Fiduciary Market Update: Q3 2022

State of the Market

- After 15 years+ of soft market conditions, the Fiduciary market plunged into a hard market about in 2021 due to a significant increase in excessive fee litigation and as well as other claim activity.
- Insurers continue to require higher premiums given continued development of prior claim experience and anticipated future losses.
- Q3 2022 Fiduciary increases are expected to be in the range of 25% to 75% for small and mid-size risks and 75%+ for larger organizations

Coverage Trends: Pricing, Terms & Conditions

- In addition to increasing rates, underwriters are reevaluating:
  - ✓ Limits being offered: many carries will only offer $5M in limits today.
  - ✓ Attachment points on large towers
  - ✓ Retentions: increasing retentions or applying larger retentions for excessive fee claims and/or class actions
  - ✓ Appetite regarding industry and plan/organization size

Legal & Regulatory Developments

- On January 24, 2022, the U.S. Supreme Court ruled in Hughes v. Northwestern University that an ERISA fiduciary that offers some prudent investment options in a retirement plan is not thereby categorically protected against a claim that other options are imprudent.
- In March 2022, the U.S. Department of Labor (DOL) issued a warning to 401(k) plan fiduciaries to “exercise extreme care” before considering adding cryptocurrencies to a retirement plan’s investment options.
- In April 2022, Fidelity, the largest retirement plan provider in the U.S., announced that it would give participants in employer-sponsored 401(k) plans options to invest in Bitcoin.
- In April 2021, in response to the increase in cyber threats to plan participant data and assets, the U.S. Department of Labor (DOL) published its first cybersecurity guidance.

Emerging Risks & Trouble Spots

- The reach of excessive fee litigation continues to expand with organizations and plans of all sizes at risk. Approximately, 1/3 of new cases are directed at plans with assets of less than $1B.
- Excessive fee cases are very expenses to defend and settle.
  - ✓ Defense costs are much higher due to the need for special ERISA counsel. Average cost to defend through motion to dismiss alone is often in excess of $1M; defense cost through settlement or trial could be as much as $10M.
  - ✓ Almost $1B in total settlement dollars was paid between 2016 and 2020
- Cyber theft of plan data or assets is a growing area of concern and presents an area of potential overlapping insurance coverage between a Fiduciary Liability policy and an Cyber insurance policy.
- The addition of bitcoin as a 401(k) plan investment option is causing more underwriting scrutiny. This decision adds a list of concerns for benefit plans and their fiduciary/administrators and raises a variety of questions regarding suitability of crypto currency, it’s potential to “excessive fee” allegations and given the Department of Labors recent warning, and potential regulatory concerns.