

INSURANCE

(A) GENERAL CONSIDERATIONS

This document presents the minimum insurance requirements as set forth by the United States Trustee Program (USTP). A standing trustee must purchase property insurance (including general liability insurance) to cover the physical assets of the trust operation and a commercial crime or employee fidelity policy. A standing trustee may purchase other insurance after an assessment of risk and prior approval of the United States Trustee. A policy that meets the minimum requirements discussed in this document is considered reasonable. Deviations, such as exceeding the limits of liability or deductibles, must be approved in advance by the United States Trustee. Reasonable premiums for mandatory or approved coverage will be considered an actual and necessary expense of the standing trustee. Premiums and deductibles that fall within these guidelines may be paid from the standing trustee's expense account, barring extraordinary circumstances and with approval of the United States Trustee. One extraordinary circumstance would be where the trustee directly contributed to the loss. The standing trustee must take all contractual steps required by the insurer to reduce risk to reduce amount of the premiums and frequency of claims.

An insurance carrier providing coverage to a standing trustee must be listed on Treasury Department Circular 570 or possess an A.M. Best Financial Rating of "A" or greater and be domiciled in the United States. The insurance company or the reinsurer must be licensed to do business in the state in which the standing trustee is appointed. Any reinsurer must provide documentation to show agreement to reinsure at least 75% of the covered activity.

(B) REQUIRED INSURANCE

(1) Commercial Crime Insurance or Employee Fidelity Bond

If the standing trustee has employees, the standing trustee is required to purchase commercial crime insurance or an employee fidelity bond. See Handbook_____. Commercial crime insurance or an employee fidelity "bond" protects the employer in case of any loss of money or property due to employee dishonesty. Some policies cover third parties as well. Employee fidelity insurance is usually a part of a

commercial crime policy which offers broader coverage against loss, including, for example, burglary and computer fraud.

To be approved for purchase, commercial crime insurance or an employee fidelity policy must comply with the following guidelines:

(a) Limits of Liability

The trustee should base the amount of coverage on a risk assessment of each employee as reflected in the classification of each employee to one of three broad categories that describe various levels of potential access to funds and accounting records, and administrative control over computer security features. Examples of the latter include ability to view or change the passwords of other employees or ability to modify users' access rights. The standing trustee must make this classification as part of the annual financial audit. The classifications of risk and required minimum limits of coverage are:

- (i) If the standing trustee has one or more employees with significant supervisory responsibilities, access to funds or accounting records, or administrative control over computer security features at a level similar to the standing trustee, then the standing trustee should be insured or the employee(s) bonded at a minimum of 50% of the trustee's bond*;
- (ii) If the standing trustee has one or more employees with responsibilities in cash receipt or disbursement area, access to funds or accounting records, or administrative control over computer security features, the standing trustee should be insured or the employee(s) bonded at a minimum of 20% of the standing trustee's bond amount*; or
- (iii) If the standing trustee has no employees with responsibility for or access to cash or accounting records, or administrative control over computer security features, then the standing trustee must, nonetheless, be insured under this policy for a

minimum of 10% of the standing trustee's bond amount.*

* If the standing trustee is covered under a bond with two or more trustees, then "the standing trustee's bond amount" is the amount of the bond that the individual trustee would be required to carry.

Regardless of the level of risk assessment assigned by the standing trustee to his employees, the standing trustee must implement, maintain, consistently monitor, and test a system of internal controls as covered in more detail in Handbook _____, Special Considerations for Computer Systems, and _____, Internal Control Features. These sections are not necessarily comprehensive guidance on internal control procedures; the standing trustee's internal control practices should be enhanced by additional reports developed by the chapter 13 software vendor or the trustee.

(b) Deductible

The deductible must be no more than \$10,000 for each claim, commensurate with the level of total coverage. If the standing trustee is unable to obtain a deductible of \$10,000 or less, then the deductible shall be in an amount as agreed with the United States Trustee.

