

**WHOSE POWER? WHOSE AND WHICH DUTIES?**  
**PENSION FUND INVESTMENTS AND FIDUCIARY-RELATED DUTIES IN**  
**THE UNITED STATES AND INDIA**

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## INTRODUCTION

This paper is set within the context of the challenges (and opportunities) posed by significant demographic changes; an associated heightened concern for the well-being of older generations of people especially as they make a transition from being among the workforce; the corresponding need for an economy which enables younger generations to create wealth to sustain themselves sufficiently well while providing the goods and services required to support those older generations over and after that transition; and the need for institutions, policies, and practices – overall what we refer to as the “retirement system” – commensurate with the foregoing which on an ongoing basis enable individuals over their working lifetime to accumulate claims for those goods and services as they leave the workforce in their later years. A retirement system typically encompasses several different clusters of institutions, policies, and practices which we refer to as “retirement plans”. The more specific context for this paper is that of retirement plans which involve members in deriving claims directly or indirectly from financial investments made by them or by others on their behalf. In conventional terminology such plans might be referred to as “funded” ones as contrasted with, for example, “pay-as-you-go” plans.

Almost by definition, central to the efficacy of funded plans are the roles and responsibilities of those individuals with ultimate authority to make the required investment-related decisions and effective fulfillment of them. (Here, we will refer to such individuals as “investment decision-makers”.) Central to the reference to “efficacy,” of course, is whether and how decisions are calculated in appropriate ways to enable realization of the sought-for claims. Practically speaking that might mean claims to an income stream in retirement – what is often referred to as a “pension” – or claims to the availability at various times of an amount of accumulated financial assets which can be a source of income or which can be withdrawn (“cashed out” so to say) to meet certain retirement-related needs and expectations. However, whatever individuals’ worries about financial security in general or as it relates to retirement, they may well have other concerns which beyond that – for example the import or impact of the behavior of the enterprises in which investments are made – which bear upon their investment decisions or how others acting on their behalf invest in their name. Moreover, as implied above, retirement plans and the retirement system as a whole are nested in the larger economy and society. Especially when the scale of funded plans of the system is great relative to the size of the economy, the economic and other implications of plan-related investment decisions overall – and perhaps in some cases on an individual basis – may loom large. If so, that poses issues as to the interplay of those implications with the roles and responsibilities of investment decision makers.

For reasons that will be detailed below discourse with respect to those roles and responsibilities may in whole or part fall under the rubric of what is termed “fiduciary duty.” Given the preceding paragraphs that discourse and the conclusions drawn and actions taken on the basis of it are very important.

It is our goal in this paper to consider key issues encompassed by discourse in India and the United States about fiduciary duty as they concern retirement plan investment decision making. In part the premise is that there can be much that each country can learn from the other in view of their different experiences in that regard. In part it is also in recognition of the fact that retirement plans in each country have made or may make investments in the other and that insofar as such investments might be mutually desirable having a sufficient understanding of how fiduciary duty shapes the expectations and channels the needs of those retirement plans is important to achievement of that shared goal.

As far as we have been able to determine the available literature in these terms is modest indeed so in a number of respects it is uncharted territory. Moreover, the retirement systems in both countries are composed of a range of rather different kinds of plans, many of which have a rich and varied history and diverse associated institutions, policies, and practices the attributes of which are not immediately or readily made transparent or accessible, especially to those in another country.

With that in mind, in this paper our aim is to set the stage for and make an initial foray into the discourse in both countries in relevant terms, identify key concepts and modes of thinking and of implementation. We strive to flesh out the foregoing by an in-depth illustrative discussion of the issues as they relate to one important kind of plan within the retirement system of each country. We do so with any eye to structuring the analysis to establish the basis for an analysis in a subsequent essay with not only potentially greater depth but also a broader reach in terms of the types of plans canvassed. In the concluding section of this paper we offer what might be termed observations but might also be viewed as recommendations for others concerned with these issues, especially those individuals with authority as to what fiduciary duty should entail. That being said we do so recognizing that given the distinctive experience of each country those observations (or recommendations) may have greater or lesser import or play out in a different way.

## **Part I: Overview of Fiduciary Duty**

As described above, the issues with which we are concerned pertain to the roles and responsibilities of those individuals who have decision-making power with respect to monies in funded retirement plans. And as noted, a number of those issues can be discussed in relation to what has conventionally and historically been understood to involve a “fiduciary” role and responsibilities.

As a general matter, according to one very useful formulation with respect that role, at its core it is concerned with the establishment of a relationship between a party termed the “fiduciary” and another called the “beneficiary.” Namely it is one in which the fiduciary acts on behalf of the beneficiary for the (sole) purpose of advancing the beneficiary’s ends. More specifically, the fiduciary does so legitimately because he or she has been accorded authority to engage in the discretionary exercise of a legal capacity ordinarily derived from the beneficiary.<sup>1</sup>

Much discussion about fiduciary duty – at least in the retirement plan context – assumes or presupposes that the relationship has been established. It then explores, given what the relationship is, the role/what are the responsibilities/duties of the fiduciary (and what is the role/what are the rights of the beneficiary). But the specification of the foregoing cannot be determined solely on the basis of the relationship; rather, it must also be assessed in the light of what occasioned the establishment of the relationship in the first place. It is to both aspects we will turn in this essay.

For the moment, though, we focus on the fiduciary relationship. According to the cited formulation, its structure is characterized by inequality – the fiduciary has the power not the beneficiary; dependence – the fiduciary’s exercise of power affects the beneficiary’s practical interests; and vulnerability – the power can be abused, misused, or exercised carelessly with prejudice to the beneficiary’s interests which are the concern and object of the fiduciary’s authority.

Those considerations or concerns are the predicate or basis for defining the duties or responsibilities of the trustee. Some of those considerations relate to ensuring that the fiduciary

is focused solely on advancing or protecting the interests of the beneficiary, sometimes framed in terms of a duty of loyalty. Others presuppose that the trustee fulfills that duty but address how well the fiduciary otherwise exercises his or her power. This assessment is typically captured by specifying the skill, care, and diligence the fiduciary needs to bring to the task. This cluster of issues concern what might be referred to as comprising the duty of care. However, in addition, in at least certain contexts (like this one concerned with investment decisions which bear in the long run on financial security in retirement) there is the distinct notion of the fiduciary acting with prudence (or perhaps with judgment). Sometimes the need for prudent judgment may be set in the context of a particular action or decision though it may be more prominent within the framework of a course of actions or decisions. In some respects the notion might be thought to fall under a duty of care, but regardless of the labeling, it can be thought to pose a set of issues distinct from the other three.

Arguably what is demanded or expected in fiduciary duty in each of these terms will be mapped out in light of the considerations listed in the preceding paragraph. For example, with regard to the duty of loyalty there are important issues which concern the connection between the particular interests of the beneficiary which are at stake and their importance to him or her, for example, the nature and extent of the harm he or she might suffer by virtue of breach of that duty. In some measure those same issues pertain to the cluster of duties under the rubric of the duty of care. However, there are other ones which relate to the appropriate way to or the basis for gauging the sufficiency of the fiduciary's competencies and capabilities and his or her manner of employing them.

Sorting through these matters is challenging enough but they become more complicated when, as in the case of retirement plans, fiduciary powers may be delegated to others. That is, the typical discourse about fiduciary duty tends to have in mind a unitary fiduciary embodied in the image of a single individual or party. However, the reality is that in the conventional (certainly pension fund) context, a collection of individuals – in the form of a board or other entity as the governing body of an organization – plays the fiduciary role. Moreover many of the tasks – indeed, many important ones – are performed by others within the organization – for example, by a CEO, a CIO, investment staff, audit staff, etc. – and/or by people outside the organization, for example, asset managers and investment consultants. In other words the fiduciary is really a fragmented or divided fiduciary.

As noted, the questions above do not exhaust those issues regarding investment decision-making in relation to retirement plans which require attention. For example, there are ones as to who (rightfully/with authority) caused the fiduciary relationship to be established, how, and why. As reflected in the formulation relied on above, the relationship can be instituted by unilateral undertaking – as in the case of a grantor trust; by mutual consent or agreement – as in the case of an employer and employee agreement to set up a retirement plan; or by legal decree (that is, by the legitimate use of state power) – as in the case of the government mandating that a plan be created (often in conjunction with allowing or compelling contributions to the plan). For the most part our focus here in those terms will be on the latter of two means for establishment of the relationship. However, in the employment context certain plans might better or more usefully be viewed as having been established as a practical matter by virtue of the unilateral undertaking on an employer.

Arguably, issues as to what has occasioned the establishment of a fiduciary relationship involve certain parties and implicate certain interests which may be present but which are distinct from those issues pertaining to the roles and responsibilities of the fiduciary whose authority was accorded by virtue of that establishment. However, in other cases, the line between these related



matters may be much less clear. For example, the boundaries may be more blurry if the beneficiary was directly (or indirectly) the party – or one of the ‘parties – who established the fiduciary relationship. This situation is the case in which an employer and its employees agree to start a plan in which those employees are beneficiaries and in which literally or in effect the legal capacity with respect to which fiduciary power is exercised is that of the employees. Also, certain actions which might be viewed as occasioning the establishment of a plan (or the opposite) and nominally thought not to be of a fiduciary character might better be thought to be of that nature.

At the extremes one might have a retirement plan established by virtue of ostensibly exclusively individual voluntary, consensual action; at the other, apparently solely as a result of state action. (The state, in doing so, might be acting in its role as a sovereign or as an employer). In the former case among the questions posed are the following: First, regardless of how those individuals with a role in establishing the plan would characterize it, the ways in which the relationship might be deemed to be of a fiduciary nature. Second, insofar as it would be so deemed – and, again, regardless of that to which those individuals who established the plan agreed – as a matter of law what would be the permissible affirmative reach of the fiduciary’s power and what would be the corresponding scope of the fiduciary’s responsibilities, that is, what would be the limitations on that power? In the other case, the issues are similar: First, whether the relationship might be characterized as fiduciary in character. Second, what is the permissible affirmative reach of the state’s power regarding establishment of the relationship, that is in what ways should the relationship be viewed as having a fiduciary character and insofar as they must what the responsibilities would be, that is what would be the limitations on that power.

In the case of private, individual action, the discussion of the issues largely starts from the extent to which the individual choices reflected in the agreement may be honored or overridden in light of the implications of those choices for those individuals. It may also encompass other possible considerations which are legitimate and perhaps important for the state to take into account. In the case of state action the discussion for the most part begins with the warrant for the exercise of power by the state to establish the scheme and the extent to which that power must be constrained or limited in view of the adverse impact that it would have on the rights or interests of individuals.

There are a good number of aspects of the Indian retirement system which would best be associated with the latter scenario and a fair number of aspects of the U.S. retirement system identified with the former one. In the following two sections we sketch out an overarching framework for answering the kinds of questions posed above and then apply it to one aspect of each of the United States and Indian retirement systems. One goal in doing so is to assess how useful the framework is to thinking about fiduciary-related roles and responsibilities in those parts of the systems. Assuming in light of the assessment, that the framework has basic merit, the second is to deepen and refine the framework with an eye to applying it broadly to other aspects of the two systems.

## **Part II: Aspects of the United States retirement system especially as they relate to fiduciary duty and an illustrative employment-based defined contribution plan**

With respect to the United States we focus in a two-stage way on one kind of retirement plan within the overall system, namely one in the private sector. We consider it on its own terms and then explore the bearing of overarching federal law on it with respect to the kinds of issues alluded to above.

Consider the case of an employment based retirement plan (Plan) established in the absence of a union.<sup>2</sup> Nominally it might be said to be established by agreement. That is, the employer and some or all of its employees ostensibly agree that it be established and in so doing specify attributes of the Plan. The agreement is embodied in what we shall refer to as the Plan Document. Suppose the following characteristics are the key features of the Plan (features which are similar to many such plans in the United States):

1. Employees can join the Plan on a voluntary basis; if so, they are Plan Members.
2. Employees, as Plan Members, can make voluntary contributions to the Plan.
3. If employees make voluntary contributions the employer is obliged to make matching contributions up to a specified maximum (in absolute terms or as a percentage of salary or wages).
4. All of the contributions – those contributions by an employee and the matching employer ones – are deemed to be made solely for the benefit of that Plan Member;
5. Contributions voluntarily made by an employee Plan Member and employer matching contributions are associated with an individual account (Account) in the Plan Member's name.
6. The Plan provides for the contributions associated with Plan Member's Account being invested. The contributions associated with Plan Member's Account and any investment returns on them (in sum, the Account Assets) are solely for the benefit of the Plan Member.
7. There are prescribed circumstances under which a Plan Member may enjoy the benefit of the Account Assets, and in what way. For example, after attaining a certain age a Plan Member has the right to take from the Plan a sum in an amount up to the total amount of Account Assets or receive an annuity-like income stream which the Plan promises to provide or a third party agrees to provide in exchange for such assets as the Plan Member has withdrawn from the Account at that time and designates for that purpose.
8. Certain authority with regard to operation of the Plan is accorded individuals who are termed Board Members; collectively they constitute the Board.
9. The authority of Board Members includes determining which kinds of choices Plan Members have for the investment of monies in their Accounts. (Consistent with the foregoing, Plan members must have some choices as to how their and matching contributions to the Plan are invested.) Board Members' determination must be made with an eye *only* to the interests of the Plan Members.
10. The Plan Document states rules as to which investment choices the Board must, may, or may not permit Plan Members to make.
11. Insofar it is possible for an employee to become a Plan Member and contribute to the Plan without making a choice from among the permitted investments the Plan Document specifies which from among the permissible choices for investments will be selected and be the basis for investment of the Plan Member's (and matching) contributions. (These choices are referred to as Default Investments.) The Board Members must choose the Default Investment with an eye *only* to the interests of the Plan Members.
12. Half of the Board Members are chosen by the employer and half by Plan Members in a manner specified in the Plan Document.

Consider now the foregoing arrangements in light of the general discussion above as to fiduciary duty.

**Establishment of fiduciary relationship:** In this case it might well be thought that the fiduciary relationship is established by virtue of the agreement between the employer and employees. Strictly speaking, though, a fiduciary relationship involving a particular employee does not arise until such time as he or she elects to participate in the plan and makes a first voluntary contribution

to it. In any case, here a Plan Member – as a result of his or her agreement with the employer or as a consequence of that agreement and his or her act of joining and first voluntarily contributing to the Plan – plays a role in establishing a fiduciary relationship between the Board/Board Members (some of whom he or she has a role in naming) and himself/herself. By reason of that agreement the employer also has a role in creating the fiduciary relationship (and in naming some Board members).

**Beneficiaries of the fiduciary relationship:** By virtue of his or her agreement to the Plan and subsequent voluntary action to participate in and contribute to it, an employee becomes a Plan Member and by definition a beneficiary of the Plan. Although in consenting to establishment of the Plan the employer might believe that doing so redounds to its advantage, the employer has no beneficial interest in the plan.

**Determination of who is the fiduciary:** The Plan specifies the method by which Board Members – who serve collectively (as the Board) as the fiduciary – are chosen. In this case Plan Members – beneficiaries by virtue of the relationship – have a say in the choice of the fiduciary. However, the employer does as well.

**Those rights which the fiduciary has power exercise in lieu of the beneficiary:** Here the Board Members have certain power in lieu of the exercise of rights Plan Members would otherwise have with respect to the monies which are their voluntary contributions and contingent rights Plan Members might arguably have with respect to monies which are the employers' matching contributions. By contingent we mean that Plan Members' contributions not only automatically trigger matching employer contributions but also activate the exercise of certain powers of the Board has with respect to them. We say arguably because it is not obvious that Plan Members have any rights with respect to monies paid made by the employer absent the employer's obligation under the Document to contribute to the Plan for its employees' benefit.

**The ends or interests of the beneficiaries which the fiduciary has power to advance and/or protect:** At first blush and on their face the ends or interests are only those ones associated with the investment of the contributions. But for the moment those ends or interests are not yet precisely defined. That is, while the Board Members must make a determination of investment choices solely with an eye to Plan Members' interests, those interests are not specified. They could be of a purely financial nature, that is, be geared to enabling Plan Members to achieve some financial goal related to financial security in retirement (such as accumulation of a certain amount of Account Assets or achievement of a certain replacement income relative to pre-retirement wages and salaries). However, the interest could be other than financial in nature, for example, investments only in companies whose policies and practices contribute minimally to climate change. This determinant might be the only ostensibly extra-financial consideration. If so, then the Board would not be authorized to set the menu of investment choices based on any other extra-financial consideration.

**Power exercised with respect to those interests:** Power has been accorded to Board Members to decide on the permissible choices of investments of contributions which are available to Plan Members. That power is given in conjunction with Plan Members having the right to select from among those permissible choices. That is, Members have no other power over the disposition (by investment) of those monies; again, they have no other right to invest the monies in any other way.

Since the relationship described above was established by virtue of the agreement of the employer and employees as expressed in the Plan Document, arguably, the authority and

responsibilities of the Board members and the corresponding rights of the employees/Plan Members might be determined solely by the terms of the Plan Document. Notwithstanding the Plan Document, though, Plan Members might be dissatisfied with one or another action taken by the Board. If so, whether they can get relief, how, and what way depends upon how the relationship is viewed and treated as a matter of law. That is, the relationship might be viewed in a way which as a matter of law requires a redefinition of the reach/limits of that authority and those responsibilities and rights as defined by the agreement. For example, it might be treated as having a character such that fiduciary-like norms/standards might be applied or be adapted in a modified or somewhat different way. At the extreme, the relationship as established might be treated as being unacceptable as a matter of law.<sup>3</sup>

Now fiduciary-like norms/standards have been applied to a wide range of relationships; indeed, such an array that there has often been and in some measure there continues to be a contentious debate as to which kinds justifiably require application of fiduciary-like norms/standards and why.<sup>4</sup> Arguments of this kind often implicate questions as to the extent to which norms/standards associated with other kinds of relationships, e.g., ones associated with the torts and contracts, are applicable to these arguably distinctive relationships.

As noted in the discussion above, for the purposes of this paper we eschew being embroiled in that debate; instead, we adopt the formulation detailed there as to key elements which are constitutive of a fiduciary relationship. Based on the presence of those key elements (in light of that formulation), the arrangements established by the Plan Document might be such as to warrant it being characterized as having given rise to a fiduciary relationship. Legal analysis would then proceed to determine whether the authority, responsibilities, and or rights defined by the Plan Document are problematic that is, in what ways, if any, they go beyond what a fiduciary relationship should allow. In the absence of a statute, that analysis would in turn rest on what is required in the context of other fiduciary relationships. For example, a “trust” in the context of Anglo-American law “denot[es] an arrangement by which land or other property is managed by one party, a trustee, on behalf of another party, a beneficiary.”<sup>5</sup> The Plan Document as such does not state the intent thereby to establish a trust. However, the relationship might be viewed as similar enough to a trust relationship to justify application in some measure the application of trust law concepts, methods, etc. to the analysis.

In the United States trust law was made relevant (or perhaps more relevant) to retirement plans by virtue of federal statutory action. Federal legislation did not *require* that retirement plans be established in the form of trusts or if constituted in a certain way be treated as trusts. Rather tax law was changed in a way which *induced* their establishment in that form. That is, “[t]he Revenue Act of 1921 exempted from current taxation interest income on trusts holding stock bonus or profit-sharing plans. Under this act, trust income was taxed as it was distributed to employees only to the extent that it exceeded employees’ own contributions. That legislation did not authorize deductions for past service contributions.”<sup>6</sup> Then, “[t]he Revenue Act of 1926 exempted income of pension trusts from current taxation.”<sup>7</sup> Shortly thereafter, “[t]he Revenue Act of 1928 allowed employers to take tax deductions for reasonable amounts paid into a qualified trust in excess of the amount required to fund current liabilities. It changed the taxation of trust distributions that are attributable to employer contributions and earnings.”<sup>8</sup> As a matter of policy, the tax subsidies accorded by these provisions were intended to act as an incentive for establishment of and participation in employment-based retirement plans and afforded some fiduciary-like protection to members of those plans. At the same time, they arguably provided additional safeguards to the worker members of the plans; that is, insofar as the relationship established by a plan did not take the form of a trust or a plan would not have taken that form but for the incentive, worker members might well have been afforded greater protection of their interests by virtue of the trust form being

assumed. Even so, that law might be adapted or revised insofar as the relationship established by the retirement plan is understood as a trust in ways different from the manner in which other kinds of relationships are considered to be trusts.

Insofar as the application (of some form) of trust law would override the responsibilities/rights defined by the Plan agreement, there are interesting and important questions as to their being legitimate as a matter of law (and perhaps as well reasonable/sensible/wise as a matter of policy) for certain of the parties' agreed-upon terms to be trumped. We will return to these questions shortly.

However, we turn to an additional overlay of considerations important to the U.S. experience. That is, because the Plan Document establishes a private occupational retirement plan, it is subject to the provisions of the Employee Retirement Income Security Act in 1974 (ERISA).<sup>9</sup> Namely, it falls under the following definitions included among the provisions of ERISA:

"Except as provided in subparagraph (B), the terms 'employee pension benefit plan' and 'pension plan' mean any plan...established or maintained by an employer or by an employee organization, or by both, to the extent that...such plan...—

(i) provides retirement income to employees, or  
(ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond..."<sup>10</sup>

In turn, according to that law (apart from certain exceptions not relevant here), "a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets..."<sup>11</sup> So, in the first instance, given the above-described powers of a Board Member, he or she would, generally speaking be deemed to be an ERISA "fiduciary."

We say generally speaking because the particular context of the illustrative scenario provided here, is one with respect to which U.S. law enables a Board member to *not* be deemed a fiduciary.<sup>12</sup> The statute's prescription is cast in terms of the matter of *control*. (For a sketch of that prescription see APPENDIX A. THE "CONTROL" EXCEPTION TO FIDUCIARY STATUS WITH RESPECT TO INDIVIDUAL ACCOUNT PLANS) Here, for the most part, the notion of control seems synonymous with the kind of exercise of power as a key element in the formulation cited above for defining a fiduciary role. That is, if a Plan Member has a certain kind of control over the assets in his or her account – in the sense of having sufficient power to make investment choices – then correspondingly a Board Member is viewed as lacking that power which is the necessary condition for he or she being deemed a fiduciary by ERISA. Stated briefly, for a Plan Member to be seen as having control, the choices allowed to him or her must first be ones by which he or she can *materially affect* the potential financial return on the assets. But materiality here is understood in terms of an ability to produce investment outcomes thought to be commensurate with what might be referred to as the achievement of "retirement income security." More particularly, there must be at least three investment choices. Moreover, each must be "diversified." Further, they must have materially different risk and return characteristics. Also, in combination they must enable the Plan Member to establish a portfolio with risk and return characteristics within the range normally thought appropriate for him or her. In addition, each must be such as to, in combination with the others, allow diversification of the overall risk of the portfolio. Altogether they must also allow the Plan Member to diversify the portfolio so as to minimize the risk of large losses taking into account the nature of the plan and the size of participants' or beneficiaries' accounts.

The foregoing exception raises important issues which we will address at another time. However, for the moment, though, we assume that Board Members are viewed by ERISA as fiduciaries. As such, they have duties specified in the following terms:

“(1) Subject to sections 1103 (c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) 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 a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III of this chapter.”<sup>13</sup>

What we have remarked on as the duty of care is addressed by the language above in two primary aspects. The care, skill, diligence, and prudence provisions characterize the personal capabilities the fiduciary must have and how in general terms he or she must exercise them. The diversification sub-section (C) defines some specific aspect of how the fiduciary must employ those capabilities with respect to the substantive content of the power he or she has. That is, the authority of the fiduciary relates to the making of investment decisions and here certain criteria for making investment decisions are detailed. What is referred to as the duty of loyalty is addressed first in the “solely interest of the participants and beneficiaries” language and second, by what might be termed a gloss on those words, by the “exclusive purpose” wording. The former defines in whose interests the Board Member/fiduciary must exercise his or her authority; the latter specifies to which among those interests that exercise must be directed.

