and the energy, oil, and gas group—each represented approximately 3 percent of total filings.

Figure 7. Number of US federal securities class action lawsuits involving pharmaceutical/health efficacy allegations, 2005–2009[†]



[†] Excludes cases alleging product efficacy.

⁶ High-technology includes computer services, electronics, and telecommunications.

Plaintiffs keep directors and officers in their sights

Senior officers of companies continued to be named in the majority of filings during 2009, though in some cases to a lesser extent than in previous years. For the second consecutive year, filings against the offices of chief executive officer (CEO), chief financial officer (CFO), and chairman decreased. For the office of the CEO, the decrease was small—only 2 percent. But the offices of the CFO and chairman experienced larger decreases, with filings against CFOs falling from 72 percent in 2008 to 62 percent in 2009, and filings against chairmen falling from 57 percent to 47 percent. The decreases appear to be principally due to the increase in financial-crisis-related cases since 2007, when the financial downfall began. Specifically, the percentage of

financial-crisis-related filings that named the CFO and chairman each fell in 2009 by 14 percent compared to filings in 2008.

Other senior positions commonly targeted, including president and director, showed minor increases in 2009: to 62 percent for presidents (compared to 59 percent in 2008) and to 43 percent for directors (compared to 38 percent in 2008).

In addition to the federal filings naming senior officers, other more wide-ranging potential issues are afoot for senior officers as a result of the SEC’s recent investigations in connection with Section 304 and the application of the “controlling persons liability” to senior officers of companies (as discussed in the “SEC and DOJ enforcement update” section on page 28).

Figure 8. Percentage of US federal securities class action lawsuits naming particular officers or committees, 2005–2009[†]

Title	2005	2006	2007	2008	2009
CEO	96	96	90	83	81
CFO	81	84	79	72	62
Chairman	72	62	66	57	47
President	59	69	56	59	62
Director	34	45	51	38	43
Audit committee	2	15	5	1	3
Compensation committee	1	12	4	1	2

[†] Titles are based on those named in the complaint. Cases filed between 2005 and 2008 may have been updated as new information became available.

Plaintiffs continue to take aim at the Fortune 500

Filings against Fortune 500 companies decreased by 3 percent in 2009, falling to 20 percent from 23 percent in 2008. Despite the drop, 2009's figure represents the third highest percentage of total filings against Fortune 500 companies to occur in any single year since passage of the PSLRA (after 2008 and the spike of 28 percent that occurred in 2002), and is also greater than the average of 15 percent since passage of the PSLRA. In number terms, the 31 cases filed against 30 Fortune 500 companies during 2009 actually represented a drop

of 37 percent from the 49 cases filed against 37 Fortune 500 companies in 2008. Nonetheless, 2009 had the third highest number of cases filed against Fortune 500 companies since 1996.

Almost half (14) of the Fortune 500 companies named in 2009 filings were financial services companies. Companies included American Express, Wells Fargo, and JPMorgan Chase. The remainder consisted of companies in the energy, oil, and gas; telecommunications; retail; health services; and other sectors. Examples include Sprint Nextel, Limited Brands, CVS Caremark, Pitney Bowes, and General Electric.

Figure 9. Number of Fortune 500 companies with US federal securities class action lawsuits filed against them, 2005–2009

Year filed	Fortune 500 companies [†]			Total filings	% [‡]
	Top 50	Top 100	Top 500		
2009	8	13	30	155	20
2008	14	17	37	210	23
2007	4	9	20	163	12
2006	5	5	12	110	11
2005	3	6	24	169	14

[†] Companies with multiple US federal securities class action lawsuits filed against them in a single year are only counted once.

[‡] Percentage includes all filings, including multiple US federal securities class action lawsuits filed against the same company.

The Second Circuit maintains its dominance

As in previous years, filing activity in 2009 occurred most frequently in the Second and Ninth Circuits. The Second Circuit continued to have the greatest amount of filing activity, recording 37 percent of filings, or 58 cases. However, this represented a drop of 8 percent over the circuit's 45 percent of filings (94 cases) in 2008.

The majority of Second Circuit filings continued to be financial crisis related. Filings in the Ninth Circuit rose from 13 percent in 2008 to 25 percent in 2009, and included 10 pharmaceutical and 11 financial services filings that together accounted for over 55 percent of the circuit's total filings. All other individual circuit filing activity remained below 10 percent of the total.

Figure 10. Percentage of US federal securities class action lawsuits filed by circuit, 2005–2009†

Circuit	2005	2006	2007	2008	2009
District of Columbia	1	1	2	1	–
First	5	5	1	7	3
Second	24	29	34	45	37
Third	12	11	6	7	6
Fourth	2	1	2	3	2
Fifth	7	5	4	2	6
Sixth	6	3	4	4	3
Seventh	5	2	4	4	5
Eighth	7	5	2	4	1
Ninth	22	25	27	13	25
Tenth	5	3	4	2	3
Eleventh	5	12	10	8	8

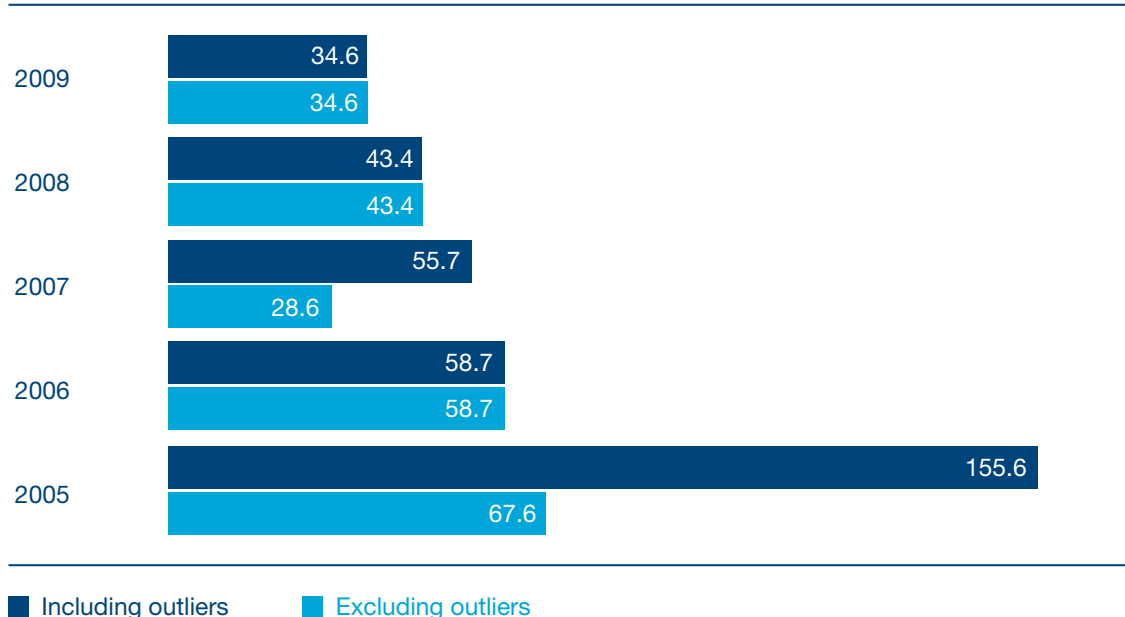
† Totals may not add up to 100% due to rounding.

The ups and downs of settlements

A total of 93⁷ settlements were reached in 2009, down from 2008's total of 95 settlements and setting a new record for the lowest number of settlements recorded in any individual year during the past decade. Both the 2009 and 2008 figures were, however, greater than the annual average number of settlements (89) recorded since the passage of the PSLRA.

In all, \$3.1 billion in settlements were recorded during 2009, compared to \$3.9 billion in 2008. The average settlement value in 2009 was \$34.6 million—which, although 20 percent lower than the average of \$43.4 million recorded for 2008, was 10 percent higher than the 10-year average (\$31.5 million) and 13 percent higher than the average since the PSLRA (\$30.7 million).

Figure 11. Average settlement values (in millions \$) for cases filed and settled post-PSLRA, by year[†]



[†] Year of settlement is determined based on the primary settlement pronouncement. Except for one settlement (WorldCom in 2005), any subsequent settlement amounts are attributed to the primary announcement year. Settlement information reflects only those cases filed and settled after passage of the PSLRA (12/22/1995). There were no outliers for the years 2006, 2008, and 2009. Excludes zero-dollar settlements and settlements in which an amount has not been determined.

⁷ Settlement amounts have not yet been published for three of the 2009 settlements recorded and two of the 2008 settlements recorded.

Figure 12. Settlements (in thousands \$): all cases, 2005–2009[†]

Year settled	2005	2006	2007	2008	2009
Number of settled cases	120	114	121	95	93
Zero-dollar (\$0)/ undisclosed settlements	–	2	4	5	2
Number of outliers	<u>2</u>	<u>–</u>	<u>1</u>	<u>–</u>	<u>–</u>
Net settlements [‡]	118	112	116	90	91
Total settlement value	18,666,200	6,685,000	6,514,000	3,902,600	3,145,700
Total settlement value excluding outliers [‡]	7,971,700	6,685,000	3,314,000	3,902,600	3,145,700
Average settlement value	67,600	59,700	28,600	43,400	34,600
Median settlement value	9,000	6,900	8,000	8,500	9,500
Average settlement value for cases settled for \$1M or more, up to \$50M	10,400	9,200	9,700	11,200	10,800

[†] Year of settlement is determined based on the primary settlement pronouncement. Except for one settlement (WorldCom in 2005), any subsequent settlement amounts are attributed to the primary announcement year. Settlement information reflects only those cases filed and settled after passage of the PSLRA (12/22/1995).

[‡] Cases and amounts used to calculate average and median settlement values.

During 2009, nine settlements (10 percent) exceeded \$100 million, compared to seven such settlements in 2008. The year also saw 36 settlements (39 percent) that were greater than or equal to \$10 million but less than

\$100 million, which is consistent with the 36 settlements within that range in 2008. Forty-eight settlements (52 percent) in 2009 were for amounts less than \$10 million, compared to 52 in 2008.⁸

Figure 13. Percentage of settled cases by settlement value range, 2005–2009[†]

Total settlement (in millions \$)	2005–2008 %	2009 %
100+	8	10
50–99.99	6	3
20–49.99	10	14
10–19.99	19	22
5–9.99	19	13
2–4.99	22	26
0–1.99	15	13

[†] Year of settlement is determined based on the primary settlement pronouncement. Except for one settlement (WorldCom in 2005), any subsequent settlement amounts are attributed to the primary announcement year. Settlement information reflects only those cases filed and settled after passage of the PSLRA (12/22/1995). Totals may not add up to 100% due to rounding.

