

# Global Benefits and Compensation Roundtable Webinar:

Benefit Plans Sponsored by Subsidiaries Outside the US:  
Insurance Coverage for Fiduciary Breach (and Other Benefit-Related Claims)

February 8, 2018



# Presenters



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# Roundtable Mission

- The mission of the Roundtable is to:
  - ✓ Provide education in an area that is becoming increasingly important and where knowledge is not concentrated in a small number of source materials or among a discreet group of professionals; and
  - ✓ Address current topics that inherently involve cross-border considerations as contrasted with a country by country review.



# How to Participate in this Webcast

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# Fiduciary Liability Insurance - Who/What is Covered?

- Insureds
  - ✓ Directors, officers, employees
  - ✓ Sponsor organization
  - ✓ Plans
  
- “Claim”
  - ✓ Written demand for monetary or non-monetary relief
  - ✓ Civil or criminal proceeding
  - ✓ Investigations – both “formal” and “fact-finding”



# Fiduciary Liability Insurance - What is Covered?

- “Loss”
  - ✓ Settlements, judgments, defense costs
  - ✓ Certain civil fines and penalties
  
- “Wrongful Acts” – Actual or alleged:
  - ✓ Breaches of fiduciary duties under “ERISA” or “Employee Benefit Law”
  - ✓ Administrative acts, errors, omissions
  - ✓ Acts, errors, omissions in Insured’s settlor capacity



# Special Provisions for Exposure Outside the U.S.

- Scope of coverage should be worldwide
  - ✓ Definition of “plan” in policy should include plans “*anywhere in the world*”
  - ✓ “Wrongful Acts” or “breaches of fiduciary duty” should not be limited to ERISA.
    - E.g. In BHSI’s policy “Employee Benefit Law” means “ERISA *and any applicable similar common or statutory law anywhere in the world...*”
  - ✓ “Investigations” should include non-U.S. governmental authorities
    - “any investigation...by the U.S. DOL or PBGC, or any similar governmental authority”
  - ✓ Explicit language for worldwide coverage
    - “Coverage shall apply to Claims made and Wrongful Acts committed worldwide”





# Special Provisions for Exposure Outside the U.S.

- Scope of coverage should be worldwide
  - ✓ “Liberalization” clause for Claims in foreign jurisdictions
    - Broader policy terms of similar policy in foreign jurisdiction applied to U.S. policy
  - ✓ Coverage for “Corporate Trustee Company”
  - ✓ Automatic coverage of subsidiaries



## While NOT Frequent, We Do See Fiduciary Claims Outside U.S.

- **UK:** After a corporate collapse, company/fiduciaries are under fire for increasing the corporate dividend as the funding hole in its pension scheme grew (~ £990M).
- **Netherlands:** Over a 10-year period, pension fiduciaries had engaged in a real estate fraud ~ €350M. Over 600 police and officials were involved in raids all over the country and people were arrested in 67 different locations.
- **Brazil:** The Public Prosecutor's Office in São Paulo filed a lawsuit against a major bank managing a fund for Brazilian Post employees alleging violation of local rules while managing plan assets, reducing returns and generating extra expenses, seeking \$2.5B .
- **Canada:** The claim alleges that the trustees of the plan improperly used plan funds to pay for plan expenses including administration costs and investment fees, breaching their fiduciary obligations and seeking to have these amounts reimbursed or returned to the plan.



# Policy Structures

- Publicly traded or large private companies in US with non-US subsidiaries
  - ✓ Stand-alone fiduciary policy (or layers of policies) issued in US
  - ✓ “Off the shelf” or
  - ✓ “Manuscripted”
  - ✓ Rely on language of US-issued policy to cover non-US exposures
  - ✓ Or, treat US-issued policy as “master” policy, with locally issued policies in other countries



# Policy Structures

- Publicly traded or large private companies outside of the US with US subsidiaries
  - ✓ Issue policy in the country of incorporation or headquarters
  - ✓ Rely on language of policy to cover US subsidiaries
  - ✓ Or, issue separate policy for US subsidiaries
- Fiduciary limits blended with other coverages – e.g. D&O, EPL



## Can a U.S. Policy Pay Local Claims Locally?

It is a sad fact, that local insurance laws may **prohibit** a global Fiduciary Liability policy from paying a claim in the local jurisdiction:

- Unless it was written in that local jurisdiction, or
- Was written using a Lloyds' license in specific jurisdictions.

For this reason, global firms may elect to negotiate certain local Fiduciary Liability contracts in order to respond locally.

**General rule:** local coverage is NOT needed in common-law jurisdictions (*Union Jack flag flew overhead at some point*); local coverage to be considered in civil law jurisdiction (*conquered by Napoleon or settled by peoples who were conquered by Napoleon*).