In sum then, there is a prescription by federal statute which (1) defines (a) in general terms what triggers the establishment of a fiduciary-like relationship, namely, when a certain person exercises certain kinds of power with respect to investment of contributions made by or on behalf of Plan Members and (b) what, in that case, are the broadly defined duties of the fiduciary; but in particular circumstances and (2) the “control” exception or exclusion deems that certain uses of such power are *not* of such a nature as to warrant the conclusion that a fiduciary-like relationship has been instituted.

Because of their importance to our later discussion we look more closely at ERISA’s duty of loyalty-related terms. They specify not only that the exercise of fiduciary power must solely be in the *interests* of Plan Members (and their beneficiaries) but also that it must be employed *only to advance a particular one among the possible interests they might have in the investment of contributions*, that is, their interest in being “provid[ed] benefits.”<sup>14</sup> That is a phrase which at first blush seems most apposite with defined plans given that they are designed to provide life-long post-retirement payments. Arguably in that kind of case the fiduciary’s investment choices would need to be made in a manner sufficiently calculated to achieve the purpose of ensuring that the accumulated financial assets are available in amounts and at times appropriate to meeting obligations to make pension payments.

By contrast, consider our U.S. example. Here, the Plan just affords a means for accumulation of assets which, at various times may be withdrawn from the Plan Member's account at the will of the Plan Member. Nonetheless, the statutory and regulatory provisions referred to above concerning the "control" exception to the existence of a fiduciary duty – however vague or diffuse – might well be thought to express the need for a menu of investment choices which can enable or channel a Plan Member's choices to afford enough of a prospect that the assets accumulated will allow for sufficient financial security in retirement. So the language might be read as requiring that insofar as the fiduciary exercises power s/he must specify available choices for investment with an eye *only* to financial consequences or outcomes of that sort. For example, the stated exclusive purpose is that of "providing benefits" and the statutory definition for an employee retirement benefit plan is one which "provides retirement income to employees...or results in a deferral of income." So the inference would be that since the wording pertains only to financial outcomes – receiving a certain level of retirement income or recouping deferred income – then investment decisions must have an eye only to only financial results.

For the moment we hold aside critical assessment of this interpretation and just assume that it is correct. If so, then ERISA would override any authority the Plan Document might give to Board Members to make investment decisions with an eye to both such financial outcomes and extra-financial ones. The question becomes one of whether that override is otherwise legitimate and, if legitimate, as a matter of policy whether it is wise.

When, indeed, is it legitimate for law to override the choice of plan participants to define those of their interests to be advanced or protected by those responsible for making investment decisions on their behalf with respect to their retirement plan assets, for example, reject interests other than those having the "financial" interests just described?

In aid of answering that question it is necessary to understand the rationales for enactment of ERISA. These justifications are in some measure reflected in what is typically a part of any elaborate federal statutory scheme such as ERISA, namely a Congressional Statement of Findings and Policy. The relevant language is below. (We have elided certain portions which pertain to addressing certain peculiarities of the federal and state governmental system in the United States which would otherwise constrain the exercise of federal government power with respect to the substantive matters taken up in the Act<sup>15</sup>):

"The Congress finds...that the continued well-being and security of millions of employees and their dependents are directly affected by employee benefit] plans; that they are affected with a national public interest; that they have become an important factor affecting the stability of employment and the successful development of industrial relations;...that owing to the lack of employee information and adequate safeguards concerning their operation, it is desirable in the interests of employees and their beneficiaries, and to provide for the general welfare..., that disclosure be made and safeguards be provided with respect to the establishment, operation, and administration of such plans; that they substantially affect the revenues of the United States because they are afforded preferential Federal tax treatment; that despite the enormous growth in such plans many employees with long years of employment are losing anticipated retirement benefits owing to the lack of vesting provisions in such plans; that owing to the inadequacy of current minimum standards, the soundness and stability of plans with respect to adequate funds to pay promised benefits may be endangered; that owing to the termination of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits; and that it is therefore desirable in the interests of employees and their beneficiaries, for the protection of the revenue of the United States,...that minimum standards be provided assuring the equitable character of such plans and their financial soundness."<sup>16</sup>

In essence, the stated motivations for the scheme overall relate to:

- (1) *The interests of employees and their beneficiaries*, namely, concerns about (a) employees being unfairly denied a pension for lack of vesting; (b) promised benefits not being paid to them because plans are not adequately funded by virtue of a lack of soundness or stability or by early termination of plans;
- (2) *The interests of employers and employees*, namely, the establishment of plans (and worker participation in them) and their successful operation contribute to stable employment and successful industrial relations;
- (3) *The interests of federal taxpayers (and in a broader sense the interests of the larger society)*, namely, because significant federal tax subsidies incentivize the establishment of employee pension benefit plans for the kinds of reasons noted in (1) and (2), if plans do not operate in a way which sufficiently achieves the sought-for outcomes, those subsidies would have been wasted or misused.

Two important, though in some ways related points need to be raised here. First, ERISA does *not* mandate the establishment of any employee pension benefit plans. Rather insofar as plans are created or maintained that is ostensibly by reason of the voluntary action of employers and employees. ERISA's provisions presuppose the occurrence of such action and center on enabling achievement of the objectives of those employers who voluntarily establish such plans (ones which at the time were largely associated with employees' receipt of a stream retirement income in the form of a "pension"). Nonetheless, as the second and third points suggest, other concerns informed the enactment of ERISA.

We now turn to the question posed with the foregoing points in mind. There are several kinds of arguments which, though not insubstantial, are, we think, without sufficient merit.

For example, it could be asserted that advancement of non-financial interests is problematic in and of itself, so much so, that it should not be permitted (or permitted under these kinds of circumstances). That is, it could be thought in some way to be "wrong" for employees and employers to enter into agreements which incorporate those other interests. That contention would seem to be without merit. Clearly, in the absence of special circumstances, people would be free to use the financial (or other) resources at their command in any way and for whatever reason they choose. (Special circumstances could range from spending monies to support otherwise illegal activities or being required to spend monies on the support of family members, namely spouses and children.) Among the ways resources can be used is to employ them in connection with one or another investment with an eye – though not necessarily an exclusive eye – to financial security in retirement. Obviously people are at liberty on an individual basis to save for ostensibly any purpose, including with a goal of enhancement of their financial security in retirement. In doing so, though, they may well have concerns about the import or impact of the policies and practices of enterprises in which the monies which they have made available for that purpose might be invested. Hence, they might choose either not to invest in the first place or to exit a current investment in light of those concerns.

Monies may be set aside/diverted from consumption/"saved" on a collective rather than an individual basis. At first blush, people, as suggested, are free to save for retirement (or otherwise) for any purpose on an individual basis. If so, there would appear to be no reason why they could not act jointly to save in a collective way with the same purposes in mind. So-called socially responsible investment funds are of that nature. There are good reasons to regulate such funds in ways which reflect their distinctive character, for example, to ensure that proper or sufficient efforts are made to take into account other than non-economic outcomes, including issues relating



to any tradeoffs between economic and non-economic outcomes. However, there is otherwise no warrant for barring their existence – that is, banning that form of collective saving. The extensive investments already being made by individuals in the United States based at least in part on extra-financial considerations and through collective vehicles toward that end are strong support for that point.<sup>17</sup>

Alternatively, it could be argued that taking into account non-economic interests might have an adverse impact on saving at an individual/household or national level. That is, insofar as people are able to take account of other, ostensibly non-financial considerations, that might result in investment returns being lower than those returns which otherwise might be gained and hence reduce savings on an individual/household basis and arguably, in aggregate terms, on a national basis. It is not clear what, if any, empirical basis for such an assertion.

There is a related contention concerning the relative financial performance of investments which do take into account such considerations being lower (or higher) than those investments which do. There are issues about how that argument is even posed, e.g., the time frame with respect to which it is relevant.<sup>18</sup> Holding those issues aside for the moment, it would appear that the assertion is heavily contested. In our view there are more than plausible arguments to suggest that it is wrong.

But even assuming that there was such a difference, in the absence of, say, fraud in terms of representations with regard to the nature of the investment vehicle or lack of competence on the part of the saver/investor in choosing it, sacrifices in terms of investment return as might be made in those terms would be left to the personal judgment of a saver-investor fully aware of such tradeoffs as there might be.

In addition, it could be asserted that although certain reasons or rationales might not otherwise suffice to warrant an override of individual choice in the terms described, they could in view of concerns that investment decisions might be more likely to abuse their power in connection with taking account of such considerations. For example, among the evidence which was brought to bear in connection with the enactment of ERISA were findings by a U.S. Senate committee investigation to the effect that “the extremely rapid growth of private pension plans had led to all manner of abuses, ranging from ineptness and lack of know-how to outright looting of benefit funds and corrupt administration. In addition to embezzlements, kickbacks, unjustifiably high administrative costs, and excessive investment of funds in employer securities, serious examples of improper insurance practices were also found.”<sup>19</sup> Another committee investigation “turned up instances of substantial underfunding in both single and multiemployer plans as well as misuse, manipulation and poor management of trust funds. One financially ailing company tried to borrow over a million dollars from a subsidiary's pension pool for use as operation capital. Another had a policy of investing more than half its pension funds' assets in the company's own common stock and in the real estate of a company subsidiary. Still another company routinely dipped into its pension funds for cash to make acquisitions.”<sup>20</sup>

Clearly, these were examples of monies in plans not being invested or used in any direct sense to protect or advance *any* interests of Plan members, let alone financial security in retirement or otherwise. So while quite obviously such behavior on the part of those making investment decisions for such (defined benefit) plans was one of the overriding concerns which ERISA was enacted to address, that did not necessarily warrant limiting those decisions to protection or advancement of a particular interest, in this case, that in financial security in retirement.

Suppose that based on the foregoing, there might otherwise be thought to be no legitimate justification to bar investment decision-makers from taking account of plan members' interests in other than financial security in retirement. However, there might be thought to be an overarching concern in that particular interest. Suppose so, and moreover, assume that a sufficient demonstration could be made that permitting account being taken of other interests would put advancement and protection of that priority of financial retirement-related interests at serious risk. For example, it could be argued that it would be too difficult for decision-makers to determine how trade-offs between or among two or more interests might be made. It might be contended, in any event, that it would be too difficult for Plan members to monitor the appropriateness of those trade-offs actually made by decision makers. It could be asserted that it might be too easy for decision-makers to settle upon choices which have an impact upon the specified interest under the cover of making tradeoffs. It might be thought difficult to formulate criteria and devise protocols for decision-making which coherently and consistently reflect the ostensible different interests of members. Even if it were in principle possible to develop relevant criteria and protocols, they might be believed to be too complicated to implement. The merits of such arguments must be assessed in light of practice or experience. The fact of the matter is, though, that there are many enterprises, for example, not for profit ones (and governments insofar as they are understood as not for profit enterprises) which are authorized to advance a range of interests (including financial ones) and must, can, and successfully (or acceptably) make tradeoffs with respect to them. Note, in any case, that contentions of this sort are rather similar to those issues brought up in the context of often sharply contested debates about whether and, if so, how companies might take into account other than the pursuit of profit in making business decisions. We return to the relationship between those arguments below.

In addition, even if contentions which relate to legitimate concerns about the use of tax subsidies are brought into play, overriding individual choice is not consistent with policy with respect to other aspects of the retirement system. Before proceeding in those terms we note that the provisions of tax law in the United States relevant here had "exclusive benefit" requirements well before the enactment of ERISA. ERISA in effect provided that insofar as fiduciary duty requirements were satisfied in that connection which also met the tax law requirements.<sup>21</sup>

As suggested, tax subsidies for employment-based retirement plans are essentially justified by their effect on accumulations of financial assets in those plans (apart from the particular nature or form of the financial benefits derived from those assets). That effect would be realized through increased establishment of plans, greater contributions to them, and (arguably) correspondingly greater investment returns. The response would be along the lines of that offered above with regard to savings. There would not appear to be meaningful empirical evidence of any negative effect of allowing plan investment choices to include non-financial considerations. If there were one would think that that such evidence would have changed policy and practice as it relates to a different, major, and increasing part of the U.S. retirement system, that involving Individual Retirement Accounts (IRAs).<sup>22</sup> Essentially IRAs involve personal saving on an individual basis, that is, not through the workplace or an employment based plan – which is tax-subsidized in ways roughly similar to those which pertain to employment based plans. Practically speaking there are essentially no meaningful categorical limitations on the investment choices which individuals with IRAs can make and implicitly no motivational ones as well. That is, as a categorical matter, individuals can invest IRA monies in just about anything. Although we have not found figures as to the scale of the activity in this regard, investment of such monies in socially responsible mutual funds is freely open to those with IRAs. So, in the first instance, in the United States at least, tax subsidies are no barrier to untrammelled choice (including choice in terms of certain kinds of non-financial considerations) in this context. Correspondingly, they should not, in principle, be a barrier to it in the context of employment-based plans. Certainly, as discussed above, the fact

that for those Plans' choices are limited from the outset by the Plans' collective character does not fundamentally change the argument in principle, though it does pose challenges of a policy and practical nature effectively to address.

Finally it should be noted that the case for the legitimacy of taking account of non-financial considerations evidence what has in fact occurred with respect to defined contribution plans. For example, according to a 2011 survey and report, "about a quarter of those surveyed either already have an SRI option or, if not, are either discussing adding an SRI option or planning on offering one in the next two to three year" and that "14% of defined contribution plans offered one or more SRI funds."<sup>23</sup> However, that being said, though, that the availability of such choices was deemed permissible was based on advisory letter from the DOL on the subject which hews to the prevailing view that the overarching concern must only be for its "economic value" as it bears upon the "interests of participants and beneficiaries in their retirement income."<sup>24</sup>

### **Part III: Aspects of the Indian retirement system especially as they relate to fiduciary duty and an illustrative government mandated, notional defined contribution plan**

As briefly described above, in large measure retirement plans in United States are "bottom up" – in the sense that establishment of them, their terms, and in some not inconsiderable measure participation in them are the immediate result of individual action. By contrast it would appear that in India plans to date have for the most part had a more "top down character," that is, the foregoing attributes or characteristics are the immediate result of government action. (The relatively more recently established retirement plan – the National Pension System (NPS) – especially that part associated with the citizenry in general rather than public sector employees, although in many respects an artifact of government action, participation is a voluntary matter. It affords space for individual choices related to investment. In a subsequent paper we will explore with regard to the NPS the matters canvassed here.) Insofar as this distinction holds, even though the fiduciary duty-related issues discussed above are in a number of ways similar to those posed in the United States, in other terms, they play out differently. For example, the focus is, in the first instance, on the legitimacy in general of the government's establishment of plans and, in particular, of mandatory aspects of those plans with respect to which interests of plan members might permissibly be advanced (and how). Nonetheless there are possible issues posed as to whether the government or those through whom it acts have fiduciary-like responsibilities with respect to how government directly or indirectly as an investment decision-maker acts ostensibly to protect or advance those interests.

To explore these issues we focus primarily on the three plans (and especially the first of them) – the Employees' Provident Funds Scheme (EPFS), the Employees' Pension Scheme (EPS), and the Employees' Deposit Linked Insurance Scheme 1976 (EDLIS)) – which were up until relatively central elements of the Indian retirement system.

### **The Employees' Provident Funds and Miscellaneous Provisions Act (EPFMPA)**

The origins of those three plans are found in The Employees' Provident Funds and Miscellaneous Provisions Act of March 4, 1952 (No. 19 of 1952) as amended (EPFMPA).<sup>25</sup>

Key provisions of the EPFMPA relating to the three noted plans as authorized and implemented pursuant to that authorization are provided in APPENDIX B (KEY PROVISIONS OF THE EMPLOYEES' PROVIDENT FUNDS AND MISCELLANEOUS PROVISIONS ACT OF MARCH 4, 1952)(AS AMENDED)(EPFMPA). At this point it is important to understand only certain critical aspects of the EPFMPA as they relate to how the EPFS (and the EPS and EDLIS) came to be authorized and established and their terms. They include the following:

Their establishment was occasioned and their terms were set solely by government action (in the form of the EPFMPA). That is, that legislation accorded the executive branch (the “Central Government”) power to establish such plans and set their terms subject to an opportunity for legislative review of the proposed executive branch action and legislative authority to reject or modify it. (Note there appears to be legislative authority to reject or modify *with finality* – that is, without further action of the executive branch – of legislation (or regulations?) proposed by the executive branch would not be permissible within the United States constitutional framework.<sup>26</sup>)

The EPFMPA was highly schematic in terms of the characteristics of the Plans which the government might establish. In turn, the power accorded the executive to specify those terms was far-ranging. More particularly, the EPFMPA states that its aim was “to provide for the institution of provident funds pension fund and deposit-linked insurance fund for employees in factories and other establishments.” It “provide[d] for the institution of provident funds, family pension fund and deposit-linked insurance fund for employees in factories and other establishments.”<sup>27</sup> However, the EPFMPA appears not to define “provident fund” (or for that matter, pension fund or deposit-linked insurance fund), perhaps because there was no need to do so given a broad understanding as to what it was.

The provision of the EPFMPA which authorized establishment of the Employees’ Provident Fund Scheme (EPFS) simply states that it be framed “for the purpose of providing for--

- (a) superannuation pension, retiring pension or permanent total disablement pension to the employees of any establishment or class of establishments to which this Act applies; and
- (b) widow or widower's pension, children pension or orphan pension payable to the beneficiaries of such employees.”<sup>28</sup>

The EPFMPA does not define “superannuation,” “pension,” or “superannuation” except to associate superannuation with a particular age.<sup>29</sup>

The EPFMPA merely states that the scheme as framed “may provide for all or any of the matters specified in Schedule II” (which appears among the legislative provisions).<sup>30</sup> Among other things the language of that Schedule authorizes the executive branch to specify (within certain broad limits) the employees to whom it applies; the contribution rates by employers and employees; how the moneys are to be invested nominally subject to certain limitations discussed immediately below; an interest rate on the moneys contributed to be credited to employees; and the circumstances under which accumulations are payable to employees or under which they may make special withdrawals or take special advances.<sup>31</sup>

In organizational terms the EPFMPA further provides that the executive branch “may... constitute... a Board of Trustees for the territories to which this Act extends (hereinafter in this Act referred to as the Central Board.)”<sup>32</sup> The executive branch has essentially complete control over the Central Board. It appoints all of the Board members, though almost all from legislatively specified categories of potential appointees. Among other things (and quite importantly as we shall see), although the Central Board is to “administer the Fund vested in it in such manner as may be specified in the Scheme” and “perform such other functions as it may be required to perform by or under any provisions of the Scheme,” “the Board of Trustees must “invest the provident fund monies in accordance with the directions issued by the Central Government from time to time.”<sup>33</sup>

In essence, then, the EPFMPA authorizes the executive branch (subject to the noted legislative “veto” prior to implementation) to establish an employment-based plan which provides as described above, which can take only the form of amounts to notional individual accounts into which mandatory employer and employee contributions must be made; which credits the accounts a nominal periodically adjusted “interest” rate of return on those contributions (and any prior accumulations thereon); and which allows under particular circumstances individual account holder “withdrawals” from the accounts (really payments corresponding to certain of the amounts) by individual account holders (or perhaps others designated by the individual).

## **Relationship between investment decision-makers and plan members**

### **Investment decision makers**

The EMFMPA leaves it in the hands of the Central Government who makes which investment decisions on the basis of what criteria. That is, with respect to the EPFS, “the investment of moneys belonging to the Fund [associated with the EPFS]” is to be done “in accordance with any directions issued or conditions specified by the Central Government.”<sup>34</sup> For the EPS the language is somewhat different though arguably has the identical meaning. That is, “[i]nvestment of moneys belonging to [the EPS are]...subject to such pattern of investment as may be determined by the Central Government.”<sup>35</sup> For the EDLIS the same could well be true: it provides that the “investment of moneys belonging to the Insurance Fund [is] subject to such pattern of investment as may be determined, by order, by the Central Government.”<sup>36</sup>

Through its actions in promulgating the EPFS (and the EPS, and the EDLIS as well), the government in certain ways slightly altered who made investment decisions (and the criteria according to which made them, which is discussed below). It did so in connection with the Central Government’s retention and exercise of its power to prescribe what permissible investments were. That is, they were and still are, in the first instance, as prescribed by the EPFMPA, the “patterns of investment” which the Central Government (through the Ministry of Finance or the Ministry of Labour and Employment) announces from time to time. It is only within the ambit of that pattern that there is play for a decision-making role by others.

More particularly, the EPFMPA as amended, authorizes the Central Government (but did does not oblige it) to “constitute...a Board of Trustees for the territories to which this Act extends hereinafter in this Act referred to as the Central Board consisting of the following persons as members, namely:-

- (a) a Chairman and a Vice-Chairman to be appointed by the Central Government;
- (aa) the Central Provident Fund Commissioner, Ex officio;
- (b) not more than five persons appointed by the Central Government from amongst its officials;
- (c) not more than fifteen persons representing Governments of such States as the Central Government may specify in this behalf, appointed by the Central Government;
- (d) ten persons representing employers of the establishments to which the Scheme applies, appointed by the Central Government after consultation with such organisations of employers as may be recognised by the Central Government in this behalf; and
- (e) ten persons representing employees in the establishments to which the Scheme applies, appointed by the Central Government after consultation with such organisations of employees as may be recognised by the Central Government in this behalf.”<sup>37</sup>

The EPFMPA provides that “[t]he EPFS fund] shall vest in, and be administered by, the Central Board.”<sup>38</sup> The Central Board “subject to the provisions of section 6A and section 6C” is to

“administer the [EPFS and EDLIS fund] vested in it in such manner as may be specified in the Scheme.”<sup>39</sup>

The EPFMPA provides for the establishment by the Central Government of an Executive Committee from amongst the members of the Central Board “to assist the Board in the discharge of its functions.”<sup>40</sup> It consists of a Chairman, two Central Board central government members and three Central Board members whom the Central Government appoints, three persons each from among the employer and employee representative Central Board members elected by the Central Board, and the Central Board Commissioner, *ex officio*.<sup>41</sup>

There is a Finance and Investment Committee (apparently) created by the Central Board of Trustees, the responsibilities of which are to:

- “Oversee the investment being done by the Fund Managers of EPFO”;
- “Watch timely investment of trust money with a view to realis[ing] the optimum returns”;
- “Issue such directions, as may be considered necessary, to the portfolio managers in regard to investment/re-investment of redemption proceeds, interest etc. within the investment pattern stipulated by Government from time to time”;
- “Recommend suggestions and changes in investment guidelines to the CBT”; and.
- “Recommend rate of interest to be credited to the accounts of PF members, to the Central Board of Trustees (EPF).”<sup>42</sup>

The Employees' Provident Fund Organisation (EPFO) is a statutory body of the Government of India under the Ministry of Labour and Employment where the Central Board of Trustees (CBT) appears to be housed.<sup>43</sup>

### **Criteria relating to the choice of investments**

As noted, with respect to what became the EPFS, the EPFMPA ostensibly afforded the Central Government a free hand with regard to the choice of investments made in connection with the EPFS. That is, in framing the scheme the Central Government could “provide for all or any of the matters specified in Schedule II.”<sup>44</sup> Among such matters were “t]he investment of moneys belonging to the Fund in accordance with any directions issued or conditions specified by the Central Government”<sup>45</sup>

In 1952, the Central Government exercised its power under the EPFMPA to establish the Employees Provident Fund Scheme (EPFS), making the noted and other specifications. For our purposes we focus on only a few. It mandated in Section 52(1) of the EPFS that the moneys in the Provident Fund “must be deposit” “in the Reserve Bank or the State Bank of India or in such other Scheduled Banks as may be approved by the Central Government from time to time” or “be invested, subject to such directions as the Central Government may from time to time give, in the securities mentioned or referred to in clauses (a) to (d) of section 20 of the Indian Trusts Act, 1882 (11 of 1882)[(ITA)],” “[p]rovided that such securities are payable both in respect of capital and in respect of interest in India.”<sup>46</sup> Note, in this regard, that strictly speaking, this provision does *not* otherwise oblige the investments to be *managed* in a manner consistent with provisions of the ITA; rather, that the only investments which might be permitted are those investments in the banks or securities referred to the cited subsections of s. 20 of the ITA.

