July 26, 2017

Mr. Nicholas C. Geale
Acting Solicitor of Labor
U.S. Department of Labor
Office of the Solicitor of Labor
200 Constitution Ave., NW
Washington, DC 20210

RE: Unwarranted and Harmful ERISA Breach of Fiduciary Duty Litigation

Dear Mr. Geale:

In recent years, retirement plan sponsors and retirement industry service providers have increasingly become the targets of class-action litigation. Dozens of new lawsuits are filed each year, and each new lawsuit, even if unsuccessful, is costly to defend. This is a significant concern for employers considering whether to adopt or enhance a retirement plan, and a drain on the private retirement system. Simply put, this litigation has become too harmful and costly to the retirement savings landscape, particularly since it provides far too few participants and plans with any significant benefits. ***As noted below, from the period of 2009 to 2016, attorneys representing plaintiffs in breach of fiduciary duty lawsuits are estimated to have collected roughly $204,000,000 for themselves, while only securing an average per participant award of $116.***[1]

We are writing today because we see this development as a material threat to the strength and growth of the private retirement system. For many of our members, the top issue in the retirement space is the proliferation of lawsuits and sources of potential liability. This is having an adverse effect on plan formation, plan enhancements, innovation, and decision-making (which is increasingly based on avoiding litigation). Our members want to do the right thing, as well as provide benefits that lead to retirement security, but increasingly there is not a safe path to take to avoid potential liabilities. In this context, we are writing with one suggestion in this letter. But this is a vast problem, and it is broadly expected that the new definition of a fiduciary will cause

[1] Tom Kmak, *Fiduciary Benchmarks: Protect yourself at all times*, DC DIMENSIONS (Summer 2016).

even further growth in harmful litigation. So beyond the suggestion addressed here, we anticipate following up with additional ideas on how to address this issue.

In order to help reduce the negative impacts of unwarranted class-action litigation against employers that sponsor a retirement plan, and the service providers that assist them, we are asking the Solicitor of Labor to direct agency resources in a manner that would slow the proliferation of unwarranted and harmful litigation. ***Specifically, we believe that the Office of the Solicitor of Labor could make a significant difference in reducing unwarranted litigation against retirement plan sponsors and service providers by filing amicus briefs where appropriate, including, but not limited to, in opposition to class-action plaintiffs that do not satisfy the pleading standards necessary to survive a motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6).*** As further explained below, reviewing courts have incorrectly allowed plaintiffs' breach of fiduciary duty claims to proceed past the pleading stage of litigation without requiring plaintiffs to provide specific factual allegations supporting their fiduciary breach claims. Accordingly, we ask the Office of the Solicitor of Labor to take an active role in preventing this trend from continuing any further.

I. BACKGROUND

Class-action plaintiffs' attorneys are increasingly filing lawsuits against the sponsors of defined contribution retirement plans, and their service providers, alleging that plan fiduciaries breached their duties by selecting poor-performing and expensive investment options for their participant-directed retirement plans' investment lineups. This litigation trend, which started and has continued in the context of large 401(k) plans, has begun to target smaller plans. In 2016, multiple plans with fewer than $25 million in assets were targeted. In addition, this trend is no longer just limited to sponsors of 401(k) plans. Many of the country's top private universities recently became the targets of claims attacking how they select and retain investments as part of their university-sponsored 403(b) plans. This spike in litigation is not the result of an organic groundswell of disaffected employees and retirees. Rather, it is the creation of plaintiffs' attorneys that may be driven by the large dollar amounts that can accrue in the employer-sponsored retirement plan system, and the belief that many large employers will settle litigation if class-action plaintiffs' claims survive a motion to dismiss and reach discovery. This has the added effect of diluting the potentially meaningful impact that a bona fide case involving a legitimate dispute might provide in establishing precedent for more effective fiduciary practices.

