



Fiduciary Liability Coverage Element Declarations

1. **NAMED INSURED:**

2. **POLICY PERIOD:**

Inception:

Expiration:

The **Policy Period** incepts and expires as of 12:01 A.M. at the **Named Insured** Address.

3. (a) **COVERAGE ELEMENT** LIMIT OF LIABILITY:

(b) **Voluntary Compliance** Loss Sub-Limit of Liability:

(c) **HIPAA Penalties** Sub-Limit of Liability:

\$

\$

\$

4. **RETENTION:**

Each **Claim:**

\$

5. **CONTINUITY DATE:**

SPECIMEN

Fiduciary Liability Coverage Element

In consideration of the premium charged and in reliance upon the statements made by the **Insureds** in the **Application**, which forms a part of this policy, and subject to all the terms and conditions of this policy, the **Insurer** agrees as follows

I. Insuring Agreements

Coverage A: **Fiduciary Liability Coverage**

The **Insurer** shall pay **Loss** of an **Insured** arising from a **Claim** first made against such **Insured** during the **Policy Period** or the Extended Reporting Period, if applicable, for any actual or alleged **Wrongful Act** of such **Insured** or any person for whom such **Insured** is legally responsible.

Coverage B: **Voluntary Settlement Program Coverage**

The **Insurer** shall pay **Voluntary Compliance Loss** of an **Insured** with respect to a **Voluntary Settlement Program Notice** first given to the **Insurer** during the **Policy Period** or the Extended Reporting Period, if applicable, provided that the **Voluntary Compliance Loss** is incurred after such **Voluntary Settlement Program Notice** first is given to the **Insurer**.

The payment of any **Voluntary Compliance Loss** under this **Coverage Element** shall not waive any of the **Insurer's** rights under this policy or at law, including in the event that a **Voluntary Compliance Loss** results in a **Claim**.

II. Definitions

In addition to the Definitions in the General Terms and Conditions, the following terms whenever set forth in boldface type in this **Coverage Element**, whether in singular or in plural, shall have the meanings indicated.

- A. **Benefits** means any obligation under a **Plan** to a participant or beneficiary that is a payment of money or property, or the grant of a privilege, right, option or perquisite.
- B. **Breach of Fiduciary Duty** means a violation of the responsibilities, obligations or duties imposed upon **Insureds** by **ERISA**.
- C. **Claim** means
 1. a written demand for monetary, non-monetary or injunctive relief (including any request to toll or waive any statute of limitations);
 2. a civil, criminal or arbitration proceeding for monetary, non-monetary or injunctive relief which is commenced by:
 - (i) service of a complaint or similar pleading;
 - (ii) return of an indictment, information or similar document (in the case of a criminal proceeding); or
 - (iii) receipt or filing of a notice of charges;
 3. a formal agency or regulatory or adjudicative proceeding commenced by the filing of a notice of charges or similar document or by entry of a formal investigative order or similar document to which an **Insured** is subject; or
 4. a written notice of commencement of a fact-finding investigation by the U.S. Department of Labor, the U.S. Pension Benefit Guaranty Corporation, or any similar governmental authority located outside the United States of America, including, but not limited to, the Pensions Ombudsman appointed by the United Kingdom Secretary of State for Social Services or by the United Kingdom Occupational Pensions Regulatory Authority, pursuant to the English Pension Scheme Act 1993, the English Pensions Act 1995, or rules or regulations thereunder.
- D. **Consulting Fees** means fees charged by a third party actuary, benefits consultant or accountant resulting solely from the correction of an actual or potential **Breach of Fiduciary Duty**, but excluding any fees, costs or expenses associated with: (1) a routine or regularly scheduled **Plan** audit; or (2) an audit or review for the purpose of identifying or finding the **Breach of Fiduciary Duty** or assessing the extent of **Loss** resulting from such **Breach of Fiduciary Duty**.