⁸ Includes zero-dollar settlements and settlements in which an amount has not been determined.

The number of accounting-related settlements continued to fall, with 58 such settlements made in 2009 compared to 68 in 2008, a decrease of 15 percent. The 2009 total was also 26 percent lower than the average number of settlements (78) over the past ten years. Accounting-related settlements represented 62 percent of the total settlements recorded in 2009.

Accounting-related settlements totaled \$2.3 billion in 2009, representing 74 percent of the year's total settlement value. In 2008, accounting-related settlements totaled \$3.6 billion. The value of accounting-related settlements for 2009 accounted for 76 percent of the year's top ten recorded settle-

ments, compared to 98 percent of the top ten in 2008. Furthermore, seven of the top ten settlements in 2009 were accounting-related cases, compared to nine of the top ten in 2008.

In 2009, the average accounting-related settlement value fell and ranks as one of the lowest recorded for an individual year for the last decade. The average settlement value for accounting-related cases in 2009 was \$40.8 million, compared to \$54.7 million in 2008—lower by 25 percent. However, the average settlement value for 2009 was 6 percent higher than the average settlement value of \$38.6 million since passage of the PSLRA.

The 93 settlements recorded for 2009 represent the lowest single-year figure over the past decade, though the average settlement value was 10 percent higher than the ten-year average.

Figure 14. Settlements (in thousands \$): accounting cases, 2005–2009[†]

Year settled	2005	2006	2007	2008	2009
Number of settled cases	89	88	82	68	58
Zero-dollar (\$0)/ undisclosed settlements	–	1	2	3	1
Number of outliers	<u>2</u>	<u>–</u>	<u>1</u>	<u>–</u>	<u>–</u>
Net settlements [‡]	87	87	79	65	57
Total settlement value	18,384,300	6,205,300	5,988,400	3,552,600	2,324,000
Total settlement value excluding outliers [‡]	7,689,800	6,205,300	2,788,400	3,552,600	2,324,000
Average settlement value	88,400	71,300	35,300	54,700	40,800
Median settlement value	13,300	7,000	8,100	9,000	10,300
Average settlement value for cases settled for \$1M or more, up to \$50M	12,200	10,000	9,600	10,600	11,400

[†] Year of settlement is determined based on the primary settlement pronouncement. Except for one settlement (WorldCom in 2005), any subsequent settlement amounts are attributed to the primary announcement year. Settlement information reflects only those cases filed and settled after passage of the PSLRA (12/22/1995).

[‡] Cases and amounts used to calculate average and median settlement values.

The number and value of non-accounting-related settlements increased in 2009 compared to 2008. A total of 35 non-accounting-related settlements were made in 2009, which accounted for \$822 million of settlement value. This compares to 27 settlements reached in 2008, which accounted for \$350 million of settlement value—an increase in value of 135 percent. Three of the ten largest settlements were non-accounting-related: Banco Santander (\$235 million), Schering-Plough (\$165 million), and Bristol-Myers Squibb (\$125 million).

In line with previous years, the value of accounting-related settlements continued to overshadow non-accounting settlements, with the average accounting-related settlement in 2009 being 69 percent higher than the average non-accounting settlement. This represents a decrease from 2008, when the difference between accounting and non-accounting-related settlements was 291 percent.

2009 settlements that exceeded \$100 million were as follows:

- Merrill Lynch⁹ \$625 million
- Marsh & McLennan \$400 million
- Banco Santander \$235 million
- Comverse Technology..... \$225 million
- The Mills Corporation..... \$203 million
- Schering-Plough \$165 million
- Broadcom \$160 million
- Bristol-Myers Squibb \$125 million

⁹ Merrill Lynch settled two cases in 2009: one filed on October 30, 2007, and settled for \$475 million, the other filed on October 22, 2008, and settled for \$150 million.

Figure 15. Settlements (in thousands \$): non-accounting cases, 2005–2009[†]

Year settled	2005	2006	2007	2008	2009
Number of settled cases	31	26	39	27	35
Zero-dollar (\$0)/ undisclosed settlements	<u>—</u>	<u>1</u>	<u>2</u>	<u>2</u>	<u>1</u>
Net settlements [‡]	31	25	37	25	34
Total settlement value [‡]	281,900	479,700	525,600	350,000	821,700
Average settlement value	9,100	19,200	14,200	14,000	24,200
Median settlement value	3,200	4,500	7,700	8,000	7,000
Average settlement value for cases settled for \$1M or more, up to \$50M	5,800	6,600	10,100	12,400	9,900

[†] Year of settlement is determined based on the primary settlement pronouncement. Except for one settlement (WorldCom in 2005), any subsequent settlement amounts are attributed to the primary announcement year. Settlement information reflects only those cases filed and settled after passage of the PSLRA (12/22/1995).

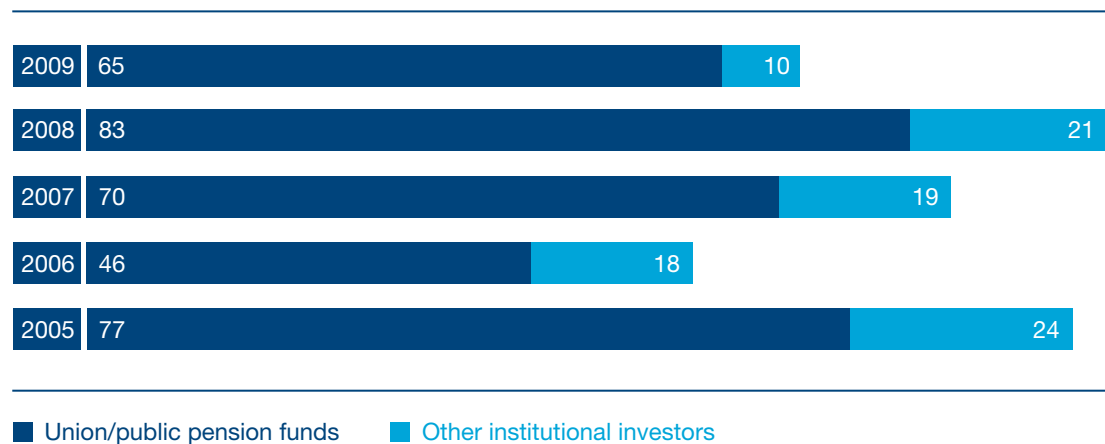
[‡] Cases and amounts used to calculate average and median settlement values.

The reign of institutional investors

Since around 2002, the involvement of institutional investors in federal class actions has become more prominent. Institutional investors' involvement as lead plaintiffs in filings rose to 60 percent (101 filings) of total cases filed by 2005; however, since then, the percentage has fallen by a few percentage

points each year, and in 2009 it fell to 48 percent of total filings—down from 50 percent in 2008, and also below the average of 52 percent recorded since 2002.¹⁰ In 2009, approximately 75 filings of the 155 total had an institutional investor as lead plaintiff, down significantly from the 104 filings reported in 2008.

Figure 16. Number of US federal securities class action lawsuits filed with institutional investors as lead plaintiff, 2005–2009†



† Final 2009 data is not available to date; the full-year projections are based upon filings through June 30, 2009.

The presence of institutional investors in settlements is no less significant than their involvement in filings. The number of cases settled which had institutional investors as the lead plaintiff fell to 53 in 2009 (representing 57 percent of the year's total settlements), compared to 65 settlements in 2008 (representing 68 percent of the 2008 total).¹¹ Despite the decrease, the settlement values associated with these cases still accounted for 85 percent of total settlements in 2009, 10 percent less than in 2008.

In terms of dollar value, total settlements for matters that had institutional investors as the lead plaintiff equated to \$2.7 billion, a decrease of 27 percent over 2008's total of \$3.7 billion. Additionally, nine of the top ten settlements reached in 2009 had institutional investors as the lead plaintiff.

¹⁰ It is worth noting that although the percentage of total cases with an institutional investor as lead plaintiff has generally tracked downward since 1995, the number of such cases in 2008 (104) was the highest number in a single year since passage of the PSLRA.

¹¹ Includes zero-dollar settlements and settlements in which an amount has not been determined.

Public pension funds continued to be the most active subgroup of institutional investors in 2009, although to a lesser extent than in prior years. Of the settlements reached by institutional investors in 2009, 81 percent (43 settlements) were with public pension funds and represented 70 percent of institutional

investor settlement value and 60 percent of total settlement value. Results in 2008 were similar, with 46 settlements reached by public pensions representing 86 percent of institutional investor settlement value and 82 percent of total settlement value.

Figure 17. Settlement values (in thousands \$): by institutional investor as lead plaintiff, 2005–2009[†]

	2005		2006		2007		2008		2009	
	Cases settled	Settlement	Cases settled	Settlement	Cases settled	Settlement	Cases settled	Settlement	Cases settled	Settlement
Public pension	40	17,499,700	41	5,487,100	48	5,610,200	46	3,197,800	43	1,888,100
Other institutional	21	390,400	21	844,000	19	521,000	19	513,700	10	796,100
Total institutional investors	61	17,890,100	62	6,331,000	67	6,131,200	65	3,711,500	53	2,684,200
Zero-dollar (\$0)/undisclosed settlements	–	–	1	–	1	–	2	–	2	–
Net settlements [‡]	61	–	61	–	66	–	63	–	52	–
Average settlement	–	293,300	–	103,800	–	97,300	–	61,900	–	109,100
Total cases settled[§]	120	18,666,200	112	6,685,000	117	6,514,000	90	3,902,600	91	3,145,700

[†] Year of settlement is determined based on the primary settlement pronouncement. Except for one settlement (WorldCom in 2005), any subsequent settlement amounts are attributed to the primary announcement year. Settlement information reflects only those cases filed and settled after passage of the PSLRA (12/22/1995). Totals may not sum exactly due to rounding.