On its face, even as amended (many times) the list of permissible securities referred to in clauses (a) to (d) is quite limited.<sup>47</sup> (See APPENDIX C. PRESCRIPTION FOR PERMISSIBLE

INVESTMENTS UNDER THE INDIAN TRUSTS ACT) By contrast, Section 20(f), which was added to the original ITA, permits investment in:

“(f) on any other security expressly authorized by the instrument of trust or by the Central Government by notification in the Official Gazette, or by any rule which the High Court may from time to time prescribe in this behalf.”<sup>48</sup>

But, recall, permission to invest contributions to the EPFS does not extend to subsection (f) investments.

As noted, the Central Government’s prescription with regard to investment of monies in the EPFS (and that for the EPS as well as the EDLIS) is denominated the “Pattern of Investment” (or “Investment Pattern”). Strictly speaking the specific words are used in connection only with the latter two. That it is, with regard to the EPS, the EMFMPA states that it “may provide for all or any of the matters specified in Schedule III.”<sup>49</sup> In turn, Section 7 of Schedule III provides that “[t]he manner in which the accounts of the Pension Fund shall be kept and investment of moneys belonging to Pension Fund to be made subject to such pattern of investment as may be determined by the Central Government...”<sup>50</sup> For the EDLIS, the EMFMPA states that the EDLIS “may provide for all or any of the matters specified in Schedule IV.”<sup>51</sup> Paragraph 2 of that schedule asserts that “[t]he manner in which the accounts of the Insurance Fund shall be kept and the investment of moneys belonging to the Insurance Fund subject to such pattern of investment as may be determined, by order, by the Central Government.”<sup>52</sup> By contrast, with regard to the EPFS, the EPFMPA states only that it “may provide for all or any of the matters specified in Schedule II.”<sup>53</sup> In turn, Section 6 of Schedule II asserts that “the manner in which ...the investment of moneys belonging to the Fund in accordance with any directions issued or conditions specified by the Central Government...”<sup>54</sup> The only reference to the pattern of investment is in connection an exemption provision.<sup>55</sup>

One of the challenges with regard to what in relevant circumstances are allowable investments is that there are three different government sources for the rules which vary in content and to whom they apply. There are prescriptions issued episodically by the Ministry of Finance and the Ministry of Labour and Employment (as well as the Department of Revenue in connection with tax rules relating to the exemption of employer and employee contributions to a plan).<sup>56</sup>

The pattern of the EPFS as well as for cognate private sector employer plans which have applied for and received exemptions from the EPFS is set by the Ministry of Labour and Employment (through the EPFO).<sup>57</sup> By contrast the Ministry of Finance specifies them for what are termed nongovernment provident funds, superannuation funds, and gratuity funds (not discussed here).<sup>58</sup> On the whole in recent years, the Ministry of Finance has prescribed patterns which are more permissive than those promulgated by the Ministry of Labour and Employment (through the EPFO) especially as they pertain to equity. For example, in its investment pattern “issued in 2005 and in 2008 [it] had given an option to the [EPFO] of parking a part of its funds in equities. It had allowed the EPFO to invest up to 5 per cent in equity in 2005 and later enhanced that limit to 15 per cent in 2008.”<sup>59</sup> The Ministry of Finance pressed the latter to follow suit, but it declined to do so.<sup>60</sup> That is during those years EPFO adhered to its 2003 investment pattern of not permitting equity investments and in its latest pattern, issued in 2013, it persisted in that position.<sup>61</sup> By contrast, the Ministry of Finance in 2014 announced a proposed pattern which would further expand the reach of equity investments.<sup>62</sup> According to one report, the Ministry of Finance had “long been pitching for investment of EPFO funds in equity markets to maximise the yields on investments” but that because of “strong opposition from unions against the volatile nature of investments in stocks, EPFO did not opt for equity investment.”<sup>63</sup>

In all events, the investment pattern defines the universe of *permissible kinds* of investments but does not prescribe – beyond the percentage of the portfolio allocated to one or another category kind of investment – what the investments *must* be. So for example, in 2013 the EPFO simply allowed for *up to* 55 percent of new contributions to be made directly or indirectly into certain kinds of government securities and *up to* 55 percent to certain kinds of securities of corporate enterprises, including banks and public financial institutions, term deposits in commercial banks, and bonds of certain development finance institutions.<sup>64</sup>

Within the just described parameters, according to the EPFO, the investment of the monies constituting the Fund are “managed by portfolio managers” who “follow the pattern of investment as notified by the Ministry of Labour & Employment and guidelines as prescribed by the [Central?] Board from time to time. The Performance of the portfolio managers of EPFO is measured against a Performance Benchmark developed by CRISIL in consultation with Investment Monitoring Cell of EPFO.”<sup>65</sup> (We believe but have not confirmed that although for accounting purposes the accumulated assets with respect to each of the three different funds are listed separately, for investment purposes the monies are pooled so that the EPFO’s references to the “Fund” ultimately relate to the moneys associated with the three funds which it manages.). As the EPFO describes it, the Performance Benchmark “is dynamic in nature and captures the daily yields of securities in which investment of EPFO money is permissible as per existing investment pattern and Investment guidelines. It is a very important tool with which we are able to compare the performance of our portfolio managers. It also serves as a reference point for both EPFO as well as for the portfolio managers, giving as indicative minimum yield which could have been generated by investing in the prevailing market in the asset classes permissible as per extant Investment pattern and Investment Guidelines.”<sup>66</sup>

Presumably, investments not only are subject to these constraints but also are informed by the objectives of the EPFS (and, as the case may be, the EPS and EDLIS) or other scheme or plan, a matter which we turn to below.

### **The relevance of “fiduciary duty” issues to the EPFS**

At first blush, the establishment of the EPFS – and it would seem the EPS and the EDLIS for that matter – does not pose any “fiduciary duty” issues in the sense of the model which we have discussed at the beginning of this paper. However, a review of elements of these schemes suggests something to the contrary, or at least that fiduciary duty-related issues are posed.

Consider the following:

The EPFS compels many employers and their employees to make prescribed contributions to an Employees’ Provident Fund (EPF) specially created for the purpose ostensibly only for the benefit of the employees. The form of the particular “benefit” is a claim against the assets associated with a nominal individual account.

The government also determines from time to time broad parameters which define which investments of the contributions are permissible in kind and in some measure amount. The government establishes a Board, the members of which are all government appointees, to make certain investment-related decisions within those parameters. That is, that Board determines which among the permissible kinds of investments may, in fact be made, and in some measure in what amount. The Board then chooses investment managers which make investments within these metes and bounds. Those investment managers are chosen based on an assessment of their ability to produce a level of investment returns in relation to Board-set benchmark returns



and evaluated based on their success measured in those terms. The investment managers have ostensible complete discretion to make investment decisions within these limits (although as discussed below that discretion may be limited). There is no apparent statutory prescription as to how the government must or might set the interest rate which is credited to contributions to and accumulations in EPFS member notional accounts.

On its face the expectation would appear to be that at such time as an EPFS member exercises he or her right to be paid money based on the amounts associated with his or her notional account, that the sum that he or she is entitled to claim is determined by the number and amount of the contributions and the interest credited to them and previous accumulations, regardless of how those contributions have, in fact, been invested. There may be an implicit understanding that insofar as there are insufficient accumulations in the EPF to satisfy any such claims that the government will satisfy them.

Of course, in a number of respects insofar as investments are made with the intent to assure that the obligations to make payments are made to members are satisfied, then the levels at which interest rates are set are correlated with the potential returns from the investments which have been deemed to be permissible.

Here the obligations are ostensibly defined by “interest” credited from time to time to the contributions to and accumulations in EPFS members’ notional accounts. The government specifies the interest credited. It is not clear what informs or guides, constrains, etc. what rate the government sets. Presumably the would-be objectives of the EPFS would be significant in this regard.

However, we note in this regard the broad gauge characterization of a recent comprehensive assessment of the Indian retirement system, namely that “[t]here is no statement of policy objective of India’s occupational pension system or of the roles that the compulsory and voluntary schemes paly in the provision of pensions and retirement income security for Indian workers.”<sup>67</sup>

The question is what might or must inform or perhaps constrain the government ascertain and exercise of the far ranging authority described above. Only the most general guidance in that regard at the constitutional level is found in Article 38, the “Directives on the Directive Principles of State Policy” which provides that the State is “to secure a social order for the promotion of welfare of the people.” More particularly, it provides as follows:

“38(1) The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life.

“38(2) The State shall, in particular, strive to minimise the inequalities in income, and endeavour to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations.”<sup>68</sup>

Only slightly more specifically, Article 41 states that:

“The State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want.”<sup>69</sup>

Beyond that, though, EPFO has in various ways indicated what are the goals or objectives for the investment of contributions to the EPF. They include “providing the members of the Employees’

Provident fund with the best return of the contributions” with an eye to the “safety and yield” of investments<sup>70</sup> and “realizing optimum return” on contributions<sup>71</sup>, doing so attentive to “sound commercial judgment and avoiding funds to be idle.”<sup>72</sup> One commentator has, somewhat by contrast, argued that they are to “ensure complete safety of the subscribers’ moneys and maintain confidence in the provident fund system”; to “channel funds to the government and government enterprises”; and “to pay a reasonable or in fact an attractive return to the employees.”<sup>73</sup>

Some link among goals, interest rates credited as a manifestation or expression of achieving, and patterns of permissible investment geared to meeting them is found in the introduction to a chapter of the EPFO’s Manual of Accounting Procedure. It states that the EPFO must “endeavour...to find ways and means of providing the members of the Employees’ Provident fund with the best return of the contributions and in the process to adopt the basic parameters of Investment viz. safety and yield.”<sup>74</sup> It refers to having constituted a Finance & Investment Committee “to watch the collection and timely Investment of Trust money with a view to realizing optimum return thereon.”<sup>75</sup> It asserts that the EPFO, in “considering the need for increasing the rate of interest payable to the subscribers and also under certain other circumstances, may recommend to the Central Government for modification in the [investment] pattern which will enable the Fund to derive additional yield towards Interest.”<sup>76</sup> Later in the document, after it states that the EPFO’s funds must be “invested as per the pattern of investment prescribed by the Government,” it adds that “[t]he investment decisions are to be taken with maximum emphasis on safety, optimum return, sound commercial judgment and avoiding funds to be idle.”<sup>77</sup> The EPFO, in its tender for expressions of interest in appointment as a fund manager asserts that “[i]t has to be insured by the Fund Manages that the funds are invested to get the optimum returns.”<sup>78</sup>

The views as to goals (and related investment issues) have overlapped but in some ways gone beyond what is articulated above. For example, some have suggested that “[t]he Finance Ministry currently mandates the investment pattern for [pension fund] trusts with three possible investment objectives a) Safety b) Captive demand for government paper and c) Ability to influence interest rates.”<sup>79</sup> Insofar investment has been driven by the first consideration the choices have been questioned by one commentator. That is “[t]he investment pattern seems to equate ‘public sector’ with safety irrespective of the actual credit rating of the enterprise. The guidelines allow[] investment in any public financial institution or public sector company without reference to its rating.”<sup>80</sup> This approach to the investments which are allowed could be the result of the second and third considerations coming into play. More generally that commentator has echoed the broad gauge assessment referred to above, that the “[o]bjectives” for investment are “not explicitly defined.” He can only suggest that they “[a]ppear to be to “[e]nsur[e] complete safety of employees’ funds and confidence in the system”; “[c]hannel funds to Government sector; and “[p]ay a reasonable return to the employee.”<sup>81</sup> In the notes to his Power Point, he suggests something slightly different: “First, ensure complete safety of the subscribers’ moneys and maintain confidence in the provident fund system. Second, to channel funds to the government and government enterprises. And third, to pay a reasonable or in fact an attractive return to the employees.”<sup>82</sup>

Insofar as the practice of fund trustees (or exempt fund trustees, per the discussion below) is concerned the (similar) perception is that “[p]ension funds in India do not have a well-articulated mission statement.”<sup>83</sup> At the extreme, fund actions are simply reduced to efforts to comply with the ostensible “rules of the game, that is, “[e]ven if not articulated, trustees often see their primary mission as compliance with the myriad guidelines and regulations. With respect to investments, the primary objective is usually to achieve the investment pattern prescribed, while a secondary objective is to achieve a least the return declared by the government provident fund.”<sup>84</sup> The result of the pressure to invest in accord with that pattern appears to have meant that the focus has

always been on 'return' rather than 'risk'. Pension fund sponsors and trustees tend to see themselves as 'return maximisers' rather than as 'risk controllers.'<sup>85</sup>

What does the foregoing suggest with respect to fiduciary duty-related requirements?

At first blush, given the cited provisions, within the Indian constitutional context it is legitimate for the government to establish a plan like the EPFS (among others) which requires contributions from employees and employers (for the sole benefit of employees) in the service of providing some assurance that plan members will have certain financial resources in their old age; that is, to provide them with a "benefit" in the form of assets resulting from contributions and associated with investments thereon. We say associated because the claims to such benefits are determined by the "interest-rates" (specified by the government) which are credited to member account balances. It would appear that regardless of how contributions are invested that the outcomes of those investments for plan members might well be assured – or perceived to be assured - by the government in that members are able to draw amounts up to those amounts determined by the pattern of contributions and the credited interest rates. (That is, arguably there may be a government "guarantee" that the sums contributed and credited will in fact be paid regardless of the status of the EPF.)<sup>86</sup>

At the same time, there would appear to be no obvious defined goals in terms of the accumulations which the plan is intended to achieve. In part, there may be implicit judgments with regard to the choice of interest rates credited in relation to inflation and, perhaps in turn, some implicit judgment as to sought-for minimum accumulations in real terms. That being said, though, it would appear that there is ostensible government discretion with regard to the level of contributions required and perhaps as well the conditions which determine when withdrawals can be made and in what amounts.<sup>87</sup>

In the first instance, then, the EPFS would arguably not give rise to a fiduciary relationship understood in the terms outlined at the beginning of this paper. At minimum this assessment would seem to be the case because there appears to be involved here no pre-existing legal capacity of a plan member with respect to which the government or any entity or persons through which it acts exercises any authority (let alone discretionary authority). Certainly it is true that a plan member had the legal capacity to dispose of the monies that he or she might be compelled to contribute. However, payments compelled by the government are hardly unusual. The government, through compulsory taxation completely supplants the rights anyone has to money which he or she pays in the form of taxes. In many cases those monies are placed in a common pool with similar kinds of (and sometimes other) revenues to be used for such purposes as the government designates. In other words, the individual (personal) character of the payments is completely negated/lost. Absent some extraordinary circumstances the individual would have no legal recourse to challenge the compulsory payment or to the subsequent disposition of the monies collected.

The fact that there are employer contributions does not change the picture. In the absence of the EPFMPA and the EPFS, an employee would have no pre-existing right to such sums as the employer is required to contribute. (Indeed, the EPFMPA makes clear that the amounts representing employer contributions cannot have come from employee wages or salaries, though it is not clear in practical terms how that might be or has been assured.<sup>88</sup>)

However, it can be argued that this situation is different. To be sure, and again in the absence of extraordinary circumstances, the government would have plenary authority (as it essentially had in this case) to establish the EPFS as it did, including the authority to require contributions.

However, the government chose to establish a plan in which individuals are accorded a certain kind of legal capacity/rights to – that is the right to withdraw – cash from the plan. (The overall sum available for withdrawal is determined, among other things, by the pattern of contributions, interest credit rates and perhaps the investment decisions with respect to them.) Thus, even though plan members would not have any relevant pre-existing legal capacity/right associated with what was contributed to the plan, the question arises whether the creation of these individual plan member legal capacities/rights in connection with the establishment of the plan gives rise to fiduciary/fiduciary-like relationship and concomitant responsibilities in relation to the interests implicated by those rights. That is, does the government (or do those individuals through whom it acts) have certain responsibilities with regard to the investment of the contributions especially as they pertain to their bearing on the ultimate value of members' claims and/or the security of those claims?

It could be argued that insofar as the government is the guarantor – or close to it – of such claims that would moot any fiduciary/fiduciary-related responsibilities. Note that in the U.S. private sector context, for defined benefit plans, notwithstanding employers being deemed to be effectively guarantors of pension payments, that does not render moot decision-makers' responsibilities with respect to investing contributions to those plans having fiduciary responsibilities. However unlike the members of such plans, members of the EPFS have monetary claims far less defined than those claims of defined benefit plan members (in the form of pension payments) with respect to which fiduciary/fiduciary-like responsibilities might arise: their ultimate claims depend upon nominally discretionary government decisions from time to time as to the interest rate to be credited. And as a constitutional matter it might not be thought appropriate to limit government authority to change benefits or not abide by guarantees.<sup>89</sup>

The foregoing points might suggest that the case for assigning fiduciary/fiduciary-like responsibilities to the government as such is not great and, in turn, similarly so for imposing duties on the Board (acting at the behest of the government). However, there are some countervailing considerations. Recall that the 2013 Ministry of Labour and Employment declaration as to the investment pattern for monies in the Fund states that “the investment of the Funds of a Trust is the Fiduciary responsibility of the Trustees and needs to be exercised with appropriate due diligence” and that as such, “the trustees are solely responsible for the investment decisions taken in accordance with the [specified] pattern of investment.”<sup>90</sup> Recall also that the EPFMPA explicitly provides for the establishment of the Board, characterizing it in terms of being a trust. Moreover with respect to investment decisions, as described, the EPFSA specifically mandates only certain permissible choices of investments among only those investments listed in s. 20 of the India Trusts Act (ITA). As noted, strictly speaking, the literal language of the EPFSA does *not* seem to mandate compliance with all the (relevant) provisions of the ITA, among them those terms relating to fiduciary-duty-like requirements. However, the reliance on the ITA, the references to a trustee and trustees in the EPFMPA and the EPFSA and the specific mention of fiduciary duty in the announcements of investment pattern in combination strongly point to the relevance of a fiduciary duty-related standard to investment decision-making, particular as it concerns trusts.

With regard to the scope of that duty, strictly speaking the words about “due diligence” in the announcement of the investment pattern as to fiduciary relate to what we refer to above as the duty of care, not the duty of loyalty. Perhaps the latter in some measure speaks for itself given the nature of the plan. That is, decisions are to be made in view of the interests of plan members at least in the sense of achieving returns commensurate with the interest to be credited, the ostensible purpose being to assure that there are monies available to meet withdrawals by plan members. Assuming the government is a guarantor of the claims to the withdrawal of assets, arguably insofar as notwithstanding that guarantee there is a residual risk to those claims being

met then members' interests would be at stake. Of course, as noted, given the discretion of the government in setting the investment pattern and other terms of the plan which ostensibly specify what those interests are, the metes and bounds of members' interest in such claims are not well defined. It should be noted here that at a certain level of generality the interests (such as they are defined) of members are the same. However, because the plan includes members in different cohorts according to the time of commencement and the duration of their participation, investments calculated to ensure meeting commitments to earlier cohorts may be in tension with those investments taken to comply with commitments to later ones. If so, then even if we are only concerned with the choice of investment patterns there may be tensions within the duty of loyalty arising from the more specific, different interests of distinct cohorts.

Even with regard to the former, the specifically cited duty of diligence (or duty of care), the interests of members in some measure come into play. That is, diligence or care must be exercised with respect to the achievement of a particular goal or outcome. As we have seen, however, the outcomes understood as claims to withdrawals are not well-defined. In addition, regardless of what member interest is associated with withdrawals, it would seem obvious that those individuals with decision-making authority cannot make decisions with their own or other (non-member) interests in mind.

Before we proceed further along these lines we need to attend to who might have a fiduciary-like or related role and corresponding duties, that is, the government as compared to others. Arguably, the government is not acting as a fiduciary in establishing the plan and setting and changing its terms (which would include, among other things, the level of contributions and interest rates credited). Seemingly only in its role in defining the universe of possible investment choices might it be thought to be acting as a fiduciary (though as noted above, there are arguments which suggest that no such designation for the government is warranted). However, that is not necessarily the case. In the context of the U.S., there has been some controversy over whether actions by private employer sponsors in terminating or changing the terms of plans should be deemed to be actions of a fiduciary nature rather than seen as having a "settlor" character (in the parlance of trusts). Although the DOL and the U.S. Supreme Court have largely characterized such actions as non-fiduciary, the arguments in that regard have not been especially compelling and it might be appropriate to assess them differently in the Indian context. (We reprise some of the arguments in APPENDIX D (MATERIALS RELATING TO WHO ERISA DEFINES AS A "FIDUCIARY")). If so, then it could be contended that government's modification of the terms of the EPFS (or the EPS or EDLIS for that matter) is fiduciary in nature. It should be noted that the debate in the U.S. as to this issue played out in the context of defined benefit plans. However, there are critical issues of this sort which pertain to defined contribution plans which have not yet been seriously explored. How those issues might be resolved could be of particular importance to the understanding of fiduciary duty as it relates to the relatively more recently established National Pension System which embodies a defined contribution plan design. We hope to address them in a subsequent paper.

In all events, whatever the import for the government as such of its role in establishing and defining the terms of (and perhaps altering) them, the Board, in exercising of such authority as it has to determine the kind and amount of the broad classes of investments from among those investments permitted by the investment pattern (and ultimately the ITA), might be viewed as playing a fiduciary role. In turn, since the authority to make decisions within those broad constraints as to specific investments is delegated or accorded to asset managers they would have fiduciary responsibilities, though ones cabined by the parameters set ultimately by the government and most immediately by the Central Board. That is, under current practice, the

investment choices available to them are far narrower than, say, those choices allowed to be made by defined benefit plan investment decision-makers in the United States.<sup>91</sup>

The preceding discussion has not quite explicitly stated so but it might seem to most readers implicitly to have been concerned only with investment decision-making as it pertains to the financial risks and rewards of particular investments (and investments in the aggregate). As noted, the legislation cited here barely makes reference to the ostensible goals/outcomes of the plans. However, the context of the wording of that legislation and other documents pertaining to its implementation suggests that its focus would arguably seem to be concerned exclusively with financial outcomes (and arguably related issues of financial risk and reward). As such that would imply that insofar as members' interests are to be vindicated – and perhaps insofar as there are fiduciary-duty-like responsibilities imposed to vindicate them – those interests are solely of a financial nature.

Certainly such conclusions are more than plausible. Insofar as they are certainly there are a range of questions posed, among them ones that might typically be thought to fall under the duty of care (or diligence), for example, the relevance and weight of various propositions, theories, beliefs, etc. as to investment in general and investment in this particular context as well as innumerable practices associated with the foregoing taking concrete form.

However, the fact that such concerns are prominently posed does not necessarily mean that interests of a different sort could be implicated. As noted above, the EPFMPA was presumably enacted pursuant to broad gauge government authority established/defined by the Indian constitution, at least such authority as was concerned with the fate of Indians during their “old age.” But it is clear that the government draws wide-ranging sanction from the constitution to act to achieve innumerable and quite diverse goals. In the first instance, then, plans might be established with some among those other goals in mind. Indeed, although there would appear to be nothing explicit in this regard, government choices and actions tend to point to the strictures of s. 52 of the EPFS Act and the investment patterns promulgated pursuant to them being informed in some measure by concerns that investment of Fund monies be made within India in general and in particular kinds of institutions in India. At least in part that would be out of a desire to strengthen the Indian economy in general, Indian financial institutions generally and certain among those institutions, perhaps to some degree Indian financial markets, etc. Pursuit of such aims would hardly seem to be unusual given similar practices in many other countries, particularly developing nations. In some measure acting in light of such other purposes might be seen as apposite with outcomes for EPFS members in that a stronger, more vibrant economy, financial markets, financial institutes, etc. would be conducive to greater returns and perhaps less risky investments in enterprises operating within that economy; to better enabling employers and employees to make greater contributions with yet greater withdrawal claims as a result; and strengthening the government's ability to fulfill any guarantee it made have with respect to the EPFS. Indeed attention to considerations in certain ways has been pressed in India, a matter which we address at length below.

For the moment, though, we observe that there might be thought to be warrant for taking account of such other goals independent of their affirmative bearing on outcomes for individual EPFS members. As noted, the government has extensive authority with respect to many different aspects of the welfare of those people who live in India. In turn, in the pursuit of increasing their welfare in old age the government might be concerned with doing so in a way which is apposite with exercising its authority (and meeting its responsibility) to advance members' welfare in other ways. Perhaps the most obvious concern would be investments of Fund contributions in enterprises which violate Indian law. Certainly, there are obviously well-established means to

deter, punish, or otherwise respond to such violations. However, active consideration – during the investment decision-making process and subsequent to any decision to invest in an enterprise – of a company’s past, current, or potential practices which violate law might be justified on normative, reputational, and/or substantive grounds. To be sure, taking account of such considerations might have negative import in terms of financial risks and rewards. But such trade-offs as there might be – with respect to which there would need to be clarity and transparency – might be thought to be justified.