- E. **Defense Costs** means reasonable and necessary fees, costs and expenses consented to by the **Insurer** (including premiums for any appeal bond, attachment bond or similar bond arising out of a covered judgment, but without any obligation to apply for or furnish any such bond), resulting solely from the investigation, adjustment, defense and appeal of a **Claim** against an **Insured**, but excluding compensation of any **Individual Insured**. **Defense Costs** shall not include any fees, costs or expenses incurred prior to the time that a **Claim** is first made against an **Insured**.
- F. **ERISA** means the Employee Retirement Income Security Act of 1974, the English Pension Scheme Act 1993, the English Pensions Act 1995, all as amended, any similar common or statutory law anywhere in the world, and any rules or regulations promulgated under any such Acts or law.
- G. **HIPAA Penalties** means civil monetary penalties imposed upon an **Insured** for violation of the privacy provisions of the Health Insurance Portability and Accountability Act ("HIPAA").
- H. **Individual Insured** means
1. any past, present or future director, officer, governor, general partner, management committee member, duly elected or appointed member of a **Pension Oversight Committee**, member of the board of managers or employee of a **Company** or, if applicable, of a **Plan**;
 2. any past, present or future natural person in a position equivalent to a position listed in subparagraph 1 of this Definition in the event that a **Company** is operating in a jurisdiction other than the United States of America or any of its territories or possessions.
- I. **Insured** means
1. any **Individual Insured**;
 2. any **Plan**;
 3. any **Company**;
 4. any **Pension Oversight Committee**; or
 5. any other person or entity in his, her or its capacity as a fiduciary, administrator or trustee of a **Plan** and included by written endorsement attached to this Fiduciary Liability Coverage Element.
- J. **Loss** means
1. the amount that any **Insured** becomes legally obligated to pay in connection with any covered **Claim**, including, but not limited to
 - (i) judgments (including pre-judgment and post-judgment interest on any covered portion thereof) and settlements;
 - (ii) damages, including punitive or exemplary damages and the multiple portion of multiplied damages relating to punitive or exemplary damages. The enforceability of this subparagraph (ii) shall be governed by such applicable law that most favors coverage for such punitive, exemplary and multiple damages; and
 2. **Defense Costs**, except for items specifically excluded from **Loss** pursuant to subparagraph 6 below; and
 3. **Voluntary Compliance Loss** solely with respect to Coverage B.

Loss does not include

1. any amount for which an **Insured** is not financially liable or which is without legal recourse to the **Insured**;
2. any costs incurred by a **Company** or **Plan** to comply with any order for injunctive or other non-monetary relief, or to comply with an agreement to provide such relief;
3. any amount incurred by an **Insured** in the defense or investigation of any action, proceeding, investigation or demand that is not then a **Claim** even if (i) such amount also benefits the defense of a covered **Claim**, or (ii) such action, proceeding, investigation or demand subsequently gives rise to a **Claim**;
4. matters which may be deemed uninsurable under the law pursuant to which this policy shall be construed;
5. taxes, fines or penalties (whether imposed by federal, state, local or other governmental authority), except:
 - (i) the 5% or less, or the 20% or less, civil penalties imposed upon an **Insured** as a fiduciary under Section 502(i) or (l), respectively, of **ERISA**, as amended;

- (ii) any civil penalties imposed by the Pension Ombudsman appointed by the United Kingdom Secretary of State for Social Services or by the United Kingdom Occupational Pensions Regulatory Authority, pursuant to the English Pension Scheme Act 1993, the English Pensions Act 1995, or rules or regulations thereunder. Any coverage for such civil penalties applies only if the funds or assets of the subject **Plan** are not used to fund, pay or reimburse the premium for this **Coverage Element**;
 - (iii) solely with respect to Coverage B, any fines or penalties paid in connection with **Voluntary Compliance Loss**; or
 - (iv) any **HIPAA Penalties**; or
6. **Benefits**, or that portion of any settlement or award in an amount equal to such **Benefits**, unless and only to the extent that recovery of such **Benefits** is based upon a covered **Wrongful Act** and is payable as a personal obligation of an **Individual Insured**. **Loss** shall include a monetary award in, or fund for settling, a **Claim** against any **Insured** to the extent it alleges a reduction in the value of **Plan** assets or a reduction in the value of the actual accounts of **Plan** participants by reason of a change in value of the investments held by that **Plan**, regardless of whether the amounts sought in such **Claim** have been characterized by plaintiffs as "benefits" or held by a court to be "benefits." **Defense Costs** shall be provided for items specifically excluded from **Loss** pursuant to subparagraphs 1, 2, 3, 4, and 5, subject to the other terms, conditions and Exclusions of this **Coverage Element**. **Defense Costs** shall not be provided for items specifically excluded from **Loss** pursuant to subparagraph 6 above.