[‡] Number of cases used to calculate average settlement value.

[§] Excludes zero-dollar settlements and settlements in which an amount has not been determined.

Trends in loss causation

By Jonathan C. Dickey, Partner, Gibson Dunn & Crutcher LLP

In 2009, courts continued to apply the Supreme Court's loss causation decision in *Dura Pharmaceuticals, Inc. v. Broudo*. Important decisions on loss causation issues were handed down last year by five appellate courts, as well as by a number of lower courts. While these decisions are sometimes difficult to reconcile, most decisions appear to favor defendants, as courts become more comfortable applying rigorous economic analysis on motions to dismiss and motions for class certification.

Major appellate rulings

Loss causation issues came before the Second, Third, Fifth, Eighth, and Tenth Circuits, with defendants winning four out of six decisions. In *In re Flag Telecom Holdings, Ltd.*, the Second Circuit reversed class certification, finding that one of the class representatives, an "in-and-out" trader, could not have suffered loss, given the timing of his transactions. The Second Circuit stated that the court must "disaggregate" alleged corrective disclosures, and assign a cause to each element of a price decline. The court held that class members who sold prior to any corrective disclosure should be excluded from the class, and rejected the district court's ruling that plaintiffs need only show that it was "conceivable" that in-and-out traders could defeat defendants' negative causation defense. In *Fener v. Belo Corp.*, the Fifth Circuit affirmed denial of class certification, finding that the plaintiffs' expert failed to "disaggregate" company disclosures. The same appellate court had reached a different result, however, a few months earlier in *In re Flowserve Corporation*, reversing the district court's entry of summary judgment because the district court improperly placed the burden of proving loss causation under

the 1933 Securities Act on plaintiffs. The Fifth Circuit stated that defendants must prove that "no reasonable juror could believe" that any portion of investors' losses was caused by misrepresentations in the registration statements. The Eighth Circuit affirmed dismissal of Section 10(b) claims on loss causation grounds in *McAdams v. McCord*, handing victory to mortgage lender UCAP. The Tenth Circuit affirmed summary judgment for defendants on loss causation grounds in *In re Williams Securities Litigation*. The *Williams* court made clear that "even if the truth has made its way into the marketplace, *Dura* requires that a plaintiff show that it was [a specific] revelation that caused the loss and not one of the 'tangle or factors' that affect price." Finally, in *In re Constar International Inc.*, the Third Circuit affirmed class certification in a Section 11 case, rejecting arguments that negative causation should be part of the Rule 23 analysis. The Third Circuit tersely stated that "Section 11 does not require a showing of individualized loss causation, because injury and loss are presumed under Section 11." The Third Circuit's ruling is at odds with the decision in *Flag Telecom*, in which the Second Circuit held that courts *may* consider negative causation defenses as part of the Rule 23 analysis.

Loss causation in "credit crisis" litigation

In 2009, defendants' loss causation arguments met with mixed success in "credit crisis" litigation. Even decisions within specific district courts reflected divergent views on how loss causation principles apply at the pleading stage. For example, in *In re Downey Securities Litigation*, the Central District of California dismissed Section 10(b) claims on a motion to dismiss, finding that the plaintiffs failed to plead

loss causation. The same district court rejected loss causation arguments in *In re Countrywide Financial Corporation Securities Litigation*. The Northern District of California rejected motions to dismiss subprime litigation in *In re Charles Schwab Corp.*, finding that the plaintiffs' claims sufficiently alleged loss causation, due to the "materialization of the risk" that risky lending practices would lead to adverse portfolio performance. In the Western District of Washington, the court refused to dismiss Section 11 claims on negative causation grounds in *In re Washington Mutual, Inc.*

The Eastern District of Pennsylvania dismissed the complaint on loss causation grounds in *Luminent Mortgage Capital, Inc. v. Merrill Lynch & Co.*, noting that "a one-and-a-half year time period between the alleged misrepresentation and the injury, combined with the market downturn in the mortgage industry that developed in early-to mid-2007, is sufficient to undermine the inference of a nexus between Defendants' misrepresentations [and plaintiffs' losses]." Similarly, the Southern District of New York dismissed Section 11 claims on loss causation grounds in *Rubin v. MF Global, Ltd.* But the same court held loss causation allegations sufficient in *In re Moody's Corporation Securities Litigation*.

Loss causation and class certification

In addition to the appellate decisions noted above, several district courts addressed loss causation in connection with class certification in 2009. In *In re Juniper Networks Inc. Securities Litigation*, for example, the Northern District of California certified a class under Sections 10(b) and

11, but excluded "in-and-out" traders from the class. In *In re Boston Scientific Corporation Securities Litigation*, the District of Massachusetts certified a class, rejecting defendants' arguments that the alleged "corrective" disclosure did not lead to a statistically significant price drop. In the Northern District of Texas, class certification was denied on loss causation grounds in *Barrie v. Intervoice-Brite Inc.*

Other key cases

In Arizona, the district court dismissed a claim partly on loss causation grounds in *Teamsters Local 617 Pension & Welfare Funds v. Apollo Group, Inc.* In *In re ShoreTel Inc.*, the Northern District of California held that an amended complaint adequately pled loss causation, after dismissing the original complaint on loss causation grounds. In *In re Oracle Corp.*, the same court granted summary judgment, finding no loss causation. In *In re Britannia Bulk Holdings, Inc.*, the Southern District of New York dismissed Section 11 claims based on negative causation. But the same court rejected loss causation arguments in *In re Dynex Capital, Inc.* In *Ross v. Walton*, the District of Columbia dismissed 10(b) claims on loss causation grounds.

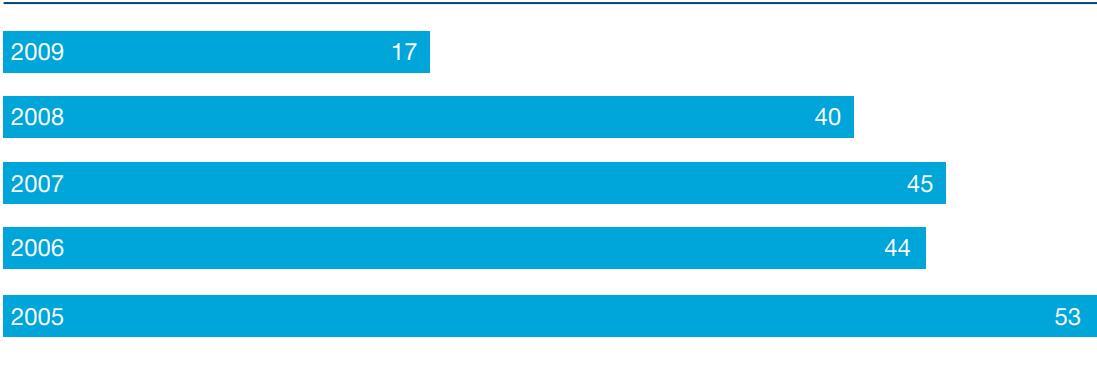
In conclusion, the cases discussed above underscore that *Dura* is having a profound impact on cases throughout the country. The lack of predictability in the case law is a concern, but the trend toward dismissal of claims on loss causation grounds is encouraging.

Decreased involvement from the SEC and DOJ

In 2009, 17 filings had some form of SEC involvement. As a percentage of total cases filed, this represented a year-over-year

decrease of 8 percent—falling from 19 percent of total filings in 2008 to 11 percent in 2009. Such cases in 2009 included Huron Consulting, UBS AG, NutraCea, and Siemens AG.

Figure 18. Number of US federal securities class action lawsuits with SEC involvement, 2005–2009[†]

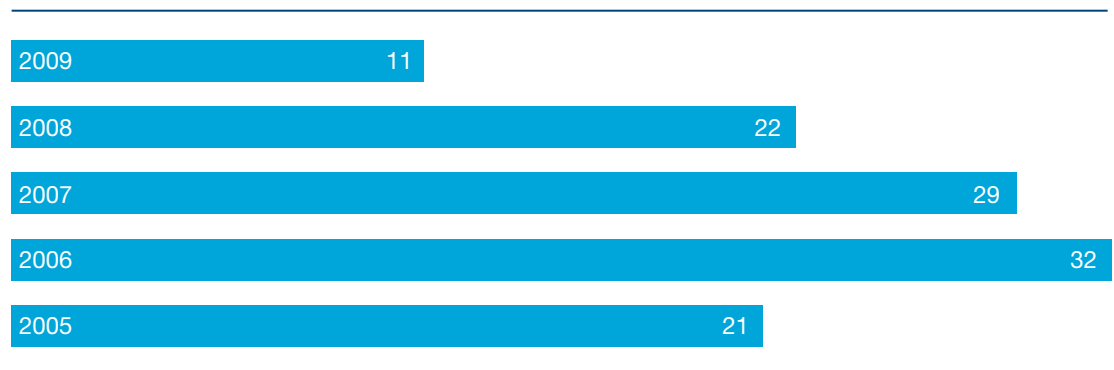


[†] Information is based on a review of press releases, SEC releases, and news articles. Statistics from prior years have been updated based on current information.

From 2008 to 2009, the number of cases with some form of DOJ involvement fell from 22 to 11. This represented 7 percent of total filings in 2009 compared to 10 percent

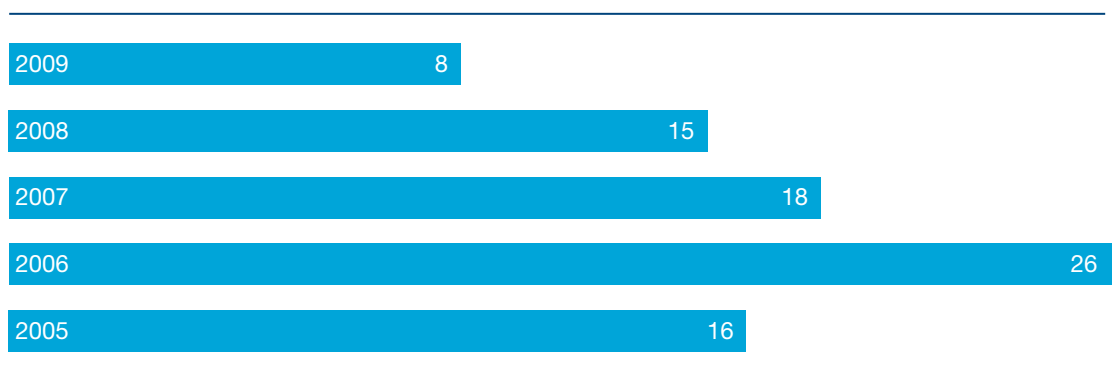
in 2008. The DOJ cases included CVS Caremark, Immucor, and Westgate Capital Management.

