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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

19 January 2011

Re: Definition of Fiduciary Proposed Rule

We are writing in response to the request for comment from the Employee Benefits Security Administration within the U.S. 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, Hermes Fund Managers Limited is owned by the British Telecom Pension Scheme, the UK's largest. Hermes manages the portfolios of over 200 other clients including many major pension schemes. Hermes Equity Ownership Services (EOS) also advises non-investment clients on governance and corporate engagement matters in respect of about US$65 billion of equities. These clients include the BBC Pension Trust, The National Pension Reserve Fund of Ireland, the Lothian Pension Fund, PNO Media (Netherlands), Canada’s Public Sector Pensions Investment Board and VicSuper of Australia (only those clients which have expressly given their support to this response are listed here). Among the work we carry out for our clients we actively vote their proxies in markets around the world which includes significant voting in the U.S.

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 through out the investment chain will have a positive impact not only on pension plan participants but the broader U.S. financial system as well. In our view an extension of the concept of fiduciary duty through out the investment chain is essential to making the financial system work more clearly in the interests of the underlying clients. One advantage of extending fiduciary responsibility is that it is a clear principle and should avoid the need for detailed rule-making in some areas.

Based on our extensive experience representing our clients’ ownership interests in both the U.S. and markets globally we would like to focus our comments regarding the proposed rule changes as they relate specifically to proxy advisory firms given the EBSA’s explicit reference to these service providers in its release.

Hermes EOS's 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. Overall we feel that proxy advisory firms benefit not only the investor community by facilitating more informed voting decisions but also issuers whose proxy materials might not otherwise receive the appropriate levels of attention.

We are extremely supportive of the Securities and Exchange Commission's efforts to enhance the current U.S. proxy voting system and assert that the current conditions evidence the timeliness and need for the type of changes presented in the SEC's Release No. 34-62495, File Number S7-14-10, relating to the reforms currently under consideration which would affect the U.S. proxy system.

While the final responsibility for voting decisions should be placed on investors, we agree with the concerns of the EBSA and SEC about potential conflicts of interest which may arise when proxy advisory firms provide services to issuers or have a significant interest in an issuer. We find the current system of "fire walls" and vague disclosure presently employed by advisory firms to be insufficient. We support the Securities and Exchange Commission's consideration of regulations aimed at addressing this issue by requiring increased transparency of proxy advisory firms to eliminate or reduce conflicts of interest by establishing detailed disclosure requirements relating to their fees, client relationships, conflicts and research procedures.

While we are supportive of the EBSA's and SEC's desire to address the potential conflicts of interest which proxy advisory firms currently confront, we do not feel that detailed regulatory controls or rules governing the accuracy of proxy advisory firms' research data would be effective in achieving this aim. As such we have encouraged the SEC to place its emphasis on addressing the underlying structural relationships which cause these potential disconnects and hope that the EBSA will take a similar view. We believe that the use of fiduciary duty achieves this regulatory goal without the need for additional detailed rules.

Beyond the advice provided by proxy advisory firms we would encourage the Administration to extend its view on what it considers to constitute the exercise of rights appurtenant to shares of stock to include other active ownership activities such as corporate engagement as is the case 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 UK companies. It makes clear that fiduciary duty leads investors to need to address the use of the full range of shareholder rights to seek change at companies in which they invest. We believe that the U.S. could consider following a similar model.

It is within this context that we support the proposed rule change currently under consideration by the Employee Benefits Security Administration as part of its broader efforts to enhance fiduciary standards in the U.S. market.

Please do not hesitate to contact us should you have further questions. We would be delighted to discuss these issues with you further.

Yours sincerely,

Darren Brady