K. **Pension Oversight Committee** means any committee or subcommittee duly formed by a **Trustee Company** and duly appointed to act as a trustee of the **Plan** or acting as a constructive trustee of the **Plan** with responsibility for pension or **Benefits** oversight.

L. **Plan** means

1. any plan, fund, trust or program (including any Employee Benefit Plan, Pension Benefit Plan, Welfare Plan or IRA-Based Plan, as each are defined in **ERISA**), established anywhere in the world, which was, is or shall be sponsored solely by a **Company**, or sponsored jointly by a **Company** and a labor organization, solely for the benefit of the employees or the directors and officers of such **Company** and which existed on or before the inception date set forth in Item 2 of the Fiduciary Liability **Coverage Element** Declarations or which is created, formed or acquired after such inception date. Any coverage with respect to any such **Plan** created, formed or acquired during the **Policy Period** shall apply only for **Wrongful Acts** committed, attempted, or allegedly committed or attempted, after the effective date of such creation, formation or acquisition and shall be subject to Section IX. of this **Coverage Element**;
2. any other employee benefit plan or program not subject to **ERISA** which is sponsored solely by a **Company** for the benefit of the employees or directors and officers of such **Company**, including any fringe benefit or excess benefit plan;
3. any other plan or program otherwise described in paragraphs 1 or 2 of this Definition while such plan or program is being actively developed, formed or proposed by a **Company** prior to the formal creation of such plan or program; provided, however, no coverage is afforded under this **Coverage Element** for any **Claim** against an **Insured** as a settler of any plan, fund, trust or program or similar uninsured capacity with respect to any plan or program; and
4. any other plan, fund or program, specifically included as a **Plan** by endorsement to this **Coverage Element**.

The Definition of **Plan** also shall include the following government-mandated programs: unemployment insurance, Social Security or disability benefits, but solely with respect to a **Wrongful Act** defined in subparagraph 2(ii) of the Definition of **Wrongful Act**.

In no event, however, shall the Definition of **Plan** include any employee stock ownership plan or multiemployer plan.

M. **Pollutants** means any solid, liquid, gaseous, biological, radiological or thermal irritant or contaminant, including smoke, vapor, dust, fibers, mold, spores, fungi, germs, soot, fumes, acids, alkalis, chemicals and Waste. "Waste" includes, but is not limited to, materials to be recycled, reconditioned or reclaimed and nuclear materials.

N. **Remediation Expenses** means reasonable and necessary fees, costs and expenses consented to by the **Insurer** resulting from the correction of an actual or potential **Breach of**

Fiduciary Duty, but excluding any fees, costs and expenses associated with finding or assessing such **Breach of Fiduciary Duty** and any compensation of **Individual Insureds** or employees of an **Insured**.