At a one-step remove from acting in this way would be to taking account such considerations as a means for advancing one or another policy in another area, e.g., in the face of the consequences of climate change, making investments in sources of renewable energy or in light of concerns about the adequacy of sources of water, investing in enterprise which use it sparingly. Here, too, tradeoffs would be posed and an even greater premium might be put on the clarity and transparency of judgments made with respect to them. To be sure, beyond those cautionary actions there would need to be close attention to sufficiently cabinining in the exercise of judgments of that sort given the risks of actions being based on decisions not adequately attentive to the immediate interests of EPFS members and being unjustifiably attentive to the interests of the decision-makers or third parties.

As noted, on its face, the EPFMPA makes no reference to actions of the sort just described. That might be read to mean that they are presumptively impermissible – though possibly the reverse. The government might choose to take some such actions so animated and await any challenge. Given the somewhat unusual arrangement for the establishment of plans, it is not clear what form the challenge might take. Recall that under s. 7 of the EPFMPA, in the event the government “add[s] to amend[s] or var[ies] either prospectively or retrospectively, the Scheme, the Pension Scheme or the Insurance Scheme,” the changes must be laid before both Houses of Parliament which, if they act in concurrence can either bar or modify. An interesting question is what government action would be deemed to constitute an addition, amendment, or variation which would trigger that legislative authority.

### **Schemes Exempt from the EPFS**

Given the terms of the EMFMPA and implementing legislation, as described above, it is not surprising that the preceding discussion has focused primarily on the role of government with respect to investment decisions. However, there is provision in the system for a greater role for private actors. More particularly, relevant provisions of Indian law allow, under specified conditions, for exemption of certain establishments and their employees from the EPFS (and the EPS and the EDLIS) and in some measure private governance and management with respect to the investment of monies collected consistent, broadly speaking with the provision of equivalent or better plans. It is important to attend to the relevance of fiduciary-related duties in that context and their import for such duties as they pertain to the plans directly managed by the government (through the EPFO).

Here we focus on the EPFS. According to Section 17 of the EMFMPA the government may exempt an establishment and its employees from the EPFS if the establishment operates a pension scheme “where the pensionary benefits are at par or more favourable than the [EPFS].” Section 39 of the EPFSA restates the point with respect to the EPFS, namely, “[t]he appropriate Government may grant exemption to any establishment or class of establishments from the operation of this Scheme, if the employees of the establishments are either members of any other pension scheme or proposed to be members of a pension scheme wherein the pensionary benefits are at par or more favourable than the benefits provided under this Scheme.”

As for the matter of investments by an exempt scheme, section 17 of the EMFMPA provides, however, that an exemption is permitted “subject to the condition on the pattern of investment of pension fund and such other conditions as may be specified therein.” Subsection (2) of Section 27A of the EPFSA, states the matter more broadly, namely, that the employer must “invest provident fund collections in such manner as the Central Government may direct.” Further, again quite broadly, according to Section 27AA of the EPFSA the exempt scheme is “subject to the terms and conditions as given in the Appendix A.” In turn, Paragraph 17 of Appendix A to the EPFSA provides, among other things, that “the Board of Trustees” (discussed further below) “shall invest the monies of the provident fund as per the directions of the government from time to time.”<sup>92</sup>

The foregoing language does not seem absolutely to require but it would appear that in practice the pattern of investment set by the Ministry of Labour & Employment/EFO for the government run plans under EPFS applies to any private plan created in connection with an exemption from the EPFS.

Other than the just quoted ones, there appear to be no other explicit references of this sort relating to *which* investments are permissible. However, there are provisions which concern the governance and management of the exempt schemes which have a bearing on that.

More particularly, Paragraph 1 of Appendix A to the EPFSA states with respect to an exempt scheme that the employer “shall establish a Board of Trustees under his Chairmanship for the management of the Provident Fund according to such directions as may be given by the Central Government or the Central Provident Fund Commissioner, as the case may be, from time to time.” Moreover “[t]he Provident Fund shall vest in the Board of Trustees who will be responsible for and accountable to the employees’ Provident Fund Organisation, inter alia, for proper accounts of the receipts into and payment from the Provident fund and the balance in the custody.” The vesting language is complemented by the requirement of Paragraph 18(a) of Appendix A that “[t]he securities shall be obtained in the name of Trust.”

In other words, certainly *the cited language of the EPFS seems rather clearly to require establishment of an entity responsible, among other things, for the investment of contributions, which takes the form of a trust.* If so, it would seem to follow that in the first instance the requirements of the ITA would apply to that trust.

In APPENDIX E. (SELECTED TRUSTEE DUTIES UNDER THE INDIAN TRUSTS ACT 1882 (AS AMENDED)) we highlight certain provisions of particular relevance here. All but one in some way define the responsibilities of trustees in terms apposite with those responsibilities discussed above in terms of the duties of loyalty, e.g., “[a] trustee may not use or deal with the trust-property for his own profit or for any other purpose unconnected with the trust”<sup>93</sup>; and diligence or care, e.g., “[a] trustee is bound to deal with the trust-property as carefully as a man of ordinary prudence would deal with such property if it were his own”<sup>94</sup>. At first blush, then, if pursuant to exemptions to the EPFS employers establish (equivalent or better) plans and the monies in those schemes are deemed to be/must be held in the form of trust, then such provisions would appear to be applicable to the trustees of those schemes.

The question arises then what if any import conformity of exempt funds with the ITA has for the trustees of the EPFS. Because the exempt scheme is in effect seen as a substitute for (or equivalent of) the EPFS one would think that both would be governed and managed according to the same standards. It could then be argued that insofar as exempt funds must be organized as trusts and, in turn, operate in compliance with the ITA so, too, must the fund administered by the



Board. However, it could be contended that this conclusion is in some measure in tension with the fact that the EPFMPA authorizes but nominally does not oblige – because the operative word is “may” – the government to establish a Board of Trustees for such provident fund scheme as it elects to create. That being said, though, the response could be that the government, pursuant to its authority under the EFMPA, promulgated the EPFS and in fact established such a Board of *Trustees* so in and of itself necessitated application of the ITA to the Board’s actions. However, as noted, while in fact the EPFSA makes reference to the ITA, it is only with respect to certain parts of s. 20 of the ITA, sections concerned with certain permissible investments. This limitation in conjunction with the plenary power accorded the government in formulating any EPFS-like scheme and the sweeping authority which it retained under the EPFS would militate against automatic application of all the strictures of the ITA.

#### **Part IV. Some Preliminary Observations**

Within the compass of the particular illustrative retirement schemes – one from the U.S. and one from India – considered here, though surveyed with an eye to the underlying context.– particularly the legal context in the respective countries – a parallel or related set of questions are posed with respect to the two.

As noted, the U.S. example is fairly typical of retirement schemes in the U.S. in that they are typically established in a bottom-up way. That is, they are in the first instance created ostensibly by virtue of private, voluntary action. As a result, the questions which arise are ones which concern the nature and legitimacy of government action/law insofar as it in some measure honors or overrides the arrangements made/understandings or agreements reached by virtue of seeming private, voluntary agreement.

In that context, it seems almost natural, in answering questions as to the role and responsibilities of retirement scheme investment decision-makers, to appeal to constructs drawn from private law in general and relationships which give rise to fiduciary duties in particular. This reasoning is based on the would-be similarity of the nature of the relationships underpinning such voluntary retirement schemes and those which are associated with certain kinds of fiduciary roles and responsibilities. Of course the latter relationships are quite varied. In turn, what are thought to be fiduciary roles and responsibilities entailed by them differ widely. We have noted that as an historical and in some measure conceptual matter fiduciary duty constructs associated with trusts and trust law have seemed to afford the “right fit”. We have suggested here and elsewhere that such appeal is if not dubious, problematic in that the relationships which underpin retirement schemes are often quite different from those relationships on which trusts are grounded.

Holding that point aside for the moment, trust law might be seen as being focused on enabling or facilitating the purposes of those individuals who have constituted the trusts and advancing and protecting those individuals with interests in the corpus of the trust which were created and/or are otherwise implicated by virtue of that constitutive action. Hence, the body of arguably similar law and policy applicable to one or another kind of retirement scheme would likely have similar purposes. The result might be, in the name of the foregoing, restructuring by the government of the terms of the relationship and/or re-formulating of the fiduciary-duty like roles and responsibilities of investment decision-makers as defined by the agreement/understanding. However, government might also act in the name of advancing or protecting the interests of others. That is, the existence and operation of the (perhaps trust-like) arrangements which the scheme represents might have implications for others, account of which government might legitimately and properly take. The “others” might be closely linked to the scheme, for example, there might be provisions for protections for spouses or children of plan members. Or they could

be plan members and their employers in their more encompassing employee-employer roles insofar as the government has an interest in the stability, economic efficacy, etc., of workplace relationships overall, only one aspect of which is associated with the retirement scheme. Or, as noted, government could have a considerable interest in schemes insofar as they are or might become significant in economic, social, environmental, or other ways by virtue of the footprint of their investments. As we have seen, in the first instance, government might do so by means of the exercise of regulatory power. However, it may for similar reasons also employ its power to tax (and to spend) to both deter and incentivize the (otherwise) voluntary establishment of plans, the purposes or goals for which they are created, the structure of the relationships associated with them, and/or the terms according to which they operate.

We explored how this system has operated in the United States in the context of ERISA. More particularly, we have seen how that legislation (1) requires that private sector occupational retirement plans be structured so that the monies are held in the form of a trust; (2) determines which actions by retirement plan investment decision-makers to which fiduciary-type duties attach; (3) mandates that in significant, though not in an exceptionally well-defined way that those duties are defined by trust law; (4) nonetheless, in recognition of the distinctive nature of the relationship underpinning those plans, envisions and permits an override of certain aspects of trust law as they relate to the permissible terms of the trust and the duties of trustees according to the body of trust law; and (5) correspondingly commands in some not insubstantial, though ill-defined way, that the duties of investment decision-makers have a character commensurate with that relationship. We have also touched on how the government has used not only its regulatory power (in the form of ERISA) but also its taxing (and spending) power to shape the terms of private sector retirement plans and the roles of investment decision-makers in the name of policy goals which relate primarily to ensuring fulfillment of the goals of retirement plans as such and improving the financial well-being of individual workers in retirement and in some measure, shaping the character of employment relationships of which retirement plans are a part. (Recall in this connection the concern/importance to legislators in enacting ERISA and courts and the DOL about interpreting it in a way which interfered with the ostensible “voluntary” character of the establishment, terms, and operation of retirement plans.)

Ostensibly in pursuit of those goals, however, depending upon how ERISA is read it has also necessarily resulted in some government override of “voluntary” arrangements for retirement plans. The very fact that the holding of the assets of the plans must take the form of a trust and the (sort of) presumption of the application of the rules of trust law is a cardinal point in that regard. At the same time, explicit legislative overrides of a number of typical aspects of trust law insofar as that body of law defers to certain ostensible voluntary choices in the context of conventional trusts – thought likely justified as being ostensibly in the service of advancing and protecting the interests of plan members – are illustrative of the point many times over.<sup>95</sup> In certain respects, the provisions of ERISA we have discussed, specifically in connection with investment decision-making which appear under the “fiduciary” rubric are of a similar character.

Arguably one of the most striking interventions is reflected in the general, opening requirement of the 29 U.S. Code § 1104(a) that a person deemed to be a “fiduciary” must “discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries.” At first blush these words simply honor and respect the terms of voluntary arrangements or agreements, that is, they presuppose that the plans which are the subject matter of ERISA were (voluntarily) constituted to serve *only* the interests of plan members (and in certain ways plan beneficiaries). If so, then it would seem indisputable that those individuals who are termed fiduciaries by virtue of the discretionary power accorded to them pursuant to the plan and who are thereby in distinctive position profoundly to affect those interests must keep them uppermost in their minds

in exercising that power. Nonetheless, as suggested above, while the barrier to insisting so might quite justifiably be thought to be extremely high, it might be argued that the nature of retirement plans is such that fiduciaries must necessarily take account of some over-arching public interest. That interest might have a positive or negative character. An example of the latter case involves restrictions on a retirement plan having no greater than a certain equity stake in an enterprise in which the plan invests even though it would be in the financial (or other) interests of plan members or beneficiaries to have a larger one. A case of the former would involve some affirmative obligation for the plan to invest in certain kinds of enterprises even though not doing so would otherwise be seen to be more in the financial (or other) interests of those members or beneficiaries.

But ERISA not only eschews a need for fiduciaries to take account of other interests but also, in a spirit seemingly contradictory to the ethos of honoring or respecting parties' voluntary choices, narrows or limits the kinds of plan member or beneficiary interests which fiduciaries are permitted to protect or advance. Here we are referring to the overlay of the requirement of 29 U.S. Code § 1104(a)(1)(A) that the fiduciary must "discharge his duties with respect to the plan... for the exclusive purpose of...providing benefits to participants and their beneficiaries." That is, ERISA limits fiduciary actions to just seeking outcomes as they concern "benefits." Given the historical and other context for ERISA, the "benefit" is perhaps not surprisingly thought to mean a benefit in a financial sense. That is, it connotes either a stream of financial income or an accumulation of financial assets upon which claims can be made. However, we have argued elsewhere that such is not necessarily the case. That is, on a broader, but still relatively narrow reading of that context, we would suggest that workers (and their employers) have not insubstantial interests in how the operation of their plan bears upon the enterprise (associated with the establishment of the plan) in general and the employment relationships which underpin it in particular. We go further to point out that although individuals as plan members (and beneficiaries) have interests by virtue of that status, they have other interests as well, ones to which, at first blush, they might be alert in connection with the operation of the plan. Although we acknowledge that there might be a number of very good reasons why decision-makers might be barred from taking cognizance of those other interests, the point is that such conclusion is not a necessary one. Rather it reflects judgments about priorities and the possibilities for practical implementation of them. ERISA represents just one among many possible ones.

There are two other sets of considerations which bridge the meaning and import of the just quoted portions of 29 U.S. Code § 1104(a) and certain of the others. One pertains to the language of 29 U.S. Code § 1104(a)(1)(B) the fiduciary must "discharge his duties...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 a like character and with like aims." As noted, this nominally circular formulation – because it has a "prudent man" acting, among other things with "prudence" – is predominantly if not overwhelmingly concerned with matters of competence writ large. That is the fiduciary must have the requisite knowledge and tools ("skill"), apply sufficiently in an ongoing way ("diligence"), in doing so, give serious attention or consideration to all the potentially relevant aspects of the matter at hand (use "care"). By contrast (and ignoring the matter of the circularity of the formulation), insofar as "prudence" has a distinct meaning it would seem to be more akin to the exercise of a form of judgment in the sense of "the ability to make considered decisions or come to sensible conclusions"<sup>96</sup> or perhaps wisdom in the sense of "soundness of...action or decision with regard to the application of experience, knowledge, and good judgment."<sup>97</sup> That is, in the present context, the decisions to be made are ones which implicate very important interests – at minimum, financial ones – of plan participants and beneficiaries. These decisions can involve complicated yet uncertain scenarios which might play out in potentially sharply differing ways with perhaps drastically different import

for those participants and beneficiaries as a group and perhaps between and among them as individuals (raising issues of equity and fairness within and perhaps across generations). In such situations the call would be for more than skill, diligence, and care.

If these factors are the parameters according to which the actions of those individuals termed to be fiduciaries are to be held to account there still remains the question of the benchmarks for sufficiency or adequacy in those terms according to which their conduct is to be assessed. For example, the benchmarks can be absolute or relative ones. The choice represented by ERISA is a relative or referential one, that is, the conduct is to be viewed in relation to that of others who are similarly enough situated, that is those who “act[]...in a like capacity” with respect to an “enterprise [or endeavor] of a like character” which has “like aims.” Arguably such a formulation would seem to require some serious attention as to what capacity, character, and aims are at play in the retirement plan context. We would suggest that such has largely not been the case in the United States. Rather the distinctive fourth specified element or aspect – that of prudence – was pretty much dropped. Instead, primary attention was given to matters of technical investment knowledge and skill though reinforced by attention to the importance of sufficient diligence and care; (2) that the referential group or community was more typically that of the financial service providers, for example, asset managers and consultants, and a supporting or symbiotic array of academics and researchers with closely aligned views as to what counts in investment decision-making. We think that in certain respects the insistence that fiduciaries focus only on financial outcomes and the reliance on such a reference group or community have operated in tandem.

We also believe that in some measure the emphasis on financial outcomes as they concern retirement plans has operated in conjunction with ostensible exclusive stress on the profitability of (for profit) enterprises. That is, there has been a long-running, intense and sharply contested debate about the legitimacy (if not the necessity) of what are understood to be for profit enterprises seeking outcomes other than ones concerning profitability. That is a debate neither which we canvas nor on which we will offer a perspective here. However, it would seem that problems are posed when there is not a “match” between the investment goals of retirement plans and the goals of the enterprises in which they invest. That is, if other than profit-related goals were permissible and pursued by enterprises then investments in such enterprises by retirement plans focused only on financial returns would be problematic. Conversely, if plans could and did attend to other than financial returns then investing in enterprises focused solely on profit-related outcomes would be a challenge. In at least that sense, then, discussion as to the permissible goals of retirement plan investments must necessarily be part of a larger or broader conversation. We explore some of these issues in greater detail in APPENDIX F (THE MATCH BETWEEN INVESTMENT GOALS AND THE GOALS OF ENTERPRISES IN WHICH INVESTMENTS ARE MADE).

The last element of the ERISA formulation for fiduciary duty, that relating to diversification – according 29 U.S.C. §1104(a)(1)(C) the fiduciary must “diversify[] the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so” – is a curious one given how little attention appears to have been devoted to it in the legislative process but the considerable weight which has in practice been placed on it. That is, ERISA’s formulation would appear to amount to little more than the nostrum about not putting all one’s eggs in one basket.<sup>98</sup> By contrast, as an historical matter, the reference to diversification has been the foil for importing complex investment practitioner and supporting academic machinery – for example, the Efficient Markets Hypothesis (EMH), Modern Portfolio Theory (MPT), and the Capital Assets Pricing Model (CAPM) and variants thereof – in the service of diversification (among other things). That is not to say that such machinery was and remains relevant – perhaps even quite relevant in that regard if properly formulated – but rather to

recognize that in some (perhaps) not inconsiderable measure its use, in the first instance, is only loosely linked to the original understanding of what was needed or required in those terms. In addition here is a risk of unwarranted reliance on these formulations; that is, unwarranted because they do not give sufficient attention to the unique nature and corresponding distinctive investment-related needs and concerns of various kinds of retirement plans. Moreover, the point is important for another reason. The would-be demands of diversification seemingly compelled by that machinery have been one basis on which consideration of other than financial outcomes from investments has been rejected, that is, taking account of such other outcomes is not infrequently said to be harmful to the achievement of (needed) financial outcomes which that machinery might be thought to yield.

As suggested above, questions of the sort just described have largely been posed and explored in the context of defined benefit plans. In that regard there are insights to be gained in that regard for the Indian experience. They might be most useful as they relate to such plans, for example thinking with respect to the EPS and perhaps as well, unregulated voluntary occupational (defined benefit) pension schemes. In doing so one might need to be alert to the would-be “top down” character of the former and ostensible “bottom up” nature of the latter. (More on that point below.) At the same time, we have seen that particular choices were made in the U.S. context which need not necessarily have been made and in retrospect might not have been the “best” from certain perspectives. In turn, then, India has the opportunity to make different choices in light of its understanding of its particular circumstances, needs, and priorities.

Although we selected as the U.S. example for this paper a voluntary employment-based defined contribution plan, there has been far less consideration of the nature and scope of fiduciary duty with respect to them. In part that has been because defined benefit plans long dominated the employment-based retirement plan landscape from before the time of the enactment of ERISA until a decade or so thereafter and the language of ERISA largely resonates with that of defined benefit plans. Perhaps one result of that discussion of fiduciary duty in the defined contribution context is that it has had a negative or secondary character. That is, it has been less a matter of affirmatively defining what fiduciary duty is in that context and more one of determining when the strictures of fiduciary are *not* applicable. In that context, a critical consideration has been that of “control.”<sup>99</sup> That is whether those strictures apply to those individuals who with some role with regard to the investments, e.g., trustees of the plan, is evaluation based upon whether plan members themselves have sufficient degree of control over the investments. Sufficiency of control is assessed in terms of the menu of investment choices from which plan members are able freely to pick. In turn, the assessment adequacy of the menu in those terms is related in some relatively broad gauge way to the potential ability of the plan member – by virtue of his or her selections from among the available ones – to achieve certain kinds of financial outcomes. That is, whether the demands of fiduciary duty have been met is evaluated in terms of the ability of plan members, given the menu of choices, to achieve financial security in retirement goals. One serious challenge, of course, is defining with sufficient specificity/clarity what those goals are. In the first instance the conversation seems to have been cast in terms of the prospects for the plan member to accumulate assets for retirement as contrasted with achievement of an income stream.<sup>100</sup> Whether that is appropriate or correct is another matter, indeed a serious one which needs to be attended to.

As we have seen, the foregoing may be complicated by issues created by any blurring of the lines between the fiduciary and other roles. That is, in the U.S. context in relation to employment based defined benefit plans at least, the Supreme Court and in some measure the Department of Labor have sought to distinguish between actions pertaining to “settling” the terms of a plan – including at the extreme, terminating it – and those actions relating to management or administration of the

plan based on the terms set, fiduciary responsibilities being attached to the latter but not the former. The Court and DOL have done so even in circumstances which some might believe inappropriately or unwarrantedly benefitted employer/plan sponsors and perhaps without sufficient justification adversely affected the interests of plan members. At first, doing so poses a challenge insofar as that distinction is carried over to the defined contribution context. That is, such a difference would result in treating plan sponsor/employer changes to the investment menu as non-fiduciary acts even though identical changes by plan trustees otherwise authorized by the plan to make them might pose serious questions as to fiduciary duty. In the United States, the exploration of this possibility is now in process through litigation as well and critical analysis by academics and others.<sup>101</sup> Without anticipating the conclusion to that exploration one might note that the distinction seems relatively unproblematic in the defined benefit context because whatever the actions of plan sponsor/employers might be they would not appear to harm the defined benefits which plan members would have earned up to the point of the change. So in that somewhat narrow sense their acquired interests in financial security in retirement would not be thought to be in harm's way. The situation is different for defined contribution plans with respect to which no specific promises are made or guarantees are offered in terms of financial security in retirement. For defined contribution plans the menu of investments is crucial to the ostensible achievement of goals central to the very existence of those plans. If so, then fiduciary-like duties need to attach to actions determinative of that menu regardless of the formal status of those individuals making those determinations.

## **Part V. Some Further Considerations and Observations**

As described, the historical experience in India with regard to the kinds of issues discussed has in a number of respects been rather different from that in the US. We have suggested that may be in some measure the result of what we have termed the “top down” character of important aspects of the Indian system. Insofar as many plans are exclusively or primarily the result of government action then, in the first instance, issues of fiduciary duty or similar constructs associated with plans which arise by virtue of private, would-be voluntary action are less likely to be posed or appear to be relevant. It does not follow from that that the underlying concerns which inform understanding of that duty or those constructs are irrelevant. That is, there remain nonetheless critical concerns which echo or resonate with those issues of what may be termed a duty of care and a duty of loyalty. It is only that they may be expressed in the form of statutory or regulatory rules or requirements and the adequacy thereof. Clearly there are provisions among the legislation authorizing the creation of the EPFS (and the EPFS and the EDLIS as well) in general and establishing the EPFS in particular which are of that character.

