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Submitted at www.regulations.gov

Mr. Fred Wong
Office of Regulations and Interpretations
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, DC 20210

Re: ***Definition of Fiduciary Proposed Rule***
RIN 1210-AB32

Dear Mr. Wong:

The National Retirees Legislative Network welcomes the opportunity to provide comments on the Department of Labor's (DOL's) Proposed Rule (RIN 1210-AB32) to update the definition of the term "fiduciary." The NRLN is a non-profit and non-partisan, grassroots coalition of 30 retiree associations, as well as individual members, representing more than 2 million retirees who have retired from more than 100 different U.S. corporations and public entities. The NRLN's principal mission is to protect the interests of retirees and workers covered by the qualified pension and welfare benefit plans of U.S. corporations.

We are pleased to support the proposed rule, which we consider a long overdue updating of the scope of ERISA's fiduciary duty protections. The NRLN agrees, as the summary section states, that the Proposed Rule

> would protect beneficiaries of pension plans and individual retirement accounts by more broadly defining the circumstances under which a person is considered to be a "fiduciary" . . . .

We fully concur with EBSA Assistant Secretary Phyllis Borzi's observation that the "dramatic evolution in the marketplace" coupled with "the enforcement activities that the DOL has undertaken both in our investigations and our litigation over the past three decades, have made it perfectly clear that these arcane rules really interfere with the ability of the Department and fiduciaries to understand where the lines are being drawn, and to protect beneficiaries and participants."

While we applaud EBSA's continuing effort to close gaps in fiduciary protections for plan participants and beneficiaries under ERISA, we also believe that the proposed definition of fiduciary will prove meaningless in a growing number of situations where plan participants, the Department of Labor and the Pension Benefit Guarantee Corporation (PBGC) will be unable to hold certain foreign fiduciaries accountable even for knowing and willful breaches of fiduciary duty that deplete plan assets. It is an empty exercise to determine that an individual or firm is an ERISA fiduciary and liable for a breach of ERISA fiduciary duties if that party is not subject to the jurisdiction of U.S. courts.

The Following Change is Requested

Our principal recommendation is that DOL should revise and add to the proposed regulation a requirement that fiduciaries under ERISA – and at a minimum contributing sponsors and "named fiduciaries" – must be subject to the jurisdiction of U.S. courts with respect to the enforcement of judgments for potential breaches of fiduciary duty. The NRLN believes that either through a further notice or through a separate proposed rulemaking to follow this one, the DOL should clarify that at a minimum all "named fiduciaries," as defined by Section 402 of ERISA, must be

(1) subject to the jurisdiction of U.S. district courts for the purpose of enforcing judgments under ERISA, and

(2) 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.

Liability for Breach of Fiduciary Duty is an Objective of ERISA and of the Proposed Rule that is Negated if a Fiduciary is Not Subject to the Jurisdiction of U.S. Courts

ERISA Section 409(a) imposes liability on a breaching fiduciary to (i) make restitution to the plan for losses resulting from the breach; (ii) disgorge profits obtained by the fiduciary as a result of the breach of duty; and (iii) be subject to other equitable or remedial relief deemed appropriate by the court, including removal of the fiduciary. ERISA Section 409(a) also provides for the personal liability of fiduciaries, stating in part:

> Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this title shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary . . . and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary.

This strict standard of accountability is negated if a person or firm can act as a fiduciary with respect to the administration or control of plan assets while remaining immune from the judgment of a U.S. court. Similarly, the rule notice clearly identifies the need for all stakeholders to have access to legal recourse with the goal of

> . . . deterring service providers from engaging in self-dealing, acting imprudently and subordinating their plan clients' interests to other interests due to the liability exposure and negative publicity that would result from being sued for a fiduciary breach under ERISA.

Such a legal action is viable only if the breaching fiduciary is subject to the jurisdiction of the U.S. courts. The Rule Proposal quotes the Securities and Exchange Commission finding that:

> Many pension consultants believe they have taken appropriate actions to insulate themselves from being considered a 'fiduciary' under ERISA.

Similarly, without the requested clarification that fiduciary liabilities must be enforceable in U.S. courts, simply locating where the U.S. legal system is not operative will effectively defeat the efforts of this notice, since this can "insulate" a fiduciary from legal redress.

Plan Participants Rely on the Ability of U.S. Courts and Regulators to Enforce Judgments and to Deter Fiduciary Breaches that Deplete Plan Assets

Effective access to federal courts to hold plan sponsors and named fiduciaries accountable is an essential protection to plan participants for fiduciary wrongdoing. The Department of Labor web site advises plan participants:

> As a plan participant or beneficiary, you may bring a civil action in court to:
> * Get appropriate relief from a breach of fiduciary duty.