- O. **Settlement Opportunity** means the **Insurer** recommended settlement that is within any applicable Limit of Liability and that is acceptable to the claimant.
- P. **Subsidiary** means:
1. any for-profit entity, whose securities are not publicly traded, in which the **Company** has or had **Management Control** on or before the inception date of the policy either directly or indirectly through one or more other **Subsidiaries**;
 2. any for-profit entity, whose securities are not publicly traded, in which the **Company** acquires **Management Control** during the **Policy Period**, either directly or indirectly through one or more other **Subsidiaries**, and whose assets do not exceed 35% of the assets of the **Company** prior to the **Company** acquiring **Management Control** of the **Subsidiary**; or
 3. any for-profit entity, whose securities are not publicly traded, in which the **Company** acquires **Management Control** during the **Policy Period**, either directly or indirectly through one or more other **Subsidiaries**, and whose assets exceed 35% of the assets of the **Named Insured** prior to the **Company** acquiring **Management Control** but only for a period of 90 days subsequent to the **Company** acquiring **Management Control**.
- Q. **Trustee Company** means a corporate trustee company that is:
1. established by a **Company** formed and operating in a jurisdiction outside the United States of America, its territories or possession, or any predecessor of such **Company**; and
 2. duly appointed to act as a trustee of a **Plan** in a jurisdiction outside the United States of America, its territories or possessions and sponsored solely by such **Company**.
- R. **Voluntary Compliance Loss** means any **Remediation Expenses**, **Consulting Fees** or other amounts paid by an **Insured** to a governmental authority pursuant to a **Voluntary Settlement Program** for the actual or alleged inadvertent noncompliance by a **Plan** with any statute, rule or regulation. **Voluntary Compliance Loss** shall not include: (1) any costs to correct the actual or alleged inadvertent noncompliance, or any other charges, expenses, taxes or damages; or (2) any fees, fines, penalties or sanctions relating to a **Plan** which, as of the earlier of the inception of this **Coverage Element** or the inception of the first policy in an uninterrupted series of policies issued by the **Insurer** of which this **Coverage Element** is a direct or indirect renewal or replacement, any **Insured** had knowledge of the actual or alleged inadvertent non-compliance.
- S. **Voluntary Settlement Program** means any voluntary compliance resolution program or similar voluntary settlement program administered by the U.S. Internal Revenue Service or the U.S. Department of Labor, including, but not limited to, the Employee Plans Compliance Resolution System, the Audit Closing Agreement Program, the Voluntary Compliance Resolution Program, the Walk-in Closing Agreement Program, the Administrative Policy Regarding Self-Correction, the Tax Sheltered Annuity Voluntary Correction Program, the Delinquent Filer Voluntary Compliance Program and the Voluntary Fiduciary Correction Program, or any similar program administered by a governmental authority located outside the United States of America.
- T. **Voluntary Settlement Program Notice** means prior written notice to the **Insurer** by the **Insured** of the **Insured's** intent to enter into a **Voluntary Settlement Program**.
- U. **Wrongful Act** means:
1. a violation of any of the responsibilities, obligations or duties imposed upon fiduciaries by **ERISA** with respect to a **Plan**, or any matter claimed against an **Insured** solely by reason of his, her or its status as a fiduciary, but only with respect to a **Plan**; or
 2. any act, error or omission solely in the performance of the following administrative duties or activities, but only with respect to a **Plan**:
 - (i) counseling employees, participants and beneficiaries;
 - (ii) providing interpretations;
 - (iii) handling of records;
 - (iv) conducting activities affecting enrollment, termination or cancellation of employees, participants and beneficiaries under the **Plan**;

- (v) complying with the privacy provisions of the **HIPAA** and any amendments thereto; or
- 3. any matter claimed against an **Insured** solely by reason of his, her or its status as an administrator, but only with respect to a **Plan**.

