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Date: February 2, 2010

Subject: **FIDUCIARY LIABILITY & E&O INSURANCE FOR ERISA PLANS:
Most Don't Have It**

Most small plan sponsors lack fiduciary liability insurance and while they may not realize it, **most advisors lack E&O coverage for fiduciary services provided to ERISA plans.** In addition to little if any licensing, CE and net worth requirements, small RIA shops may not have ANY insurance. Non-specialized insurance brokers who sell E&O coverage have added to the confusion and contributed to the inadequate coverage.

Additionally, sponsors and advisors are often confused about the differences between Fiduciary Liability Insurance & E&O Insurance as well as the differences between first and third party policies.

First party insurance is purchased directly by an individual or company who may be impacted by a loss while third party insurance is purchased by an individual or an entity providing services to a third party.

Fiduciary Liability Insurance is an example of first party insurance and E&O Insurance is an example of third party insurance. First party Fiduciary Liability Insurance is NOT purchased by advisors.

FIDUCIARY LIABILITY INSURANCE FOR SPONSORS:

Fiduciary Liability Insurance is purchased to protect plan sponsors, named fiduciaries and other functional fiduciaries with a DIRECT relationship to the plan from claims alleging a breach of fiduciary duties.

Fiduciary liability insurance covers all the sponsor's ERISA plans, including health & welfare plans. This is important because more than half of all claims are unrelated to retirement plans.

In addition to claims alleging a breach of fiduciary duties, the insurance covers:

- Negligent Errors & Omissions
- Improper Disclosure To Plan Participants
- Remiss Investment Advice

- Imprudent Choice Of Outside Service Providers
- Faulty Advice Of Counsel
- Improper Amendments to Plan Documents

While “Named fiduciaries” are listed in the plan document, fiduciary status may also be defined by functional roles. As a result, individuals may become fiduciaries without knowing it.

The individuals insured under first party fiduciary liability insurance generally include those who are directors, officers, governors, trustees, equivalent executives, employees, committee members, etc. The lawful spouse as well as the estate, heirs, legal representatives or assigns of a deceased fiduciary may also be covered for wrongful acts of the insured.

While possible, **advisors and other third-party fiduciaries are rarely added to the plan sponsor’s first party fiduciary liability insurance policy.** In the rare situations where third parties are added to the sponsor’s policy, relief would require both parties to be named in the suit and the third party reimbursement may be limited to defense costs.

Adding a third party, investment advisor, TPA or other professional to the plan sponsor’s policy is not recommended because first party policies are only designed to cover the exposures and personal assets of named fiduciaries. If the third party was negligent, the sponsor’s policy would have to respond and the sponsor’s policy limits would be eroded.

Looking at it another way, the plan sponsor’s due diligence should ensure that outside vendors have the proper professional liability insurance in place. The due diligence should further ensure that the policies provide coverage as a fiduciary for the services rendered to the sponsor and their ERISA plan.

As noted, plan sponsors rarely add third parties to their first party policies. Similarly, plan sponsors rarely purchase third party coverage for others and when they do, plan assets should NOT be used to purchase the insurance.

WHY FIDUCIARY LIABILITY INSURANCE & WHAT TO LOOK FOR

Fiduciary claims against plan sponsors have increased significantly and half of all claims receive awards. Small companies also have a one in twelve chance of a claim. Nevertheless, fiduciary liability insurance is not required and as a result, **most small plan sponsors self-insure fiduciary risk with personal and corporate assets.**

Regardless of the creativity surrounding new retirement plan sales approaches, **named fiduciaries cannot escape ALL their fiduciary responsibilities and personal liability.** Given the litigious environment and the low cost of fiduciary liability insurance, **plan sponsors who fail to obtain the appropriate insurance coverage are foolishly exposing themselves to unnecessary risk.**

As noted, fiduciary liability insurance is not expensive and in addition to helping sponsors obtain the coverage at a discount, an expert retirement plans advisor could help sponsors review their coverage.

Although ERISA does not require plan sponsors to purchase fiduciary liability insurance, **sponsors who use plan assets to defend themselves from claims could be breaching their fiduciary duties.** In addition, the facts of the litigation are not subject to attorney client privilege when plan assets are used to pay the premium.

