ERIC
The ERISA Industry Committee
Driven By and For Large Employers
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Annette Guarisco Fildes, President & CEO

May 15, 2019

The Honorable Preston Rutledge
Assistant Secretary
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue, NW, Suite 400
Washington, DC 20210

Re: Follow Up from March 26, 2019 Meeting Requesting Halt to Fiduciary Breach Allegation Letters in TVPP Investigations on Missing and Unresponsive Participants

Dear Assistant Secretary Rutledge:

I am writing to follow up on our March 26, 2019 meeting with your staff on the important issue of missing retirement plan participants and participants who do not commence benefits at the required beginning date (the latter referred to in this letter as "unresponsive" participants). A number of issues were discussed, and we look forward to continuing the full conversation and working with the United States Department of Labor (the "Department") to develop appropriate guidance. However, there is one issue we want to bring to your attention as warranting immediate consideration, and that is letters from the Department finding or alleging breaches of fiduciary duty under the Employee Retirement Income Security Act of 1974, as amended ("ERISA") in its Terminated Vested Participant Project ("TVPP") investigations.

As we have expressed before, The ERISA Industry Committee ("ERIC") shares the concern of the Department regarding missing and unresponsive participants. Like the Department, ERIC is committed to supporting solutions to address this issue. In that regard, we greatly appreciated the Department's willingness to consider ERIC's detailed submissions, and to meet with ERIC representatives on March 26, 2019 to discuss the need for Departmental guidance in this area and ERIC's suggestions for such guidance. ERIC and its member companies are uniquely positioned to provide valuable insight that could strengthen such guidance. ERIC's large employer members are especially likely to face missing participant challenges because they tend to have larger defined benefit plans, which are inherently more complex and have more significant acquisition histories. ERIC's members would be happy to share their insight on these challenges, and to help the Department in any other manner. ERIC stands ready to provide that assistance and looks forward to receiving any further questions or requests that the Department has on potential guidance. We urge the Department to issue guidance as soon as practicable, including to consider issuing such guidance in discrete parts in order to expedite the process and provide the much-needed information to plan sponsors and fiduciaries as soon as possible.

In the meantime, we want to reiterate a request that we made at that March 26, 2019 meeting, which is that until the Department provides this guidance, it should refrain from issuing letters finding breaches of fiduciary duty under ERISA in its TVPP investigations.

ERIC recognizes that the TVPP initiative has been successful in highlighting the challenges of missing and unresponsive participants and encouraging retirement plans (and plan vendors) to focus on this issue and to improve processes around such participants. But ERIC is deeply concerned that these investigations are moving forward without Departmental guidance and frequently ending with letters asserting fiduciary breach.[1] As ERIC has expressed before, this practice of issuing such letters is unfair to plan fiduciaries because the Department has never provided guidance on the applicable fiduciary standards for ongoing administration or defined benefit plan missing participants or on unresponsive participant outreach. Before these investigations, plan fiduciaries had little notice that these participants required proactive plan action, and, even today, plan fiduciaries are without definitive guidance on the actions required by law. Without such guidance, even the most compliance-oriented fiduciaries find it difficult to identify what the law requires of them. There are also significant practical challenges to locating missing participants and getting unresponsive participants into payment (which ERIC detailed at length in its previous letters to the Department). It is simply unfair to penalize these fiduciaries when they lack instruction from the Department.

ERIC recognizes that there may be individual egregious cases that warrant adverse findings (even in the absence of guidance), but ERIC's members report that the Department is routinely issuing letters finding fiduciary breach at the conclusion of its investigations, using form letters, including where the plan has been exceedingly cooperative in reducing its missing and unresponsive participant population and/or has a minimal number of such individuals. For example, ERIC is aware of findings letters being issued for plans that retain a *de minimis* number or percentage of deferred vested participants currently past the plan's required beginning date (for example, in one case, only one such individual). And these letters often state that these (even *de minimis*) breaches will remain "ongoing" until all such participants are put into pay status (or the plan takes other significant measures such as retaining an independent fiduciary). These types of findings are highly objectionable because they are outcome driven and fail to account for the fact that most large retirement plans retain some number of missing or unresponsive deferred vested participants, even after the plan undertakes extensive search and outreach efforts (and again, are being made without existing guidance from the Department).

It cannot be overstated that these types of findings letters can trigger serious consequences. Putting aside the threat of Section 502(l) penalties, these letters can create significant reputational damage. For example, plan sponsors that operate in industries related to ERISA such as finance, insurance and health care are often required to disclose adverse Department findings in RFPs or contract bids. Department fiduciary breach findings can also trigger other serious consequences such as mandatory disclosure to other regulators or professional licensing bodies. Such findings may also result in increases in fiduciary liability insurance premiums. These are very significant potential costs for the plan sponsor's businesses.

Individual fiduciaries are also impacted by these letters. Often these individuals work in human resources or finance departments, and their livelihood is connected to their ability to serve as a fiduciary or to assist with plan administration. These individuals worry that they may have to disclose these findings on job applications or may be precluded from serving in a fiduciary or plan-administrative role in the future. These are very significant consequences that could impact these individuals' future employment.

Of course, ERIC recognizes that these consequences should not limit the ability of the Department to protect plan participants from clear legal violations. But the issuance of these letters finding fiduciary breach in the particular context of the TVPP investigations is not appropriate or productive when the Department has not articulated the applicable legal standards. Accordingly, until the Department issues guidance in this area, ERIC asks that the Department stop issuing letters finding fiduciary breach in the TVPP investigations, except in the most egregious of circumstances. Instead, the Department should focus its TVPP investigations on encouraging compliance and process changes, followed thereafter by closing letters ending the investigations on the basis of such cooperation.

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[1] In some cases, these letters describe "potential" fiduciary breaches. ERIC's concern and its request also relate to such letters asserting "potential" fiduciary breaches.

Again, ERIC greatly appreciates the Department's time in considering ERIC's view and our offer to provide assistance. If you have any questions concerning our comments, or if ERIC can be of further assistance, please do not hesitate to contact Aliya Robinson, Senior Vice President, Retirement and Compensation Policy, at 202-627-1930 or arobinson@eric.org, or me.

Best regards,

Annette Guarisco Fildes