However, the reality is that even in this context, given the noted informing concerns, appeal might be made to formulations or constructs associated with bottom-up/private, voluntary plans. The initial use of the language and reference in the EPFMPA to (a) trust(s) is picked up subsequently in the EPFSA. We have pointed out in our case discussion of the EPFS that the EPFSA specifically makes reference to the applicability of the ITA though, as remarked, on its face only with respect to the matter of specific investment choices available to the trustees of the EPFS. The point is not breadth of the appeal to trust law but the fact that some such reliance was mandated. That is, given certain similarities of the relationships established by virtue of the creation of the plan (as a result of government action) to certain relationships arising in the private sector, there is a recognition or admission that laws, rules, or norms applicable to the latter might have relevance to the former. That being said, insofar as there is a cautionary tale offered by the U.S. experience it is that giving heed to that relevance still requires that one exercise care in taking up (if at all) any of those laws, rules, or norms, given the distinctive character of the relationships established in that way. The particular case of the EPFS is one which falls between

the kind of conventional defined plan to which the bulk of the literature concerned with fiduciary duty has been addressed and a conventional defined contribution plan, which is the kind of plan featured in our United States case study.

The importance of the exercise of care in this and other senses is aptly illustrated by a recent report prepared by a group of private sector experts at the Indian government's behest which in some measure assesses how fiduciary duty related responsibilities might or should best be linked to a broader set of issues and concerns many of which we have referred to above. The document was the product of the Committee on Investment Pattern for Insurance and Pension Sector<sup>102</sup> created in 2012 within the Department of Financial Services of the Indian Ministry of Finance. The embedding/intertwining was reflected in the Committee's terms of reference. Among other things they were to analyze "the ... investment of funds under Insurance Sector and Pension Sector and review the existing Investment patterns and exposure limits laid down by the Regulator and the Government" and "market mechanisms and review the potential of Insurance and Pension funds in contributing to the development and deepening of markets as well as re-energise investment management"<sup>103</sup>; "to help...understand and capture the potential of Insurance and Pension sectors in contributing to meeting the long term financing needs of the nation while maintaining the safety of the policyholder as the topmost priority"<sup>104</sup>; and "[t]o...suggest a road map for the gradual easing of investment exposure patterns with the aim of eventual alignment of Indian Insurance and Pension Fund management to a global investment framework."<sup>105</sup>

Interestingly the Report makes little explicit reference to fiduciary duty and none to the specific source for it.<sup>106</sup> Only toward the latter part of it – in the conclusions and recommendations section – does it remark that "[t]he new regime envisages that [insurance and pension funds/fund managers (IPFs / IPFMs)] have a fiduciary responsibility towards their clients and beneficiaries."<sup>107</sup> There is also no mention of the ITA (although there is some discussion about trusts and trust law in the United States.) In the first instance, then, it is not clear what are the standards associated with the "old regime" and on the basis of what authority those standards were established and could subsequently be changed. However, as we shall see, the Report appears to identify the prevailing standard in India as embodying norms associated with the "prudent man rule" of an earlier era in the United States and other developed countries. In turn, they view the new regime as one more reflective of the requirements of the "prudent person rule" – or the so-called "prudent investor rule" extension thereof – which they see as having been adopted by those countries in more recent times.

In all events, in making the case for the recommended transition the Report illustrates how discourse about those standards is embedded in/closely related to a broader conversation which encompasses a host of other considerations. Moreover, the Report appears to presuppose freedom on the part of the government to define the responsibilities of IPFs/IPFMS in light of those considerations. Further, it does seem to tether its analysis to standards articulated in the body of trust law. So it clearly merits serious review.

### **The Report: key assumptions, arguments, and conclusions**

Briefly stated, the Report's analysis and arguments rest on the following:

- A commitment to or belief in, as a general matter, "allowing economic agents the liberty to take decisions in a developed and regulated environment and to take responsibility for their decisions"<sup>108</sup> and in this context, "[i]n the interest of equity and natural justice, all citizens [being]...allowed freedom of individual choice to invest."<sup>109</sup>

- Acknowledgment of both an “over-riding concern[] of the insurance and pension sector custodians [about]...shield[ing] the savings of beneficiaries from volatility and risk, and protecting[] it from capital erosion”<sup>110</sup> and the view that pension plan members should not without sufficient warrant be “den[ie]d...positive rates of return, in the name of safety and risk mitigation.”<sup>111</sup>
- That the current narrow and highly prescriptive requirements as to permissible investments not only interfere with that liberty/freedom but also do so in way which may have, in fact, denied them such returns and perhaps even resulted in negative real returns.<sup>112</sup>
- Theories (and the merits thereof) – which appear aligned or apposite with 1, 2, and 3 – as to the operation of financial markets and their bearing on the possible returns and risks of investments in those markets, for example “a fundamental concept enshrined in modern portfolio management theory”<sup>113</sup> – “based on the efficient market hypothesis”<sup>114</sup> – “that the flexibility to diversify investments” enables investors to “earn higher real returns”<sup>115</sup>
- A view that the current requirements have negative implications while the proposed ones could have positive implications for savings, investment, and growth in the Indian economy, that is
  - “[N]egative real returns might over time also result in large-scale flight to physical savings”<sup>116</sup>;
  - More broadly, “the continuation of these investment norms” not only poses the foregoing challenges but also was “likely to erect potential future roadblocks for the economy and are probably carrying the seeds of future fiscal disequilibrium as well.”<sup>117</sup>;
  - By virtue of the restricted investment choices the pension (and insurance) sector are “unable to provide funds to industry and infrastructure”<sup>118</sup>/ “infrastructure and other long term projects”<sup>119</sup> even though such investment “provides the ideal investment opportunity for the nature of funds parked with the institutions”<sup>120</sup>; that is “[a]t a time when the economy, and the nation, need long term funds to lay the foundation for future growth, insurance and pension sector provide the right balance – in terms of volume as well in terms of tenor.”<sup>121</sup>;
  - “The directed investment regime in India has provided very little space for the insurance companies and provident funds to help develop the financial market, especially the debt market” while “[e]mpirical research suggests that pension funds and insurance companies have over time helped the development of the financial markets in mature[] economies”<sup>122</sup> and the latter possibility rests on a much less directed regime.
- The wisdom of moving to something like a prudent person rule because other (developed) countries have adopted it, that is, “[p]rudent person rules` are more common for pension fund members in most OECD countries”<sup>123</sup>
- The (ostensible) fact that the “new prudent-investor rule” “[d]raw[s] on the teachings of modern portfolio theory...[and] directs the trustee to invest on the basis of risk and return objectives reasonably suited to the trust and instructs courts to review the prudence of individual investments not in isolation but in the context of the trust portfolio as a whole.”<sup>124</sup>

As noted, the conclusion is that accountability of investment decision-makers should take the form of some version of what the Report refers to as the “prudent investor rule” or the “prudent investor regime” (PIR). While the Report sometimes juxtaposes the PIR with an ostensibly historically earlier (and now often rejected) “prudent man rule” it is not entirely clear or consistent in its use of terminology in this regard.<sup>125</sup> That notwithstanding, the Report characterizes the PIR as mandating or requiring, among other things, that



- IPFs/IPFMs “have a fiduciary responsibility towards their clients and beneficiaries”<sup>126</sup>;
- IPFs/IPFMs “must discharge their duties with the care, skill and diligence that a prudent investor of similar character and objectives would do in a similar environment”;
- “every investment option and every investment strategy is benign”<sup>127</sup>;
- investment decisions are “‘principle based’ rather than ‘rule based’” and correspondingly, they are assessed “not on the basis of whether ...decisions were successful, but whether... [they have] applied reasonable principles and processes in arriving at [their] decisions”<sup>128</sup>

The Committee effectively makes clear that the ability to realize the new regime and the efficacy of doing so are conditioned on certain important considerations first being addressed.<sup>129</sup> Those factors include the following:

- Fund governance, which includes the need for every fund to have an Investment Committee, the membership of which is “subject to minimum suitability standards” and has “ultimate responsibility for the fund...[and] accountable to the clients and beneficiaries and the competent authorities”<sup>130</sup>;
- Governance of markets which includes “an empowered regulator to regulate and develop the market for the assets and protect the investors in those assets before the investor ventures to invest in those assets”<sup>131</sup>;
- Governance of investees, that is, investments may be made “in the assets issued by the investee who is subject to certain regulations and governance norms” (and investees which “abide[] by certain best practices”). e.g., corporate governance norms for listed companies and analogous norms for other investees such as “collective investment scheme, venture capital fund, infrastructure project, etc.”<sup>132</sup>
- Given the “skewed development of Indian financial markets” (and concomitant concern about “risk-return mispricing and existence of alpha or excess returns,”) a “need for prudent investment limits to ensure there is a predictable rate of return on investments.”<sup>133</sup>

At the same time the Committee stresses the need for parallel efforts to create financial products and develop financial markets tailored in ways which both spur and enable pension fund (and insurance) investors to exercise their newly accorded prudent investor rule power in and through them and by virtue of those investments help achieve national economic goals.<sup>134</sup> As a general matter this approach means, among other things, “introducing certain products (such as, take-out financing),” “increasing depth and liquidity of the Indian capital markets, providing increased financing options (such as mezzanine equity)” and addressing the “lack of a deep forward market inhibiting long term currency loans, an underdeveloped debt market, and so on.”<sup>135</sup> As an illustration, with regard to the infrastructure related goals, it might entail the Government “launching some more infrastructure finance companies, in addition to the ones existing today...[which] will automatically increase the supply of paper to the market”<sup>136</sup>; “[e]xempting income - arising out of investments in infrastructure made by insurance companies or pension funds -- from tax”<sup>137</sup>; affording some sort of an explicit guarantee” for infrastructure bonds”<sup>138</sup>; and “relaxing substantially” the “minimum rating standard for infrastructure projects” and giving “[p]roject investors a wider choice of credit enhancement facilities.”<sup>139</sup> Again, “[a]llowing an opportunity for greater investment in corporate debt would not only provide better real returns but also help deepen the debt markets and contribute to infrastructure financing.”<sup>140</sup>

We now turn to consider the meaning and import of the Report’s analysis and recommendations. As noted, the Report largely frames its conclusions with regard to a recommendation for application of a prudent investor rule (or regime or standard) – the PIR – which it sees as common to most OECD countries.<sup>141</sup> It is a rule or standard which it is suggested is in stark contrast to

with that which was prevalent in those countries in an earlier era and similar to what prevails in India today. We discuss that contrast below. However, the fact is that there is immense variety across countries of the formulations for the fiduciary-type standard, each representing a different combination or overlap of statutory law, regulatory requirements, and case law. For that reason and because of a certain lack of clarity about terminology used in the Report it is not useful to discuss the contrast in those terms.

At the outset it is more productive to compare what the Report provides for the standard in relation to ERISA.

In literal terms the Report states that under the rule, IPFMs “must discharge their duties with the care, skill and diligence that a prudent investor of similar character and objectives would do in a similar environment.”<sup>142</sup> In a number of respects the phrasing of this part of the standard is very much like that of comparable ERISA requirements. However there are some differences. It refers to a “prudent investor.” This reference would appear to be a reflection of the Committee’s view that “over the past fifty years or so, the ‘prudent-man’ rule morphed or evolved into the ‘prudent-investor’ rule.”<sup>143</sup> However, as we discuss below, ERISA’s literal reference has been and still is to a “prudent man” with the “prudent investor” being a gloss put on the text by some in later years. Second (and perhaps related), although the reference to “similar[ity]” echoes roughly corresponding terminology in ERISA, unlike ERISA, the language makes no reference to the particular nature of the “enterprise” in whose service the decision-maker acts; rather, there is use of only the broader/more generic term “investor”. Third, unlike ERISA, among the list of required specific attributes of the decision-maker, that of “prudence,” is not included. Again, as explored later, this exclusion is a not unimportant matter.

Beyond the foregoing, the Report’s formulation makes no *explicit* reference to ERISA’s “sole[]...interest” and “exclusive purpose” requirements, criteria which are closely associated with the duty of *loyalty*. As such the Report’s wording is focused only on matters of *competence*. However, as we suggest, we believe any such formulation has to be made in view of the purposes and interests at stake in the plan/fund. To be fair, though, there is repeated reference in the Report to great concern about the financial returns which plan members might enjoy (and such tradeoffs as there might be with regard to the risks posed by their securing such returns) so at least in that sense there is attention to member interests/purposes. The matter of purposes and interests is closely linked to the nature of the relationships upon which the plan/fund which underpins the enterprise the decisions maker serves. Thus, ERISA’s use of the word “enterprise” arguably reflects such an acknowledgment or recognition of that; the Report’s different wording does not.

Interestingly, although there are a number of references in the Report to trustees and some to “trusts” there is no mention of or comment on the relevance of trust law in India in general and the IAT in particular. For that matter, there are just a couple of brief mentions of trust law in the United States. By contrast, for good or ill, discourse as to fiduciary duty under ERISA was and is largely still bound up with discussion about fiduciary duty as it arose and has operated in the context of trusts. Insofar as speculation on this point is warranted, picking up on arguments made above, this lack of reference in the Report might derive from the (putative) top-down character of the Indian retirement system. That is, insofar as a plan is the result of a government initiative, in the first instance, there is no occasion to appeal to law as to emerge in the context of bottom-up, private and voluntary action, for example, trust law.

These points aside, the themes or considerations which bear upon the Report’s conclusions/recommendations are of most importance especially because we have explored

many of them in earlier parts of this paper. However, as discussed below, the inferences we make are in certain ways different from those conclusions drawn by the Committee.

It is clear that the Report's proposals are informed by the achievement of a number of different goals. With respect to *plan members* there is concern expressed in financial terms that members receive or are credited with (sufficient) positive returns while being afforded sufficient protection from volatility and risk and capital erosion. Beyond that, though, there is little mention of the specific character of the goals for the particular retirement plans which would appear to be at issue, largely the EPFS, the EPF, the EDLIS, and NPS. Each of these plans has a distinctive character, namely, a notional defined contribution plan with government-determined "returns" and with no member role in investment decision-making; a defined benefit plan; a life insurance plan; and a defined contribution plan with member investment choices made from a limited, government determined menu. Both the EPF and the EDLIS by their very nature have relatively well-defined outcomes (in terms of lifetime retirement income and a lump sum benefit, respectively). By contrast, for the EPFS and the NPS there is just a general/diffuse goal of members achieving some measure of accumulated real returns on contributions by a "normal" or societally accepted retirement age (and presumably being at relatively low risk of not succeeding in doing so).

With regard to the *larger society* the proposals are animated by a need for a source for investments deemed critical to economic growth in general and the infrastructure and industry/manufacturing sectors' role in it in particular. There is as well a clearly expressed desire to develop and deepen financial markets in ways seen as linked to such growth. At first blush the implicit sense of the appropriateness or "right"-ness of the pursuit of such objectives seems to derive from a belief that there are legitimate and important government priorities the achievement of which the proposals might well be thought to advance. If one accepts this notion then there could be other legitimate and important priorities, for example, ones relating to the environmental and social implications or import of the investments which funds might make, which might give rise to a different understanding of the responsibilities of investment decision-makers.

It might be argued that any such proposals would have a different character. That is, the Report's recommendations are cast in terms of (ultimately) freeing investment decision-makers entirely from any investment specific constraints on what investment decision-makers might elect to do (subject, of course, to the process-oriented and portfolio-level strictures associated with any prudent man/investor standard.). By contrast, it might be thought that defining decision-makers' responsibilities with an eye to environmental and social priorities is almost by definition about limiting choices. There would be some truth to that contention but there are strong arguments to the contrary. For example, a focus on environmental and social considerations might be viewed as spurring a different or new way of "doing business". That is, requirements (or perhaps incentives, to be discussed) to take account of such considerations mean that enterprises might operate differently or entirely new enterprises might have to be established; if so, both would represent new and perhaps dramatically different (and perhaps superior) investment opportunities. If so, that would mean an expansion of choices for investment rather than the opposite.

In all events, the breadth of the Committee's proposals raises questions as to the freedom of choice rationale it offers. That is, the Committee acknowledges that markets for a range of financial securities are undeveloped or otherwise inadequate (or perhaps non-existent). In turn, its suggestions include ones which would reconstitute (or perhaps establish) those markets. Generally speaking the service in doing so would be to make available choices for investments the existence of which are, in a sense, presupposed in the justification for affording fund decision-makers open-ended selections as to investments. But the recommendations go even further.

They contemplate taking steps to ensure the availability in the first instance or on better or more attractive terms of certain kinds of investments closely linked to key economic growth objectives. For example, with respect to infrastructure, the Report urges that there be financial incentives, guarantees, credit enhancements, or less demanding ratings standards to spur those investments. In other words, the ostensibly otherwise free choices envisioned by the proposals are limited, expanded, or otherwise channeled in ways which are thought to be consistent with the achievement not only of plan member (financial) goals but also of certain, perhaps larger societal goals. Again, if such action is warranted in that case, then it might well be justified in the service of other, perhaps also larger goals, for example, those goals which pertain to environmental and social concerns.

As described above, the Report's reach extends to the enterprises themselves which are the ultimate potential object of investment (as well as to such intermediaries through which investments in them might be made). More particularly, in that connection the Committee expresses the need for "best practices and governance";<sup>144</sup> that is, "corporate governance structure and processes," for/of investees.<sup>145</sup> The notion would appear to be that if investees have appropriate governance and act in accord with best practices that will allow or enable certain kinds of investments by funds in the first instance and/or ultimately make for better investments. That is, the investments would be more likely to evidence the kinds of financial characteristics which might be needed or desired by funds. Broadly stated, there is envisioned legislative, regulatory or other government action which seeks to align the calculus of what is possible and desirable for investors with the calculus which shapes or determines how enterprises do or might operate. Here, the goals are likely to be two-fold. On one hand, they would have a financial character commensurate with meeting plan members' financial needs or expectations. On the other they would have a concern with ensuring the creation and successful operation of enterprises in the name of economic goals for the larger society. Again, if so, as noted above, the logic could plausibly extend to other kinds of objectives, namely environmental and social ones.

The preceding paragraphs are primarily concerned with issues which arise by virtue of the motivations in general for proposing the changes proposed in the Report. There are other, related issues which pertain to the rationales for the specific changes recommended.

More particularly, the Report relies directly on MPT to justify the transition to some version of a PIR it sets forth<sup>146</sup>; and indirectly insofar as it claims validation for such a change based on similar transitions made in other countries in not inconsiderable measure in reliance on the MPT. We have neither the intention nor the space to explore in the needed depth the warrant for such reliance. However, we think it important to highlight certain issues in that connection which we suggest are worthy of serious attention going forward. We do so leaving to a footnote discussion of somewhat confusing references in the Report to MPT's and the PIR's relation to the Efficient Market Hypothesis (EMH).<sup>147</sup>

Certainly the development of fiduciary duty as it was concerned with *trusts* in the United States reflects the influence of MPT, perhaps even significantly so. However, a nearly two-decade effort to succeed in those terms appears seriously to have commenced only a couple of years after the enactment of ERISA and succeeded only in the early 1990s.<sup>148</sup> Moreover, and more importantly, insofar as *retirement plans* are concerned, despite some occasional broad claims to the contrary we believe there is little to be found in the legislative history of ERISA to suggest that MPT had a role to play in the formulation of the fiduciary standard that was mandated in 1974.<sup>149</sup> Moreover neither the proposed provisions nor the justifications offered in the 1978 draft of the U.S.

Department of Labor's (DOL's) first interpretive regulation fleshing out the fiduciary standard (with *defined benefit plans* largely in mind) mention MPT at all. Neither did the accompanying text nor did the regulation when it was finalized in 1979.<sup>150</sup> It is true that the regulation did "insist that the prudence of any *individual* investment had to be assessed in relation to the *overall* investment portfolio, rather than on an individual basis," a formulation associated with reliance on MPT. However, the primary reason the DOL offered for the rule when proposed did *not* involve MPT. Rather the agency asserted that "it derived from *the distinctive character of such plans as compared to trusts*." That is, it rested on "the conflict (in the common law) between income beneficiaries and remaindermen was presented far differently, if at all, in employee benefit plans"<sup>151</sup>

It was only much later – 1996 – in connection with an interpretive regulation concerned with *defined contribution plans* that the DOL first mentioned MPT. Moreover, there actually was no reference to MPT in that regulation. Rather in the accompanying narrative stating the DOL's reasoning behind the regulation, the DOL remarks upon MPT in connection with the regulation's requirement for reliance on asset allocation models "based on *generally accepted investments theories* that take into account the historic returns of different asset classes (e.g., equities, bonds, or cash) over define periods of time"<sup>152</sup> That is, as the DOL explained, it had "included this requirement to assure that, for purposes of the safe harbors, any models or materials presented to participants or beneficiaries will be consistent with *widely accepted principles* of modern portfolio theory, recognizing the relationship between risk and return, the historic returns of different asset classes, and the importance of diversification."<sup>153</sup>

In all events, the Report itself actually says very little specific about the assumptions of MPT and not much more as to its implications. At one point it refers to the desirability of "flexibility to diversify investments and earn higher real returns – a *fundamental concept enshrined in modern portfolio management theory*"<sup>154</sup> At two other points it briefly mentions the *implications* of MPT for fiduciary duty.<sup>155</sup> However, it would appear for this aspect of its report, the Committee relied – perhaps significantly so – on the characterization of MPT by authors of one of the scholarly papers it cites.

With regard to substance of MPT, the authors of that paper argue that MPT "recognizes that there are two types of risk: asset-specific risk and market risk," and further assumes that

- "[R]isk and return are related";
- "[I]nvestors (or trustees) can make a reasonable estimate of risk and return"; and
- "[I]nvestors dislike variation in returns."<sup>156</sup>

They assert, in turn, that the foregoing yield "*the three key insights of MPT*, which are almost sufficient for understanding the substance of the PIR" "as laid down in [the] Uniform Prudent Investor Act and the Restatement."<sup>157</sup> That Act and the Restatement are, respectively, a model statute which states might adopt and a characterization of the law as certain prominent academics and practitioners would have, which pertain to *trusts*. Note that the Act was promulgated in 1994 and the Restatement in 1992.<sup>158</sup> Those "insights" are termed to be the following:

- "[A]sset-specific risk can be reduced through diversification"<sup>159</sup>;
- "[A]n investment cannot be analyzed in isolation, but must be placed in the context of the portfolio. We do not care about an asset's individual risk, but rather how that asset's risk contributes to the portfolio's risk"<sup>160</sup>;
- "[A]n investor chooses from among the available well-diversified portfolios the one that best matches his preferences on risk and return. Greater return requires greater risk, and

hence there is a tradeoff between investor desire for return and investor desire for risk.”<sup>161</sup>

These insights (or, perhaps conclusions) are, correspondingly, said to sustain *the key elements of the PIR* as the authors understand them, namely,

- “[d]iversification is a duty”;
- “[t]here are no categorical restrictions on investments”;
- “[p]ortfolios are evaluated as a whole”; and that
- “[t]he trustee needs to consider the risk tolerances of the beneficiaries and purpose of the trust.”<sup>162</sup>

Note that the Report characterizes the “three important” changes wrought by the transition to the PIF in a somewhat different way:

- “trustees’ duty to diversify investments to minimise risk” (as contrasted with the “old order’s emphasis[...on] the need to avoid speculation”);
- “trustees ... assess the risk-tolerance of a particular trust and to invest for ‘risk and return objectives reasonably suited to the trust’”; and
- “revers[al of] the earlier accent on non-delegation and encourage[ment of] trustees to delegate the investment responsibility to professionals.”<sup>163</sup>

The last point, though not mentioned in the authors’ list above, is perhaps implicit in their observation that “[a]ctive investors often resist MPT in part because it is more challenging for active investors to diversify...The duty to diversify may have diminished the ability of trustees to engage in active management of funds, but this is counterweighted by greater ability to delegate and the rejection of categorical restriction under PIR.”<sup>164</sup> Although the matter of delegation is on the Report’s list and not on the authors’ list, the latter do mention it in passing.<sup>165</sup>

The above being said, even the authors acknowledge that MPT in and of itself is not unproblematic. They remark that certain of the assumptions of “the classic version of MPT” are contested. That is, on one hand they assert that the assumptions that “investors are risk-averse”<sup>166</sup>; that they “know or can reasonably estimate the risk and expected return of different investments”; and that “risk and return are related”<sup>167</sup> are “not open to *serious* challenge” though it is not clear how they judge what is “serious.”<sup>168</sup> On the other, they state that the assumptions that “investment returns follow a well-behaved, symmetric distribution (the bell-shaped normal distribution)” “has been widely questioned” and that “diversification is costless (no taxes or transactions costs)” “is often not true.”<sup>169</sup> The Report adopts this view as well.<sup>170</sup> It also acknowledges challenges to MPT posed by the 2007-2008 financial crisis.<sup>171</sup> Indeed, there was a literature critical of MPT – even sharply so – before that crisis, and in certain respects it was even sharper as a result thereof. (There was, of course, a corresponding literature defending it at one or another level of its specifics.)