Attorneys pursuing breach of fiduciary duty claims against retirement plan sponsors and service providers often commence litigation by filing complaints with few, if any, specific facts regarding how or why a plan fiduciary selected or retained investments for the plan. Plaintiffs' attorneys have successfully pursued class-action claims by filing literal "cookie-cutter" complaints that state the legal basis for their claims in vague generalities founded entirely on impermissible hindsight. Most complaints rely entirely

on improper comparisons of the investment performance and expense ratio of specific plan investments versus other similar investment options, selected with hindsight, that performed better or were cheaper. It has not been uncommon to see multiple complaints filed within days of one another that are functionally identical, except for the names of the parties, the investments' performance and costs, and the duration for which such investments were made available by the plan. Essentially, law firms are employing a "shotgun" approach to litigation and hoping that at least some of their claims hit the mark. As further discussed below, we believe that these complaints, which fail to identify a breach of fiduciary duty with any specificity, do not satisfy the well-settled pleading standards that are applicable in federal courts and should not be able to survive a defendant's motion to dismiss for failure to state a claim.

Although a few lower courts have properly identified this problem and granted employers' motions to dismiss, many other courts have allowed these claims to proceed past the pleading stages into costly discovery.

In some of those cases, employers have chosen to reach multi-million dollar settlements rather than proceed with what can be even more expensive litigation, in addition to a diversion of attention for the plan's support staff away from plan management. According to one recent study, the cost of defending a breach of fiduciary duty lawsuit through the motion to dismiss stage can cost up to $750,000, and discovery can cost affected companies between $2.5 and $5 million dollars.[2] Even if plaintiffs are successful in reaching a settlement, a significant portion of the settlement amounts ultimately ends up in the pockets of the plaintiffs' attorneys, not the accounts of retirement investors. From the period of 2009 to 2016, attorneys representing plaintiffs in breach of fiduciary duty lawsuits are estimated to have collected roughly $204,000,000 for themselves, while only securing an average per participant award of $116.[3]

This recent spike in ERISA class-action litigation is costly for employers, a deterrent to employers that are considering whether to adopt or enhance a voluntary retirement plan, and an overall drain on the private retirement system. The potential benefits for participants resulting from this litigation are far outweighed by the costs and other harms created by this litigation. From an employer perspective, the significant amounts spent on defending class-action breach of fiduciary duty claims (and on payments for fiduciary liability insurance) cannot be used to benefit employees through retirement plan contributions. From a service provider perspective, these lawsuits create significant costs that are ultimately passed on to plans and participants in the form of fees and other charges assessed when accessing retirement products and services. So

[2] LOCKTON COMPANIES, *Fiduciary Liability Claim trends* (February 2017).

[3] Tom Kmak, *Fiduciary Benchmarks: Protect yourself at all times*, DC DIMENSIONS (Summer 2016).

the modest recoveries by some participants in some lawsuits are vastly outweighed by the cost participants bear as a result of these suits. And these adverse effects are expected to grow significantly with the new definition of a fiduciary and the increased litigation it will generate.

II. BREACH OF FIDUCIARY DUTY

Under section 404 of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), fiduciaries are bound to act "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of like character and with like aims." ERISA section 404 is generally understood to be a statutory expression of the common law duty of prudence imposed on fiduciaries.

When evaluating whether a fiduciary has satisfied its duty of prudence, reviewing courts are only supposed to consider the fiduciary's conduct at the time of the investment decision without the benefit of hindsight. This notion, which is primarily derived from the common law of trusts, requires reviewing courts to evaluate the fiduciary *process* leading up to a given investment decision and ask whether the fiduciary followed a *prudent process*. The prudence standard is a test of conduct, not investment results.

As a corollary to this standard, it is a well-recognized principle of law that fiduciaries are not required to always select the lowest cost investments or the investments that have had the most favorable past performance. This is true for several reasons:

- Future performance, without unjustified risks, is the objective under ERISA, not the lowest possible fees or favorable past performance. Fees and past performance are just two factors to consider, among many others, in a prudent process to identify investments for the future.

