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*By E-Mail: garys@naplia.com &
U.S. Mail*

Gary Sutherland
Chief Executive Officer
North American Professional Liability Insurance Agency, LLC.
5 Whittier Street, 4th Floor
Framingham, MA 01701

RE: Advisor's Purchase of Fiduciary Liability Insurance

Dear Gary:

You have asked us to comment the ability of a plan advisor or TPA to purchase fiduciary insurance for their respective plan sponsor clients. Our discussion of this issue follows.

ERISA Rules Regarding Fiduciary Liability Insurance

Section 410(b) of ERISA specifically permits a fiduciary that is concerned about potential liability to purchase liability insurance to protect against breaches of fiduciary liability. Alternatively, the employer may purchase fiduciary liability insurance for itself or its employees. Finally, the plan itself may purchase such insurance for its fiduciaries, but, in this case, section 410(b)(1) requires that the insurance policy permit recourse against the covered fiduciary by the insurer in the event of a fiduciary breach by the covered fiduciary.

We are aware of no rule that would prohibit a service provider, such as an investment advisor or third party administrator, from acting as the employer's agent for the purpose of purchasing such insurance. However, we note several potential limitations if the purchase of insurance is on behalf of the plan. In this event, care would be needed to ensure that the policy incorporated the recourse provision noted above. Further, the service provider should be properly authorized by the applicable plan fiduciary to act on behalf of the plan. Finally, procedures must be adopted to deal with any potential extension of credit to the plan by the service provider.

Prohibited Transaction Exemption for Advisor Loans

Having the service provider pay the insurance premium first and then having the plan reimburse the service provider would result in a loan or extension of credit from a party-in-interest to the plan. Such a loan would be a prohibited transaction under Section 406(a)(1)(B) of ERISA. Similarly, repayment of the loan would constitute a transfer of plan assets to a party in

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interest, in violation of Section 406(a)(1)(D) of ERISA . In addition, under Section 406(b)(2) of ERISA, a plan fiduciary may not act on behalf of a party (including itself) with adverse interests to the plan or its participants in a transaction involving the plan.

Notwithstanding the statutory restrictions described above, the DOL has recognized that fully invested plans can run short of cash and, accordingly, has issued a class prohibited transaction exemption allowing short-term interest-free loans to the plan by the party interest in order to pay ordinary operating expenses as well as expenses that are incidental to ordinary operating expenses.

Prohibited Transaction Exemption 80-26, which was most recently amended on April 7, 2006, provides an exemption from the aforementioned prohibited transaction rules for service provider loans to an employee benefit plan, as well as for the repayment of such loans by a plan, provided that no interest or other fee is charged to the plan, and no discount for payment in cash is relinquished by the plan, in connection with the loan or extension of credit. Further, the loan or extension of credit must be unsecured and, unless reduced to writing, must be repaid within 60 days. We think that an extension of credit by a service provider to facilitate the purchase of fiduciary liability insurance would come within the terms of this exemption.

Premium Payment with Advisor Funds

You have asked whether a prohibited transaction would arise if an advisor spent its own money to purchase a fiduciary liability policy for the plan. You state that this would not be a loan and that the advisor would not be reimbursed by the plan. The short answer here is that there can be no prohibited transaction within the meaning of Section 406 of ERISA, since the insurance purchase involved a one-way transfer of funds from the advisor to the plan (i.e., no sale or exchange) and no plan assets were involved in the transaction.

I trust that this discussion has been responsive to your concerns. Please do not hesitate to call or email if you have questions or would like to discuss these matters.

Best wishes.

Sincerely,



Marcia S. Wagner