III. Exclusions

The **Insurer** shall not be liable to make any payment for **Loss** in connection with any **Claim** made against any **Insured**:

- A. alleging, arising out of, based upon or attributable to:
 - 1. the gaining of any profit or advantage to which any final adjudication establishes the **Insured** was not legally entitled; or
 - 2. the committing of any deliberate criminal or deliberate fraudulent act, or any willful violation of any statute, rule or law, including, but not limited to, **ERISA** if any final adjudication establishes that such deliberate criminal or deliberate fraudulent act or willful violation of statute, rule or law was committed. For purposes of determining the applicability of this exclusion (i) the facts pertaining to and knowledge possessed by any **Insured** shall not be imputed to any other **Individual Insured**; and (ii) only facts pertaining to and knowledge possessed by any past, present or future chairman, chief executive officer or chief financial officer (or equivalent positions) of a **Company** or the signatory of the **Application** shall be imputed to such **Company**;
- B. alleging, arising out of, based upon or attributable to the facts alleged, or the same **Wrongful Act** or **Related Wrongful Act(s)** alleged or contained in any claim or demand which has been reported, or to any circumstances of which notice has been given, under any prior insurer's policy or policy of which this **Coverage Element** is a renewal or replacement or which it may succeed in time;
- C. alleging, arising out of, based upon or attributable to any demand, suit or other proceeding pending against, or order, decree or judgment entered for or against any **Insured**, on or prior to the Continuity Date set forth in Item 5 of the Fiduciary Liability **Coverage Element** Declarations, or the alleging of any **Wrongful Act** which is the same or a **Related Wrongful Act** to that alleged in such pending or prior demand, suit, proceeding or in the underlying demand, order, decree or judgment;
- D. for discrimination in violation of any law. This Exclusion shall not apply to discrimination in violation of **ERISA**;
- E. for failure to fund a **Plan** in accordance with **ERISA** or the **Plan** instrument or documents, or the failure to collect contributions owed to the **Plan**. This Exclusion shall not apply to: (1) **Defense Costs**; or (2) the portion of **Loss** that is payable as a personal obligation of an **Individual Insured**;
- F. alleging, arising out of, based upon or attributable to any act, error or omission of an **Insured** in his, her or its capacity as a fiduciary or administrator of any plan, fund or program, other than a **Plan** as defined in this **Coverage Element**, or by reason of his, her or its status as a fiduciary or administrator of such other plan, fund or program;
- G. for bodily injury, sickness, disease, death, emotional distress or mental anguish of any person, or damage to, loss of use or destruction of any tangible property. This Exclusion shall not apply to **Defense Costs** incurred in the defense of a **Claim** for **Breach of Fiduciary Duty**;
- H. alleging, arising out of, based upon or attributable to any **Wrongful Act** with respect to the **Plan** taking place at any time when a **Company** did not sponsor such **Plan** or when the **Individual Insured** was not a fiduciary, administrator, trustee, **Pension Oversight Committee Member**, director, officer, governor, management committee member, member of the board of managers, general partner or employee of a **Company** or, if applicable, a **Plan**; or
- I. for any actual, alleged or threatened discharge, dispersal, release or escape of **Pollutants**, or any direction or request to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize **Pollutants**. Other than for expenses (including, but not limited to, legal and professional fees) incurred in testing for, monitoring, cleaning up, removing, containing,

treating, neutralizing, detoxifying or assessing the effects of **Pollutants**, this Exclusion shall not apply to:

- (i) **Loss** for which the **Company** is neither permitted nor required to indemnify or advance to the **Individual Insureds** arising from a **Claim** alleging damage to a **Plan**, other than expenses (including, but not limited to, legal and professional fees) incurred in testing for, monitoring, cleaning up, removing, containing, treating, neutralizing, detoxifying or assessing the effects of **Pollutants**; or
- (ii) any **Claim** brought by or on behalf of a beneficiary of or participant in any **Plan** based upon, arising from or attributable to the diminution in value of any securities owned by the **Plan** in any entity other than a **Company**, if such diminution in value is allegedly as a result of the matters described above in this Exclusion I.