Figure 19. Number of US federal securities class action lawsuits with DOJ involvement, 2005–2009[†]



[†] Information is based on a review of press releases and news articles. Statistics from prior years have been updated based on current information.

Figure 20. Number of US federal securities class action lawsuits with both SEC and DOJ involvement, 2005–2009[†]



[†] Information is based on a review of press releases, SEC releases, and news articles. Statistics from prior years have been updated based on current information.

SEC and DOJ enforcement update

The SEC's *2009 Performance and Accountability Report*¹² detailed its 2009 efforts to protect investors and restore investor confidence in the wake of the financial crisis and the Madoff scandal. These efforts included comprehensive examinations and enforcement activities, in addition to a series of reforms aimed at closing regulatory gaps, strengthening shareholder rights, and improving the quality of disclosures provided to investors. The changes also aimed to improve internal SEC operations in order to enhance the agency's ability to detect wrongdoing and to quickly punish violators. Most importantly, the changes aimed to more efficiently identify and address emerging problems that could potentially threaten investors and capital markets in the future.

Among other things, the SEC reported the following for 2009:

- A 6 percent increase in the number of investigations opened: 994 compared to 890 in 2008
- A 1 percent decrease in the number of cases filed: 664 compared to 671 in 2008
- \$345 million in penalties imposed: an increase of 35 percent over 2008
- A 47 percent decrease in the number of investigations closed: 716 compared to 1,355 in 2008

The SEC also continued to increase cross-border cooperation in connection with enforcement actions. In all, it made more than 700 requests for assistance to foreign regulators during 2009, compared to 556 in 2008.

Major enforcement cases listed during 2009 included actions involving subprime-related securities, auction rate securities, fraud and Ponzi schemes, insider trading, and financial fraud and issuer disclosure.

¹² <http://www.sec.gov/about/secpar/secpar2009.pdf>

Major enforcement cases listed during 2009 included actions involving subprime-related securities, auction rate securities (ARS), fraud and Ponzi schemes, insider trading, and financial fraud and issuer disclosure. Entities and related individuals involved in these matters included Evergreen Investment Management Company, The Reserve Fund, Beazer Homes, JPMorgan Chase, and Raj Rajaratnam from the Galleon Group.

Following the record settlements it achieved in 2008 in connection with ARS and Foreign Corrupt Practices Act (FCPA) matters, the SEC secured several more large settlements in 2009. The largest was agreed with Wachovia Securities for \$7 billion in connection with ARS. Other ARS-related settlements will restore approximately \$4.5 billion in liquidity to Bank of America customers, \$1.3 billion in liquidity to Deutsche Bank customers, \$800 million in liquidity to RBC Capital

Markets customers,¹³ and \$456 million in liquidity to TD Ameritrade customers. The SEC charged that these firms misled investors about the liquidity risks associated with ARS that they underwrote, marketed, and sold.

The SEC's other noteworthy settlements¹⁴ in 2009 included:

- UBS AG..... \$200 million
- Halliburton/KBR \$177 million¹⁵
- General Electric..... \$50 million
- Evergreen Investment Management \$40 million
- E*Trade..... \$34 million
- AIG \$16.5 million

Figure 21. Number of SEC litigation releases related to new accounting cases, 2005–2009†

Year	Number of releases
2009	45
2008	40
2007	53
2006	32
2005	43

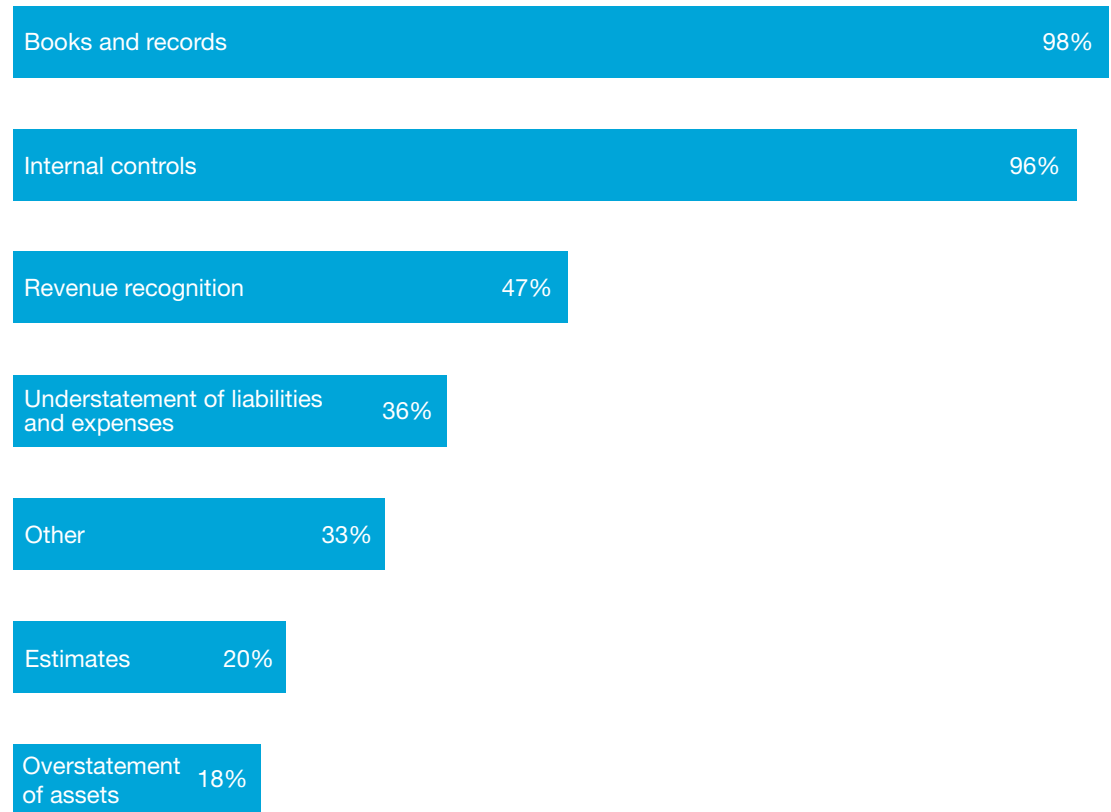
† New accounting cases are defined as the first litigation release naming a particular company or related individual. Subsequent releases that contain the same allegations are not counted.

¹³ <http://www.sec.gov/news/press/2009/2009-127.htm>

¹⁴ Settlements are listed with the corresponding company; however, the SEC may have settled with the company and/or with current or former executives.

¹⁵ In addition to the settlement with the SEC, Halliburton/KBR also agreed to pay the DOJ a criminal fine of \$402 million.

Figure 22. Percentage of SEC litigation releases related to new accounting cases citing specific accounting issues, 2009†



† Some cases allege multiple accounting issues.

The number of new accounting litigation releases¹⁶ issued by the SEC during 2009 increased to 45, up from 40 in 2008. As in prior years, books and records violations and internal control failures continued to be the most common allegations, cited in 98 percent and 96 percent of releases, respectively. Revenue recognition allegations were the next most common citation (in 47 percent of releases), followed by allegations of understatement of expenses or liabilities (in 36 percent of releases). The revenue recognition allegations centered around issues involving round-trip transactions and side agreements. The number of releases alleging FCPA violations fell for the second year, from 18 percent (7 cases) in 2008 to 13 percent (6 cases) in 2009.

An interesting development, and perhaps a sign of things to come, was the SEC's application of SOX Section 304¹⁷ in 2009. In July, the SEC charged Maynard Jenkins, a former chairman and CEO of CSK Auto Corporation, with violating SOX 304, and sought recovery of profits earned by him during the period of CSK's alleged misconduct. What is new about the SEC's application of Section 304 in this matter is that Mr. Jenkins was not personally accused of misconduct or violating any securities laws. Instead, the SEC has essentially drawn a new line in the sand, establishing that senior officers can and will be held liable for returning to the issuer any bonuses, incentive-based compensation, and/or stock sale profits received during the relevant period, if the alleged misconduct happened on the senior officer's watch. On previous occasions, the SEC used Section 304 only against individuals involved in wrongdoing in connection with the alleged misstatement.

Another first for the SEC during 2009 was its application of the concept of "controlling persons liability" to an FCPA case. In

the Nature's Sunshine Products matter, the SEC charged company CEO Douglas Faggioli and former CFO Craig D. Huff, in their capacity as "control persons," for failing to adequately supervise the actions of company personnel. This case also signaled a potential extension of the SEC's focus toward individuals who may not be directly involved in or otherwise associated with wrongdoing, and is particularly important for those in positions of control who have some level of responsibility over a company's books and records.

In its *FY 2009 Performance and Accountability Report*,¹⁸ the DOJ communicated a significant increase in various types of economic crimes, including mortgage fraud, white collar crimes, health care fraud, and grant and procurement fraud. Corporate fraud and misconduct in the securities and commodities markets at the institutional, corporate, and private investor levels have also reportedly increased. According to the report, by November 2009 the FBI was investigating some 189 major corporate frauds. The DOJ stated its commitment to aggressively investigate and prosecute financial crimes through enhanced coordination internally, and also with partner agencies across federal, state, local, and tribal governments.

What is being referred to as the largest hedge fund insider trading case to be prosecuted by the government emerged in 2009 in the form of the Galleon Group case. The DOJ and the SEC have since brought both criminal and civil charges against Galleon Group founder Raj Rajaratnam, along with several other hedge fund managers and technology executives. Assistant US attorney Joshua Klein reportedly estimated that the gains made by Mr. Rajaratnam could exceed \$50 million.¹⁹

16 The SEC issued 517 litigation releases in 2009. A new accounting litigation release refers to the first accounting-related litigation release, based on unique allegations listed, involving a company and its officers.