(c) Coverage

- (i) Coverage shall be for the loss of or damage to "money," "securities," and "other property" which results directly from "theft" by an "employee," whether or not identifiable, while acting alone or in collusion with other persons (excluding the standing trustee).
- (ii) Coverage may, dependent on the specific policy, also extend to insure losses caused by third parties due to theft, forgery, alteration of checks, robbery,

disappearance and destruction of money and securities, burglary, computer fraud, and the intentional, unauthorized, or fraudulent creation of data.

- (iii) The definition of "employee" is to include employees of the standing trustee while acting within the scope of the person's duties as such.
- (iv) The policy period should be for one year.
- (v) Written notice of cancellation by the insurance carrier is required at least 60 days in advance of cancellation.
- (vi) The insurance company must provide a written statement to the standing trustee that the insurer or reinsurer meets all of the minimum requirements as set forth by the USTP.

(d) Additional Policy Provisions

In addition to the requirements discussed above, the standing trustee should consider the following additions to the policy:

- (i) Include in the definition of "employees" those persons leased from a third party such as a temporary service.
- (ii) Include any software vendor and nonemployee computer technician as an additional insured.

(2) Property and General Liability Insurance

The standing trustee is required to purchase insurance to cover the physical assets of the trust operation. Property and general liability insurance is the most customized and office specific of the USTP approved coverages. No two trust operations will have the same amount of office equipment, furniture and liability exposure. However, to be approved for purchase, a liability policy should comply with the following guidelines:

(a) Limits of Liability

- (i) Property. For coverage of the physical assets of the trust operation, the amount of coverage is specific to each office based upon replacement cost of the assets.
- (ii) General liability. Coverage under a general liability policy must be a minimum of \$1,000,000 for each occurrence and have a \$1,000,000 annual aggregate.

(b) Deductible

The maximum deductible shall be \$10,000 for property and general liability policies.

(c) General Liability Insurance

A general liability policy shall have the following provisions:

- (i) Business liability involving bodily injury, property damage and personal injury.
- (ii) A duty to defend imposed on the carrier.
- (iii) Coverage of medical expenses for bodily injury.
- (iv) Hired and non-owned auto endorsement that provides liability for automobiles not owned by the insured but used in business (e.g., employees'

vehicles when used for trust operation business, but only in an amount in excess of the employees' personal automobile insurance).

(d) Recommended Coverages

- (i) Replacement cost coverage for business personal property rather than actual cash value.
- (ii) Specific policy language or endorsement for computers and media including not only direct physical loss, but also electromagnetic injury caused by power surges, power failure, brownouts, and computer viruses.
- (iii) Valuable papers and records, manuscripts, and books.
- (iv) Money and securities, including money orders, involving loss by disappearance, destruction, theft, forgery, and alteration of instruments.
- (v) Business income interruption that involves direct physical loss of or damage to the property at the described premises or other location where the trustee does business. Coverage would be for normal operating expenses, including payroll, and provide business income for twelve consecutive months after the date of the loss or damage.
- (v) Acts, errors or omissions negligently committed in the administration of an employee benefit program.

(C) OTHER INSURANCE

Other types of insurance may be purchased when the standing trustee and United States Trustee agree a policy covering the risk would be advisable. The terms and conditions of coverage, as with as the cost of the premiums shall be as negotiated by the standing trustee and approved by the United States Trustee.

(1) Cyberliability Insurance

(a) Limits of Liability

The limits of liability should be based on an evaluation of the standing trustee's cyberliability risks, but should not exceed \$1,000,000 for each occurrence and up to \$1,000,000 annual aggregate.

(b) Deductible

The deductible should be a minimum of \$5,000 and a maximum of \$10,000.

(c) Coverage

The standing trustee should consider coverage for various risks, including:

- (i) **Business Income Coverage.** In a traditional property insurance policy this covers loss of income by an insured that arises out of direct physical damage. An example would be a department store burning down and the insured losing revenue while it is being rebuilt. When included in a cyber-liability policy, it covers loss of income due to network intrusion or other computer event that makes the network inaccessible or operate slowly.
- (ii) **Cyber Extortion.** Coverage that pays for ransom money and, in some instances, the cost to investigate and catch extortionists. This applies only if it arises out of a third party claiming they have sensitive information gained from unauthorized access to your network, and that they will release this information to the public unless you pay the ransom. The data is being held hostage.
- (iii) **Digital Asset Protection.** Coverage for loss of data and/or network resources in a cyber liability policy.