IV. Limits of Liability

1. Subject to the Policy Aggregate Limit of Liability set forth in Item 3 of the General Declarations, the **Coverage Element** Limit of Liability set forth in Item 3(a) of the Fiduciary Liability **Coverage Element** Declarations shall be the maximum aggregate limit of the **Insurer's** liability for all **Loss** under this **Coverage Element**. Upon exhaustion of the Limit of Liability set forth in Item 3(a) of the Fiduciary Liability **Coverage Element** Declarations or the Policy Aggregate Limit of Liability set forth in Item 3 of the General Declarations, the **Insurer's** obligations under this **Coverage Element** shall be deemed completely fulfilled and extinguished and the **Insurer's** duty to defend and pay **Defense Costs** shall end.
2. The maximum limit of the **Insurer's** liability for all **Voluntary Compliance Loss** incurred during the **Policy Period** and the Extended Reporting Period, if applicable, in the aggregate, shall be the **Voluntary Compliance Loss** Sub-Limit of Liability set forth in Item 3(b) of the **Fiduciary Liability Coverage Element** Declarations. The **Voluntary Compliance Loss** Sub-Limit of Liability shall be part of, and not in addition to, the **Coverage Element** Limit of Liability set forth in Item 3(a) of the **Fiduciary Liability Coverage Element** Declarations which is also part of and not in addition to the Policy Aggregate Limit of Liability shown in Item 3 of the General Declarations.
3. The maximum limit of the **Insurer's** liability for all **HIPAA Penalties** incurred during the **Policy Period** and the Extended Reporting Period, if applicable, in the aggregate shall be the **HIPAA Penalties** Sub-Limit of Liability set forth in Item 3(c) of the **Fiduciary Liability Coverage Element** Declarations. The **HIPAA Penalties** Sub-Limit of Liability shall be part of, and not in addition to, the **Coverage Element** Limit of Liability as set forth in Item 3(a) of the **Fiduciary Liability Coverage Element** Declarations which is also part of and not in addition to the Policy Aggregate Limit of Liability shown in Item 3 of the General Declarations.

V. Retentions

The following provision shall apply in addition to the provisions of Section V. Retentions of the General Terms and Conditions:

- A. The **Insurer** shall only be liable for the amount of **Loss** arising from a **Claim** which is in excess of the Retention set forth in Item 4 of the Fiduciary Liability **Coverage Element** Declarations. The Retention shall be borne by the **Insureds** and shall remain uninsured, with regard to (1) **Indemnifiable Loss**, and (2) **Loss** of a **Company**.
- B. A single retention shall apply to **Loss** arising from all **Claims** alleging the same **Wrongful Act** or **Related Wrongful Acts**.
- C. No retention is applicable to:
 1. **Loss** for which a **Company** is not permitted to indemnify an **Individual Insured** pursuant to law, contract or the charter, by-laws, operating agreement or similar documents of such **Company**, or
 2. that part of **Loss** constituting **Voluntary Compliance Loss**, or
 3. that part of **Loss** constituting **HIPAA Penalties**.

VI. Defense Costs, Defense Counsel, Settlements & Judgments

A. Defense

Except as hereinafter stated, the **Insurer** shall have both the right and duty to defend any **Claim** against an **Insured** alleging a **Wrongful Act**, even if such **Claim** is groundless, false or fraudulent. The **Insurer** shall have the right and duty to defend any **Claim** until the Limit of Liability set forth in Item 3 of the Fiduciary Liability **Coverage Element** Declarations or the Policy Aggregate Limit of Liability set forth in Item 3 of the General Declarations has been exhausted by payment of **Loss**. With the express prior written consent of the **Insurer**, an **Insured** may select a defense counsel different from that selected by other **Insured** defendants if such selection is required due to an actual conflict of interest.

The **Insured** shall have the right to associate effectively with the **Insurer** in the defense of any **Claim**, including, but not limited to, negotiating a settlement, subject to the provisions of this Section VI.

