PENSION RIGHTS CENTER

1140 19TH STREET, NW SUITE 602 WASHINGTON, DC 20036-6608
TEL: 202-296-3776 FAX: 202-833-2472
E-MAIL: pnsnrights@aol.com

STATEMENT OF THE PENSION RIGHTS CENTER
ON
"FIDUCIARY EDUCATION"
BEFORE THE
WORKING GROUP ON FIDUCIARY EDUCATION
OF THE
ERISA ADVISORY COUNCIL
WASHINGTON, D.C.
SEPTEMBER 19, 2002

Good morning Chairman Stein and members of the Working Group. My name is John Hotz and I am the Deputy Director of the Pension Rights Center. The Center is the nation's only consumer organization dedicated solely to protecting and promoting the pension rights of American workers, retirees and their families. For the past 26 years, the Center has been at the forefront of efforts to help individuals understand and enforce their retirement rights. I also coordinate the Center's Technical Assistance Project, providing training and legal assistance to the Administration on Aging's Pension Information and Counseling Program, a network of pension assistance projects around the country which offer free help to older Americans, particularly disadvantaged seniors, women and minorities. Thank you for inviting me to testify this morning on fiduciary education.

Our unique role allows us to hear from plan participants from around the country with questions and problems that run the full gamut of pension law issues, including fiduciary error. Even within these fiduciary error cases, we see a wide range of situations; from cases where the fiduciary does not know the law, to those where the fiduciary does not even know they are a fiduciary; from cases where the fiduciary is well informed but her subordinates who deal directly with participants are not, to situations where experts and attorneys surround the administrator, yet fail to provide accurate information. I would like to share a few examples with you, and afterwards address the remedial and / or prophylactic potential of fiduciary education.

The first case I will describe is one I like to call "The Fiduciary's New Clothes." In April of 1998, four individuals contacted me to assist them in receiving a distribution from their 401(k) plan. The sponsor was a small manufacturing company and the plan provided for distribution on termination of employment. These individuals had all repeatedly requested distributions since their termination in February of 1996, but had received nothing from the plan in the time since. I found out that in that same time period the company's accountant, who was also the plan administrator, had been fired and replaced at least three times, leaving the position unfilled for months at a time. Although "accountant number four" knew that she had responsibility for the 401(k) plan and was apparently resilient enough to maintain her employment for more than a few months, she had no idea that she was the plan administrator… or that there was a law that governed many of her responsibilities… or that she was something called a fiduciary. I worked with her, sending her fact sheets and other information explaining the importance of the fiduciary's role. In checking up on her progress, it was not uncommon to hear, "I forgot," "I have it about half done," "I should be able to send that to you tomorrow," "I am putting a binder together to get organized" and "I forgot" (again). It took almost nine more months to get the less-than $15,000 in funds properly rolled out of the plan. And though this particular fiduciary was significantly better informed than she had been only a few months before, I have little confidence that other participants similarly situated wouldn't encounter similar delays.

In another case involving a lay plan administrator, my client was seeking a distribution (again from a 401(k) plan). Here, the plan administrator processed the distribution quite efficiently; however, the amount received by my client included only the exact value of his contributions to the plan. According to the administrator, he had forfeited any earnings. I was able to "educate" this plan administrator about his fiduciary obligations very quickly, by partnering with the PWBA. Our combined efforts resulted in prompt receipt by my client of all investment earnings (as well as a DOL investigation of the plan).

Perhaps one of the most common complaints I hear from pension counselors and participants is that even though there may be highly trained, educated professionals in the fiduciary role, the plan's front line staff – those who deal directly with plan participants – are not properly trained and too often give incomplete or inaccurate information. In one such case, a routine request for a Summary Plan Description revealed that the individual responsible for processing requests for plan information, did not even know what an SPD was. After two written requests and several phone calls, a third written request was sent to the plan administrator with a "cc" to the local office of the PWBA. Shortly thereafter I received a phone call from a very upset plan administrator … "How dare I communicate to the Department of Labor that one of her staff did not know what an SPD was?!" I never had any trouble obtaining information from that plan again.

With a law as complex as ERISA, and its companion the Internal Revenue Code, even the most competent plan administrators must turn to experts for advice on difficult issues. Problems arise for these fiduciaries when the experts they turn to are unfamiliar with specific provisions of the law or applicable regulations. A 71-year old client from Cincinnati applied for her in-service annuity under the age 70-1/2 distribution provision in her plan. Subsequent to this request, the plan was amended to eliminate the provision under which she sought benefits - a cutback in a protected form of benefit. When she went to the plan administrator to inquire on the status of her claim, she was informed that her claim had been denied. When she complained that the president of the company had personally promised her that no employee benefits would be cut, the plan administrator simply replied, “he was wrong.” The plan’s attorney then wrote the client a letter asserting that a benefit payable at age 70-1/2 is not a protected form of benefit under the law. The client and her Counseling Project attorney have educated the plan about the regulation. We expect that she will shortly receive the benefit that she is due.

