



CLIENT ALERT FACEBOOK SETTLEMENT



FACEBOOK, INC. D&O COVERAGE CONSIDERATIONS

Within a week of completing its initial public offering (IPO), Facebook received a securities class action alleging that the Registration Statement and Prospectus issued in connection with the IPO were false and misleading in violation of the Securities Act of 1933. Nearly six years later, Facebook reached a settlement with plaintiffs of \$35,000,000.

It is worth noting that this settlement does not include defense expenses, which can often make up a large percentage of the overall cost. It is common for publicly traded companies such as Facebook to purchase Directors and Officers (D&O) Liability insurance for this exposure. While defense expenses and settlements typically fall squarely within the four corners of a D&O policy, there are several considerations when evaluating this claim.

The initial complaint alleged wrongdoing by Facebook (the company), several directors and officers of Facebook, and the investment banking underwriters. A common public company D&O policy provides coverage for the company and the directors and officers of the company. Securities class action claims are typically indemnifiable by the company, and thus, subject to a retention.

While it is common for the investment banking underwriters to be dismissed from the complaint, a typical D&O policy does not provide indemnification for this group (although this coverage is available in the marketplace). Once the retention has been satisfied, the D&O insurance carriers begin funding defense and settlement. Importantly, given the nearly six years it took for this litigation to be settled, the financial stability and commitment of the insurance carrier is crucial when initially structuring a D&O program. There are also other considerations when purchasing a D&O program, such as the overall breadth of coverage, flexibility with choice of defense counsel, carriers' claims paying reputations, etc.

Lastly, it is important to note that there is heightened exposure for companies shortly after an IPO. Approximately one in five "post-IPO" companies are subject to a securities class action, in which companies are strictly liable for misrepresentations and omissions in the offering documents.

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