Given that the majority of E&O policies do not provide affirmative fiduciary coverage, **sponsors who hire advisors without adequate insurance may also be breaching their fiduciary duties.**

PROFESSIONAL LIABILITY INSURANCE FOR INVESTMENT ADVISORS:

Errors & Omissions (E&O) Insurance is a professional liability type of insurance for investment advisors, consultants and other service providers.

The E&O Insurance policy protects advisors and consultants against losses due to any actual or alleged negligent act, error or omission committed in the scope of their duties as investment advisors or consultants.

Professional liability insurance is available for a number of different types of investment advisors and consultants, including: Investment Advisors, RIA's, Registered Representatives, Investment Consultants, TPAs, Recordkeepers, Trustees, Broker-Dealers, Pension Consultants, Litigation Consultants and Actuaries.

E&O Insurance is important because **one out of seven professionals will be named in some type of claim** at some point in their career. Even when unwarranted, lawsuits are expensive to defend. **The costs could bankrupt a smaller company or individual** as well as have a lasting impact on the bottom line of larger companies.

E&O Insurance policies are unique and they contain widely varying coverage and exclusions. In many cases, the insurance is also product-line specific. In general, the insurance helps pay for defense costs and damage awards. These policies have specific limits and usually include legal costs and damage awards in a single limit.

Because E&O Insurance is a specialty area, these policies should be reviewed by independent insurance brokers who specialize in E&O Insurance and have industry specific knowledge. **The policy should cover the specific professional services provided.** Advisors often shop for cheaper policies and it is important to note that lower priced policies often exclude these professional services.

INCREASED SCRUTINY & THE NEED FOR CLARITY

ERISA attorneys who assist plan sponsors with their RFP's and compliance reviews are becoming a driving force behind investment advisors seeking clarity on their insurance coverage. Unlike the past, proof of insurance coverage can no longer be satisfied by a simple certificate of insurance.

Sponsors and their attorneys are increasingly asking to review the full policy, including all endorsements. The purpose of the review is to **ensure the advisor has fiduciary coverage for the services rendered to their plans as well as the mandated ERISA bond applicable to discretionary authority.**

The EAE's detailed RFP service for vetting the advisor's E&O policy is beyond the scope of this newsletter, but note that attorneys generally include fiduciary services coverage, limits, deductibles, exclusions and added endorsements when reviewing a policy.

Additional questions on lawsuits, outcomes, fines, censure, disciplinary actions, audits, designations, certifications, independence and lost clients are also appropriate.

Many professionals believe they have the appropriate insurance coverage for the services they provide when in fact they don't. As a result, **expert retirement plan advisors are raising the bar on their competitors by reviewing their policies and presenting proof of affirmative insurance coverage upfront.**

THE ADEQUACY OF COVERAGE & EXCLUSIONS

The only way to determine if an E&O policy provides adequate coverage for the advisor - and the entity - is to have a "legitimate expert" **read the policy, including all endorsements, and compare the coverage to the services offered.**

As noted, E&O policies vary widely and **they often contain coverage restrictions and contradictory clauses on policy coverage intent.**

The most common methods for writing policies are:

- Absolute ERISA Exclusion
- Silent on ERISA Coverage
- Limited ERISA Coverage
- Affirmative ERISA Coverage

Affirmative ERISA coverage is obviously the preferred path. With or without amendments, **a covered act should be defined as a “fiduciary act by the advisor.”** The definitions may also have to be amended to include administration, benefits and actual as well as alleged fiduciary acts.

B-D POLICIES & RIA ACTIVITIES

Broker-Dealer E&O policies for RIA activities vary widely. Historically, B-D policies excluded or limited coverage for acts as a fiduciary when performing services for ERISA plans, but this coverage is evolving. On the other hand, large B-Ds have the financial capacity to stand behind indemnification gone wrong.

The RIA coverage may be limited to the individual and not cover the advisor’s entity. Some B-D policies also exclude services not approved or offered through the B-D.