The Counseling Projects report many other fiduciary errors that frustrate and confuse the participants they serve. These include:

- inaccurate estimates of retirement benefits that the clients rely upon in making important retirement decisions, only to find out later that the estimates were wrong and, in the worst of cases, that they must pay tremendous amounts of money back to the plan;
- inaccurate, incomplete or misleading information relating to the timing and form of benefits available under the plan – these errors have proven to have a particularly devastating impact on the surviving spouse; and,
- unreasonably long delays in the processing of benefit claims and distributions - particularly unforgivable in today’s climate of automated plan administration.

In reviewing these situations it is clear that education has a role to play in improving the service that many plan participants receive. Questions remain, however, as to what form that education should take, how it should be administered and what the large-scale impact of any formalized program might be.

Certainly, there will be some well-intentioned individuals who would seek additional information if such were made available to them. The Department of Labor has already laid the foundation for an easily accessible system of fiduciary education through its publication efforts and its “e-laws” virtual advisor systems. The Department has done a good job over the years of producing a variety of helpful publications for participants, and continues to do so. Currently, however, there is only one DOL publication that specifically addresses the needs of fiduciaries by title: “Frequently Asked Questions for Plan Sponsors, Fiduciaries, and Service Providers Related to the Events of September 11th.” The Department could easily and inexpensively expand its ERISA publications library to include helpful information for fiduciaries. A pamphlet outlining the basic responsibilities of fiduciaries, along with the resources available to them at PWBA and elsewhere would be a good beginning.

Additionally, the DOL’s e-laws system – an Internet-based interactive tool providing information about many Federal employment-related laws – could be enhanced to provide a virtual advisor on fiduciary matters. Currently, only one of the 22 virtual advisors available on the DOL web site focuses on the area of employee benefits – the “Small Business Retirement Saving Advisor.” Publications and virtual advisors readily available on the DOL’s web site would go a long way toward educating those interested fiduciaries on the most basic fiduciary concepts, such as the requirement to administer the plan solely in the interests of the participants and beneficiaries, and helpful information about recent changes in the laws and regulations.

A possible “next-level” of education-like activity could also be built upon the services already offered by the PWBA’s benefit advisors by offering a special a toll-free technical assistance line, exclusively for and marketed to fiduciaries, similar to the one offered by the Internal Revenue Service for tax-related retirement plan questions. The appeal of such a service would be enhance by its confidential nature and the fact that it would constitute a single point of entry for fiduciaries to contact an expert advisor on both the traditional "role of the fiduciary" topics, as well as those issues relating to "operating the plan in compliance with the law," typically viewed as qualification issues. Another related service that could be of great potential benefit to plan fiduciaries would be a "General Information Letter" request program. Again, this

could be modeled after the program of the same name offered by the IRS. The Program would be less formal than the DOL's current Advisory Opinion Program. Under the IRS's Program, plan representatives and participants may write in requesting the opinion of the Service opn qualification and other technical issues. It is the experience of the Counseling Projects and many participant-side litigators that this program has been quite successful in "educating" plan fiduciaries on issues related to plan qualification. Another benefit of this service is that it is made available to both plan representatives and participants. Having a program open to participants as well as fiduciaries may work to close the education gap, particularly for those fiduciaries that might not otherwise avail themselves of this or other similar educational opportunities.

In reality, however, one need look no further than the decisions in such cases as Farr v. US West, Helfrich v. PNC Bank and the dread Pegram v. Herdrich - all "wrongs without remedies" cases - to realize that under ERISA's current remedial and enforcement scheme there is little incentive for fiduciaries to actively seek additional education, or for that matter, to do anything differently at all.

In the vast majority of breach of fiduciary duty cases that participants bring to the Center and to the Counseling Projects, whether due to their individual nature or small monetary value, the claim holds little potential of interesting a private litigator, or the PWBA. Even if a case is litigated, short of criminal conduct on the part of the fiduciary, the worst an errant fiduciary has to fear is that he or she will have to pay the participant the benefit promised by the plan.

To whatever extent fiduciary education can be used by the Department, it should be used as an integrated complement to the DOL's present enforcement activities, and not as a substitute therefore. One possible approach that might address the incentive and interest-level deficits among the fiduciary population would be to provide the PWBA with "citation authority."

Similar to a traffic cop writing a ticket, the Department of Labor, upon satisfactory proof that a fiduciary error had occurred, could cite the fiduciary. Education could be incorporated into this model just as it is in the traffic violation analogy. For the first violation, failing to provide participants with Summary Plan Descriptions in a timely fashion, the fiduciary would have the option of attending fiduciary school on their own time, or paying a fine out of their own pocket. For the second violation, education might be mandated along with a fine. There are many questions to be answered and details to be worked out with a model such as this, but without an incentive to avoid making the kinds of errors that I have been discussing, it is unlikely that any meaningful change will be observed from the perspective of the average plan participant. After all, when was the last time any of you *voluntarily* attended a driver's education course?

Because of the clear impact that fiduciary education (or lack thereof) has on plan participants, the Center would look forward to any opportunity of partnering with this Working Group, its sponsoring Council and the Department to develop workable solutions to the issue of sub-standard fiduciary conduct, thereby increasing retirement security for American workers.

Thank you for allowing us the opportunity to speak with you this morning. I would be pleased to answer any questions you may have.