601 Pennsylvania Avenue, N.W. South Building – Suite 900 - Washington, D.C. 20004-2601
Phone: 202-220-3172   Fax: 202-639-8238   Toll-Free: 1-866-360-7197
Email: nrlnmessage@msn.com   Website: http://www.NRLN.org

Public Hearing
Definition of Fiduciary - Investment Advice
Employee Benefits Security Administration
United States Department of Labor
March 2, 2011

Testimony of
Marta Bascom
Executive Director
The National Retiree Legislative Network

Thank you Assistant Secretary Borzi, ladies and gentleman, for this opportunity to testify on behalf of the National Retiree Legislative Network on this very important issue. The NRLN is a non-partisan, grassroots coalition representing over 2 million retirees from 30 retiree associations as well as individual members. Our members have retired from 125 U.S. companies and public entities. They have grave concerns about present and future retirees' financial security, with particular trepidation about the state of their pension plans, now and in the future.

The NRLN strongly supports EBSA's efforts to update the scope of ERISA's fiduciary duty protections and, specifically, the proposed rule on the definition of the term "fiduciary." The changing marketplace has made several aspects of the current regulatory structure obsolete and ineffective. EBSA's proposed changes are necessary to provide needed protection for pension plan participants. The NRLN applauds these efforts and thanks the Assistant Secretary and her staff for moving forward on this issue but the NRLN also remains hopeful that this proposed rulemaking process will take into consideration the increasing role of foreign fiduciaries in this global marketplace.

The NRLN believes that the definition of the term "fiduciary" as proposed must be expanded in this proceeding, or one in the near future, to address situations where fiduciary duty is breached by a foreign fiduciary and results in depleted plan assets. Specifically, the NRLN recommends that the proposed rule include a requirement that at a minimum, all named fiduciaries under ERISA be subject to the jurisdiction of U.S. district courts with respect to the enforcement of judgments for potential breaches of fiduciary duty. In addition, named fiduciaries should be held jointly liable for the fiduciary breaches of other fiduciaries who they designate under Section 405(c)(1) and who they know, or reasonably should have known, are not subject to the jurisdiction of U.S. courts for the purpose of enforcing judgments under ERISA. Increasing globalization dictates that this should be so.

The environment has changed dramatically since the rules defining fiduciaries were originally established. In the 1970s, the marketplace in the U.S. was still largely comprised of U.S.-based companies with assets and fiduciaries in the U.S., all within the jurisdiction of U.S. courts. The expansive globalization of the marketplace was not envisioned then. Now, globalization through mergers and acquisitions has changed the make-up of fiduciaries charged with the caretaking of the pension plan assets of millions of retirees in this country. We are increasingly seeing more and more foreign companies merging with or acquiring U.S. companies with pension plans, and more will be coming. As part of a common business strategy, foreign entities often strategize to combine pension plans of dissimilar businesses they acquire in the U.S. in order to leverage the management of combined assets. These actions magnify the potential impact of an arms-length foreign fiduciary and thus the need to make named fiduciaries subject to U.S. legal jurisdiction.

Within the NRLN's membership, retirees have seen this with the acquisition of Lucent Technologies by France-based Alcatel. In addition, there are numerous media accounts of foreign entities looking to acquire U.S. companies in the technology sector and the automotive industry, just to name two. Those are just examples from among the former employers of NRLN members. The examples of other U.S. companies that have been acquired over the last three decades are too numerous to name here.

The fact is that the regulatory structure currently in place does not address the realities of the global marketplace nor the vulnerability of U.S. plan participants should there be a breach in the foreign fiduciary's duty. Unless our government examines the current regulatory structure with a proactive strategy, U.S. plan participants remain dangerously vulnerable due to the lack of legal recourse. Under these circumstances, it is an incomplete exercise to determine that an individual or firm is an ERISA fiduciary and liable for breach of fiduciary duties if that party is not required to be subject to the jurisdiction of U.S. courts.

Liability for breach of fiduciary duty is a clear objective of ERISA. That objective is circumvented if a fiduciary is not subject to the jurisdiction of U.S. courts. In addition, without enforceability in U.S. courts, a foreign buyer of a U.S. entity with pension obligations can circumvent ERISA's protections by simply locating beyond the reach of U.S. courts, thus insulating a bad actor from legal action. Without this additional protection, foreign fiduciaries are able to participate in management decisions to move fungible assets offshore out of the reach of U.S bankruptcy courts, thus making such assets unavailable to be liquidated and applied to highly underfunded U.S. defined pension plans.

Including this requirement is not a far reach when considering the rationale Congress devised for establishing the regulatory framework for ERISA at its inception. The prospect of holding named foreign fiduciaries liable for missing assets due to a breach of fiduciary duty is consistent with the Congressional intent of maintaining the indicia of plan asset ownership under the jurisdiction of federal district courts. As you know, Section 404(b) of ERISA prohibits a fiduciary from maintaining plan assets beyond the reach of U.S. district courts. While Congress in 1974 could not foresee a situation where named fiduciaries could be foreign nationals beyond the reach of our courts, it is highly likely that those same lawmakers would see the consistency in requiring *all* named fiduciaries to be subject to federal court jurisdiction. The goal of the two requirements would be the same, to have the law allow for both obtaining and enforcing judgments in all cases where a named fiduciary is found to be in breach of duty in order to protect plan participants.

The U.S. government, through the Department of Labor and the PBGC, needs to have the ability to rely on the jurisdiction of U.S. courts to enforce judgments against breaching fiduciaries acting on behalf of a foreign entity. Specifically, they need the ability to both obtain and enforce judgments in an action for fiduciary breach against *any* fiduciary, not just those that choose to maintain sufficient assets within the jurisdiction of U.S. courts. Recent upward trends in foreign acquisitions and in spin-offs of divisions of U.S.-based firms to foreign-based investors will become more common, and plans arising after these transactions resulting in foreign fiduciaries will increase as well. That will pose a significant challenge to both the Department of Labor as well as the PBGC if they are unable to hold at least all named fiduciaries accountable in U.S. courts.

Perhaps most importantly for retirees, plan participants rely on the ability of U.S. courts and regulators to enforce judgments and to deter bad actors. This is an essential protection for plan participants. In fact, the Department of Labor website advises plan participants that they may bring a civil action in court to, among other actions, attain appropriate relief from a breach of fiduciary duty. In general, this private right of action has greatly benefitted plan participants in both providing access to U.S. courts as well as in deterring potential bad actors. This private right of action should be available in cases of breach of fiduciary duty against *all* named fiduciaries, regardless of nationality. The global marketplace has created a new paradigm which calls for the U.S. government to continue to provide this same standard of recourse and deterrence with a progressive framework to protect plan participants - and, indeed, millions of retirees - from losses that have can have a devastating impact on their already fragile financial security.

Again, thank you very much for the opportunity to address this issue of great importance to retirees.