

# Fiduciary liability insurance

informed decisions may help keep the cost down  
for your retirement plan



## For the past several years, the fiduciary insurance market has been especially challenging for both insurers and sponsors of defined contribution (DC) plans.

Insurers, grappling with more frequent and severe fiduciary claims, mostly around excessive fees and investor imprudence, have paid out tens of millions of dollars in settlements since 2020<sup>1</sup>. The plaintiffs' bar has been experiencing some recent early and big wins, with a very low percentage of cases being dismissed. This significant uptick in litigation, along with sizable defense costs, are driving many insurers to evaluate their profitability and exposure. As a result, many are substantially increasing both liability insurance premiums and self-insured retention (SIR) rates for plan sponsors<sup>2</sup>.

They're also scrutinizing which insureds they will write, requiring extensive documentation from DC plan sponsors that they are meeting their fiduciary responsibilities under the Employee Retirement Income Security Act of 1974 (ERISA). These duties include the following:


- Duties of loyalty to plan participants
- To act prudently when making decisions for the plan
- To diversify plan investments
- To follow plan documents

Under ERISA, DC plan fiduciaries who do not follow these basic rules of conduct "may be personally liable to restore any losses to the plan, or to restore any profits made through improper use of the plan's assets resulting from their actions<sup>3</sup>." As the highest duty known to law, this liability is arguably even higher than the standard of care placed on corporate directors and officers. According to Kate Maybee, CPCU, Senior Vice President and Fiduciary Product Leader, Marsh FINPRO, "heightened regulatory scrutiny and class action suits are making fiduciary liability insurance essential to protect the personal assets of individual plan fiduciaries, the balance sheets of plan sponsors and the assets of the plan against litigation."


<sup>1</sup>"Flood of 401(k) Lawsuits Spur Wave of Plaintiff Wins," Bloomberglaw.com, April 5, 2022.

<sup>2</sup>SIR is a specific amount of loss that is not covered by an insurance policy, but instead must be borne by the policyholder before the insurer will respond.

<sup>3</sup>ERISA Section 409. See also U.S. Department of Labor, Employee Benefits Security Administration (EBSA), "Meeting Your Fiduciary Responsibilities." <https://www.dol.gov/sites/dolgov/files/ebsa/about-ebsa/our-activities/resource-center/publications/meeting-your-fiduciary-responsibilities.pdf>



**Plan sponsors are facing heightened underwriter scrutiny in the areas of due diligence, participant costs, investment options offered, subsidiaries or affiliates, documentation and expertise. Finding adequate coverage to protect corporate and single employer retirement plan fiduciaries clearly has become more challenging.**



— Kate Maybee, CPCU, Senior Vice President and Fiduciary Product Leader, Marsh FINPRO




DC plan fiduciaries who cannot demonstrate having superior governance controls and diligence in place in the area of ERISA compliance — ideally, for several years — may find themselves unable to obtain fiduciary insurance. It is important to note that fiduciary liability policies differ markedly from ERISA bonds which, as required under ERISA Section 412(a), are designed to protect the plan from the risk of loss due to fraud or dishonesty, and employee benefits liability (EBL) coverage, which covers errors in plan administration only.


As a practical matter, DC plan sponsors tend to be most exposed to liability claims that include, but are not limited to, making bad investment decisions, negligently handling plan records or negligently selecting plan service providers. According to Jennifer Flodin, Partner, Mercer's DC Segment Leader, Central Market, the areas of insurer scrutiny that most affect the prices of policies for DC plans include the following:

- Whether sufficient due diligence is performed when selecting and compensating service providers [including questions used in a request for proposal (RFP) process]
- Whether participant costs, including what participants pay annually for recordkeeping on a per capita basis, are reasonable and justifiable relative to the value of services provided
- Whether investment options reflect a sensible representation of active and passive lower-cost investment-class funds and index funds
- Whether the sponsor has evidence that all plan meetings and decision-making processes are adequately documented

When discussing insurance renewals with clients, the insurance brokers at Marsh will review your submission, paying particular attention to uncover any red flags in your fiduciary controls that underwriters are typically looking out for. If such challenges are identified in your submission, your Marsh team will refer you to DC specialists at Mercer, who can help you make changes to your fiduciary controls. Through our close collaboration, Marsh and Mercer specialists are able to offer clients access to a number of specific consultative projects to help remedy such deficiencies — or prepare them to seek other carriers to find better rates or terms — before their next fiduciary liability insurance renewal.



**As part of following a prudent process, plan sponsors need to demonstrate their ability to make informed decisions. And what helps to inform those decisions, especially in the area of reasonableness of fees or the 'fit' of an investment lineup to a plan's demographic, is having access to high quality benchmarking data."**



— Jennifer Flodin, Partner, Mercer's DC Segment Leader, Central Market

### **Request for Information (RFI) on recordkeeper fees**

An RFI specific to the plan can be issued to recordkeepers (including the incumbent) of similar capabilities, including modeling such live market pricing elements as core and transaction fees, and providing the plan sponsor with suggested next steps.

### **Investment management (IM) fee review**

An RFI specific to the plan can be issued to recordkeepers (including the incumbent) of similar capabilities, including modeling such live market pricing elements as core and transaction fees, and providing the plan sponsor with suggested next steps.

### **DC investment structure review**

Designed to help align the investment mix to a plan's specific demographics, this analysis also can benchmark the current plan to those of similar size, as well as recommend the number and type of options across active and passive investment tiers.

### **Target date fund (TDF) suitability analysis**

A glidepath suitability analysis can be performed that incorporates specific plan-participant data related to tenure, savings rate, compensation, etc., and how it relates to the current TDF glidepath.

Until about 15 years ago, only retirement plans with more than \$1 billion in plan assets and companies in the health care and education industries were at higher risk of litigation. But now plaintiffs are more aggressively targeting companies within any industry and any size, putting more organizations — and their fiduciaries — at risk of litigation. By working with Marsh and Mercer, plan fiduciaries can gain access to a combination of industry-specific insurance experience and a deep understanding of how using the right data, applied with a human touch, can help address a range of risks your organization faces.



#### For more information

To learn how one of Mercer's DC fiduciary liability projects might be able to improve your plan's insurance posture, protect your fiduciaries from personal liability and potentially lower your cost of coverage, please contact your Marsh or Mercer consultant.

#### Resources

Marsh, Kate Maybee, "Fiduciary Liability Insurance: Growing Risks, Growing Challenges"  
Mercer Brief: 2022 Defined Contribution Considerations Before Insurance Renewal

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