ICGN

By email: ORI@dol.gov

Office of Regulations and Interpretations,
Employee Benefits Security Administration
Attn: Definition of Fiduciary Proposed Rule, Room N-5655
United States Department of Labor
200 Constitution Ave, NW
Washington, DC 20210
USA

27 January 2011

Re: Definition of Fiduciary Proposed Rule (RIN 1210-AB32)

Dear Sir or Madam,

We are writing in response to the request for comment from the Employee Benefits Security Administration ("EBSA") within the US Department of Labor relating to the proposed rule change currently under consideration which would affect the definition of the term "fiduciary" under the Employee Retirement Income Security Act ("ERISA").

By way of background, we are writing on behalf of the International Corporate Governance Network (ICGN). The ICGN is a global membership organisation of institutional and private investors, corporations, and advisors from 50 countries. Our investor members are responsible for global assets of US$12 trillion. The mission of the ICGN is to contribute meaningfully to the continuous improvement of corporate governance best practices through the exchange of ideas and information across borders. Information about the ICGN, its members, and its activities is available on our website: www.icgn.org.

We are broadly supportive of the EBSA's efforts to enhance the protections afforded pension plan beneficiaries through its proposed update to the rules defining the circumstances under which a person is considered to be a "fiduciary" under ERISA. As suggested in the proposal, we would anticipate these expanded criteria will extend to include several parties not currently covered by the existing regulation, such as certain types of investment advisors, consultants, and proxy advisory firms.

We generally feel that increasing the notion of fiduciary responsibility throughout the investment chain will have a positive impact, not only for pension plan participants, but on the broader US financial system as well. ERISA imposes a strict duty of loyalty on pension fund trustees, which requires them to discharge their duties solely in the interests of fund participants and beneficiaries. Self-dealing by trustees is also strictly prohibited. However, since ERISA was enacted, an expansive industry of consultants and advisors has developed that now effectively exerts a strong influence over many pension fund decisions. As EBSA has noted, many of those consultants and advisors are not treated as fiduciaries, though trustees increasingly defer to their judgment.

The result has been a steady erosion of protections afforded by the duty of loyalty. In fact, a 2008 survey of pension fund executives and advisors by Create-Research concluded:

"There is a widespread perception in the pension world that the investment industry is perverse in one crucial sense; its food chain operates in reverse, with

service providers at the top and clients at the bottom. Agents fare better than principals." (See, "DB & DC Plans: Strengthening Their Delivery," available at http://www.create-research.co.uk)

In our view, an extension of the concept of fiduciary duty throughout the investment chain is essential to making the financial system work more clearly in the interests of its underlying clients. We would not expect that working more clearly in the interests of clients should lead to fee increases, but were this to happen we believe that such increased costs would be more than offset by enhanced performance from more reliable advice. An additional advantage of extending fiduciary responsibility is that it is an established legal principle, which should reduce the need for detailed rule-making.

We would also like to comment more specifically on the proposed rule changes to the proxy advisory firms, given the EBSA's explicit reference to these service providers in its release. With ERISA's recognition that proxy voting rights are an asset that must be managed in accordance with fiduciary duties, we believe it is appropriate to treat proxy advisory firms as fiduciaries.

Our view is that proxy advisory firms provide a valuable service to institutional investors across the globe who have come to rely on their research, data, analyses and voting recommendations as an important tool to aid in the implementation of their voting policies. Many pension funds defer to proxy advisor recommendations, while others place great reliance on their underlying vote analyses. Overall, we feel that high standards for proxy advisory firm integrity will benefit not only the investor community but also companies and the markets generally, by facilitating more informed voting decisions.

We are also extremely supportive of efforts by the Securities and Exchange Commission (SEC) to enhance the current US proxy voting system. Existing conditions evidence the timeliness and need for the type of changes presented in the SEC's Concept Release No. 34-62495, File Number S7-14-10, relating to the reforms currently under consideration which would affect the US proxy system (also referred to as the "Proxy Plumbing Concept Release").

While the final responsibility for voting decisions should be placed on investors, we recognise the influence that proxy advisors exert and agree with concerns expressed by the EBSA and SEC about potential conflicts of interest which may arise when proxy advisory firms provide services to issuers or have significant business interests in an issuer. We believe that there is some scope for such conflicts to be managed more effectively and more transparently – and for them to be removed where they cannot be managed. We support addressing this issue by requiring increased transparency of proxy advisory firms, including detailed disclosures relating to their fees, client relationships, conflicts and research procedures.

While we are supportive of both the EBSA's and SEC's efforts to address the potential conflicts of interest which proxy advisory firms currently exhibit, we do not feel that detailed regulatory rules governing proxy advisory firms' research would be effective in achieving this aim. A more effective approach would be to emphasize addressing the underlying structural relationships which cause these potential conflicts. We believe that extending the definition of "fiduciary" to cover proxy voting advisors would impose a higher standard of conduct that achieves this regulatory goal without the need for additional detailed rules.

We believe that it is a natural understanding of the EBSA proposal that fiduciary duty applies to the exercise of other ownership rights appurtenant to shares

of stock beyond merely voting proxies, such as engagement with companies and dialogue with corporate directors. We would encourage the Administration to give active consideration to this area. This is now an established trend in other markets internationally. For example, the publication of the UK Stewardship Code by the Financial Reporting Council (FRC) in July 2010 marks a watershed for investors in the UK. It makes clear that fiduciary duty includes use of the full range of shareholder rights to manage shareholder value risks and opportunities at companies in which they invest, and it reflects the ICGN's Statement of Principles on Institutional Shareholder Responsibilities (which we attach to this response). This thinking has already gained some traction in the US: for example, the NYSE Commission on Corporate Governance included a Core Principle recommendation in its 2010 Final Report that shareholders have a responsibility to "vote their shares in a reasoned and responsible manner and should engage in a dialogue with companies".

We believe that the US should initiate a process, with investor participation, to consider following a similar stewardship model. As progress continues towards codes of best practice for institutional investors in Canada, South Africa, the Netherlands and the EU, among other markets, there is an increasing risk that pension fund participants in the United States could become disadvantaged.

It is within this context that we support the proposed rule change currently under consideration by the EBSA as part of its broader efforts to enhance fiduciary standards in the US market.

We would be delighted to discuss these issues or provide additional information. Please do not hesitate to contact Carl Rosén, the ICGN's Executive Director, by email at Carl.rosen@icgn.org or by telephone on +44 (0) 207 612 7098.

Yours sincerely,

Paul Lee
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