17 SOX 304 provides for disgorgement of certain bonuses, incentive- or equity-based compensation, and stock sale profits by the CEO and CFO of an issuer that is required to restate its financial statements "due to the material noncompliance of the issuer, as a result of misconduct."

18 <http://www.justice.gov/ag/annualreports/pr2009/TableofContents.htm>

19 http://www.boston.com/business/articles/2010/01/12/hedge_fund_boss_faces_bail_hearing

Two steps back: Pending legislation regarding aiding and abetting liability and notice pleading

By Paul Alfieri, Partner, and Linda Regis-Hallinan, Associate, Linklaters LLP

In July 2009, Senator Arlen Specter introduced two bills that could substantially impact the future of securities litigation: the Liability for Aiding and Abetting Securities Violations Act of 2009 (S.1551) and the Notice Pleading Restoration Act of 2009 (S.1504). Shortly thereafter, Representative Jerrold Nadler introduced the Open Access to Courts Act of 2009 (H.R. 4115), a House bill similar to the Notice Pleading Restoration Act. The Senate and House bills are currently pending at the Committee level. These bills, if passed in their current forms, would dramatically tilt the securities litigation playing field in favor of plaintiffs.

The Liability for Aiding and Abetting Securities Violations Act

This bill creates a private right of action against individuals and corporations that provide “substantial assistance” in a securities law violation. A private right of action for aiding and abetting has been barred since 1994, when the Supreme Court rendered its decision in *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*²⁰ One year later, Congress enacted the PSLRA, which expressly authorized the SEC to bring civil enforcement actions against aiders and abettors. In 2008, the Supreme Court in *Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc.* reinforced that there is no private right of action against aiders and abettors under Section 10(b).²¹

The pending legislation seeks to overturn *Central Bank* and *Stoneridge*. When introducing the bill, Senator Specter asserted that secondary actors, such as auditors,

bankers, lawyers, and rating agencies, should be held accountable since they “all too often actively participate in and enable the issuer’s fraud.” During a September 2009 subcommittee hearing, supporters of the bill questioned the SEC’s ability to deter secondary actors alone, particularly given the SEC’s limited resources.²² In order to improve the chances of the bill’s passage, Columbia Law Professor John Coffee proposed that liability against secondary actors be capped at \$2 million for individuals and \$50 million for corporations.

Opponents of the bill have argued that its primary goal is to allow class action plaintiffs to “rope in more deep pocket defendants”²³ and to “shake down settlements.”²⁴ Moreover, critics have warned that if the bill were to pass, the competitiveness of the US would be undermined because foreign companies would avoid doing business with American issuers.²⁵

Importantly, the term “substantial assistance,” which is used in the bill, is not defined anywhere in it, and as a result may be open to broad interpretation by the courts. Passage of the bill, therefore, could impact not only secondary actors who provide professional services, but all individuals and corporations that conduct business with the issuer, including vendors and customers. Moreover, the bill lowers the standard of scienter for aiding and abetting liability from “knowingly” to “knowingly or recklessly” for both SEC enforcement actions and the bill’s proposed private actions, which would lower the bar for plaintiffs to bring Section 10(b) claims against secondary actors.

20 511 U.S. 164 (1994). In *Central Bank*, the Court held that Section 10(b) of the Securities and Exchange Act of 1934, the main anti-fraud provision, “prohibits only the making of a material misstatement...or the commission of a manipulative act” and “does not itself reach those who aid and abet a § 10(b) violation.” *Central Bank*, 511 U.S. at 177.

21 552 U.S. 148 (2008). The Court also found that the plaintiff’s Section 10(b) claims against secondary actors under a theory of scheme liability failed to establish reliance, a required element of a Section 10(b) primary violation. *Stoneridge*, 552 U.S. at 166-67.

22 *Evaluating S. 1551: The Liability for Aiding and Abetting Securities Violations Act of 2009: Hearing on S. 1551 Before the Subcomm. on Crime and Drugs of the S. Comm. on the Judiciary*, 111th Cong. (2009) 5-6 (statement of John C. Coffee, Jr., Prof. of Law, Columbia University Law School); (statement of Tanya Solov, Director, Office of the Illinois Secretary of State, on behalf of the North American Securities Administrators Assoc., at 3).

23 *Evaluating S. 1551: The Liability for Aiding and Abetting Securities Violations Act of 2009: Hearing on S. 1551 Before the Subcomm. on Crime and Drugs of the S. Comm. on the Judiciary*, 111th Cong. 2 (2009) (statement of Adam C. Pritchard, Prof. of Law, University of Michigan).

24 *Id.* at 4.

25 *Id.* at 2.

Notice Pleading Restoration Act and Open Access to Courts Act

These bills seek to relax the pleading requirements for a complaint to survive a motion to dismiss under Federal Rules of Civil Procedure 12(b)(6), 12(c), or 12(e). The bills were introduced in response to two recent Supreme Court decisions, *Bell Atlantic Corp. v. Twombly*²⁶ and *Ashcroft v. Iqbal*.²⁷

In *Twombly*, an antitrust dispute, the Supreme Court ruled that a complaint must “state a claim to relief that is plausible on its face.”²⁸ The Court rejected a “focused and literal reading” of its prior language in *Conley v. Gibson*, where the Court had held that “a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim.”²⁹ In *Iqbal*, the Supreme Court applied the plausibility standard provided in *Twombly* and clarified that the standard applies in all federal civil actions.³⁰

The pending Senate bill undermines the holdings in *Twombly* and *Iqbal* and provides that a court should not dismiss a complaint “except under the standards set forth by the Supreme Court...in *Conley v. Gibson*.”³¹ Opponents of the bill claim that such general language would create great uncertainty in motion to dismiss practice because the standard under *Conley* is far from clear and has been interpreted differently by courts over the past 50 years.³² Indeed, one could reasonably argue that *Twombly* simply clarified the standard in *Conley*, and should therefore be unaffected by the bill.

The House bill proposes the explicit language from *Conley*: a court should not dismiss a complaint “unless it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim.”³³ In the 50-plus years since the *Conley* decision, however, courts have not interpreted that language literally. Rather, courts have consistently held that conclusory allegations are not sufficient to survive a motion to dismiss. Accordingly, the codification of that express language may create an entirely new pleading standard, permitting even conclusory allegations, and making it very difficult for defendants to prevail on motions to dismiss.

Moreover, neither the House nor Senate bill addresses the heightened pleading requirements for fraud set forth in the PSLRA or Fed. R. Civ. P. 9(b). The current versions of both bills could abolish those requirements.

Conclusion

While these bills are still in committee, they must be carefully monitored by in-house and outside counsel because, if passed, they will significantly increase the potential litigation costs and liability for issuers and secondary actors facing the prospect of securities litigation.

²⁶ 550 U.S. 544 (2007).

²⁷ 129 S. Ct. 1937 (2009).

²⁸ *Twombly*, 550 U.S. at 570.

²⁹ *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

³⁰ *Iqbal*, 129 S. Ct. at 1953.

³¹ S. 1504, 111th Cong. (2009).

³² *Federal Pleading Standards Under Twombly and Iqbal: Hearing Before the Subcomm. on the Constitution, Civil Rights and Civil Liberties of the H. Comm. on the Judiciary*, 111th Cong. 25-26 (2009) (statement of Gregory Katsas, Former Assistant Attorney General, Civil Division, U.S. Department of Justice).

³³ H.R. 4115, 111th Cong. (2009).

Foreign issuers: End of a decade

Foreign issuers (FIs) had their fair share of the securities litigation and regulatory limelight over the past ten years, averaging approximately 20 cases per year. During this period, FIs also paid out some of the highest USD class action settlements, including Tyco International's \$3.2 billion, Nortel Networks' \$2.2 billion, and Royal Ahold's \$1.1 billion. The average settlement over the ten-year period was \$88.4 million.³⁴

The last decade also gave rise to the term "F-cubed," used to define matters in which foreign shareholders who purchased stock of a foreign company, on a foreign exchange, filed securities lawsuits in US courts. The first F-cubed securities class action was initiated against Vivendi in July 2002. The trial began in October 2009 and a decision was reached by the jury in January 2010. The jury decided in favor of US and European shareholders who said the Vivendi media group lied to the public about its shaky finances. The company was found liable, but Vivendi's executives were not.

Another F-cubed case, *Morrison v. National Australia Bank*—which was initially filed in August 2003 but dismissed due to lack of subject matter jurisdiction in US courts—once again gained attention in November 2009. The foreign shareholders of the matter petitioned for certiorari, urging the Supreme Court to resolve the conflict between how the various circuits determined whether there was a sufficient connection to the US to permit a private action to move forward under Rule 10b-5. The US Supreme Court granted certiorari.

A well-established reality in the US, class actions have increasingly been on the minds of governments and legal communities around the world. In light of the significant losses suffered in recent years by investors, several countries are evaluating some form of collective action to recoup losses. For example, Hong Kong's Law Reform Commission proposed allowing class action lawsuits for those investors who suffered losses on notes guaranteed by failed Lehman Brothers. The UK government also proposed a Financial Services Bill that not only included proposed collective actions in the financial sector but also introduced opt-out collective procedures for the first time. If passed, the bill could significantly change the way complaints are filed against banks and other financial institutions. Additionally, although it is intended to address complaints related to the financial services sector, the bill could also serve as the model for future collective consumer action in other sectors.

The decade also brought a heightened focus by the DOJ and the SEC and a commitment to actively enforcing the FCPA. As a result, companies saw a record number of investigations as well as record fines and penalties. In 2008, Siemens settled a two-year worldwide FCPA investigation with the SEC and the DOJ. In addition to paying the largest settlement of its kind in the decade (a combined \$1.6 billion),³⁵ the company was also the first to ever be charged criminally by the DOJ for internal control violations identified during the investigation.

³⁴ Includes Tyco as an outlier case.

³⁵ PricewaterhouseCoopers, *Corruption Crackdown* (July 2009); http://www.pwc.com/en_US/us/foreign-corrupt-practices-act/publications/assets/pwc-corruption-crackdown-fcpa-2009.pdf

The last decade was not all bad news for FIs, however, and they did benefit from certain SEC initiatives. Specifically, changes to US reporting obligations to allow acceptance of FI financial statements prepared in accordance with International Financial Reporting Standards without a reconciliation to US Generally Accepted Accounting Principles (GAAP) made filing easier. Additionally, revised rules made it easier for companies to deregister, if average daily trading volume in the US over the previous 12 months failed to exceed 5 percent of the company's total global average trading volume.