- More fundamentally, a claim against an ERISA fiduciary is required to be based on an allegation that the investment selection *process* was not prudent or in accordance with ERISA. If a plaintiff is unable to show that a fiduciary's decision-making process was somehow flawed, the plaintiff cannot succeed on a claim for breach of fiduciary duty. Standing alone, a plaintiff cannot successfully argue that a fiduciary breached its duties by pointing to the fact that other similar investments performed better in the past or cost less than the investments actually selected by the fiduciary. Any such standard would elevate past performance and/or fees over a prudent evaluation of investments. This could have disastrous results, such as fiduciaries always investing in options that just enjoyed a major run-up and may be facing a correction.

- Prudence under ERISA is based on what a person with "like aims" would decide. A legitimate "aim" of plan sponsors and fiduciaries is the desire to provide participants with more choices and/or better services, both of which necessarily cost more. The recent avalanche of class-action litigation is an attack by the plaintiffs' bar on the notion that sponsors and fiduciaries can properly choose to provide their participants with more choices or better service. From the perspective of most of the complaints that have been filed, any investment decision that does not focus exclusively on what is cheapest from a fee perspective is allegedly imprudent. This perspective does great harm to the system, which is designed to permit, and indeed require, fiduciaries to consider all relevant information in making their investment decisions.

- Further, ERISA requires fiduciaries to make decisions based on what is in the "best interest" of the participants of the plan. The plaintiffs' bar has attempted to impose its narrow view that the "best interest" of the participants is always the lowest possible fee, to the exclusion of any other considerations (for example, better service, and more choice). What is in the "best interest" of the participants necessarily varies from plan to plan. Nothing in ERISA or its jurisprudence dictates that the "best interest" of the participants is, universally, the lowest possible fee.

Despite these well-established fiduciary legal standards, a number of class-action plaintiffs have been able to advance their breach of fiduciary duty claims by merely pointing to the results of a fiduciary process, using impermissible hindsight, coupled with the absence of any specific factual allegations identifying how the fiduciary failed to conduct a prudent decision-making process. There is virtually never any factual allegation regarding what the fiduciaries considered, or what their aims were, when they made the decisions at issue. For example, the following assertions have successfully been used by plaintiffs to survive a motion to dismiss:

- The fiduciaries chose and failed to remove investments from the plan's lineup when less expensive and better performing investments were available to the plan. (*As discussed above, such allegations reflect a fundamental misunderstanding of ERISA, and as discussed below, fail to satisfy the federal pleading standards, which require a complaint to identify specific flaws in the decision-making process.*)

- The fiduciaries chose to pay an asset-based recordkeeping fee, which is *per se* unreasonable in comparison to a flat per-participant recordkeeping fee. (*Again, this allegation is not consistent with ERISA, which contains no such per se prohibition, and it fails to identify any specific flaws in the decision-making process.*)

- The plan is paying more than a particular amount, per participant (such as $30 per participant, per year) for recordkeeping fees. (Plaintiffs select and conclusively allege the particular dollar figure – which is invariably lower than

what the plan paid – with no factual basis to support the notion that it can or should be used as an upper limit on the amount of recordkeeping fees for that particular plan, or any consideration of what the fiduciaries considered when selecting a particular recordkeeper for the plan).

- The fiduciaries failed to monitor the plan's investments. (*This argument does not identify any specific flaw in the decision-making process, initial or ongoing. As explained below, it simply restates the elements of the cause of action.*)

- The fiduciaries failed to investigate or consider alternative investment options. (*Again, this argument simply restates the elements of the cause of action without alleging any specific facts.*)

As further explained below, we are concerned that these allegations, in the absence of specific facts describing how a fiduciary failed to conduct a prudent decision-making process, have incorrectly been permitted to get past the pleadings stage in a number of cases, despite the fact that they do not satisfy the standards for evaluating federal pleadings under Federal Rule of Civil Procedure 12(b)(6). Accordingly, we are urging the Solicitor of Labor to file amicus briefs in opposition to class-action plaintiffs' claims that do not satisfy the pleading standards necessary to survive a motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6).