Section 502(a)(3) of ERISA provides that a civil action may be brought by a participant, beneficiary or fiduciary to recover benefits, to enjoin any act or practice which violates Title I or the terms of the plan, or to obtain any other appropriate equitable relief to redress a fiduciary breach. In general this private right of action has greatly benefited plan participants, resulting in well over 1,000 fiduciary lawsuits in U.S. court and no doubt deterring countless more.[1] But unless DOL updates its fiduciary rules as the NRLN proposes, plan participants and beneficiaries will, in an increasing number of cases, have no effective remedy vis-a-vis foreign fiduciaries in the American court system.

The Department of Labor and the PBGC Rely on the Jurisdiction of U.S. Courts to Enforce Judgments Against Breaching Fiduciaries

The Department of Labor and the PBGC also need the ability to both obtain and enforce judgments in an action for fiduciary breach against *any* fiduciary and not only against fiduciaries that choose to maintain sufficient assets within the jurisdiction of U.S. courts. In the "Regulatory Impact Notice" section of the proposed rulemaking, DOL opines that "no matter how egregious the abuse," unless certain plan consultants and advisers "meet every element of the five-part test" the "Department would be unable to bring an action for fiduciary breach." It laments that such a breaching party "would be absolved of liability . . .

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[1] *See, e.g.,* Robert N. Eccles, "Fiduciary Litigation Under ERISA," O'Melveny & Myers LLP, Washington, D.C., BNA Books, reprinted with permission (Apr. 15, 2004).

. even if the consultant engaged in precisely the same conduct that would have been per se illegal if committed by an equally culpable consultant" that met the current five-part test.[2]

The NRLN agrees that certain parties should not be "absolved of liability" under ERISA for misconduct injurious to plan participants and beneficiaries because of their ability to exploit a gap in the regulatory interpretation of the statute. However, although less common, it is no less problematic if federal regulators cannot enforce a judgment against a contributing sponsor or named fiduciary because they are outside the jurisdiction of U.S. courts. Recent trends in foreign acquisitions and in spin-offs of divisions of U.S.-based firms to foreign-based investors suggest that any updating of the rules related to fiduciary liability anticipate the need to be able to actually hold at least named fiduciaries accountable in U.S. courts.

Plan participants rely on DOL enforcement both for actual financial recoveries and for its wider deterrent effects. The Employment Benefits Security Administration (EBSA) reports its many fiduciary enforcement actions on the Department of Labor Web site.[3] Just recently a news organization reported that the Department of Labor filed up to 24 lawsuits against fiduciaries in a single day.[4] Without the requested change, the Department would have great difficulty in enforcement actions against non-U.S. fiduciaries.

Effective jurisdiction over breaching fiduciaries is also essential for the recovery of assets by the PBGC in the aftermath of a distress termination, which frequently results in the agency pursuing a bankrupt plan sponsor and/or controlled group members for additional contributions to a pension plan with assets substantially less than its termination liability. Even a judgment in favor of the regulator, or of plan participants, which orders restitution or the disgorgement of ill-gotten profits, could generally not be enforced against a fiduciary lacking assets under the jurisdiction of U.S. courts.

We note that where the foreign status of a party subject to federal regulation is a relevant or special concern, there is certainly precedent for ensuring that the appropriate distinctions are made in U.S. law and regulation. For example, the Federal Election Commission has established standards[5] under the Federal Election Campaign Act defining "foreign nationals."

Globalization Will Certainly Increase the Number of Named Fiduciaries and Controlled Group Members that are Effectively Beyond the Reach of U.S. Legal Jurisdiction

The notice of proposed rulemaking acknowledges that "[t]he current regulation has not been updated since its promulgation in 1975." The notice goes on to observe that during

[2] Rule Proposal, FED. REG. at 65271.

[3] Web site http://www.dol.gov/ebsa/newsroom/criminal/main.html

[4] Web site http://www.hreonline.com/HRE/story.jsp?storyId=533325938

[5] Web site http://www.fec.gov/pages/brochures/foreign.shtml

this time interval, both the financial marketplace and the very structure of most qualified plans have changed. In parallel with these changes has been a vast change in the globalization of business activities. Investment advisers have offices world-wide. American businesses have been merged with or acquired by foreign entities, leaving the pension plan sponsors as subsidiaries of parent entities incorporated in foreign countries. In the latter case, it is increasingly the case that foreign-based entities are assuming the role of "named fiduciaries," as defined by Section 402 of ERISA, with respect to control or management of the assets of the plan, as well as the designation of other subordinate fiduciaries

Without the requested change, the off-shoring of fiduciary responsibilities would leave stakeholders with limited recourse to redress wrongs, and thus have little or no remedy for breaches.

The Implicit Exemption for Foreign Fiduciaries is at Odds with ERISA's Concern with Maintaining the Indicia of Plan Asset Ownership Under the Jurisdiction of Federal District Courts

ERISA Section 404 defines the duties of a fiduciary and is arguably the best guide to Congressional intent concerning the risks and abuses that could undermine plan benefit security. Accordingly, Section 404(b) states:

> Except as authorized by the Secretary by regulation, no fiduciary may maintain the indicia of ownership of any assets of a plan outside the jurisdiction of the district courts of the United States.