- (iv) E-Theft. Coverage for losses resulting from the transfer, payment or delivery of funds or other property due to a cyber attack; the misappropriation, copying or duplication of confidential customer information or records by hackers or employees who breach network security; and the physical loss or damage of stolen electronic media.
- (v) Denial or Impairment of E-Service. Coverage when your system is subject to a cyber attack or fraudulently accessed, regardless of whether there has been direct physical loss or damage to tangible property. This includes system slowdowns or shutdowns caused by cyber attacks, such as worms or spamming.
- (vi) Network Security Liability Coverage. Coverage for allegations by third parties that they were economically harmed by a breach in your network security. This could include disparaging information that is made publicly known, embarrassing information made public and identity theft. Also covers certain fines imposed by regulatory agencies.
- (vii) Privacy Liability Coverage. This extends network security coverage to cover paper files.
- (viii) Internal Breach of Security. Extends network security coverage for network security breaches by employees. An example would be a rogue employee who abuses access to your network and obtains private information to cause identity theft.

(d) Additional Policy Considerations

In addition to the coverages discussed above, the standing trustee should consider the following additions to the policy:

- (i) Include in the definition of “employees” those persons leased from a third party such as a temporary service.
- (ii) Include any software vendor and nonemployee computer technician as an additional insured.

(2) Employment Practices Liability Insurance

(a) Limits of Liability

The maximum of EPL coverage shall be \$2,000,000 for each claim and \$2,000,000 annual aggregate.

(b) Deductible

The minimum deductible shall be \$5,000 and the maximum deductible shall be no more than \$10,000.

(c) Coverage

The EPL policy must provide coverage for:

- (i) Legal costs and compensatory damages resulting from claims alleging wrongful employment practices, including wrongful discrimination, sexual harassment, wrongful termination, failure to employ or promote, breach of employment contract, employment-related misrepresentation, wrongful discipline, equal pay violations, wrongful deprivation of career opportunity, negligent evaluation, invasion of privacy, employment-related defamation, retaliation and employment-related wrongful infliction of emotional distress.
- (ii) Legal costs and compensatory damages resulting from claims alleging acts of discrimination with regard to another person’s employment due to race, religion, creed, age, gender, national origin, disability, handicap, status as an individual with a disability (as defined by the Americans with Disabilities Act and court decisions construing the

ADA), sexual orientation or preference, or pregnancy.

- (iii) A failure to act with respect to public accommodation or accessibility as required by the ADA.
- (iv) Defense costs for the insured for allegations of intentional acts of discrimination until the point it is proven in a legal proceeding that the insured committed the act intentionally. At that point, all defense and damages protection will cease for the individual but will continue for the trust operation or any other insured named in the suit.

(d) Additional required policy provisions

- (i) The insurance carrier cannot settle a claim without the consent of the named insured.
- (ii) The definition of "insured" is to include employees of the standing trustee while acting within the scope of the person's duties as such, and independent contractors and those persons leased from a third party
- (iii) The policy period shall be for one year.
- (iv) Written notice of cancellation by the insurance carrier is required at least 60 days in advance of cancellation.
- (v) If the policy is not renewed by the insurance carrier, the insured has the right, under certain conditions, to purchase a one-year extension period policy.
- (vi) The insurance carrier has the duty to defend.
- (vii) The insurance company or reinsurer must provide a written statement to the standing trustee that the insurer or reinsurer meets all of the minimum requirements as set forth by the USTP.
- (viii) The policy must contain severability provisions.

(3) Errors and Omissions Insurance

An E&O insurance policy must meet the following requirements:

(a) Limits of Liability

Limits of liability must not exceed \$2,000,000 for each occurrence and \$2,000,000 annual aggregate.

(b) Deductible

The minimum deductible for a claim shall be \$5,000 and the maximum deductible shall be \$10,000.