Nonetheless, for the authors (whose paper was written in 2012) it was not the MPT as such but rather “[t]he application of MPT, like most theories,...where much disagreement and skepticism may originate. Should the trustee rely on CAPM and passive investment strategies? Should the portfolio be actively managed or are markets efficient? How should risk be measured? How risky are equities? The brilliance of the PIR is that it purposefully avoided answering these questions.”<sup>172</sup> For them, the PIR “is a careful marriage of economic theory and legal institutions. The rule relies on process and standards; it is not lashed to a controversial theory or a particular method of investment.”<sup>173</sup>

The preceding paragraph poses with respect to the authors and the Report several potentially troubling kinds of issues.

The similar arguments outlined by both the authors and the Report rest on an understanding of the nature of MPT and its implications. Each argument is actually rather simply stated, but perhaps too simply or at least too simply to bear the weight of what is justified in its name. That is, the case rests on a very few broadly stated propositions, ones akin to the slightly different formulations listed above. That those propositions are small in number and rather general in character is not necessarily problematic. Indeed, paradigm shifts in thinking might well be cast in that way, in terms intended to express the essence or kernel of a proposed very different way of framing or conceptualizing a problem, task, etc. For example, the two key postulates of Einstein's then revolutionary theory of special relativity – stated without complication – are said to be (1) "The laws of physics are the same in all inertial frames of reference" implying that "motion is relative" rather than absolute and (2) "Light propagates through empty space with a definite speed  $c$  independent of the motion of the source or of the observer." ("the principle of the constancy of the speed of light").<sup>174</sup> But giving weight and significance to an ostensible paradigm shift in the sphere of human conduct is a rather different exercise from doing so in the sphere of physical science. And therein lies the rub, so to say, here in the context of financial investments.

Holding aside the matter of certain contestable assumptions – among them one with which we are particularly concerned here, namely the kinds of rewards and risks to which "investors" attend – the central feature of the MPT argument is the following notion: Insofar as different individual investments pose different financial risks and rewards, the "best" outcomes (defined in certain financial terms) for choices among them can be achieved by an appropriate assessment of the combined or aggregate effect of the attributes (as they bear upon the financial risks and rewards of the investments) associated with every investment among the universe of those investments from which an investor is in a position to choose. In certain respects this method of investment was not an entirely novel idea insofar as prior to that there certainly had been some sense as to the merits of diversification. However Markowitz, in his 1952 paper, starting from a set of not unrealistic/plausible assumptions about the basis on which "investors" make decisions and the relevant attributes of a not insignificant segment of the then contemporary universe of investment choices, was able to illustrate in a specific mathematical/quantitative way how that notion might in fact play out in the way suggested. The precise historical reasons for the ultimate take-up and playing out of that notion extensively and in a variety of ways are largely not the concern of this paper. That being said, in circumstances where there was otherwise a perceived need or attractiveness (as a matter of interest or self-interest) to trusts and other vehicles to be authorized to make investments ranging more widely, there would have been a confluence of interests and a symbiosis of action.<sup>175</sup> As such, some caution is required in relying on just the fact that in other jurisdictions there has been a change in the fiduciary standard; the extent of reliance depends upon a sufficient understanding as to all the forces/interests which came into play in effecting that change.<sup>176</sup>

Even assuming the core or essential notion in some measure "holds", the practical and important issue is one as to *how far* that notion might and should be taken as a general matter and in particular contexts. The legitimacy and appropriateness of "applying" the notion depends upon critical judgments as to the strength of the assumptions which underpin it, and, in turn, the credibility or meaningfulness of use of the analytic machinery, in this case, first employed by Markowitz, in potentially very different circumstances. So, for example, within the setting of investment decision-making for retirement plans the foregoing might be thought to warrant relatively uninhibited choices as they concern publicly listed securities which are traded under certain conditions, for example, on stock exchanges which meeting certain requirements as to

their operation and which establish certain criteria on the basis of which companies qualify for listing. That is, changes to the metes and bounds of fiduciary duty in view of the ostensibly new MPT paradigm must be carefully defined in light of the foregoing. Correspondingly, the MPT-grounded rationale for modifying the fiduciary standard should be viewed only as suggestive, for at least two kinds of reasons. First, it is at minimum not illuminating and perhaps even problematic to appeal to “*widely accepted principles* of modern portfolio theory” in connection with mapping out the standard.<sup>177</sup> Insofar as there are readily identified “principles” for MPT they operate at a rather high level of generality. So the justification for reliance on them should carry less and less weight as their application moves beyond the sphere in which they have been seriously and convincingly tested. Second, “widely accepted” entails other judgments, for example, those outcomes to whom one should look to sustain acceptance and the quality, depth, objectivity, etc. of the basis upon which their acceptance is grounded. (The latter point we return to below.)

In some respects this view may be implicit in the Report’s recommendations especially as they pertain to an ostensible transition to a PIR standard over perhaps five years. On one hand the Report states – informed by the rationales it has offered – that “strings of investment norms must be substantially loosened to prepare for a complete shift to ‘product investor’ regime.”<sup>178</sup> “[R]egulators must jettison mandated investment edict.”<sup>179</sup> On the other, that there must be a move to “prudential guidelines which seek to achieve substantive and qualitative risk diminution within the framework of modern portfolio theory.”<sup>180</sup> The guidelines could include certain assets being “out of bounds”; placing limits on the assets under management held “in the equity of any one company or sector”; or (for fixed securities) “duration gap limits, prudential limits for interest rate sensitivity and a structural liquidity framework.”<sup>181</sup> These actions would be apart and different from the need to “introduc[e]...some new ideas and products” geared, among other things, to the elimination of counter-party risk, the enhancement of liquidity, and putting check on excess volatility.<sup>182</sup> Notwithstanding some of the discourse framed in terms of “freedom of choice” at the individual and institutional level this discussion reflects potentially extensive regulatory involvement. Most interestingly and importantly it presupposes judgments as to the best or most appropriate version of MPT (or perhaps better, its application) by which to arrive at the regulations and envisions consciously altering the landscape of investments across which whatever version of MPT is adopted. The Report suggests that after five years there should be a “[m]ove to [the] Prudent Investor regime completely” though it does not explain what that means.<sup>183</sup> That is, even under a would-be “freer” (or entirely “free”?) or “open-ended” investment regime regulations of the sort described would be needed. If that is correct then sufficient thought would need to be devoted to assessing the prospects that the envisioned regulatory regime during any subsequent phase might create new and perhaps more serious problems or exacerbate existing ones, apart from the merits of any assumption that the regime could otherwise be effectively implemented.

This position brings us back to a several points raised earlier in the discussion relating to the United States. That is, we suggested that as a practical matter the ERISA standard was largely an empty one – something of a normative/technical vacuum which had to be filled one way or another. The literal language of ERISA might have been read to correspond to that of norms derived from the conduct of those individuals responsible for investment decisions for retirement plans of a basically similar character, “character” including the nature of the relationships which underpinned those plans. And certain prominent legislative testimony on the prudence standard during the period leading up to the enactment of ERISA is suggestive in that regard.<sup>184</sup> However, perhaps because there was (almost by definition) a lack of sufficient experience with conduct of that sort, appeal had to be made elsewhere. In the first instance, given the (briefly characterized) legislative history of ERISA, that appeal was in some measure naturally to trusts, though with some alertness to the likelihood that the experience of trusts and trustees might fail in application given the differences between trusts and retirement plans.<sup>185</sup> However, whatever the rationale



offered by the DOL in 1979 for seemingly allowing fiduciaries, in principle, potentially to make any kind of specific investment, that meant that the range and kinds of choices and decisions which fiduciaries were in a position to make extended far beyond the experience of and what had up to that point been sanctioned by courts and legal scholars and expert practitioners with trust investments.<sup>186</sup>

Moreover, insofar as the DOL, in 1979, opened the way to diverse paths for investment, it was unable or unwilling to offer road markers to guide or inform which paths could be chosen and/or how they might be traveled. For example, the DOL rejected “request[s] that [it]...clarify or define terms such as ‘diversification of risk,’ ‘risk,’ ‘volatility,’ and ‘liquidity.’”<sup>187</sup> Whatever their weaknesses or failings of the prescriptive/restrictive “legal list”-related standards which had been associated with trust law afforded some substantive anchor for reviewing fiduciary’s “prudence,” a review which otherwise under the older and emerging standard was only process based.

Apart from the role of MPT in the matter, in practical terms, this approach lent itself to reliance on the practices of the only other “community” to which appeal might plausibly be made, that of the community of asset managers, advisors and consultants, etc. In and of itself such appeal was/is not unreasonable. The challenge, though, is what kind of appeal is warranted in light of the institutional and personal interests (and self-interest) of those individuals among them. Certainly, at some point the DOL (and arguably the courts) might attend to those interests. As for MPT, the issue was/is not necessarily one of the merits and import of its broad gauge assumptions and, in turn, its broad gauge implications. Rather as suggested, the issue is one of “getting down to cases.” That is, if the test is merely conformity with MPT at a high level of generality, it is a test without substance. For it to have substance the decisions(s) would have to be assessed to be in sufficient measure consistent or in accord with a coherent set of detailed assumptions and/or specific analytic machinery by or through which an MPT-related formulation is given specific meaning. The question is then one as to which set of assumptions and specific analytic machinery are necessary or if not that, at least sufficiently suited to the task and the basis upon which that adequacy is to be determined. Here the relevant expertise has in practice been found in the financial services community and/or in the related academic community. Again reliance on the latter is at first blush entirely reasonable but a sufficient awareness of the institutional and personal interests of members thereof is important as well, particularly insofar as they might be linked with those of asset managers, consultants, advisors, and others.<sup>188</sup>

In other words, insofar as there is/is to be a shift from a fiduciary duty standard more associated with what may have been American (and likely English) common law formulations – especially those constructions relating to trusts – to one cast in terms of the PIF and justified in the ways described, effective or meaningful oversight/discipline by courts seems questionable. In the absence of such oversight/discipline, there is a pressing need to have an appropriate combination of substantive criteria and institutional roles and processes to, at minimum inform, and perhaps even guide or channel investment decision-making.

In a real sense the Report reflects or anticipates some such need in its proposals for substantive investment-related criteria, governance mechanisms relating to investment management and the enterprises in which investments are made, and the like, to effect a full transition to a PIR regime. However, insofar as the Report implies that the kinds of actions which its proposals demand will no longer be needed after a transition to a PIR regime, the Report’s characterization of the experience of the United States in that regard would suggest caution and perhaps even a contrary view. That is, among other things, the calculus of choice in investment decision-making requires clarity about the plan goals toward which choices are directed.

These goals are ones which might immediately concern with outcomes for individuals as members or would-be members of a plan which has been organized to enable them to achieve, to be achieved on their behalf, or perhaps might be achieved by means of one or other kind of guarantee. Of course, key goals will have a financial character, for example, in the form of an income in retirement, an accumulation of assets as such, mechanisms for the withdrawal of those assets, or accumulation of assets linked to conversion of some of those assets to an income stream along with possible assurance or guarantees with respect to such outcomes.

However, there also needs to be attention to other goals individuals might have and how plans are crafted to allow for account to be taken of them. That is, individuals in their role as “investors” – directly or indirectly – almost by definition have financial objectives in mind; but as individuals they have other priorities as well. Some are reflected in their concern about the import or impact in other than financial terms of investments which they make or are made in their name. Insofar as plans are organized in a way by or in the name of “choice” then there needs to be an exploration of the ability to give play to what such choices mean for people.

Certainly there is a wealth of (often contested) literature on the matter of the relationship and possible tensions between the pursuit of financial objectives and the effort to achieve non- or extra-financial goals. Designing plans alert to and consonant with learning from that literature is no mean task but is a necessary and important one which needs to be well done.

There also needs to be clarity about plan goals as they might concern the larger society as reflected through government action. Certainly, as we have seen, government may act to enable or spur individuals to gain the benefits of what retirement plans might have to offer to them. It has also acted to protect and advance the individual interests which are implicated by the establishment of plans, especially creation of ones by virtue of private, individual action.

So for example and as noted, in the United States the more typical form of governmental action has been in response to ostensibly voluntary choices which individuals have already made in the first instance. As we have seen, ERISA in some measure sought to adopt and adapt the legal framework which sustained fiduciary duty in the trust context. On one hand, that framework in and of itself was concerned with vindicating the interests of settlors and beneficiaries and the means for realizing them as reflected in the terms of the trust, provisions were ostensibly an artifact of individual voluntary choice. On the other, that framework not only created legal standards and mechanisms to render those means practicable but also in some measure shaped or perhaps even overrode those terms or means based on a view that they were not fully up to the task of enabling settlors and/or beneficiaries to realize what it was envisioned they would gain from establishment of the trust. ERISA in effect did the same thing, in some measure starting from those standards and mechanisms but refashioning them to render them suitable to the nature of the relationships embedded in and the interests to be advanced by retirement plans.

Nonetheless, and also as we have seen, government may be a legitimate and an important means for setting and achieving goals which transcend the immediate interests of individuals within the society. Narrowly speaking, those goals can be closely related to individual ones, for example, insofar as government sees an important *societal* interest in retirement plans being established in the first place and once established their being well enough run. As noted pursuit of this objective may not only be achieved by regulatory means but also through tax and spending policies.

However government has at least two other concerns with retirement plans in and of themselves (concerns which are highlighted in the Report). The institutions which they call into being have

significance within and for the larger society in which they operate, especially insofar as they reach a significant size and scale. They are ostensibly a means for saving and in turn for the channeling of savings into investments in ways which can be productive or wasteful for (or even destructive to) the economy, shape or even drive financial markets and the creation of financial products, etc. Moreover, of necessity, with the investments they make in enterprises come associated ownership-type interests and rights or powers, the pursuit and exercise of which, respectively, can potentially profoundly shape how those enterprises conduct themselves. In turn, what that conduct is or might be has tremendous importance both for stakeholders in the enterprises and for the larger society. Hence, government may conclude as a matter of wise policy to employ its regulatory power or where relevant, condition the use of its taxing or spending power to spur desired conduct.

At first blush, doing so in India would seem more likely given what seems to have been the more extensive history of government action from the outset to establish plans and tightly regulate them in certain ways. At the same time the Report reflects a reaction against that informed by a number of legitimate concerns. But as the foregoing suggests, it cannot and should not be an all or nothing proposition. Rather, it is a matter of settling upon the forms of government action best calculated to achieve the individual and societal goals implicated by retirement plans (alert to such tradeoffs as there might be in attaining some in relation to others).

## **Part VI. Conclusions**

In the preceding pages we have raised or canvassed a wide range of issues concerning fiduciary duty as it pertains to retirement plans and certain similar and different aspects of the United States and Indian experience in that regard. It was not our intent in this paper to strive to resolve those issues. Rather, given the relative novelty of the sought-for comparisons and contrasts there was task enough in gaining some minimally sufficient understanding of the Indian experience to enable so initial observations and questions. We look to exploring the topic in a more focused way and with specific attention to parts of the Indian retirement system other than those parts explored here. In that regard we anticipate that our subsequent inquiry and perhaps any similar study by others be informed by the following kinds of considerations, among others.

1. Whatever the importance and strengths of financial experts the experience, insights, and voice of members and others with a stake in the conduct of investment decision-makers must be heard in the formulation of the standards, the establishment of institutions, and of institutional mechanisms for such decision-making.<sup>189</sup>
2. Retirement plans are largely about the future, especially the distant future. By contrast, by virtue of instincts, capacities, and (individual and institutional) incentives, it is easier/more likely that people will act in view of the present or images of the present projected onto the future. It also all so easy for people to be caught up in a self-referential discourse (and game) defined solely by financial outcomes achieved by one or another investor. As a result this discourse puts a premium on being clear about and hewing to the key goals to be achieved over relatively long periods time (especially their cumulative effect). These goals need to be formulated in a way which provides steady guidance as to whether and how best to change course in light of the almost inevitable unanticipated or unexpected changes – not infrequently dramatic ones – that will occur. There is a need for institutional mechanisms to enable that guidance to be followed despite one or another short-term pressure.
3. There is a need to avoid discourse about investment not only as it becomes self-referential but also as it plays out in ways that are reductionist. There is an elaborate and complex (and not infrequently as well, Delphic) verbal and (especially) mathematical machinery

which underpins that discourse which may offer a false sense of certainty and/or security. While such machinery should be accorded respect there is a pressing need to have a sufficiently critical understanding of what has been shorn from a richer and wider human experience to allow the proffered conclusions to be drawn, and, in turn, of the reach of those conclusions.

4. There is an especial need to avoid that aspect of the discourse which relates to an understanding of risk. Quite frequently that understanding is limited to a characterization of outcomes in immediate financial terms. Too often it is not informed by the particular nature of the plan, the nature of the interests at stake, and associated outcomes. At the extreme the compass of that understanding have been shrunk to risk understood only as the volatility of returns (and yet even more narrowly as volatility as expressed in the standard deviation of returns). There is a corresponding imperative to contextualize the understanding risk in the underlying real world experience of the enterprises in which investments are made and in turn, how that experience is further contextualized by the experience of the larger society. It could be that doing so might diminish the possibilities for the application of mathematical machinery or its reach. But that in some measure would be an expression of the fact that the nature of the prudential judgments which have to be made are such that often they may require a different kind of knowledge, experience, and skill (or a capacity or ability of a different sort).
5. As the preceding pages might suggest devising a fiduciary duty standard (and related requirements) so as to help ensure that judgments of that character are made is no mean task. As proposed there, if there is warrant for a standard grounded in the practice of a community of reference then there should be a focus in the first instance, on the community (or possibly different communities) of retirement plan investment decision makers, that is with those individuals who have similar, ultimate responsibilities for the decisions which are made. Such a different reference would in some measure give a different meaning to the “care, skill, [and] diligence” required and as well, as noted, entail appropriate attention to the attributes of “prudence” as such. This approach is not to say that the kind of care, skill, and diligence of the sort which has heretofore been cited – that of the community (or complex) of asset managers, consultants, and advisors and closely associated academics – is not important; it might well be a close second, but it should still come second.
6. In addition as the very brief discussion above has suggested, the duty of care plays out very differently depending upon the different roles which plan members might play even in conventional terms with respect to investment decision-making. That is, in the context of ERISA and defined contribution plans, the conceptual “hook” defining who if anyone other than plan members has fiduciary-like responsibilities with respect to investment decision is that of the nature and extent “control” over such decisions which has been accorded to plan members. In turn, such control being deemed sufficient to get fund trustees/would-be fiduciaries in not inconsiderable measure “off the hook” hinges in diffuse and murky ways on the ability of plan members to achieve financial-security-in-retirement-related goals through exercise of the control allowed to them. This matter is a subject which was not canvassed by the Report but will be of increasing importance insofar as the current government mandated or offered defined contribution plans expand or others are otherwise created.
7. Of course in some not insubstantial measure the attributes of care, skill, and diligence must be those attributes of the individual with ultimate responsibility for plan investment decision-making. However as an historical and practical matter – likely independent of and to some degree the result of the influence of MPT related discourse – there has been considerable delegation of elements of the decision-making process – in the American experience to some not inconsiderable degree internally within retirement plans but more

typically externally to those asset managers and others. Although the Report appears to allude to that delegation, yet it does not attend to the implications of delegation for fiduciary duty as it concerns both the ultimate decision-makers and those individuals to whom certain tasks are delegated. Again, in the American experience, ERISA as a formal legal matter appears to some degree explicitly to address those issues.<sup>190</sup> However, as a practical one it is not clear how effective it has been.<sup>191</sup> They need to be assessed in view of the terms and understandings of agreements by which delegated tasks are taken up by other than the ultimate decision-makers, how those terms and how they might be undermined by unwarranted reliance by those decision-makers on or unwarranted deference to those individuals who have assumed those tasks.

8. The foregoing considerations are ones typically associated with a “duty of care,” although the principal-agent and related problems to which delegation gives rise readily implicate concerns about a “duty of loyalty”. Clearly the lodestar for guiding formulation of what is expected of investment decision-makers in those terms are whose interests the term specifies to be at stake – those individuals on whose behalf and for whose benefit the investment decisions are to be made – and the particular interests/benefits which are at play. Even within the context of ERISA’s prescription in those terms – or at least the prevailing though challenged reading of that prescription – limiting those interests/benefits to financial ones of plan members, there are important issues which the Report did not canvas. First and foremost in that regard – and as we have reiterated – loyalty needs to be fleshed out in terms of the particular kinds of financial interests/benefits to which the plan must attend – ones which vary greatly according to whether it is a defined benefit, defined contribution, hybrid or other kind of plan – and the relationships between and among members of the plan, which differ correspondingly. The problems are ones both intergenerational and intra-generational in nature. Perhaps as well, there are the interests of others who had a role in establishing the plan and may have a continuing role with respect to it, for example, insofar as they have the power to change the terms of the plan or to the degree that they are potential guarantors of pension payments, returns on investments, or otherwise.
9. As noted, the prevailing reading of ERISA may not be correct; indeed we argue to that effect. Then it might be legitimate and perhaps necessary to take account of a broader range of (at least) members’ interests. Alternatively, it might be required by statute or regulation or perhaps case law, for example, by virtue of an amendment to ERISA or any other legal prescription for fiduciary duty-related duties. We write “might” because the relevant provisions could allow but not require account be taken of such other interests.<sup>192</sup> Insofar as account is taken, then not only would there be need for care, skill, and diligence with regard to the additional interests implicated but also there would be another layer of possible complication with regard to the matters of loyalty as they pertain to the various interests. Moreover, it is, for example, one thing to pursue for a defined benefit plan, an investment-related mandate with respect to issues which of necessity will have implications for all members. It is another for a defined contribution plan which allows some measure of investment choice to plan members. Therefore, while the mandate could apply to all available choices, it could alternatively be limited to certain choices from among which members are free to select.
10. As detailed above, formulations regarding fiduciary duty in general emerged and evolved out of the experience of in the first instance of voluntary private action in connection with retirement plans, in at least in the United States and certain other common law countries, like the UK and Canada. To be sure, as we have explained, that duty could not be given practical meaning and force without certain kinds of government action in the form of statutes, regulations, or judicial decisions. However, that action is largely of a different character from that which has been involved with the establishment of plans by (the) Indian

government(s) and related oversight and management of them. As such the just noted concepts and standards of fiduciary duty are, in the first instance, not immediately relevant or applicable although they might be made to be. The narrative above reflects such insights and understanding of the play given to those concepts and standards by virtue of government action. For example, there is the suggestion while an insistence on the government (or its agents) being constrained by those concepts and standards runs afoul of the authority of the sovereign, there is no necessary bar to the sovereign imposing on itself those constraints. The discussion above about the relevance of the Indian Trusts Act is illustrative in that regard. (There are additional refinements of any analysis in these terms insofar as the exercise of government authority is directed to the citizenry at large rather than to individuals as employees of the government.). These matters are issues which are, at minimum, not directly touched upon in the Report. Going forward it would be useful, if not essential, to have clarity with regard to them.

