


*Ask the Expert*

## An open discussion on fiduciary exposure and ERISA bonding

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## Gary Sutherland, CIC

CEO of North American Professional Liability Insurance Agency, LLC (NAPLIA). Certified Insurance Counselor.



Mr. Sutherland is a regular presenter on risk management and insurance for Investment Advisors and other Financial Professionals. He speaks annually at conferences for The Center for Due Diligence and fi360, both nationally recognized associations for Investment professionals. He has further served on several national panel discussions regarding best practices, claim mitigation and understanding E&O insurance for Investment professionals.



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## Jason Roberts, Esq

Jason Roberts is a partner of the law firm of Reish & Reicher, specializing in employee benefits and securities regulation, and is the co-chair of the Financial Services Practice Group.



He counsels broker-dealers, registered investment advisers (RIAs), hedge funds, private equity funds, retirement plan sponsors and plan providers in ERISA and investment-related matters. Jason represents clients and serves as an expert witness in federal and state court at the trial and appellate level and in arbitrations before FINRA. He also counsels clients involved in government enforcement proceedings and employment disputes.



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## Section 412 ERISA Bonding

When are investment advisors required to having bonding for their clients?

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## Section 412 Legal Opinion

"A person is subject to the bonding requirements if he or she has the right or power to exercise discretionary authority over purchases and sales of plan assets or has discretionary authority in the administration of the plan."

"Bonding is required regardless of whether the fiduciary has custody of or otherwise actually handles assets of the plan"

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## According to the DOL

3(21) *Full Scope* and 3(38) Status Fiduciary's are required to be bonded

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## Fiduciary Impact on Insurance

How does the definition of "Fiduciary" impact my insurance coverage and client contracts as defined by ERISA 3(21) and 3(38) ?

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## 4 levels of fiduciary coverage

Your Professional Liability policy may address fiduciary coverage in one of four ways:

- Excluded
- Silent
- Limited
- Affirmative

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## Confirmation of Coverage

- Not a Certificate of Insurance
- Utilize in RFP's to demonstrate coverage and differentiate among competitors
- Raise the bar for competition

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The image shows a sample 'Confirmation of Insurance Coverage' form for Financial Professional Liability Insurance. The form is titled 'Financial Professional Confirmation of Insurance Coverage' and includes the following details:

- Section A: Excludes Professional Liability Coverage**
  - Insurance Company: [Redacted]
  - Limit: \$1,000,000 per claim / \$3,000,000 aggregate
  - Self-Retention: \$0
- Section B: Coverage for ERISA (ERISA)**

NAPLIA has reviewed the above Financial Professional Liability policy and confirmed that it applies to coverage for acts as an ERISA Fiduciary in the following format:

  - A. Affirmative coverage for acts as a fiduciary** — explicitly covering ERISA fiduciary
  - B. Silent** — fiduciary coverage not excluded; fiduciary coverage not added
  - C. Excludes coverage for acts as a fiduciary**
- Section C: Investment Advisor ERISA Excess**

Under ERISA Section 402(c)(5)(B) fiduciaries of an employee benefit plan and every person who handles funds or other property of such a plan shall be "fiduciaries" against fraud or dishonesty, an investment advisor ERISA Excess is a specific limit on the investment advisor and is required of all ERISA fiduciaries under ERISA Section 402(c)(5)(B).

At the bottom, there is a disclaimer: 'This confirmation of insurance coverage is intended to provide an outline of the insurance coverage contained in the insurance policy. Only the actual insurance policy can be provided for details of coverage including conditions and exclusions. For more information, please contact your insurance broker.'

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## Legal Ramifications

What legal ramifications and/or contract changes are required ?



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## First Party Fiduciary Exposure

Why is first party Fiduciary Insurance important?



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### Fiduciary Acknowledgement

- Demonstrate your value and knowledge to your client
- Fulfill fiduciary responsibility to client
- Protect yourself with additional layer of coverage

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**Fiduciary Insurance Acknowledgement**

Under the Securities Investor Protection Act (SIPPA), a fiduciary of a company which may be held personally liable for a breach of fiduciary duty.

**What is Acknowledgement?**

By this Acknowledgement, you are certifying that you are a fiduciary of the company and that you are acting in the best interest of the company and its clients. It is a statement of your understanding of the nature and scope of your fiduciary duties and your responsibility to act in the best interest of the company and its clients. It is a statement of your understanding of the nature and scope of your fiduciary duties and your responsibility to act in the best interest of the company and its clients.

**What is Fiduciary Insurance?**

Fiduciary Insurance provides the highest level of protection for your business and your clients. It provides coverage for the most common types of claims against fiduciaries, including breach of fiduciary duty, negligence, and errors and omissions. It also provides coverage for the most common types of claims against fiduciaries, including breach of fiduciary duty, negligence, and errors and omissions.

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**Ask the Expert**

Additional questions on ERISA  
Bonding or Fiduciary Status ?

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**Additional Questions**

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