By regulation, DOL has generally taken pains to ensure that plan "assets are under the management and control of a fiduciary which is a corporation or partnership organized under the laws of the United States . . . [and] has its principal place of business within the United States and which is" a bank, insurance company or registered investment adviser under U.S. regulation and with substantial net worth or equity.[6] Where a foreign entity, such as a foreign securities depository, holds the indicia of ownership, DOL regulations require that it does so only as an agent for the U.S. bank or other entity that is subject to the jurisdiction of U.S. district courts, which in turn remains "liable to the plan to the same extent it would be if it retained the physical possession of the indicia of ownership within the United States."[7]

However, although in 1974 Congress could clearly foresee the need to maintain plan *assets* under the jurisdiction of U.S. district courts, there remains a gap in EBSA's regulations concerning the ability to hold plan fiduciaries liable for *missing assets – viz.*, for the enforcement of judgments against named or other fiduciaries to recover losses due to a breach of fiduciary duty that typically leave a plan more under-funded (on a termination

[6] 29 C.F.R. §2550.404(b)-1(a).

[7] 29 C.F.R. §2550.404(b)-1(a)(2)(ii)(C).

basis) than it otherwise would have been. While ERISA regulation is careful to ensure that plan assets are ultimately recoverable within the jurisdiction of U.S. courts, it neglects to do the same with respect to the liability of plan fiduciaries for the recovery of plan assets lost due to a fiduciary breach.

We believe that the same clear Congressional intent evinced in ERISA Section 404(b) with respect to protecting plan assets against misconduct by foreign fiduciaries beyond the reach of U.S. courts should be interpreted by EBSA in a further notice or separate rulemaking to ensure that plan sponsors and "named fiduciaries" must likewise make themselves subject to the jurisdiction of U.S. federal district courts for purposes of enforcing judgments to recover plan assets and any other appropriate relief.

The Department of Labor Has Required the Effective Jurisdiction of U.S. Courts to Protect the Restitution of Assets in Exemptions to Prohibited Transactions

EBSA has in the past acknowledged the importance of distinguishing situations where a foreign fiduciary can be held accountable, at least in the context of exemptions to the prohibited transaction rules. In setting class exemptions for the lending of securities by employee benefit plans to foreign banks or foreign broker-dealers, EBSA created an exception to the prohibited transaction rules for entities in the United Kingdom explicitly because – unlike most other nations – British common law permits the enforcement of monetary judgments by U.S. courts against parties that have entered into a contractual agreement to be subject to the jurisdiction of a foreign court for this purpose. EBSA's notice of proposed class exemption included a series of conditions designed to ensure that U.S. courts had jurisdiction, including requiring collateral at least equal to the market value of securities lent, and required specifically that:

> The Foreign Broker-Dealer or Foreign Bank agrees to submit to the jurisdiction of the United States; agrees to appoint an agent for service of process in the United States, which may be an affiliate (the Process Agent); consents to service of process on the Process Agent; and agrees that any enforcement by a plan of its rights under the securities lending agreement will, at the option of the plan, occur exclusively in the United States courts. [8]

Conclusion

The NRLN supports the Proposed Rule since it increases the protections available to pension plan participants and beneficiaries. It will provide a measured and needed updating of the regulatory definition of "fiduciary" that fills a gap in the protections available to retirees, workers and their beneficiaries.

However, an effective updating of ERISA's fiduciary rules must also address the gap created by the current ambiguity concerning whether a fiduciary can be "absolved of

[8] EBSA, "Proposed Class Exemption to Permit Certain Loans of Securities by Employee Benefit Plans," **FEDERAL REGISTER,** Vol. 68, No. 205, Thursday, Oct. 23, 2003, at 60724.

liability" for even egregious breaches of fiduciary duty because that person or entity is not subject to the jurisdiction of U.S. courts for the purpose of enforcing a judgment, particularly one that requires monetary restitution or disgorgement.

The NRLN believes that either through a further notice or through a separate proposed rulemaking to follow this one, the DOL should clarify that at a minimum all contributing sponsors and "named fiduciaries," as defined by Section 402 of ERISA, must be:

(1) subject to the jurisdiction of the federal district courts of the United States for the purpose of enforcing judgments under ERISA, and

(2) 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.

We fully concur with the stated benefits of the Proposed Rule, as set forth in the Regulatory Impact Analysis, and believe that they apply more generally to the need to ensure that fiduciary liability is actually enforceable. As the Proposed Rule states:

> Where a plan suffers a loss because of an investment adviser's imprudence or actions contrary to the plan's interests, the plan will have remedies under ERISA to recoup its losses and disgorge the adviser's ill-gotten gains.[9]

If the stated objectives of the Proposed Rule are to be fully achieved, it is essential that the definition of fiduciary in this rulemaking requires all fiduciaries be subject to the jurisdiction of the U.S. courts.

Sincerely,

Bill Kadereit

Bill Kadereit
President

[9] Proposed Rule, FED. REG. at 65273.