For clarification purposes, portability, prior acts coverage, aggregate policy limits, coverage for services outside the B-D, RIA activities and entity coverage should be reviewed. Independent RIA’s & IAR’s who are not viewed as employees may be able to rectify any deficiencies through the purchase of separate coverage.

2010 CONFERENCE AGENDA: Developing Early

Consistent with the CFDD’s EAE initiative to help plan sponsors evaluate retirement plan advisors and spearhead the consolidation of retirement plan advisory services, the CFDD’s October 6-8, 2010 Advisor Conference agenda will include a session on: ***E&O Insurance, Fiduciary Exposure & ERISA Bonding: Ask An Expert.***

This session will be populated by NAPLIA, the CFDD’s resource contributor on professional liability insurance, Bruce Ashton (Partner, Reish & Reicher) and other industry experts.

The CFDD's audience is too advanced for a basic overview of the aforementioned. On the other hand, the network could benefit from specific questions unique to their practice. To submit questions in advance of the conference email or contact:

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Chapter Eleven on "Insurance: Fiduciary Liability & E&O Coverage" has been added to the CFDD's guide on "Evaluating Retirement Plan Advisors." The chapters on ERISA Bonding and Fidelity Insurance will follow. The dynamic document has been uploaded to the CFDD's website and may be viewed at: <http://www.thecfdd.com/EAEprogram>.

CFDD 2010 ADVISOR CONFERENCE: The Fonz Lives

The CFDD's October 6-8 (Wednesday-Friday), 2010 Advisor Conference, *NEW AGE MARKETING: What Worked In The Past Is No Longer Effective*, will return to the downtown Chicago Fairmont - Millennium Park Hotel, Chicago, Illinois.

Given the evolving decision making process, the retirement industry must adapt to the new environment to maintain and increase market share. The CFDD's sole purpose centers on **helping specialists grow their retirement plans business and professionalizing the advisor selection process**. Given our mission, the new ERISA Advisor Evaluator program for plan sponsors will play a key role in the consolidation of retirement plan advisory services.

While CFDD '09 was another homerun, CFDD '10 is designed more intimately to facilitate deeper networking and enhanced learning. Specific education tracks will be threaded throughout the event and more advisor roundtables will be included in the program, including spirited after hour meetings.

The CFDD's conferences sell out early and **more than 1,000 retirement plan experts will attend the 2010 Advisor Conference, including more than 500 accomplished retirement plan advisors**.

To bridge the conference's educational demands and create a relaxed atmosphere, **CFDD '10 will feature a lively 50's theme**, including an Elvis impersonator, professional entertainers, a Grand Prize Trip To Graceland for two and major photo-ops for sponsors. In addition to authentic 50's His & Her Attire Awards, the Kick-Off Party will feature hula hoop, twist and Fonz look-a-like contests. The '57 Chevy may be no more than a ghost, but cats & chicks can still roll up t-shirt sleeves, don retro sunglasses, poodle skirts, pony tails, ducktails and network in a friendly environment.

The Chicago Fairmont's exhibitor space is limited to sixty exhibition booths and while only twenty are left, all booth locations are equally traffic friendly. To facilitate increased networking, **all food and beverage will be served in the exhibition area.**

As a bonus, **the 2010 exhibition package includes complimentary advertising on the CFDD's website and in our email newsletter with a value up to \$25,000.** The website is currently experiencing more than 300,000 page visits per month and our newsletter reaches a highly targeted audience of over 35,000 retirement plan professionals.

The CFDD already offers more value, unbiased content, CE credits and attracts more accomplished retirement plan advisors than any other industry event. To add even more value, **join exhibitors who register early and benefit from banner ad exposure on the CFDD's entire website and our email newsletter for up to one year without additional cost.**

Our limited 2010 booth space will sell out early. To secure your space now, **benefit from extended complimentary advertising and exposure to the industry's most powerful database of retirement plan specialists**, exhibitors should click [HERE](#) to register.

Rather than continue to offer selective group discounts to large organizations, we are donning our Robin Hood hats and making the discounts available to all individual advisor registrants. **To benefit from the maximum discount, you must register early.** To register early and save, individual advisors should click [HERE](#)

For more information on the conference, visit: <http://www.thecfdd.com/CFDDconference2010>.

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