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Over the last year, corporate giants and captains of industry have suffered major reverses in the most severe financial crisis of our lifetimes. This has not gone unnoticed in the world of Directors & Officers (D&O) insurance. For many, the enormous challenges of 2009 can be expected to continue in 2010.

- New D&O claims reported to Willis have increased by 18% from the same period last year. This follows a 50% increase for newly reported D&O claims in the previous year.
- Last year's turmoil at several major D&O carriers resulted in increased competition from many others looking to take over lead positions or profit from rate increases seen in certain industry sectors.
- Overall, in 2010, corporate executives and their firms can expect continued competition for attractive risks, which should result in stable pricing or price decreases.

PLAYERS: RESHUFFLING THE DECK

The financial upsets suffered by several of the top D&O markets over the past 12 months and the reexamination of risk portfolios by other big-name D&O carriers has reshuffled the list of D&O markets. Previously dominated by three or four names, the list of potential lead markets on many accounts is now often as long as 12. The relative newcomers to the lead role, as well as those that restaffed with top executives from the old guard, can be expected to supply additional capacity and competition in 2010.

Some of the newer or reinvigorated D&O markets include CV Starr, Endurance (USA), Everest National and W.R. Berkley, in addition to Freedom Specialty and Ironshore, who had their coming out in 2007 and 2008.

CAPACITY

For financial institutions and those firms facing the toughest financial challenges, it has been a hard battle to find the D&O capacity that they and their executives have sought – assuming that they could afford to pay for it once they'd found it. For others, however, there has been – and there is expected to be – an abundance of insurance markets eager to write their business. Some of this is newer capacity attracted by higher



D&O pricing, while the rest comes from markets seeking shelter from the financial institutions D&O marketplace. (For more on the issues facing financial institutions, see the *Marketplace Realities* article on that sector.)

PRICING

Pricing is largely a function of available insurance capacity. For companies that are succeeding in these rocky times, capacity can be almost ridiculously abundant. For them, even if they face an increase in external risk factors, pricing is likely to be stable. For those that are best-in-class, reductions in pricing are possible, in some cases, in the double digits.

TERMS OF ENDEARMENT

New forms for traditional and A-Side coverage, both primary and excess, are providing additional clarity of coverage as well as new enhancements. Some of the terms and conditions previously only available on the best broad A-Side forms are making their way down into underlying traditional (A+B+C) policies. Expanding coverage in the underlying forms takes pressure off of the excess A-Side forms to drop down on a difference-in-conditions basis – potentially removing obstacles to price reductions on these excess layers.

Some of the terms now more readily available include new A-Side triggers, financial insolvency drop-down provisions, clarification of the exhaustion of limits wording, and expansion of the definition of “subsidiary” under some forms to clearly include limited liability corporations. Additionally, as mentioned below, new coverage for independent directors is available from select markets.

A-SIDE COVERAGES ARE BEING TESTED

During the past year, the A-Side policies and the A-Side of traditional D&O policies have been hit by a raft of nonindemnifiable claims and claim settlements. This is expected to continue in 2010, with the economic and legal drivers in place to spur more derivative claims and claims against insolvent companies. If this impacts the profitability of these lines of coverage, a countervailing trend may emerge, i.e., price increases. (For more on A-Side coverage, see our recent *Alert*, “Picking the Right Lead A-Side D&O Carrier.”)

INDEPENDENT DIRECTORS ARE SPEAKING UP

While separate coverage for independent directors (also known as nonexecutive directors) has been around for some time, these contracts have not attracted wide attention. This appears to be changing, with both buyer interest and coverage options on the rise.

On the demand side, a series of widely read articles questioned the practice of combining coverage for both directors and officers in the

same insurance contract, while others suggested that the independent directors might want some additional, dedicated coverage for themselves. Further impetus was provided by the recent Peregrine Systems settlements, which brought the total payments demanded of Peregrine's outside or independent directors to \$61.5 million, making this one of the largest such securities settlements.¹

On the supply side, several A-Side carriers in 2008 began offering additional limits of coverage for independent directors and in 2009 a major carrier introduced this partial reinstatement of limits into its traditional primary D&O form. Such moves are often emulated by others.

CHANGING D&O PURCHASING PATTERNS

In the wake of their own financial challenges as well as the credit crisis at large, buyers of D&O insurance continue to reassess their buying patterns. For one, many are now reconsidering where they buy their insurance due to counterparty risk. In some cases, this means that otherwise attractive, credit-worthy and competitive carriers may not be included in the final D&O carrier selection process.

While we believe that the market will not harden in 2010, carriers are hoping otherwise. Some are already pushing for higher rates. But the insurance buyers in this marketplace are being challenged as never before to do more with less, to protect their companies and executives with a shrinking insurance budget. This means softer demand, which has a softening effect on the marketplace.

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¹*In re Peregrine Systems, Inc. Securities Litigation*,
Case No. 02-CV-0870 BEN