

FIDUCIARY LIABILITY INSURANCE AND THE EXCESSIVE FEE QUESTIONNAIRE

BY SARAH PARKER, AIF®, SENIOR MANAGING DIRECTOR

With the wave of excessive fee lawsuits in 2020, fiduciary education has increased across employer-sponsored employee benefit plans. Alongside reviewing their plan fees, many Plan Sponsors have also begun to evaluate their Fiduciary Liability Insurance policies. Fiduciary Liability Insurance is intended to protect employers against claims resulting from a breach in fiduciary duty. Some insurance companies that issue Fiduciary Liability Insurance are now beginning to request that Plan Sponsors complete an “Excessive Fee Questionnaire” for their files. So, what do plan fiduciaries need to know?



WHO IS A FIDUCIARY?

Individuals included in an employee benefit plan document by name or title, as well as anyone with discretionary decision-making authority over the administration or management of the plan or its assets, can be considered a fiduciary under the Employee Retirement Income Security Act of 1974 (ERISA). The plan administrator, oversight Committee, investment managers, and investment consultants are typically fiduciaries. A fiduciary’s core responsibilities are defined in ERISA and are best summarized as the responsibility to act prudently and in the best interest of a participant or beneficiary.

FIDUCIARY LIABILITY INSURANCE

Fiduciary Liability Insurance is similar to Errors & Omissions (E&O) insurance. It commonly protects fiduciaries against errors in fiduciary duties, such as prudent selection of investments and prudent monitoring of service providers. A Fiduciary Liability Policy covers associated legal costs to defend against claims of errors and breach of fiduciary duty. Fiduciary Liability Insurance will only cover the insured company and its employees engaged in fiduciary roles. The coverage does not extend to external service providers. External fiduciaries usually purchase their own Fiduciary Liability Insurance.

INSURANCE POLICY / BOND	DESCRIPTION	REQUIRED BY ERISA?
ERISA Bond	Bonds any employee who handles funds of the plan, protecting the plan from risk of loss from fraud or dishonesty.	Yes
Employee Benefits Liability Insurance	Provides coverage for employee plan claims but limited to clerical and administrative errors. Typically, this is an add-on to general liability coverage.	No
Fiduciary Liability Insurance	Provides coverage for a breach in fiduciary duty, including investment prudence issues.	No

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If you already have Fiduciary Liability Insurance, you may be asked to complete an “Excessive Fee Questionnaire” prior to a renewal. Although many insurance firms are simply filing away such questionnaires, they are becoming necessary for both renewals and applications. The questions are multi-part, complex, and best completed with the assistance of an independent, third-party investment professional, such as Clearstead. Sample questions include the following:

1. Describe the process your plan investment committee goes through in evaluating the reasonableness of service provider fees and, in particular, your record keeper(s).
2. On what basis do you compensate your record keepers (per capita, fixed/flat fee, revenue sharing, combination of assets under management/revenue sharing, or other)?
3. Do you benchmark your recordkeeping fees in any way, and if so, how and what do you do with that information?
4. How many investment plan options do you offer plan participants?
5. Describe how the options are selected. Describe your selection process.
6. Does your plan offer any index funds as an investment option, and if not, please explain the rationale.
7. Please provide the number of individuals on your oversight committee.

Clearstead, as a named fiduciary to all its retirement plan clients, addresses all the topics and items included in the questionnaire as part of our ongoing comprehensive services and oversight. These services include recordkeeper oversight, RFPs, fee benchmarking, and monitoring and recommending investment options. Clearstead can complete the questionnaires for our clients because we understand the questions and what the insurance provider is seeking. Our response to the questions includes the supporting documentation, data, and evidence from the reporting, analysis, benchmarking, and due diligence we routinely present and provide to our clients.

If you've received a questionnaire, or are anticipating receiving one, or want to learn more, please contact your Clearstead Institutional Investment Consultant, or reach out to me directly at sparker@clearstead.com.

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