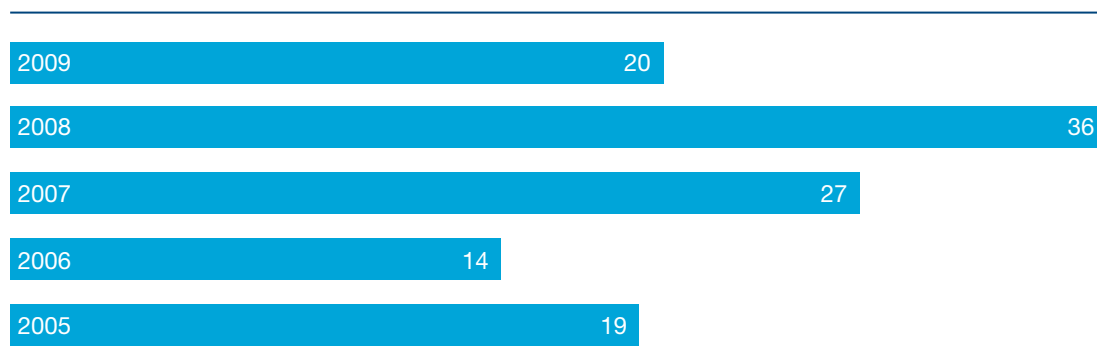
Foreign issuer filings fall away

The 20 federal securities class actions filed against FIs in 2009 represented a drop of 16 cases (or approximately 44 percent) from 2008's all-time high of 36 cases. The number of cases filed against FIs as a percentage of overall federal filings was also lower, falling to 13 percent and representing a 4 percent decrease when compared to the 17 percent of overall filings recorded in both 2007 and 2008. Despite the decrease, the number of cases filed in 2009 represented the fifth highest number of cases filed against FIs over the past 14 years. The average number

of cases filed in a single year since the PSLRA has been 18.

It is not evident why, in a year when investors continued to suffer significant losses in the market, the plaintiffs' bar filed almost 50 percent fewer cases against FIs than it did in previous years. Beyond the decrease in the number of foreign registrants, there are a multitude of factors to consider. The drop may be partly due to reportedly fewer funds available to pursue cases, causing plaintiffs' counsel to be more selective in the cases they file. There may also have been uncertainty regarding the ability of potential target companies to continue as going concerns. In some cases, the fall-off may reflect a wait-and-see approach regarding which Securities Act sections to rely on when writing the complaint—an example being financial-crisis-related complaints filed under Sections 11 and 12(a)(2), which seemed to fare better as they do not require the plaintiff to prove scienter. Possibly there may also have been a reluctance and/or an inability to file cases against companies that received government bailout funding. And finally, the drop could reflect the recent disruption in the plaintiffs' bar caused by the Milberg Weiss episode.

Figure 23. Number of US federal securities class action lawsuits filed against foreign companies per year, 2005–2009



Reflective of the financial crisis, 11 of the 20 FI cases filed (or 55 percent of total) were against entities related to the financial services industry. Other defendant industries included high-technology (5); pharmaceutical (2); energy, oil, and gas (1); and manufacturing (1).

As noted earlier, there is a distinct possibility that other countries outside the US may embrace some form of class actions in the not-too-distant future. Canada is already there: In December 2009, Justice Katherine van Rensburg of the Ontario Superior Court issued landmark rulings in the securities class action against IMAX. The court certified the first securities class action in Canada involving secondary market disclosures, and also certified a global class that will affect investors from other countries. A similar action had previously been filed in the US but was not yet certified, and the Canadian court has taken the position that the possibility that a similar action may be certified in another jurisdiction is insufficient to preclude the court from certifying a global class in Ontario. It is unclear whether plaintiffs will use this as an opportunity to get two bites of the same apple in order to see which forum gives them a better result.

Accounting-related allegations dominate foreign issuer cases

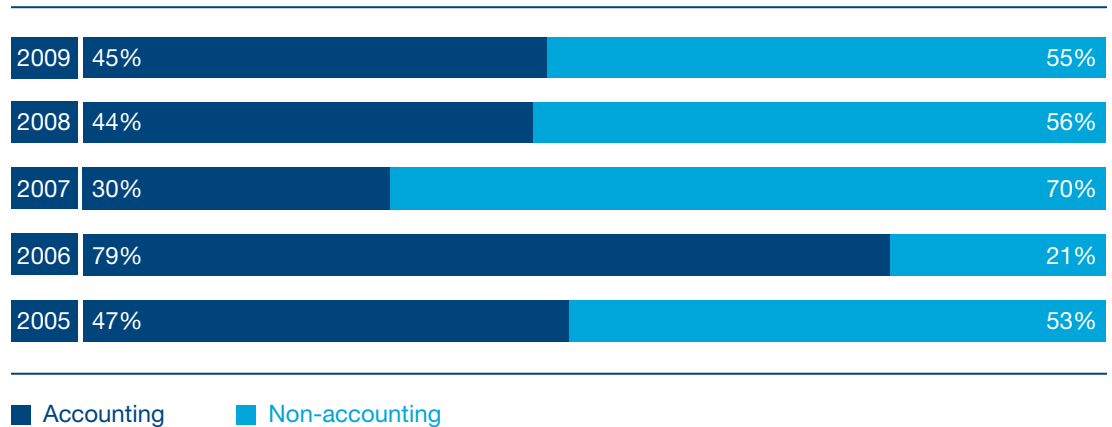
Unlike 2008, when both domestic and foreign defendants had a similar percentage of accounting-related cases filed against them, 2009 saw 9 percent more accounting-related cases filed against FIs than against domestic registrants.³⁶ Nine cases, representing 45 percent of the cases filed against FIs, contained accounting-related allegations. All nine accounting-related cases were filed in the Second Circuit and represented companies in India, Canada, Israel, and several European countries.

For at least the last nine years, the majority of cases against FIs have been filed in the Second Circuit. In 2009, that trend continued with 16 cases filed there, representing 80 percent of the year's total. Two cases were filed in the Ninth Circuit (Lumenis and Roche) and two were filed in the Eleventh Circuit (Willis Group and JML Portfolio Management).

For at least the last nine years, the majority of cases against foreign issuers have been filed in the Second Circuit—a trend that continued in 2009, with the 16 cases filed there representing 80 percent of the year's total.

³⁶ Cases against domestic registrants (135) excludes foreign cases.

Figure 24. Percentage of accounting and non-accounting US federal securities class action lawsuits filed against foreign companies per year, 2005–2009†



† Cases filed between 2005 and 2008 may have been updated with accounting allegations if the amended complaints alleged accounting violations not previously recognized. The number for 2009 reflects initial complaints.

Similar to 2008, inadequate internal controls and improper estimates allegations were cited in most accounting-related cases. Allegations of improper estimates were cited in 56 percent of the cases, nearly double the five-year average of 30 percent. Allegations of inadequate controls were cited in 78 percent of the cases, representing a 36 percentage point increase over the five-year average of 42 percent.

Continuing with the declining trend that began in 2006, improper revenue recognition allegations again decreased in 2009. The only allegation of improper revenue recognition was cited in the case filed against Satyam Computer Services at the start of the year.

Allegations of understatement of expenses jumped 9 percent, to 22 percent of cases filed in 2009 versus 13 percent in 2008. However, 22 percent is more in line with the percentage of cases filed in 2007 (25 percent).

Financial crisis cases represented five of the accounting-related cases. Allegations included impairment charges associated with the company's exposure to bad loans and mortgage-related securities. All cases but one were filed against financial services companies or banks. The only non-financial-services defendant named was MIND C.T.I., Ltd. (a billing and customer care solutions provider), which in addition to allegations of inadequate internal controls, also allegedly concealed from investors that "reported cash positions were comprised of illiquid auction rate securities."³⁷

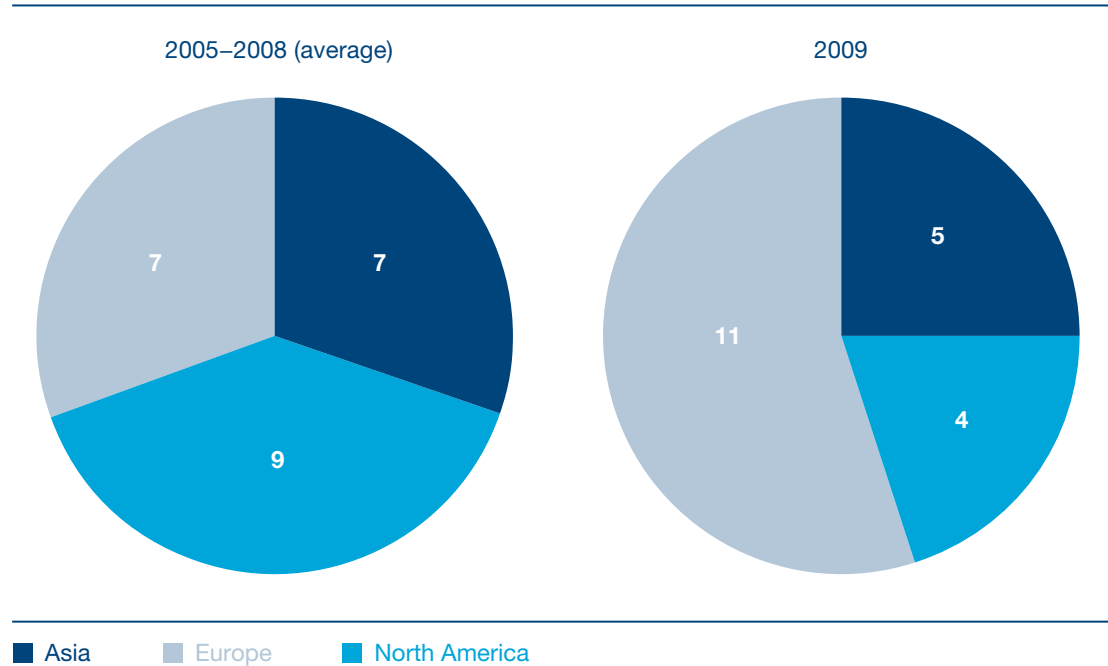
37 Second Circuit 09-CV-07132 (August 14, 2009).

