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# INSURANCE THAT ADVISERS WILL NEED TO COVER NEW FIDUCIARY DUTIES

## FIDUCIARIES HAVE CERTAIN RESPONSIBILITIES THAT TRIGGER LIABILITY SEPARATE FROM CONTRACT AND ORDINARY TORT LIABILITY

By: Daniel J. Healy*

The U.S. Department of Labor recently expanded the definition of a fiduciary. The people who likely will bear the responsibilities of a fiduciary include a wide array of financial industry advisers not formerly required to take on that responsibility.

Advisers who are new to this role should consider whether they have insurance coverage for new potential liabilities. Fiduciaries have certain responsibilities — such as not putting one's interests before the client's — that trigger liability separate from contract and ordinary tort liability. Specific to the DOL regulations, ERISA provides statutory means for holding fiduciaries liable. Claims alleging breach of fiduciary duty may be brought by individual clients or by pension plans, employee benefits plans, trusts or other entities. The most common lines of business insurance arguably may not be ideal for covering such liabilities.

Errors and omissions coverage, business practices liability coverage and other professional lines such as malpractice typically are best styled to provide coverage for claims brought by clients that allege breach of fiduciary duty. But the devil often lies in the details.

As the DOL is changing the fiduciary concept, insurance policy definitions may not match current realities. Coverage provisions need to be clear. Policyholders should review the coverage language to be sure it aligns with the types of services a fiduciary provides and with claims brought by the types of clients the fiduciary serves. Whether a business or individual is a broker-dealer, bank or other type of service provider could matter if the covered services are defined narrowly in an E&O policy. The policy language should make clear whether the service provider entity is covered and whether employees, contractors and others are covered. And it preferably should not be limited to negligence nor exclude coverage for fees, the cost of investigations or consequential damages.

Perhaps obviously, an E&O policy should not exclude ERISA liabilities, an unfortunately common exclusion that could severely limit coverage for fiduciaries, particularly in the event of a claim under the expanded DOL definition. The policy also should not exclude various types of services, such as those relating to securities, which may be subject to fiduciary claims.

Since coverage for outside consultants historically has been limited and the DOL regulations are newly expanded, it would not be surprising if insurance companies took a narrow view of the coverage they sell that applies to outside fiduciaries. Outside consultants falling within the newly expanded definition of fiduciary will want to review their exposure and their coverage.

Of course, the best time to consider one's potential exposures and obtain responsive coverage is before the claims hit. Waiting until allegations are made will only present further problems. It is then that insurance companies can all too easily rely not only on exclusions but on policy language that they claim provides only narrow coverage or no coverage at all.

Policy language on which insurance companies tend to focus after claims are made includes exclusions for fraud and dishonesty, for government enforcement and related penalties, and for known losses. Policyholders should be prepared to support their claims for coverage. The fact that a claim involves an allegedly dishonest employee does not necessarily mean that the employer of the fiduciary will be unable to obtain coverage. Such claims may induce government authorities to become involved and possibly conduct investigations that require expensive compliance by the policyholder company. In such situations, it may be important to demonstrate not only to the government but also to insurance companies that the fraud or dishonesty was limited. It can be valuable to have broad enough language in policies to cover investigations that never attain litigation or "suit" status. It also may matter when an exclusion applies in an alleged instance of fraud. In certain policies, an adjudication of fraud is required before the exclusion applies.

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Along with E&O and business practices policies, directors and officers or fiduciary liability policies may offer some protection against claims alleging breach of fiduciary duty, though they are less likely to serve as the first line of defense. While the term fiduciary has been included in such policies for some time, it is used in exclusions from coverage as well as coverage grants. For example, general liability policies, even broad form coverage, often exclude fiduciary and ERISA liabilities. D&O policies often contain ERISA exclusions. While removing them could restore coverage for the directors, officers and corporation, the coverage may not protect individual non-officers and other employees with fiduciary obligations. Stand-alone fiduciary liability policies can be purchased as well, but such coverage more typically covers claims brought by employees or benefit plans, which may be distinguished from claims by clients against fiduciaries.

In this expanded area of fiduciary liabilities, insurance companies may be aggressive in trying to limit their own exposure. Policyholders should be vigilant in obtaining policy language that fits their risks — and be prepared not to take coverage denials at face value.

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