(c) Coverage

The contract must contain a severability provision and the insurance carrier must have the duty to defend. Also, the definition of "insured" in the policy must include employees of the standing trustee and third parties for whom the standing trustee would be legally obligated. The insurance company or the reinsurer must provide a written statement to the trustee that the insurer or reinsurer meets all of the minimum requirements as set forth by the USTP. An E&O policy must provide coverage for:

- (i) Actual or alleged acts, errors, or omissions arising out of professional services rendered for others by the trustee or any person or organization for whom the trustee is legally liable.
- (ii) Damages and claims expense.
- (iii) An event or circumstance which occurred prior to the effective date of the policy if it involves a bankruptcy case that was open as of the effective date of the policy, unless the insured had knowledge of the event or circumstance prior to the effective date of the policy.
- (iv) Failure to discharge fiduciary obligations.
- (v) Incorrect, ambiguous or late disbursement of funds.

- (vi) Failure to investigate acts, operations or conduct of a debtor.
- (vii) Failure to complete services on time.
- (viii) Failure to estimate costs correctly.
- (ix) Failure to maintain insurance where the insured does not have custody or control of assets, other than money.
- (x) Damages resulting in bodily injury or property damage claims as a result of failure to maintain insurance in cases where the insured does not have physical control of assets, other than money.
- (xi) Unintentional violations of statutes, ordinances, or codes.
- (xii) Failure to pay creditors on a timely basis.
- (xiii) Failure to establish and maintain administrative controls.
- (xiv) Damages resulting from the improper computation of fees.
- (xv) Wrongful termination (other than resulting from illegal discrimination).

(d) Extended Reporting Period

If the E&O policy is other than an occurrence form—a “claims made” contract—then the policy must provide for an extended reporting period.

(e) Additional Policy Considerations

In addition to the coverages discussed above, the standing trustee should consider the following additions to the policy:

- (i) The definition of a claim should include any formal administrative or regulatory proceeding, civil

proceeding, and arbitration or mediation or similar alternative dispute resolution proceeding.

- (ii) Include in the definition of "employees" those independent contractors performing professional services for the trustee.
- (iii) Written notice of cancellation by the insurance carrier is required at least 60 days in advance of cancellation.

(4) Fiduciary Liability Insurance

Fiduciary liability insurance covers legal liability arising from claims for alleged failure to prudently act in the administration of a pension or 401(k) plan. Such claims may be for improper advice or disclosure, inappropriate selection of service providers, imprudent investments, lack of investment diversity, breach of fiduciary duties, negligence in the administration of a plan, or a conflict of interest regarding investments.

(a) Coverage

A fiduciary liability policy should cover the trustee and employees.

(b) Limits of Liability

In determining the limits of liability, the trustee should take into account the amount of monies in a pension or 401(k) plan administered by the trustee.

(c) Deductible.

The minimum deductible for a claim shall be \$5,000 and the maximum deductible for a claim shall be \$10,000.

(5) Umbrella Insurance

- (a) Coverage. An umbrella policy would provide supplemental general liability coverage. The amount of coverage shall

be reasonable and determined by the standing trustee after an assessment of the risks to the trust operation.

- (b) Umbrella coverage is insurance that will apply in excess of the primary layer of insurance. This excess coverage will apply in the event a liability claim occurs which exhausts the limits of the general liability policy. In some instances, the umbrella coverage may provide broader coverage than the underlying policies resulting in a claim being covered which otherwise would not have been. In this event, a self-insured retention limit applies and acts as a deductible.
 - (c) While umbrella coverage is excess coverage, it is not necessarily an excess liability policy. Excess liability is usually not broader than the underlying coverage and can actually be more restrictive.
 - (d) The insurance company should pay on behalf of the insured and not provide an indemnity provision requiring the individual to first pay for defense and judgment with later reimbursement by the company.
 - (e) The policy should provide for defense costs in addition to its limits, rather than as part of its limits.
 - (f) The umbrella policy should provide that no material change in the underlying policy will automatically affect the umbrella coverage in an adverse manner. This will prevent automatic termination if the underlying coverage is canceled or not renewed.
 - (g) The maximum deductible shall be \$10,000.
-