Europe takes the most hits

Eleven of the FI cases filed, or 55 percent, were against European companies, a 22 percentage point increase when compared to 33 percent in 2008. European countries represented included Germany (3), Switzerland (3), the Netherlands (1), Spain (1), and the United Kingdom (3). Five of the cases filed, or 25 percent, were against Asian companies, representing a slight increase when compared to 17 percent in 2008. For the third time ever, a case was brought against a Russian company,

Mechel. The first two cases (against Vimpel-Communications and Yukos Oil) were both filed in 2004. Four of the cases filed (or 20 percent) were against North American companies, representing a decrease from the 36 percent in 2008. Three of those four companies were Canadian, representing the financial services; telecommunications; and energy, oil, and gas industries. The fourth company, Ariel Fund Limited, is based in the Cayman Islands.

Figure 25. Number of US federal securities class action lawsuits filed against foreign companies: by region, 2005–2009



Foreign issuers: The number of settlements dips but the dollars rise

Of the 20 cases filed against FIs in 2009 that identified their lead plaintiffs,³⁸ five named private investors as the lead plaintiff. Public investment funds, pension funds, or institutional investors were named as the lead plaintiff in 8 of the 20 cases filed during the year.

The number of settlements fell from 19 in 2008 to 9 in 2009, a drop of 53 percent. The average settlement, however, increased by 65 percent—from \$23.1 million in 2008 to \$38 million in 2009. Nine cases were settled in 2009, some of them having initially

been filed as early as 1999, some with filing dates as late as 2009 (for example, the case against Banco Santander). Lead plaintiffs for the settled matters varied, but included institutional investors, union pension funds, and private investors. The largest of the nine settlements was for \$235 million, from Banco Santander in relation to investments in Madoff funds made by its Optimal Strategic US Equity Fund. Banco Santander agreed to pay the Madoff trustee \$235 million to avoid being named in a clawback lawsuit that the trustee was planning to file to reclaim profits withdrawn by clients shortly before the Madoff collapse.

Figure 26. Settlement values (in thousands \$) for foreign companies: by lead plaintiff, 2005–2009[†]

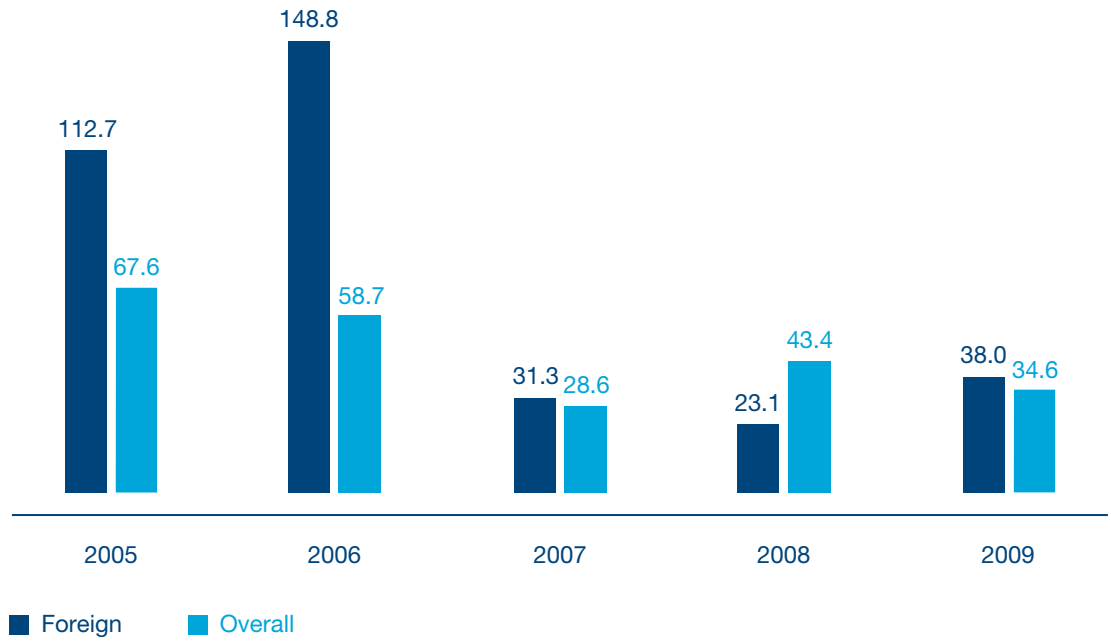
	2005		2006		2007		2008		2009	
	Cases settled	Settlement	Cases settled	Settlement	Cases settled	Settlement	Cases settled	Settlement	Cases settled	Settlement
Public pension	2	1,107,000	6	2,241,400	6	3,402,800	9	347,600	3	76,000
Other institutional	3	37,800	3	21,300	2	121,800	6	81,400	2	235,800
Private investors	7	208,000	7	117,900	4	20,500	4	10,300	3	26,300
No lead plaintiff [‡]	–	–	–	–	1	30,000	–	–	1	4,000
Total cases settled	12	1,352,800	16	2,380,600	13	3,575,100	19	439,300	9	342,100

[†] Year of settlement is determined based on the primary settlement pronouncement. Any subsequent settlement amounts are attributed to the primary announcement year. Settlement information reflects only those cases filed and settled after passage of the PSLRA (12/22/1995). Excludes zero-dollar settlements and settlements in which an amount has not been determined. Totals may not sum exactly due to rounding.

[‡] Two cases were settled without lead plaintiff involvement: Converium Holding (2007) and Lernout & Hauspie (2009).

³⁸ Lead plaintiffs have not been identified to date for seven cases.

Figure 27. Average settlement values (in millions \$): foreign vs. overall, 2005–2009†



† Excludes zero-dollar settlements and settlements in which an amount has not been determined.

Figure 28. Top settlement values over \$100 million by foreign companies, 2005–2009[†]

Company	Country	Year settled [‡]	Amount
Tyco International	Bermuda	2007	\$3,200,000,000
Nortel Networks [§]	Canada	2006	\$2,217,040,606
Royal Ahold NV	Netherlands	2005	\$1,100,000,000
Banco Santander	Spain	2009	\$235,000,000
Biovail Corporation	Canada	2007	\$138,000,000
Royal Dutch/Shell Transport	Netherlands	2008	\$130,000,000
Deutsche Telekom AG	Germany	2005	\$120,000,000
Parmalat Finanziaria SpA [#]	Italy	2007	\$101,800,000

[†] Includes only US settlements.

[‡] Year of settlement is determined based on the primary settlement pronouncement. Any subsequent settlement amounts are attributed to the primary announcement year. Settlement information reflects only cases filed and settled after passage of the PSLRA (12/22/1995).

[§] Nortel settled both the 2001 case and the 2004 case in 2006.

^{||} Partial settlement.

[#] Parmalat Finanziaria SpA settled for \$50 million, \$36.8 million, and \$15 million in 2007, 2008, and 2009, respectively.

SEC litigation releases against foreign issuers taper off

Overall, there was a decline in the number of accounting-related SEC litigation releases issued against FIs in 2009. Litigation releases issued in 2009 related to two companies and/or their senior executives, representing a 75 percent decrease when compared to the eight releases issued in 2008. However, the 2009 activity more closely reflects the activity in 2007 (3) and 2006 (3).

Research in Motion

L.R. 20902

February 17, 2009

ACL Technologies

L.R. 21063

May 29, 2009

The first release issued against an FI was in mid-February 2009, and charged both the company, Research in Motion, and four of its senior executives with stock option backdating. All defendants agreed to settle the matter and the individual defendants will pay civil penalties totalling \$1.4 million collectively. They also agreed to disgorge the in-the-money value of backdated options

they exercised, which totaled an additional \$843,415. The US was not alone in its interest in this matter, nor was it first to charge the company and individuals. In early February 2009, the Ontario Securities Commission brought a related settled action against the company, the same four executives, and also certain directors, which included a total payment of more than C\$77 million. The SEC noted that it had received assistance from the Ontario Securities Commission in the matter, supporting one of the key objectives laid out by the SEC in 2008 regarding increasing global regulatory cooperation in pursuing matters.

In May 2009, the SEC issued a settled enforcement action against the former president of ACL Technologies, a former subsidiary of United Industrial Corporation that was involved in providing aerospace and defense systems. The SEC charged the former president with violations of the FCPA for allegedly authorizing illicit payments to an Egypt-based agent. The SEC asserted that the former president disregarded the high probability that some portion of the payments might be offered to Egyptian Air Force officials in order to influence the

awarding of business to United Industrial Corporation, the parent company. The allegedly authorized payments totaled over \$150,000 and resulted in awarded contracts with gross revenues of \$5.3 million and net profits of \$267,000. The SEC charged the former president with aiding and abetting United Industrial Corporation's violations of the FCPA. The settled charges resulted in a final judgment permanently enjoining him from future violations and ordering him to pay a \$35,000 civil penalty.

A related release was issued against ACL Technologies and resulted in a settled administrative proceeding against United Industrial Corporation. The company agreed to cease-and-desist orders and the payment of \$337,679 in disgorgement and pre-judgment interest.

New foreign issuer activity falls

Notably, there were 25 new private issuers in 2009, representing a decrease of 61 percent when compared to 2008, which saw 64 new private issuers. The dollar amount of registered securities decreased by \$41 billion (or 32 percent) when compared to 2008.³⁹ A number of factors influence the annual increase or decrease—and, usually, the number of new foreign companies registering with the SEC is a reflection of the confidence and liquidity of the US markets, and the money that can be raised. The overall decrease in 2009 is arguably attributable to the poor economic environment.

Sixty-one percent fewer new foreign private issuers registered with the SEC in 2009 than in 2008, representing a year-over-year drop of \$41 billion.