III. MOTIONS TO DISMISS FOR FAILURE TO STATE A CLAIM

A. The standard for judging a motion to dismiss

A motion to dismiss for failure to state a claim upon which relief can be granted is governed by Federal Rule of Civil Procedure 12(b)(6). A motion to dismiss, if successful, can end litigation at the pleading stage before the parties can be compelled to conduct costly discovery. As noted in the ERISA context by the Supreme Court decision in the case of *Fifth Third Bancorp v. Dudenhoffer*, the motion to dismiss for failure to state a claim is "one important mechanism for weeding out meritless claims."[4]

As discussed below, in order for a plaintiff to survive a motion to dismiss, the complaint must contain ***sufficient factual matters*** to state a claim for relief that is plausible on its face. "The plausibility standard is not akin to a probability requirement, but it asks for ***more than a sheer possibility*** that a defendant has acted unlawfully."[5] In the ERISA context, this would require a plaintiff to plead ***specific facts*** allowing a court to infer that a fiduciary has actually committed a breach by failing to conduct a prudent decision-making process. An actual investment performance result is not, and should not be permitted, to be construed or accepted as a sufficient fact to support an allegation

[4] *Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459, 2471 (2014).

[5] *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal citations omitted).

of a process breach. And, although a reviewing court must accept all factual allegations in a complaint as true, reviewing courts are not required to accept legal conclusions or other conclusory statements of fact when considering a motion to dismiss. The standard for surviving a motion to dismiss is described by the Supreme Court as follows:

A pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do. Nor does a complaint suffice if it tenders naked assertions devoid of further factual enhancement. . . . [T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. (Although for the purposes of a motion to dismiss we must take all of the factual allegations in the complaint as true, we are not bound to accept as true a legal conclusion couched as a factual allegation). . . . In keeping with these principles a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009) (internal citations and quotations omitted).

The standard for deciding a motion to dismiss for failure to state a claim can be described as a two-step process. First, a reviewing court separates factual allegations from allegations that are not entitled to the assumption of truth (e.g., legal conclusions and mere recitals of the cause of action). Second, the court asks whether the factual allegations, which are accepted as true, state a claim for which the plaintiffs would be entitled to relief.

B. Class-action plaintiffs' arguments supporting breach of fiduciary duty claims

After reviewing a number of the recent cases alleging that retirement plan fiduciaries breached their fiduciary duties, we are concerned that the motion to dismiss for failure to state a claim is not properly serving its purposes of "weeding out meritless claims" in the context of ERISA fiduciary breach claims. This is because plaintiffs have been able to survive the pleadings stage of litigation and reach discovery, despite the fact that their complaints are *devoid of any specific factual allegations* that would allow a court to infer that a plan fiduciary breached its fiduciary duties to the plan or its participants by conducting an imprudent decision-making process. Instead, plaintiffs have merely alleged conclusions about the results of a fiduciary decision-making process and other arguments that rely on the benefit of hindsight.

Not only does the failure to weed out these meritless claims create bad results for the private retirement savings system, we also believe that such a result is flawed from a legal perspective for two reasons. First, such a result fails to properly account for the emphasis the law places on a fiduciary's decision-making process, as opposed to the

results of a fiduciary's decisions, when determining liability for breach of fiduciary duty. Second, such a result accepts as true legal conclusions that are couched as factual allegations – a result that is inconsistent with the federal pleading standards described above.

i. Failure to account for the importance of process

As explained above, the key to a claim for breach of fiduciary duty is demonstrating that a fiduciary failed to conduct a prudent process in reaching its decision to select or retain a specific investment option. It is not enough to simply second guess a fiduciary's decision by pointing to the fact that other better-performing and less-costly investments could have been chosen by the plan fiduciary. However, the recent string of cases permitting breach of fiduciary duty claims to advance past the motion to dismiss stage in the absence of any specific facts regarding the fiduciary process contradicts this general principle of fiduciary law. Plaintiffs have simply alleged that other investments performed better or cost less than the investments selected by the plan fiduciary. The complaints fail to provide any specific factual allegations indicating that a fiduciary failed to follow a prudent process. This result is inconsistent with the duties imposed on ERISA fiduciaries, and the Office of the Solicitor should support motions to dismiss that correctly point out that class-action plaintiffs have failed to meet their burden of pleading by failing to allege specific facts. This would ultimately help to eliminate, or at least slow, the recent trend of frivolous fiduciary litigation, which is a drain on the private retirement system and more harmful than it is helpful to retirement savers.