## Fiduciary Liability in the Rest of the World

Marsh tends to believe that pension fiduciaries have potential exposure in those jurisdictions where their firms privately fund local pension obligations either

- Through a separate segregated “trust”, or
- By ring fencing allocated funds within the company’s accounts

*An additional caveat might be, where the funding is other than strictly through the purchase of insurance contracts.*

This is opposed to situations where firms and/or the individuals themselves may contribute to national, regional or industry-wide funds.



# Global Private Pension Assets

Historically, private pension plans started at very different times, with the US seeing its 1st plan for private sector workers in 1875 and Canada in 1874 –

- Contrasted with most countries in Latin America and Central and Eastern Europe introducing funded private pension systems in the 1990s and 2000s

Today, the most recent [OECD annual report](#) covering 85 countries, tells us that private pension plan assets are at ***an all time high***, with pension assets growing faster than GDP in most countries over the last decade.



# Calls of Concern

Typically, we discuss concerns about potential local fiduciary exposure, in the context of –

1. The company is strategically consolidating its pension and investment approach
2. A corporate transaction
3. A local fiduciary expressing their internal concern about potential personal liability.





## Being Global Strategic

Often a senior financial or pension staffer will sit on local pension boards or committees or instruct them on how to approach the pension promise, funding and/or investment

- He or she is not doing so to maintain the status quo, but is likely an agent of change
- Change can signal an increase in local fiduciary risk.



## Objectively assessing local exposure

One might consider local regulation and governance, along with any local legal protection for plan participants and beneficiaries.

Fortunately, this is what the [Mercer Global Pension Index](#) does on an annual basis for 30 jurisdictions, in its Integrity Index, including:

- *How actively does [any local pension] regulator discharge its supervisory responsibilities?*
- *Are the private pension plan's trustees/executives/fiduciaries required to: prepare an investment and a risk management policy? How about a conflicts of interest policy?*
- *Are the financial accounts of private pension plans (or equivalent) required to be audited annually by a recognized professional?*

Mercer also factors in [The World Bank's Worldwide Governance Indicators](#) including: regulatory quality, rule of law and voice and accountability.

*f*



# Mercer Global Pension Index, Data for Top Funded Plans

Country	Overall Index		Adequacy		Sustainability		Integrity	
	Value	Grade	Value	Grade	Value	Grade	Value	Grade
Australia	77.1	B+	75.3	B+	73.0	B	85.7	A
Brazil	54.8	C	67.8	B	29.2	E	70.0	B
Canada	66.8	B	69.9	B	55.4	C	77.7	B+
Denmark	78.9	B+	76.5	B+	79.8	B+	81.3	A
France	59.6	C	80.4	A	38.6	D	55.8	C
Germany	63.5	C+	76.5	B+	40.9	D	74.0	B
Japan	43.5	D	48.0	D	26.0	E	60.7	C+
Netherlands	78.8	B+	78.0	B+	73.5	B	87.5	A
South Africa	48.9	D	34.0	E	45.7	D	77.1	B+
Sweden	72.0	B	67.7	B	71.0	B	80.3	A
UK	61.4	C+	58.2	C	49.4	D	83.5	A
USA	57.8	C	57.0	C	57.1	C	60.1	C+
Average	59.9	C	60.9	C+	50.8	C	71.2	B



# Transactions: Corporate M&A

**Case study:** Client is selling off its local operations in-country, but is maintaining its pre-transaction pension plan and its obligations

**Challenge:** Local fiduciaries/pension trustees are inquiring about local Fiduciary Liability insurance for their on-going duties and responsibilities

**Solution:** Place a local Fiduciary Liability policy.



## Transactions: Plan De-Risking

**Case study:** Payment of plan pension obligations is being transferred to a 3<sup>rd</sup> party (typically an insurance company)

**Challenge:** Local fiduciaries express concern that this process and decision might result in liability for them some time in the future.

**Solution:** Place a local (multiyear) Fiduciary Liability policy.



# Questions



# Thank you for participating

- Be sure to visit the Roundtable Participant's Site <http://www.conferenceboard.org/gbcr/participant>
- Access to all past roundtable session recordings, presentations, and related materials
- Information on upcoming sessions
- Available 24/7
- Registration required. Please contact Michael Mahoney at [michael.mahoney@conferenceboard.org](mailto:michael.mahoney@conferenceboard.org)



## Upcoming Events

- **18<sup>th</sup> Annual Employee Healthcare Conference**  
Capturing Value in a Dynamic Market  
(March 8-9, New York; March 27-28, San Diego)
- **14<sup>th</sup> Annual Strategic Sourcing & Supplier Relationship Management Conference**  
Co-Innovation, Risk Mitigation and Data Challenges  
(April 17-18, Chicago)
- **2018 Merger Integration Conference**  
Integration Excellence: Best Practices to Leverage, Pitfalls to Avoid  
(May 17-18, New York)