## APPENDIX A.

### THE “CONTROL” EXCEPTION TO FIDUCIARY STATUS WITH RESPECT TO INDIVIDUAL ACCOUNT PLANS

In the United States, the Employee Retirement Income Security Act of 1974 establishes requirements with respect to the establishment and operation of private sector occupational retirement plans. More particularly, 29 U.S. Code § 1104(a)<sup>193</sup> provides that a “fiduciary” (as defined by ERISA) has certain duties. However, § 1104 (c)(1)(a)(ii) provides that in cases like this one in which the plan “provides for individual accounts” and if the Plan “permits a participant or beneficiary to exercise control over the assets in his account” and that person “exercises control over the assets in his account (as determined under regulations of the Secretary [of Labor]),” then any person who would “otherwise [be] a fiduciary” will, in effect, not be deemed not to be one. According to the Secretary’s determination a necessary (though not entirely sufficient) condition for a person being deemed to exercise control is that that he or she be afforded a “broad range of investment alternatives.” According to 29 CFR 2550.404c-1(b)(3), to constitute such a range, “the available investment alternatives are sufficient to provide the participant or beneficiary with a reasonable opportunity to:

- (A) Materially affect the potential return on amounts in his individual account with respect to which he is permitted to exercise control and the degree of risk to which such amounts are subject;
- (B) Choose from at least three investment alternatives:
  - (1) Each of which is diversified;
  - (2) Each of which has materially different risk and return characteristics;
  - (3) Which in the aggregate enable the participant or beneficiary by choosing among them to achieve a portfolio with aggregate risk and return characteristics at any point within the range normally appropriate for the participant or beneficiary; and
  - (4) Each of which when combined with investments in the other alternatives tends to minimize through diversification the overall risk of a participant's or beneficiary's portfolio;
- (C) Diversify the investment of that portion of his individual account with respect to which he is permitted to exercise control so as to minimize the risk of large losses, taking into account the nature of the plan and the size of participants' or beneficiaries' accounts. In determining whether a plan provides the participant or beneficiary with a reasonable opportunity to diversify his investments, the nature of the investment alternatives offered by the plan and the size of the portion of the individual's account over which he is permitted to exercise control must be considered. Where such portion of the account of any participant or beneficiary is so limited in size that the opportunity to invest in look-through investment vehicles is the only prudent means to assure an opportunity to achieve appropriate diversification, a plan may satisfy the requirements of this paragraph only by offering look-through investment vehicles.”<sup>194</sup>

The foregoing notwithstanding, a likely scenario is one in which a Plan Member does not make designated choices from among those permitted to him or her. If so, 29 U.S.C. §1104 (c)(5)(A) provide that he or she is “treated as exercising control over the assets in the account with respect to the amount of contributions and earnings which, in the absence of an investment election by the participant or beneficiary, are invested by the plan in accordance with regulations prescribed by the Secretary.”<sup>195</sup> Those regulations must “provide guidance on the appropriateness of

designating default investments that include a mix of asset classes consistent with capital preservation or long-term capital appreciation, or a blend of both.” According to 29 CFR 2550.404c-5(e)(4), a necessary (though not entirely sufficient condition) is that the default investment is a “qualified one,” that is,

“(4) Constitutes one of the following:

- (i) An investment fund product or model portfolio that applies generally accepted investment theories, is diversified so as to minimize the risk of large losses and that is designed to provide varying degrees of long-term appreciation and capital preservation through a mix of equity and fixed income exposures based on the participant's age, target retirement date (such as normal retirement age under the plan) or life expectancy. Such products and portfolios change their asset allocations and associated risk levels over time with the objective of becoming more conservative (*i.e.*, decreasing risk of losses) with increasing age. For purposes of this paragraph (e)(4)(i), asset allocation decisions for such products and portfolios are not required to take into account risk tolerances, investments or other preferences of an individual participant. An example of such a fund or portfolio may be a “life-cycle” or “targeted-retirement-date” fund or account.
- (ii) An investment fund product or model portfolio that applies generally accepted investment theories, is diversified so as to minimize the risk of large losses and that is designed to provide long-term appreciation and capital preservation through a mix of equity and fixed income exposures consistent with a target level of risk appropriate for participants of the plan as a whole. For purposes of this paragraph (e)(4)(ii), asset allocation decisions for such products and portfolios are not required to take into account the age, risk tolerances, investments or other preferences of an individual participant. An example of such a fund or portfolio may be a “balanced” fund.
- (iii) An investment management service with respect to which a fiduciary, within the meaning of paragraph (e)(3)(i) of this section, applying generally accepted investment theories, allocates the assets of a participant's individual account to achieve varying degrees of long-term appreciation and capital preservation through a mix of equity and fixed income exposures, offered through investment alternatives available under the plan, based on the participant's age, target retirement date (such as normal retirement age under the plan) or life expectancy. Such portfolios are diversified so as to minimize the risk of large losses and change their asset allocations and associated risk levels for an individual account over time with the objective of becoming more conservative (*i.e.*, decreasing risk of losses) with increasing age. For purposes of this paragraph (e)(4)(iii), asset allocation decisions are not required to take into account risk tolerances, investments or other preferences of an individual participant. An example of such a service may be a “managed account.”<sup>196</sup>



## APPENDIX B.

### KEY PROVISIONS OF THE EMPLOYEES' PROVIDENT FUNDS AND MISCELLANEOUS PROVISIONS ACT OF MARCH 4, 1952 (AS AMENDED) (EPFMPA)

The EPFMPA authorizes the Central Government:

- To “frame a Scheme to be called the Employees' Provident Fund Scheme for the establishment of provident funds under [the EPFMP Act] for employees or for any class of employees and specify the establishments or class of establishments to which the said Scheme shall apply”<sup>197</sup>.
  - The Scheme proposed or any modification of it must be submitted to Parliament which has the power to reject or modify it within a specified time.<sup>198</sup>
  - Correspondingly there is to be created “a Fund in accordance with the provisions of the [EPFMP Act] and the Scheme.”<sup>199</sup>
  - Subject to the provisions of the EPFMP Act “a scheme framed under sub-section (I) may provide for all or any of the matters specified in Schedule II.”<sup>200</sup>
  - Schedule II states “matters for which provision may be made in a Scheme” which include:
    - The employees who must join the Fund.<sup>201</sup>
    - The contributions to the Fund required of employers and contributions employees might make.<sup>202</sup>
    - The payments required of employers to meet administration costs.<sup>203</sup>
    - “[T]he investment of moneys belonging to the Fund in accordance with any directions issued or conditions specified by the Central Government.”<sup>204</sup>
    - “The conditions under which withdrawals from the Fund may be permitted.”<sup>205</sup>
    - “The fixation by the Central Government in consultation with the boards of trustees concerned of the rate of interest payable to members.”<sup>206</sup>
    - “The fees to be levied for any of the purposes specified in this Schedule.”<sup>207</sup>
    - Any other necessary or proper purpose to implement the Scheme.<sup>208</sup>
- To “frame a scheme to be called the Employees' Pension Scheme for the purpose of providing for--
  - (a) superannuation pension, retiring pension or permanent total disablement pension to the employees of any establishment or class of establishments to which this Act applies; and
  - (b) widow or widower's pension, children pension or orphan pension payable to the beneficiaries of such employees.”<sup>209</sup>
    - The proposed Scheme (or any amendment thereto) must be submitted to Parliament which has the authority to reject all of or modify it.<sup>210</sup>
    - Correspondingly there is to be created “a Pension Fund into which there shall be paid, from time to time, as may be specified in the Pension Scheme” specified employer contributions.<sup>211</sup>
    - The Pension Fund is to “vest in and be administered by the Central Board in such manner as may be specified in the Pension Scheme.”<sup>212</sup>
    - Subject to the provisions of the EPFMP Act the Pension Scheme “may provide for all or any of the matters specified in Schedule III.”<sup>213</sup>
      - The employees to whom the Pension Scheme applies.<sup>214</sup>
      - How much of the employers' contributions to the Provident Fund are credited to the Pension Fund.<sup>215</sup>

- Minimum service qualifications for eligibility and the manner of granting benefits.<sup>216</sup>
- “Investment of moneys belong to Pension Fund...[are]...subject to such pattern of investment as may be determined by the Central Government.”<sup>217</sup>
- “The scale of pension and pensionary benefits and the conditions relating to grant of such benefits”<sup>218</sup>
- Manner of administrative expenses for administration are met from income of the Pension Fund.<sup>219</sup>
- Any other necessary or proper purpose to implement the Scheme.<sup>220</sup>
- To “frame a scheme to be called the Employees' Deposit-linked Insurance Scheme for the purpose of providing life insurance benefits to the employees of any establishment or class of establishments to which this Act applies.”<sup>221</sup>
  - The Scheme proposed or any modification of it must be submitted to Parliament which has the power to reject or modify it within a specified time.
  - Correspondingly, there is to be created a “Deposit-linked Insurance Fund into which shall be paid by the employer from time to time in respect of every such employee in relation to whom he is the employer, such amount, not being more than one per cent of the aggregate of the basic wages, dearness allowance and retaining allowance (if any) for the time being payable in relation to such employee as the Central Government may, by notification in the Official Gazette, specify.”<sup>222</sup>
  - The Insurance Fund is to “vest in the Central Board and be administered by it in such manner as may be specified in the Insurance Scheme.”
  - The Insurance Fund “may provide for all or any matters specified in Schedule IV.”<sup>223</sup>
    - The employees to whom the Pension Scheme applies.<sup>224</sup>
    - The “investment of moneys belonging to the Insurance Fund subject to such pattern of investment as may be determined, by order, by the Central Government.”<sup>225</sup>
    - “The scales of insurance benefits and conditions relating to the grant of such benefits.”<sup>226</sup>
    - Any other necessary or proper purpose to implement the Scheme.<sup>227</sup>
- In addition, the Central Government “constitutes...a Board of Trustees for the territories to which this Act extends (hereinafter in this Act referred to as the Central Board) consisting of” named persons who include:
  - “[a Chairman and a Vice-Chairman to be appointed by the Central Government”;
  - “the Central Provident Fund Commissioner, ex officio”
  - 5 central government officials appointed by the Central Government;
  - 15 persons representing such states as the Central Government designates and whom the Central Government appoints;
  - 10 persons each representing employees and employers appointed by the Central Government after consultation with employee and employer organizations.”<sup>228</sup>
- The Central Government
  - “[S]ubject to the provisions of section 6A and section 6C administer[s] the Fund vested in it in such manner as may be specified in the Scheme.”<sup>229</sup>
- The Central Government
  - [P]erforms such other functions as it may be required to perform by or under any provisions of the Scheme, the Pension Scheme and the Insurance Scheme.”<sup>230</sup>
  - May “constitute...an Executive Committee to assist the Central Board in the performance of its functions,” the members of which are appointed by the

Central Government in a specified way from among the Central Board members..  
231

- The Central Government
  - “[M]ay, after consultation with the Government of any State...constitute for that State a Board of Trustees (hereinafter in this Act referred to as the State Board) in such manner as may be provided for in the Scheme.” <sup>232</sup>
  - “A State Board shall exercise such powers and perform such duties as the Central Government may assign to it from time to time.” <sup>233</sup>

## APPENDIX C.

### PREScription FOR PERMISSIBLE INVESTMENTS UNDER THE INDIAN TRUSTS ACT, NO. 2 of 1882, JANUARY 12, 1882 (AS AMENDED)

[http://www.liiofindia.org/in/legis/cen/num\\_act/ita1882177/](http://www.liiofindia.org/in/legis/cen/num_act/ita1882177/)

"20. Investment of trust-money.-Where the trust-property consists of money and cannot be applied immediately or at an early date to the purposes of the trust, the trustee is bound (subject to any direction contained in the instrument of trust) to invest the money on the following securities, and on no others:-

(a) in promissory notes, debentures, stock or other securities 1\*[of any State Government or] of the Central Government or of the United Kingdom of Great Britain and Ireland:

2\*[Provided that securities, both the principal whereof and the interest whereon shall have been fully and unconditionally guaranteed by any such Government shall be deemed, for the purposes of this clause, to be securities of such Government;]

(b) in bonds, debentures and annuities 3\*[charged or secured by the 4\*[Parliament of the United Kingdom] 5\* [before the fifteenth day of August, 1947] on the revenues of India or of the 6\*[Governor-General in Council] or of any Province]:

7\*[Provided that, after the fifteenth day of February, 1916, no money shall be invested in any such annuity being a terminable annuity unless a sinking fund has been established in connection with such annuity; but nothing in this proviso shall apply to investments made before the date aforesaid;]"<sup>234</sup>

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1 Ins. by Act 31 of 1920, s. 2 and Sch. I.

2 Added by Act 18 of 1934, s. 2.3 Subs. by the A. O. 1937 for "charged by the Imperial Parliament on the revenues of India".

4 Subs. by the A. O. 1950 for "Imperial Parliament".

5 Ins. by the A. O. 1948.6 Subs. by the A. O. 1948 for "Federation".

7 Added by Act 1 of 1916, s. 2.27.

1\*[(bb) in India three and a half per cent. stock, India three per cent. stock, India two and a half per cent. stock or any other capital stock 2\*[which before the 15th day of August, 1947, was] issued by the Secretary of State for India in Council under the authority of an Act of Parliament 3\*[of the United Kingdom] and charged on the revenues of India] 4\*[or which 5\*[was] issued by the Secretary of State on behalf of the Governor-General in Council under the provisions of Part XIII of the Government of India Act, 1935]; (26 Geo. 5, Ch. 2.)

(c) in stock or debentures of, or shares in, Railway or other Companies the interest whereon shall have been guaranteed by the Secretary of State for India in Council 1\*[or by the Central Government] 6\*[or in debentures of the Bombay 7\*[Provincial] Co-operative Bank, Limited, the interest whereon shall have been guaranteed, by the Secretary of State for India in Council] 4\*[or the State Government of Bombay];

8\*[(d) in debentures or other securities for money issued, under the authority of 9\*[any Central Act or Provincial Act or State Act], by or on behalf of any municipal body, port trust or city improvement trust in any Presidency-town, or in Rangoon Town, or by or on behalf of the trustees of the port of Karachi:]

10\*[Provided that after the 31st day of March, 1948, no money shall be invested in any securities issued by or on behalf of a municipal body, port trust or city improvement trust in Rangoon town, or by or on behalf of the trustees of the port of Karachi.]

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1 Ins. by Act 1 of 1916, s. 2.2 Subs. by the A. O. 1950 for "which may at any time hereafter be".

3 Ins. by the A. O. 1950.

4 Ins. by the A. O. 1937.5 Subs. by the A. O. 1950 for "may be".

6 Ins. by Act 21 of 1917, s. 2.7 Subs. by Act 37 of 1925, s. 2 and Sch. I, for "Central".

8 Subs. by Act 3 of 1908, s. 2, for the original clause.

9 The words "any Act of a Legislature established in British India" have been successively amended by the A. O. 1948, the A. O. 1950 and Act 3 of 1951 to read as above.

10 Ins. by the A. O. 1948.28.

(e) on a first mortgage of immoveable property situate in 1\*[any part of the territories to which this Act extends]: Provided that the property is not a leasehold for a term of years and that the value of the property exceeds by one-third, or, if consisting of buildings, exceeds by one-half, the mortgage-money;<sup>4\*\*\*</sup>

4\*(ee) in units issued by the Unit Trust of India under any unit scheme made under section 21 of the Unit Trust of India Act, 1963; or;

(f) on any other security expressly authorized by the instrument of trust 4\* [or by the Central Government by notification in the Official Gazette,] or by any rule which the High Court may from time to time prescribe in this behalf:

Provided that, where there is a person competent to contract and entitled in possession to receive the income of the trust-property for his life, or for any greater estate, no investment on any security mentioned or referred to in clauses (d), (e) and (f) shall be made without his consent in writing.

## APPENDIX D.

### MATERIALS RELATING TO ERISA'S DEFINITION OF WHO IS A "FIDUCIARY"

The question of what actions by whom are deemed to be fiduciary in nature is an important one. In the United States, under ERISA, that question must be addressed in view of the statutory definition of a fiduciary. But for a certain exception immediately relevant here, ERISA states that a person "is a fiduciary with respect to a plan to the extent

(i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan. Such term includes any person designated under section 1105 (c)(1)(B) of this title."<sup>235</sup>

At first blush, the first part of subsection (i) resonates with the definition of a fiduciary role insofar as it is concerned with *discretionary* action. (It is not clear why there is no reference to discretionary action in the second part.) If it is understood that plan members have certain rights pertaining to the plan assets with respect to which that discretionary power is exercised, then this provision sets conditions for establishing fiduciary status which comes close to those conditions described at the outset of this paper.

The question, though, is which kinds of actions fall outside of those actions deemed to concern the management of a plan or management or disposition of its assets. The U.S. Department of Labor weighed in on this issue in an "information letter," that is it provide an advisory opinion provided in response to a private party's inquiry as to the meaning/application of a provision of ERISA. The particular issue which occasioned the inquiry was an employer's decision to terminate a plan (which, because it was overfunded, enabled the employer to capture the defined benefit plan funding surplus.) According to the DOL, by virtue of the "the voluntary nature of the private pension system governed by ERISA,...there is a class of discretionary activities which relate to the formation, rather than the management, of plans. These so-called 'settlor' functions include decisions relating to the establishment, termination and design of plans and are not fiduciary activities subject to Title I of ERISA."<sup>236</sup>

This conclusion was informed by the view that a determination of fiduciary status was "functional" in nature, that is the analytic task was to "examine the types of functions performed, or transactions undertaken, on behalf of a plan to determine whether such activities are fiduciary in nature and therefore subject to ERISA's fiduciary responsibility provisions. 29 CFR §2509.75-8, D-2. Although persons holding certain positions with a plan (for example, plan administrator) will be plan fiduciaries because of the discretionary nature of the duties attendant upon such position, fiduciary status is not limited to persons occupying those positions. Rather, it is the function performed that will determine fiduciary status. 29 CFR §2509.75-8, D-3."<sup>237</sup>

About a decade later, the Supreme Court, in a series of cases reached broadly the same conclusion though arguably based on somewhat different rationales. More particularly, in *Curtiss Wright v. Schoonejongen*, the U.S. Supreme Court held that ERISA does not create any substantive entitlement to employer provided health benefits or any other kind of welfare benefits. Employers or other plan sponsors are generally free under ERISA, for any reason at any time, to adopt, modify, or terminate welfare plans. See *Adams v. Avondale Industries, Inc.*, 905 F. 2d 943, 947 (CA6 1990) ("[A] company does not act in a fiduciary capacity when deciding to amend

or terminate a welfare benefits plan").<sup>238</sup> In so stating and citing *Adams*, the Court relied on a key argument made in *Adams* which is apposite with the DOL rationale described above, namely one grounded in ERISA associated with employment based plans being voluntary and the intent in ERISA not to override employer action to establish (or not) a plan." It added

"Although Congress considered imposing vesting requirements on welfare benefits, it decided to limit vesting to pension plans in order to "keep [ ] costs within reasonable limits." S.Rep. No. 383, 93d Cong., 2d Sess. 18, reprinted in 1974 U.S.CODE CONG. & ADMIN.NEWS 4639, 4890, 4903 and in 1 Legislative History of the Employee Retirement Income Security Act of 1974 at 1086 (1976); Note, Unfunded Vacation Benefits: Determining the Scope of ERISA, 87 Colum.L.Rev. 1702, 1715 (1987). Apparently, Congress chose not to impose vesting requirements on welfare benefit plans for fear that placing such a burden on employers would inhibit the establishment of such plans. See Note, supra, 87 Colum.L.Rev. at 1715 n. 93 and accompanying text. In drawing the line between employer actions subject to the fiduciary duty requirement and those not, we must avoid any rule that would have the effect of undermining Congress' considered decision that welfare benefit plans not be subject to a vesting requirement. We are compelled, therefore, to reject plaintiffs' proposed rule that welfare benefit plans such as the one before us be amended or terminated only when such action would be in the best interests of the employees. To adopt such a requirement would, in effect, accord employees a vested right to welfare benefits, thereby upsetting ERISA's delicate balance in this area. Instead, we employ the rule, already announced by this circuit as dicta in *Musto*, 861 F.2d at 911, that a company does not act in a fiduciary capacity when deciding to amend or terminate a welfare benefits plan. In so doing, we join the majority of circuits that have already ruled on this issue."<sup>239</sup>

In *Lockheed v Spink*, the Court extended that conclusion to pension plans stating that "[w]hen employers undertake those actions, they do not act as fiduciaries, 514 U.S. at 78, but are analogous to the settlors of a trust."<sup>240</sup> It grounded its opinion on ERISA's definition of a fiduciary citing a lower federal court case to the effect that "[B]ecause [the] defined functions [in the definition] do not include plan design, an employer may decide to amend an employee benefits plan without being subject to fiduciary review."<sup>241</sup> (Previously, the Court had intimated but not directly embraced the assertion, stating in *Varity Corp. v. Howe*, that "[w]hile it may be true that amending or terminating a plan (or a common-law trust) is beyond the power of a plan administrator (or trustee) – and, therefore, cannot be an act of plan "management" or "administration" – it does not follow that making statements about the likely future of the plan is also beyond the scope of plan administration."<sup>242</sup>) T

The Court reiterated the point in *Hughes Aircraft Co. v. Jacobson*, offering a gloss on *Curtiss Wright* to the effect "[i]n general, an employer's decision to amend a pension plan concerns the composition or design of the plan itself and does not implicate the employer's fiduciary duties which consist of such actions as the administration of the plan's assets."<sup>243</sup> It added: "In general, an employer's decision to amend a pension plan concerns the composition or design of the plan itself and does not implicate the employer's fiduciary duties which consist of such actions as the administration of the plan's assets. See *id.*, at 890. ERISA's fiduciary duty requirement simply is not implicated where Hughes, acting as the Plan's settlor, makes a decision regarding the form or structure of the Plan such as who is entitled to receive Plan benefits and in what amounts, or how such benefits are calculated."<sup>244</sup>

Finally, In *Beck v. PACE International Union*, a case which centered on whether the merger of a plan with was tantamount to termination of that plan, the Court re-emphasized the approach: :an employer's fiduciary duties under ERISA are implicated only when it acts in the ...capacity of [a plan administrator, not a plan sponsor]. Which hat the employer is proverbially wearing depends

upon the nature of the function performed...and is an inquiry that is aided by the common law of trusts which serves as ERISA's backdrop. See *Shaw v. Delta Air Lines, Inc.*, 463 U. S. 85, 91 (1983) (describing how ERISA does not mandate that "employers provide any particular benefits, and does not itself proscribe discrimination in the provision of employee benefits").<sup>[5]</sup> A settlor's powers include the ability to add a new benefit structure to an existing plan."<sup>245</sup>

At the legal rhetorical level, the emphasis, as noted, was on a putative distinction between settlor and other functions as they pertain to trusts (and relatedly the difference between certain management or administrative functions and other kinds of functions.) However, lurking behind that rhetoric – in some measure in Hughes by the reference to *Shaw* – was the concern that imposing any fiduciary duty in connection with such a function/role would cut against the pre-supposed voluntary character of employment based plans.

Unfortunately the Court has had very little to say as to its reading of the terms "management" and "administration" as used in ERISA's definition of fiduciary.

An important question the foregoing raises concerns the determination of the investment vehicles from among which a defined contribution plan participant might choose. According to a 1992 DOL regulation "the act of limiting or designating investment options which are intended to constitute all or part of the investment universe of an ERISA 404(c) plan is a fiduciary function, whether achieved through fiduciary designation or express plan language."<sup>246</sup> However, insofar as the investment choices are defined by the terms of the plan, and not by the trustees of the plan (subject to its terms), the Court's reasoning in the defined benefit plan cases might suggest a contrary conclusion.



## APPENDIX E.

### SELECTED TRUSTEE DUTIES UNDER THE INDIAN TRUSTS ACT 1882, NO. 2 of 1882, JANUARY 12, 1882 (AS AMENDED)

[http://www.liiofindia.org/in/legis/cen/num\\_act/ita1882177/](http://www.liiofindia.org/in/legis/cen/num_act/ita1882177/)

11. Trustee to execute trust. The trustee is bound to fulfil the purpose of the trust, and to obey the directions of the author of the trust given at the time of its creation, except as modified by the consent of all the beneficiaries being competent to contract. Where the beneficiary is incompetent to contract, his consent may, for the purposes of this section, be given by a principal Civil Court of original jurisdiction. Nothing in this section shall be deemed to require a trustee to obey any direction when to do so would be impracticable, illegal or manifestly injurious to the beneficiaries...

13. Trustee to protect title to trust-property.-A trustee is bound to maintain and defend all such suits, and (subject to the provisions of the instrument of trust) to take such other steps as, regard being had to the nature and amount or value of the trust- property, may be reasonably requisite for the preservation of the trust-property and the assertion or protection of the title thereto. Illustration The trust-property is immoveable property which has been given to the author of the trust by an unregistered instrument. Subject to the provisions of the Indian Registration Act, 1877 (3 of 1877), 1\* the trustee's duty is to cause the instrument to be registered.