B. Insured's Option to Assume Defense.

Notwithstanding the above, the **Insureds** shall have the right to assume the defense of any **Claim** made against them. This right shall be exercised in writing by the **Named Insured** on the behalf of all **Insureds** within thirty (30) days of the reporting of the **Claim** to the **Insurer** pursuant to Section VI. of the General Terms and Conditions. Upon receipt of such written request, the **Insurer** shall tender the defense of the **Claim** to the **Insureds** and the **Insurer** cannot re-assume the defense of the **Claim**. The **Insurer** shall have the right to associate effectively with the **Insureds** in the defense of any **Claim**, including, but not limited to, negotiating a settlement and approving the selection of defense counsel. Provided that the **Insurer** shall be permitted to associate effectively with the **Insureds** in the defense of any **Claim**, including, but not limited to, negotiating a settlement of any **Claim** and approving the selection of defense counsel, the **Insurer's** consent to settlements, stipulated judgments and **Defense Costs** shall not be unreasonably withheld.

C. Advancement

The **Insurer** shall advance **Defense Costs** on behalf of the **Insured** prior to the final disposition of a **Claim**, subject to the other provisions of this Fiduciary Liability **Coverage Element**. Such advance payments by the **Insurer** shall be repaid to the **Insurer** by the **Insureds**, severally according to their respective interests, in the event and to the extent that the **Insureds** shall not be entitled to payment of such **Loss** under the Terms and Conditions of this Fiduciary Liability **Coverage Element**.

D. The Insureds shall not admit or assume any liability, enter into any settlement agreement, stipulate to any judgment, incur any Defense Costs or Voluntary Compliance Loss or retain any defense counsel without the prior written consent of the Insurer. Only those settlements, stipulated judgments, Defense Costs and Voluntary Compliance Loss which have been consented to in writing by the Insurer shall be recoverable as Loss under the terms of this Fiduciary Liability Coverage Element.

E. Settlement

If an **Insured** has not assumed the defense of a **Claim** and does not consent to the first **Settlement Opportunity** within thirty (30) days of the date the **Insureds** are first made aware of such **Settlement Opportunity** (or in the case of a **Settlement Opportunity** which arises from a settlement offer by the claimant, then within the time permitted by the claimant to accept such settlement offer, but in all events no later than thirty (30) days after the settlement offer was made), then, subject to any applicable Limit of Liability, the **Insurer's** liability for all **Loss** on account of such **Claim** shall not exceed: (1) the amount for which the **Insurer** could have settled such **Claim** plus **Defense Costs** incurred as of the date such settlement was proposed in writing by the **Insurer** ("**Settlement Opportunity Amount**"), plus (2) 80% of covered **Loss** in excess of such **Settlement Opportunity Amount**, if being a condition of this insurance that the remaining 20% of such covered **Loss** excess of such **Settlement Opportunity Amount** shall be carried by the **Insureds** at their own risk and be uninsured. Notwithstanding the foregoing, this paragraph shall not apply until such **Settlement Opportunity Amount** exceeds the applicable Retention set forth in Item 4. of the Declarations or to those **Claims** for which the **Insured** has assumed the defense.

- F. The **Insureds** shall give the **Insurer** full cooperation and such information as the **Insurer** may reasonably require and take such actions which, in such **Insurer's** judgment, are deemed necessary and practicable to prevent or limit **Loss** arising from any **Wrongful Act**.

VII. Other Insurance

Such insurance as is provided by this Fiduciary Liability **Coverage Element** shall apply only as excess over any other valid and collectible insurance, unless such other insurance is expressly written to be excess over any applicable Limit of Liability for this policy or any **Coverage Element**. This policy specifically shall be excess of any other policy pursuant to which any other insurer has a duty to defend a **Claim** for which this policy may be obligated to pay **Loss**.

VIII. Allocation

Provided that the **Insured** does not assume the defense of a **Claim** in accordance with Section VI. above, the following allocation provision shall apply:

If both **Loss** covered under this Fiduciary Liability **Coverage Element** and loss not covered under this Fiduciary Liability **Coverage Element** are incurred by the **Insureds** on account of any **Claim** because such **Claim** against the **Insureds** includes both covered and non-covered matters, then coverage under this **Coverage Element** with respect to such **Claim** shall apply as follows:

1. **Defense Costs**: 100% of **Defense Costs** incurred by the **Insurer** on account of such **Claim** will be considered covered **Loss** subject to Clause VII. of this **Coverage Element**; and
2. **Loss** other than **Defense Costs**: All remaining amounts incurred by the **Insured** on account of such **Claim** shall be allocated by the **Insurer** pro rata between covered **Loss** and non-covered loss based on the legal liability and financial exposures of the **Insureds** to covered and non-covered matters and, in the event of a settlement in such **Claim**, based on the number of counts, causes of action or allegations against the **Insureds**.