³⁹ <http://www.sec.gov/about/secpar2009.shtml>

International securities litigation: 2009 developments

By Deborah R. Meshulam, Partner, DLA Piper LLP

In 2009, several international securities litigation issues took the spotlight: F-cubed cases continued to test the limits of the international reach of US securities laws; conflicts between US and overseas laws created challenges in transnational securities litigation; lawsuits premised on FCPA violations seemed to increase; and the expansion of US-style private securities litigation in Canada continued.

F-cubed cases—still alive and kicking

In 2009, F-cubed cases gained some traction, even in the face of the late 2008 decision by the Second Circuit in *Morrison v. National Australia Bank*. Although the Second Circuit found no subject matter jurisdiction on the facts in *Morrison*, other courts took a different approach and allowed claims by foreign investors who purchased their stock overseas to proceed.

For example, in *In re Infineon Technologies AG Securities Litigation* (March 2009), the Northern District of California allowed the claims of foreign investors who purchased shares of Infineon on the Frankfurt Stock Exchange to proceed. The court's order found sufficient conduct in the US to support jurisdiction and did not mention *Morrison*. The order is under interlocutory appeal to the Ninth Circuit.

In *In re CP Ships Ltd. Securities Litigation* (August 2009), the Eleventh Circuit held that a lower court properly exercised subject matter jurisdiction over securities fraud claims brought in part by Canadian investors who purchased stock in CP Ships, a Canadian company, on the Toronto Stock Exchange. The Eleventh Circuit found sufficient conduct in the US to sustain jurisdiction and distinguished *Morrison* by concluding that the alleged US activity at issue represented "substantial acts in furtherance of the fraud which directly caused the claimed losses." In reaching its conclusion, the Eleventh Circuit

noted the conflicting standards applied in the Circuit Courts of Appeals when deciding whether F-cubed cases could proceed.

Perhaps in recognition of this conflict among the circuits, in November 2009 the US Supreme Court agreed to decide an appeal of *Morrison*. In agreeing to hear the case, the Supreme Court will face the issues of whether and when the anti-fraud provisions of US securities laws apply to international securities fraud and what is the appropriate test for resolving jurisdictional questions.

Notably, even while the Supreme Court considers the issue, Congress took a first step in 2009 to expand US transnational securities fraud jurisdiction. Section 215 of the Investor Protection Act of 2009 as currently drafted would amend relevant provisions of US securities laws to provide for jurisdiction if there is either: (i) "conduct within the United States that constitutes significant steps in furtherance of [a] violation, even if the securities transaction occurs outside the United States and involves only foreign investors"; or (ii) "conduct occurring outside the United States that has a foreseeable substantial effect within the United States." This provision may not become law but support for providing expanded remedies remains.

Clashing discovery rules and litigation disputes

Challenging issues emerged in 2009 as international securities litigations moved into discovery and trial. *In re Vivendi Universal, S.A. Securities Litigation* presented some of these issues. Vivendi is a French company with US operations. The litigation involves a class composed of the company's US, French, UK, and Dutch shareholders. During discovery and after the trial commenced, differences between French and US law emerged and were resolved.

First, the US court addressed issues presented by France's blocking statutes. Ernst & Young (E&Y) had audited Vivendi's US subsidiaries at the request of Vivendi's French statutory auditors. Plaintiffs sought production of E&Y's work papers. E&Y objected because production would violate French law and subject it to possible criminal prosecution. French courts had already ruled that the French auditor could not produce its work papers. French law also covered E&Y as an "expert" retained by the French auditor. Applying a comity analysis, the court concluded that E&Y should produce the documents even though the court recognized that French law would prohibit production. In July 2009, the court confirmed its decision after E&Y sought reconsideration.

Second, the US court dealt with competing French litigation. After the October 2009 trial began in the US, Vivendi sued in Paris to recover damages from two French class representatives who allegedly violated the French civil code through their participation in the trial. Vivendi also sought an order requiring those shareholders to withdraw from the US action. Rather than issue a foreign anti-suit injunction that could impinge on the authority of the French court, the district court relieved the French shareholders of their responsibilities as class representatives while maintaining their status as class members.

Securities litigation premised on FCPA violations

Although there is no private right of action under the FCPA, 2009 saw additional securities actions premised on international conduct that allegedly violated the FCPA. In July 2009, US and Cayman investors in Swiss company Panalpina sued alleging securities law violations due to the drop in stock value upon revelations of FCPA

violations. Panalpina's shares are traded only on the Swiss Stock Exchange and the FCPA violations took place outside the US. Motions to dismiss are pending. Additionally, in December 2009, a securities fraud class action was filed against Siemens alleging violations premised on misrepresentations regarding its ability to generate revenues without bribery. These cases represent a shift from the more typical shareholder derivative action relating to FCPA violations.

Canadian securities class actions

In 2009, the trend of a more active securities class action litigation practice in Canada continued. New cases were filed against issuers such as Timminco, Manulife Financial, NovaGold, and Western Coal. Class certification was granted in previously pending cases such as CP Ships, IMAX, and Aspen Group Resources Corporation. Each of these cases involved allegations of misrepresentations and omissions under both common law and newer statutory continuous disclosure provisions.

Further, 2009 was a turning point in cooperation between Canadian and US securities plaintiffs' lawyers, with the October decision from the Ontario Superior Court of Justice in the Timminco securities class action. In that case, the Canadian court ruled that US plaintiffs' counsel may directly participate in a Canadian class action in a supporting role. That role involves investigation and document review as well as strategic advice.

What this means for your business

2009's class action lull may signal a shift in focus from financial services to other industries, and abroad.

Although 2009 saw a decline in the total number of federal securities class action lawsuits, neither financial services firms nor companies in other sectors should take this as license to relax their guard. Far from being a trend, the decline may simply be a lull as the plaintiffs' bar refocuses following two years of intense financial-crisis-related filings. And arguably, as the economy and particularly the financial sector returns to stability, other sectors may find the glare from the plaintiffs' bar uncomfortably bright once again.

The number of 2009 filings made a year or more after the end of their class periods suggests that plaintiffs' attorneys may have put these cases on hold while dealing with financial-crisis-related filings, and were beginning to refocus on their backlog.

Several pieces of legislation before Congress could have serious ramifications for the financial services industry in particular, potentially expanding the population of defendants. Senator Arlen Specter's Liability for Aiding and Abetting Securities Violations Act of 2009 would allow private litigation against any person who provides "substantial assistance" in a violation of securities laws. Another Specter proposal, the Notice Pleading Restoration Act of 2009, would substantially loosen plaintiff pleading requirements, making it harder for defendants in all industries to have cases dismissed, and thus opening the door to costly and burdensome discovery.

Individuals, notably officers and directors, should be more cognizant than ever of their own exposure to litigation and investigation. In 2009, senior officers continued to be named in the majority of filings, and both the SEC and DOJ signaled a heightened commitment to pursuing individuals.

Securities and Exchange Commission v. Maynard L. Jenkins provided the most obvious red flag. In it, the SEC charged the former chairman and CEO of CSK Auto Corporation with violating SOX Section 304 by not disgorging bonuses and stock sale profits he earned during a period in which others at CSK filed fraudulent financial statements. In effect, officers may now be held personally accountable via their wallets for financial fraud committed on their watch, regardless of whether they were associated personally with the fraudulent activity. The SEC and DOJ are also increasing their targeting of individuals in FCPA investigations, as was evidenced in the Nature's Sunshine Products matter, and by the accounting-related release issued against the former president of ACL Technologies.

From an enforcement standpoint, the reforms detailed by the SEC in its *2009 Performance and Accountability Report* will likely bring about closer overall scrutiny of activity in 2010 and beyond. More comprehensive examinations, the closing of regulatory gaps, strengthening of shareholder rights, improvement of the quality of disclosures provided to investors, and procedural changes to more efficiently reveal wrongdoing and emerging issues will all work toward the SEC's reform objectives.

Pending court cases could also spur new suits against foreign companies. In late March 2010—just after this study went to press—the US Supreme Court reviewed *Morrison v. National Australia Bank*. Their ruling will determine the reach of US securities laws beyond the nation’s borders, and potentially pave the way toward more suits against foreign companies.

Bottom line: Though 2009 saw a lull in federal securities class action suits, companies will need to maintain their day-to-day vigilance as if they were still in the bad old days of 2008. Companies will need to continually and proactively ensure that they have proper internal controls and risk management procedures in place to mitigate potential future situations.

Now more than ever, individuals in positions of control or responsibility for company books and records should be mindful of the potential ramifications of the SEC’s application of Section 304 and the concept of “controlling persons liability,” relevant in the Jenkins and Nature’s Sunshine Products cases.

The issue of compliance must be a priority. There has never been a greater need or expectation for senior officials to involve themselves on a more practical level in ensuring that their companies’ books and records are accurate, that internal control systems are functioning effectively, and that the proper tone at the top is being communicated to—and heard by—all parts of the organization. Management should also ensure that comprehensive crisis plans are in place to ensure that potential investigations are executed correctly and expeditiously, and that the ramifications thereof are fully anticipated and carefully considered. Uncertain days lie ahead, and senior management must take appropriate steps to protect the companies they lead and ensure that they personally meet the responsibilities and expectations regulators now demand.

Companies will need to continually and proactively ensure that they have proper internal controls and risk management procedures in place to mitigate potential future situations.

Methodology

The PricewaterhouseCoopers (PwC) Securities Litigation database contains shareholder class actions filed since 1994. The focus of this study is on all cases filed after passage of the Private Securities Litigation Reform Act. PwC tracks all cases filed and more than 50 data points related to each case, including court, circuit, company location, SIC code, class period, stock exchanges, GAAP allegations, earnings restatements, SEC investigations, DOJ investigations, and lead plaintiff type.

PwC also analyzes a variety of issues, including whether the case is accounting-related, a breakdown of accounting issues, and settlement data.

Sources: case dockets, news articles, press releases, claims administrators, and SEC filings.

Filings from 1996 onward occurred after the PSLRA of December 22, 1995; filings for 1999–2009 occurred after the Securities Litigation Uniform Standards Act of November 3, 1998.

The year a case was filed is determined by the filing date of the initial complaint in federal court. Multiple filings against the same defendant with similar allegations are counted as one case.

All figures, except when noted, exclude “IPO laddering,” “analyst,” and “mutual fund” cases pertaining to the 2003/2004 “market timing” and “revenue sharing” cases.

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