Willis Towers Watson

Insurance Marketplace Realities 2021 – Fiduciary

November 18, 2020

Fiduciary liability turns sharply harder as the transition to a new administration is likely to escalate fiduciary risks.

Rate predictions

	Trend	Range
Overall:	▲	+5% to +70% or more
Commercial – medium to large plans with assets exceeding $50M:	▲	+15% to +70% or more
Other commercial companies:	▲	+5 to +15%
Financial institutions:	▲	+15% to +50%

Rate predictions: Fiduciary

Key takeaway

Expect change, perhaps disruptive change, through 2021, as our hard market has caught up with fiduciary liability, and regulatory uncertainty will continue for some time.

Concerning trends of lawyer-driven litigation and regulatory uncertainty show no signs of subsiding.

- **The claims keep coming**: In both July and August, a new class action complaint was filed almost every other day.
- **This cottage industry for plaintiffs' firms has expanded**: Fee case success has attracted new firms and diversified the bases of claims to now also include actuarial equivalence tables and COBRA notice deficiencies.
- **Controversy over fiduciary duties continues**: Controversy over new and proposed rules continues to elevate compliance risk and increase compliance costs. Balkanization of regulation potentially increases compliance and claim complexity risk.

Carriers have rather suddenly and materially stepped up their responses to these concerning trends.

- **Potentially abruptly harder**: The market recently turned sharply - which is why we have considerably broadened the range of our commercial rate increase prediction.
- **Class/mass/fee cases**: Expect new retentions, sublimits or exclusions for class, mass and/or fee cases. Size will vary with plan size, plan governance and claims history, but retentions of six to seven figures for class, mass and/or fee claims may become more common.
- **Capacity/limits management**: Carriers are pulling back on deployed capacity. Expect layer sizes to shrink as they have in D&O. Expect layers larger than $10 million to be trimmed back to $10 million or $5 million.
- **Rate**: Expect far more pressure on rate through 2021.
- **Blended coverage — small and medium-sized private and not-for-profit (NFP) enterprises**: Smaller private/NFP companies may continue to buy fiduciary liability coverage as part of a package policy.
- **Primary market concentration — large and complex:** A few carriers continue to lead most large programs. This concentration heightens difficulties with the hardening market.

Most accounts are now seen by carriers as challenged.

- **Challenged classes**: Until recently, challenged classes included financial institutions with proprietary funds in their plans — especially if they had not been the subject of a prohibited transaction claim or if they were facing significant ESOP exposures

— and higher education and health care organizations. Nearly every class is at risk of being treated as challenged, though smaller plans may avoid heightened underwriting scrutiny.

The pandemic may heighten risks.

- **Part of the problem but not the primary problem**: The fiduciary liability insurance market is likely to see considerable hardening and change quickly even if the pandemic environment remains relatively stable. Nevertheless, while not likely the primary cause of fiduciary pricing pressure, the pandemic environment is not helping.
- **Unprecedented and uncertain environment**: The good news: to some extent pandemic-related risk drivers may have waned somewhat as companies and plans are now largely better informed and better prepared for what may come next. However, if the pandemic environment worsens, it could make our hardening market considerably worse.
- **Specific pandemic risk concerns**
  - The COVID-19 environment could accentuate risks from company stock in plans due to volatility in the market and precipitous drops in value. While the stock market is at helpful levels, its state is fragile. If government lifelines are cut too early, we could see a correction or worse.
  - Cutbacks in benefits (i.e., 401(k) matches) and/or workforces may yield claims — potentially class action claims.

Buyers should keep on an eye on key loss drivers.

- **Fees/suitability**: Fee cases continue to drive loss development. These cases allege that fees paid to financial institutions have eroded employee retirement plan assets and less expensive, non-proprietary investment options should have been offered. These suits are no longer limited to large plans. A wave of 403(b) fee cases has impacted universities and the health care industry. Plaintiffs are now pushing for jury trials, which could put upward pressure on awards and settlements.
- **Mortality tables**: We are seeing ERISA claims alleging that plans calculate non-single life annuity benefits using unreasonable mortality table assumptions, with the effect of lowering benefits below what ERISA requires.
- **Regulation and enforcement uncertainty**: With a new administration in Washington in 2021, we can expect more change and uncertainty. For example, expect the Fiduciary Rule controversy to heat back up as leadership at the Department of Labor will change, and with it, views on investor protections. Until the dust settles, the heightened risk from uncertainty will continue to be a challenge.
- **Financial institutions**: Insureds with proprietary funds in their plans will face the most challenging renewals.
  - **Already been sued?** Although it may seem counterintuitive, a financial institution that has already been sued may be seen as a better risk to a new insurer. Nevertheless, incumbent insurers adjusting a claim will want a premium increase.
  - **No such claim yet?** Claims-free may NOT be seen as a good thing! Insurers believe that for financial institutions with proprietary funds in their plans, it is only a matter of time before a proprietary fund-related claim will be made. Accordingly, renewal terms from the incumbent will likely look to push rate and restrict terms. Also, there could be very limited interest from other insurers.
  - At least one leading insurer has been looking to broadly exclude this risk without giving back any premium credit.
- **Law**: U.S. Supreme Courtrulings have heightened fiduciary risk. For example, in Intel v. Sulyma (https://www.supremecourt.gov/opinions/19pdf/18-1116_h3cj.pdf), the U.S. Supreme Court held that a three-year statute of limitations failed to begin to run, since “actual knowledge” was required and the plaintiff “did not remember reviewing” any of the numerous disclosures of the investment allocation that afforded the basis of the claim.
- **Are limits adequate?** In our current COVID-19 environment and with fee litigation driving up claim frequency and loss severity, buyers should reassess the adequacy of their limits. The fiduciary market is heading into a period of firming along with other financial lines markets. The window of opportunity to add capacity may close.
- **Governance**: Developments in plan governance have heightened fiduciary exposure to potential sanctions, correction expenses and litigation. IRS determination letters, once extensively relied upon by plan sponsors to ensure that a plan document complied with the tax qualification requirements, are no longer issued in most circumstances. Today’s employers must navigate regulatory change and ambiguity without IRS validation.

Disclaimer

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