If the **Insureds** and the **Insurer** cannot agree on an allocation of covered **Loss** or non-covered loss

- A. no presumption as to allocation shall exist in any arbitration, suit or other proceeding; and
- B. the **Insurer**, if requested by the **Insureds**, shall submit the dispute to binding arbitration. The rules of the American Arbitration Association shall apply except with respect to the selection of the arbitration panel, which shall consist of one arbitrator selected by the **Insureds**, one arbitrator selected by the **Insurer**, and a third independent arbitrator selected by the first two arbitrators.

IX. Plans Created, Formed or Acquired During the Policy Period

If a **Plan**:

1. is created, formed or acquired during the **Policy Period** as a result of a **Company's** acquisition of a **Subsidiary** whose assets total less than 25% of the total consolidated assets of such **Company** as of the inception date of this **Coverage Element**; or
2. is created, formed or acquired during the **Policy Period** and such **Plan's** assets total less than 25% of the total consolidated assets of all covered **Plans** as of the inception date of this **Coverage Element**;

then, this **Coverage Element** shall apply to such **Plan** solely with respect to any **Wrongful Act** occurring after the date of such creation, formation or acquisition, and only upon the condition that within ninety (90) days of its creation, formation or acquisition, the **Named Insured** shall have provided the **Insurer** with a completed **Application** for such new **Plan** and agreed to any additional premium or amendment of the provisions of this **Coverage Element** required by the **Insurer** relating to such new **Plan**.

Coverage for Terminated Plans

If a **Company** terminates a **Plan** before or after the inception date set forth in Item 2. of the Declarations, coverage under this **Coverage Element** with respect to such terminated **Plan** and

its **Insureds** shall continue until termination of this **Coverage Element** for those who were **Insureds** prior to or at the time of such **Plan** termination or who would have been **Insureds** at the time of such termination if this **Coverage Element** had then been in effect. Such continuation of coverage shall apply with respect to **Claims** for **Wrongful Acts** committed, attempted, or allegedly committed or attempted, prior to or after the date the **Plan** was terminated.

X. Subrogation

Notwithstanding anything in Clause X. Subrogation of the General Terms and Conditions to the contrary, the **Insurer** shall not exercise its subrogation rights unless required to exercise its recourse rights pursuant to **ERISA**.

In the event the **Insurer** recovers any amounts based on its recourse rights under **ERISA**, any Limit of Liability applicable to this **Coverage Element** shall be restored to the extent of such recovery after subtracting any costs, expenses or reimbursements incurred by the **Insurer** in connection therewith.

XI. Order of payments

In the event of **Loss** arising from a covered **Claim** for which payment is due under the provisions of this **Coverage Element**, then the **Insurer** shall in all events:

1. first, pay **Loss** for which coverage is provided under this Fiduciary Liability **Coverage Element** for any **Individual Insured**;
2. second, only after payment of **Loss** has been made pursuant to subparagraph 1 of this Section XI. with respect to whatever remaining amount of any Limit of Liability applicable to this **Fiduciary Liability Coverage Element** is available after such payment, pay **Loss** of any covered **Plan**; and
3. then, only after payment of **Loss** has been made pursuant to subparagraphs 1 and 2 of this Section XI. with respect to whatever remaining amount of any Limit of Liability applicable to this Fiduciary Liability **Coverage Element** is available after such payment, shall payment for a **Company** be made for such other **Loss** for which coverage is provided under this Fiduciary Liability **Coverage Element**.