ii. Conclusory statements couched as factual assertion

Moreover, even when plaintiffs make allegations that call into question a fiduciary's decision-making process, those allegations fail to satisfy the federal pleading standards because they rely on conclusory statements and mere recitals of the cause of action. In many cases, class-action plaintiffs have broadly alleged that fiduciaries have "failed to monitor" the plan's existing investments or "failed to investigate" alternatives. However, many of those same plaintiffs have failed to allege any specific facts to support those statements, which are blanket conclusions and mere recitals of the cause of action. Similarly, plaintiffs often allege, in a totally conclusory fashion, a particular dollar figure that they claim is the maximum amount that can be paid for recordkeeping or other plan services. In fact, of course, such amounts differ among plans because no two plans, or the services provided, are exactly alike. Because reviewing courts are not supposed to accept conclusory statements and mere recitals of the cause of action as fact during the pleadings stage, reviewing courts should be dismissing these claims because they fail to state an actionable claim with any specificity based in fact. Simply put, those allegations fail to allege any specific facts that would allow a court to infer that a fiduciary breached its fiduciary duties by failing to conduct a prudent decision-making process.

In the absence of any specific factual support, plaintiffs should not be able to survive a motion to dismiss by simply asserting that a defendant failed to monitor the plan's investments or that a defendant failed to remove imprudent investments. Those allegations, in the absence of specific factual allegations, are conclusory statements that rely on hindsight and effectively recite the cause of action. In the Supreme Court's 2015 decision in *Tibble v. Edison*, the Supreme Court explained that fiduciaries have a "continuing duty to monitor trust investments and remove imprudent ones."[6] Those stated duties are a more nuanced expression of the overall duty of prudence. The federal pleading standards, which require specific factual allegations to survive a motion to dismiss, should not be satisfied when a plaintiff merely concludes that a plaintiff breached its duty of prudence while pointing to the fact that better-performing and less-costly investments were available to the plan. To hold otherwise would obfuscate the federal pleading standards that have been established, as the Supreme Court explained, to prevent plaintiffs from "unlock[ing] the doors of discovery for a plaintiff armed with nothing more than conclusions."[7]

Before allowing plaintiffs to proceed to the discovery phase of litigation, reviewing courts should require plaintiffs to identify specific facts that would allow the court to infer that all of the elements of the claim can be satisfied. Otherwise, plaintiffs would be able to survive a motion to dismiss by only asserting the type of threadbare recitals that do not satisfy the federal pleading standard. Such a result would be harmful to the private retirement systems, is inconsistent with the purpose of the federal pleading standards, and fails to recognize the appropriate legal standards for evaluating fiduciary decision-making.

IV. OUR REQUEST OF DOL

In short, as noted above, we believe that the Office of the Solicitor of Labor could make a significant difference in reducing unwarranted litigation against retirement plan sponsors and service providers by filing amicus briefs where appropriate, including, but not limited to, in opposition to class-action plaintiffs that do not satisfy the pleading standards necessary to survive a motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). As discussed above, reviewing courts have incorrectly allowed plaintiffs' breach of fiduciary duty claims to proceed past the pleading stage of litigation without requiring plaintiffs to provide specific factual allegations supporting their fiduciary breach claims. Accordingly, we ask the Office of the Solicitor of Labor to take an active role in preventing this trend from continuing any further.

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[6] *Tibble v. Edison*, 135 S. Ct. 1823, 1829 (2015).

[7] *Iqbal*, 556 U.S. at 678.

If you have any questions, please feel free to contact me at 202-289-6700 or by email at ldudley@abcstaff.org. Thank you for considering the issues raised in this letter.

Sincerely,

Lynn D. Dudley
Senior Vice President,
Global Retirement and Compensation Policy