14. Trustee not to set up title adverse to beneficiary.-The trustee must not for himself or another set up or aid any title to the trust-property adverse to the interest of the beneficiary.

15. Care required from trustee.-A trustee is bound to deal with the trust-property as carefully as a man of ordinary prudence would deal with such property if it were his own; and, in the absence of a contract to the contrary, a trustee so dealing is not responsible for the loss, destruction or deterioration of the trust-property...

...

17. Trustee to be impartial.-Where there are more beneficiaries than one, the trustee is bound to be impartial, and must not execute the trust for the advantage of one at the expense of another...

...

20. Investment of trust-money. - Where the trust-property consists of money and cannot be applied immediately or at an early date to the purposes of the trust, the trustee is bound (subject to any direction contained in the instrument of trust) to invest the money on the following securities, and on no others:- ... or; (f) on any other security expressly authorized by the instrument of trust or by the Central Government by notification in the Official Gazette...

...

47. Trustee cannot delegate.- A trustee cannot delegate his office or any of his duties either to a co-trustee or to a stranger, unless (a) the instrument of trust so provides, or (b) the delegation is in the regular course of business, or (c) the delegation is necessary, or (d) the beneficiary, being competent to contract, consents to the delegation...

...

51. Trustee may not use trust-property for his own profit.- A trustee may not use or deal with the trust-property for his own profit or for any other purpose unconnected with the trust.

...

55. Rights to rents and profits.-The beneficiary has, subject to the provisions of the instrument of trust, a right to the rents and profits of the trust-property.

...

88. Advantage gained by fiduciary.- Where a trustee, executor, partner, agent, director of a company, legal adviser, or other person bound in a fiduciary character to protect the interests of another person, by availing himself of his character, gains for himself any pecuniary advantage, or where any person so bound enters into any dealings under circumstances in which his own interests are, or may be, adverse to those of such other person and thereby gains for himself a pecuniary advantage, he must hold for the benefit of such other person the advantage so gained.

...

## APPENDIX F.

### THE MATCH BETWEEN INVESTMENT GOALS AND THE GOALS OF ENTERPRISES IN WHICH INVESTMENTS ARE MADE

Clearly financial returns from investments in enterprises are central to thinking about funded retirement plans. Equally clearly, prospects of that sort derive from three kinds of considerations: first, what the forms of possible (or permissible) investment in the enterprise are and their relation to the nature of the returns which might be realized<sup>247</sup>; second, the legal and other parameters which define whether and how enterprises can operate to yield those returns; and third, given those parameters and the economic and other context in which they find themselves, how prepared enterprises are and so prepared, how effectively they operate to generate results deemed (sufficiently) successful in those respects.

In the American context, there are of course innumerable enterprises organized as “for-profit” corporations. Acquisition of shares issued by the corporate (typically though not always) entitles shareowners to certain governance rights – for example, to choose members of the board of directors and generally to vote on a few kinds of major decisions. It also affords potential financial claims in the form of distributions of corporate funds generally linked to corporate profits (dividends) and to residual corporate assets, for instance, in the form of bankruptcy. And, of course, insofar as the sale of the shares is permissible financial benefits may be derived from their sale (or variations thereof) as well.<sup>248</sup> In addition, at (at least) one step removed, derivatives with respect to which the underlying asset is a corporate share afford other ways to secure financial gain. Acquisition of instruments of corporate debt entails no role in corporate governance /decision-making except indirectly and in limited ways as might arise in the context of distressed situations and at the extreme, corporate failure, i.e., bankruptcy. The financial claims associated with the debt are defined by the interest and amount and timing of principal payments and perhaps other conditions.

In the first instance, the ultimate calculus of financial risk and reward with regard to both is ultimately linked to the profitability of the enterprise, though, of course, for shares, in rather different ways for shares than for debt instruments. Clearly the manner or extent to which corporations must (or may) and do pursue profit are critical to that calculus. As we have noted, in the U.S. the matter of the exclusivity or otherwise of the corporate pursuit of profit has been and remains contested. Suffice to say that funded retirement plans as investors have a critical interest in how that matter is resolved, at minimum, in terms not only of what it means for its financial import but also with respect to its non-financial implications insofar investment decision-makers must or might take account of them. In other words, there must be some measure of alignment between the goals of investors in general and funded retirement plans in particular and the goals of enterprises in which they invest.

The point is highlighted by a couple of examples. In the United States so-called “benefit corporations” can be chartered in some states. While such corporations are for profit, they also “have a corporate purpose to create a material positive impact on society and the environment”; “are required to consider the impact of their decisions not only on shareholders but also on workers, community, and the environment; and” “are required to make available to the public an annual benefit report that assesses their overall social and environmental performance against a third party standard.”<sup>249</sup> Arguably the profit profile and the ultimate calculus of financial risks and reward from investment in these benefit corporations would be different – perhaps better or worse – than that of conventional ones. Consider another and in certain ways more extreme case, namely a worker owned enterprise, one with respect to which the only property rights are those

of workers in the form of internal capital accounts which represent their portions of enterprise retained profits allocated to them. By contrast with conventional corporations the governance rights which workers would have are purely personal in nature (rather than their being seen as being derived from or associated with shares which are typically viewed as having a property type character). For such corporations there are simply no shareholders and therefore equity investments as such are not possible. Rather, on one model the only form of investment would be in the form of debt.<sup>250</sup> By their very nature such enterprises offer a very different universe of investment opportunities and arguably a very different calculus – perhaps superior, perhaps inferior – of risks and reward should those opportunities be taken up. Again, discourse as to the permissibility and desirability of investments of that sort for funded retirement plans must in sufficient degree be apposite with the existence of and availability for investment of such enterprises.

## ENDNOTES

<sup>1</sup> In this and the following three paragraphs we draw on “The Fiduciary Relationship,” by Paul B. Miller, November 10, 2013, p 14. (Forthcoming in: Andrew S. Gold & Paul B. Miller, eds., *Philosophical Foundations of Fiduciary Law* (Oxford: Oxford University Press). <http://ssrn.com/abstract=2353062> and “A Theory of Fiduciary Liability,” by Paul B. Miller, 56 *McGill Law Journal* 235, 282-283 (2011). <http://lawjournal.mcgill.ca/userfiles/other/8214887-Miller.pdf>

<sup>2</sup> At this stage this scenario has emerged as the dominant one for employment-based retirement plans even though there are still a significant number of defined benefit plans which in the aggregate represent a substantial fraction of overall retirement assets.

<sup>3</sup> The Document itself might have provisions relating to such matters. With regard to certain of them, for example, when and how Members might initiate legal action the law might specify whether such provisions would be permissible. As we shall note later in the context of U.S. federal regulation of private sector employment-based retirement plans, there are certain provisions of law which cannot be trumped even if the parties to the Document agree on them. See for example, 29 U.S. Code § 1110 (b) which provides that “(a) Except as provided in sections 1105 (b)(1) and 1105 (d) of this title, any provision in an agreement or instrument which purports to relieve a fiduciary from responsibility or liability for any responsibility, obligation, or duty under this part shall be void as against public policy.” <http://www.law.cornell.edu/uscode/text/29/1110>

<sup>4</sup> For example, notwithstanding the contract-like aspects of the relationship associated with the Plan Document, the law of contracts might not be viewed as applicable in whole or part. Rather, by virtue of the distinctive nature of the relationship, that is one characterized by the kinds of features referred in the main text, those individuals in a position to authoritatively specify the applicable law – typically a legislature or in the absence of a legislative specification perhaps a court – might conclude that such applicable law is in greater or lesser measure other than contract law. [See “Fiduciary Relationships are Not Contracts,” by Scott Fitzgibbon, *Marquette Law Review*, Vol. 82, 1999, pp. 303-353.] But whatever the law, the question posed would be the legitimacy of the law not honoring what was agreed to as reflected in the Plan Document or perhaps even further limiting what could be agreed to in those terms.

<sup>5</sup> “Trust and Fiduciary Law Duty in the Early Common Law,” by David J. Siepp, *Boston University Law Review*, Volume 91, 1011-1038, 1011 (2011).

<sup>6</sup> “Facts from EBRI, U.S. Retirement Income System,” Employee Benefits Research Institute, 1998. <http://www.ebri.org/publications/facts/>

<sup>7</sup> Id.

<sup>8</sup> Id.

<sup>9</sup> Note that because, for the illustrative purposes, we have focused on private sector employment based plans, it is ERISA which provides the relevant standard. For state and municipal employment based plans the standards are by state law. Even though the language of those standards may to a greater or lesser degree vary from those standards of ERISA, as a practical matter what ERISA has been understood to require has had significant influence on what state law requires.

<sup>10</sup> 29 U.S. Code § 1002(2)(A). <http://www.law.cornell.edu/uscode/text/29/1002>

<sup>11</sup> 29 U.S. Code § 1002 (21)(A)(i). <http://www.law.cornell.edu/uscode/text/29/1002> Note that designation also applies if “(ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.” Id.

<sup>12</sup> That is, it would be relevant to situations in which individual accounts through and by which plan members accumulate assets. It would not apply to a defined benefit plans which afford not a direct role of plan members in investment decisions.

<sup>13</sup> 29 U.S. Code § 1104(a). <http://www.law.cornell.edu/uscode/text/29/1104>

<sup>14</sup> It is more accurate to say that the fiduciary relationship is established at the time contributions are made by or on behalf of a Plan Member. Even if the contributions are not invested they must be kept safely under custodial care.

<sup>15</sup> That is, for example, the constitutional reach of the so-called Commerce Clause. Art. I. s. 8, which relevant part states that “Congress shall have power...

To regulate commerce with foreign nations, and among the several states, and with the Indian tribes...”

<http://www.law.cornell.edu/constitution/articlei>

<sup>16</sup> 29 U.S. Code § 1001(a) – Congressional findings and declaration of policy. <http://www.law.cornell.edu/uscode/text/29/1001>

<sup>17</sup> For example, according to the most recent report of The Forum for Sustainable and Responsible Investment (supported by the US Social Investment Forum) “\$3.31 trillion in US-domiciled assets at year-end 2011 held by 443 institutional investors, 272 money managers and 1,043 community investment institutions that apply various environmental, social and governance (ESG) criteria in their investment analysis and portfolio selection.” “Report on Sustainable and Responsible Investing Trends in the United States, 2012,” The Forum for Sustainable and Responsible Investment, p. 11.

[http://www.ussif.org/files/Publications/12\\_Trends\\_Exec\\_Summary.pdf](http://www.ussif.org/files/Publications/12_Trends_Exec_Summary.pdf) Among the universe of investment vehicles that incorporated ESG factors into investment management were “registered investment companies, such as mutual funds (including those underlying annuity products), exchange-traded funds (ETFs) and closed-end funds, [which] accounted for \$644 billion, invested through 361 funds.” Id.

<sup>18</sup> There is an intense debate about the necessity to make investments with a close eye to the “long term” given the extended time horizon – decades – associated with retirement plans.

<sup>19</sup> “The Employee Retirement Income Security Act of 1974, The First Decade, An Information Paper,” Prepared for Use by the Special Committee on Aging, United States Senate, Washington, U.S. G.P.O., 1984, p. 6.

<sup>20</sup> Id. at 17.

<sup>21</sup> According to an IRS interpretation of IRC 401(a) (which pre-dated the enactment of ERISA), “[t]he primary purpose of benefiting employees or their beneficiaries must be maintained with respect to investments of the trust funds as well as with respect to other activities of the trust. This requirement, however, does not prevent others from also deriving some benefit from a transaction with the trust. For example, a sale of securities at a profit benefits the seller, but if the purchase price is not in excess of the fair market value of the securities at the time of sale and the applicable investment requisites have been met, the investment is consistent with the exclusive-benefit-of-employees requirement. These requisites are: (1) the cost must not exceed fair market value at time of purchase; (2) a fair return commensurate with the prevailing rate must be provided; (3) sufficient liquidity must be maintained to

permit distributions in accordance with the terms of the plan, and (4) the safeguards and diversity that a prudent investor would adhere to must be present.” Rev. Rul. 69-492, Internal Revenue Service, United States Department of the Treasury.

<http://www.charitableplanning.com/document/665866> In turn, in the IRS Revenue Manual, it states that the “[f]our criteria are set forth in Rev. Rul. 69-494 and were incorporated into ERISA 404 and its legislative history.” “Internal Revenue Manual,” Internal Revenue Service, U.S. Department of the Treasury. [http://www.irs.gov/irm/part4/irm\\_04-072-011.html](http://www.irs.gov/irm/part4/irm_04-072-011.html) That is compliance with ERISA’s exclusive benefit requirements implies compliance with the requirements of IRC 401(a).

<sup>22</sup> According to one report, as of March 31, 2014, IRA defined contribution plan assets were \$7.2 trillion, private sector defined benefit plan assets were 6.6 trillion, and state and local defined benefit plan assets were \$3.2 trillion. “Retirement Assets Total \$24.0 Trillion in Second Quarter 2014.” Investment Company Institute. [http://www.ici.org/research/stats/retirement/ret\\_14\\_q2](http://www.ici.org/research/stats/retirement/ret_14_q2)

<sup>23</sup> See “Demand grows for SRI options at US DC plans,” by Sam Riley, top1000funds.com, October 5, 2011 (referring to report, *Opportunities for Sustainable and Responsible Investing In US Defined Contribution Plans* by Mercer and the US SIF Foundation). <http://www.top1000funds.com/news/2011/10/05/demand-grows-for-sri-options-at-us-dc-plans/>

<sup>24</sup> Advisory Opinion 98-0A, Pension and Benefits Welfare Administration, U.S. Department of Labor, May 28, 1998. <http://www.dol.gov/ebsa/programs/ori/advisory98/98-04a.htm> That is, it cited earlier letters and advisory opinions from the Department of Labor for the following position:

“[T]he Department has construed the requirements that a fiduciary act solely in the interest of, and for the exclusive purpose of providing benefits to participants and beneficiaries, as prohibiting a fiduciary from subordinating the interests of participants and beneficiaries in their retirement income to unrelated objectives. In other words, in deciding whether and to what extent to invest in a particular investment, or to make a particular fund available as a designated investment alternative, a fiduciary must ordinarily consider only factors relating to the interests of plan participants and beneficiaries in their retirement income. A decision to make an investment, or to designate an investment alternative, may not be influenced by non-economic factors unless the investment ultimately chosen for the plan, when judged solely on the basis of its economic value, would be equal to or superior to alternative available investments.” Id.

<sup>25</sup> <http://www.legalcrystal.com/acts/51715>

<sup>26</sup> See, for example, “Legislative Vetoes After *Chadha*,” Louis Fisher, Congressional Research Service, May 2, 2005.

<http://www.constitutionproject.org/wp-content/uploads/2012/09/4116.pdf>

<sup>27</sup> EPFMPA, Preamble.

<sup>28</sup> EPFMPA, Section 6A

<sup>29</sup> EPFMPA, Section 1 (kb)(II),

<sup>30</sup> EPFMPA, Section 5 (1B),

<sup>31</sup> The EPFMPA “applies--

(a) to every establishment which is a factory engaged in any industry specified in Schedule I and in which [ twenty] or more persons are employed, and

(b) to any other establishment employing [ twenty] or more persons or class of such establishments which the Central Government may, by notification in the Official Gazette, specify in this behalf.” s. 1 (3)

<sup>32</sup> EPFMPA, Section 5A.

<sup>33</sup> EPFMPA, Section 1A.

<sup>34</sup> EPFMPA, Schedule II, 6. “Fund means the provident fund established under a Scheme.” EPFMPA, Section 2(h).

<sup>35</sup> EPFMPA, Schedule III, 7.

<sup>36</sup> EPFMPA, Schedule IV, 2.

<sup>37</sup> EPFMPA S. 5A(1)

<sup>38</sup> EPFMPA S. 5(1A)

<sup>39</sup> EPFMPA S. 5A(3) (Similarly, the EPS fund “shall vest in and be administered by the Central Board in such manner as may be specified in the [EPS]”<sup>39</sup> and the EDLIS “shall vest in and be administered by the Central Board in such manner as may be specified in the [EDLIS].” EPFMPA S. 6C(5)

<sup>40</sup> EPFMPA s. 5AA(1)

<sup>41</sup> EPFMPA s. 5AA(2)

<sup>42</sup> “Central Board of Trustees,” EPFO. [http://www.epfindia.com/board\\_of\\_trustees.html](http://www.epfindia.com/board_of_trustees.html)

<sup>43</sup> See “Annual Report, 2012-2013,” Employees Provident Fund Organization (stating that the EPFO “[a]dministers the Employees’ Provident Fund and Miscellaneous Provisions Act, 1952”), p. x. [http://www.epfindia.com/annual\\_reports.html](http://www.epfindia.com/annual_reports.html) The EPFO organization chart places the Central Board at the top. Id. at xi.

<sup>44</sup> EPFMPA, Section 5 (1B)

<sup>45</sup> EPFMPA, Schedule II 6.

<sup>46</sup> EPFS s. 52

<sup>47</sup> Indian Trusts Act, 1882 (as amended).

<http://www.helpline1aw.com/docs/THE%20INDIAN%20TRUSTS%20ACT,%201882/CHAPTER%20III%20OF%20THE%20DUTIES%20AND%20LIABILITIES%20OF%20TRUSTEES>

<sup>48</sup> Id.

<sup>49</sup> EPFMPA, Section 6A(5).

<sup>50</sup> “Schedule III: SCHEDULE 3, MATTERS FOR WHICH PROVISION MAY BE MADE IN THE PENSION SCHEME”

<sup>51</sup> EPFMPA, Section 6C(6).

<sup>52</sup> EPFMPA, “SCHEDULE IV, MATTERS TO BE PROVIDED FOR IN THE EMPLOYEES’ DEPOSIT-LINKED INSURANCE SCHEME”.

<sup>53</sup> EPFMPA, Section 5(1B).

<sup>54</sup> “Schedule II: SCHEDULE II, MATTERS FOR WHICH PROVISION MAY BE MADE IN A SCHEME,” EPFMPA.

<sup>55</sup> “The appropriate Government may, by notification in the Official Gazette, and subject to the condition on the pattern of investment of pension fund and such other conditions as may be specified therein, exempt any establishment or class of establishments from the operation of the Pension Scheme.” EPFMPA, Section 17(1C). Curiously, even though exemptions would appear to potentially

apply to the EPFS, EPS, and EDLIS, according to Section 2 (k) of the EPFMPA. “Pension Scheme’ means the Employees’ Pension Scheme [EPS] framed under sub-section (l) of section 6A.”

<sup>56</sup> With regard to the last of the three see “Investment of Provident Fund Moneys Contributed Whether by Employer or Employee,” Income-tax Rules, 1962, Rule 76, <http://www.exploreincometax.com/Rules-under-Indian-Income-tax-Act-1961/Rule-67>

<sup>57</sup> See “Implementing an Inclusive and Equitable Pension Reform, Lessons from India’s New Pension Scheme,” by Cheolsu Kim, Landis MacKellar, Russell G. Galer, and Gautam Bhardwaj, Asian Development Bank and Routledge, 2012, p. 157-168. <http://www.adb.org/publications/implementing-inclusive-and-equitable-pension-reform-lessons-indias-new-pension-scheme> and “60<sup>th</sup> Annual Report, 2012-2013,” Employees Provident Fund Organization, pp. 43 and 46. [http://www.epfindia.com/annual\\_reports.html](http://www.epfindia.com/annual_reports.html)

<sup>58</sup> “Implementing an Inclusive and Equitable Pension Reform, Lessons from India’s New Pension Scheme,” by Cheolsu Kim, Landis MacKellar, Russell G. Galer, and Gautam Bhardwaj, Asian Development Bank and Routledge, 2012, p. 151.

<http://www.adb.org/publications/implementing-inclusive-and-equitable-pension-reform-lessons-indias-new-pension-scheme>

<sup>59</sup> See “Revised Investment Pattern,” Government of India, Ministry of Finance, Department of Economic Affairs, No. F 5(88)/2006-PR, August 14, 2008.

<sup>60</sup> “EPFO cannot invest funds in equities: Labour Ministry,” *The Financial Express*, December 5, 2013.

<http://www.financialexpress.com/news/epfo-cannot-invest-funds-in-equities-labour-ministry/1203759> The EPFO cites s. 52 of the EPFS for its authority to set the investment pattern (and presumably its authority not to follow the pattern set by the Ministry of Finance). See <sup>60</sup>“60<sup>th</sup> Annual Report, 2012-2013,” Employees Provident Fund Organization, p.43.

[http://www.epfindia.com/annual\\_reports.html](http://www.epfindia.com/annual_reports.html)

<sup>61</sup> “Notification [of Revised Investment Pattern],” Government of India, Ministry of Labour and Employment, S. 3450(E), November 21, 2013.

<sup>62</sup> “Revised Investment Pattern (draft),” Ministry of Finance, Department of Financial Services, India, F. No .11/152013-PR.

<sup>63</sup> “EPFO cannot invest funds in equities: Labour Ministry,” *The Financial Express*, December 5, 2013.

<http://www.financialexpress.com/news/epfo-cannot-invest-funds-in-equities-labour-ministry/1203759>

<sup>64</sup> “Notification [of Revised Investment Pattern],” Government of India, Ministry of Labour and Employment, S. 3450(E), November 21, 2013.

<sup>65</sup> “60<sup>th</sup> Annual Report, 2012-2013,” Employees Provident Fund Organization, pp.44-45.

[http://www.epfindia.com/annual\\_reports.html](http://www.epfindia.com/annual_reports.html)

<sup>66</sup> “60<sup>th</sup> Annual Report, 2012-2013,” Employees Provident Fund Organization, p.45. [http://www.epfindia.com/annual\\_reports.html](http://www.epfindia.com/annual_reports.html)

<sup>67</sup> “Implementing an Inclusive and Equitable Pension Reform, Lessons from India’s New Pension Scheme,” by Cheolsu Kim, Landis MacKellar, Russell G. Galer, and Gautam Bhardwaj, Asian Development Bank and Routledge, 2012, p. 214

<http://www.adb.org/publications/implementing-inclusive-and-equitable-pension-reform-lessons-indias-new-pension-scheme>

<sup>68</sup> Article 38, “The Constitution of India”. <http://www.constitution.org/cons/india/p04038.html>

<sup>69</sup> Article 41, “Constitution of India”, Article. <http://www.constitution.org/cons/india/p04041.html>

<sup>70</sup> “Manual of Accounting Procedure, Part – I General,” EPFO p. 8/11. [http://www.epfindia.com/MAP\\_PartI\\_Index.html](http://www.epfindia.com/MAP_PartI_Index.html)

<sup>71</sup> Id.at 8/1.

<sup>72</sup> Id.

<sup>73</sup> “Public Pension Fund Management in India,” by Nageshwar Rao, Conference on Public Pension Fund Management September 24-26, 2001, Managing Director, IDBI Capital Markets Limited., Slide 22.

[http://www1.worldbank.org/finance/html/presentations\\_ppfm.html](http://www1.worldbank.org/finance/html/presentations_ppfm.html)

<sup>74</sup> “Manual of Accounting Procedure, Part – I General,” EPFO p. 8/11. [http://www.epfindia.com/MAP\\_PartI\\_Index.html](http://www.epfindia.com/MAP_PartI_Index.html)

<sup>75</sup> Id.

<sup>76</sup> Id. at 8/3.

<sup>77</sup> Id. at 8/1.

<sup>78</sup> “Expression of Interest (EOI) Package for Appointment of Fund Managers for Employees’ Provident Fund Organization (EPFO) Corpus,” Employees’ Provident Fund Organization, February 7, 2011, p.7.

[http://www.epfindia.com/Tenders/T200910/EOI\\_20110205\\_CRISIL%20Version\\_Final.pdf](http://www.epfindia.com/Tenders/T200910/EOI_20110205_CRISIL%20Version_Final.pdf)

<sup>79</sup> “Employer Pensions in India: Status and Reform Agenda,” by Manish Savharwal and Madhu D and Amit Gopal, p. 25

<sup>80</sup> “Pension Fund Management in India: Issues of Return and Accountability,” by G.V. Nageswara Rao, p. 11.

<sup>81</sup> “Public Pension Fund Management in India,” by Nageshwar Rao, Conference on Public Pension Fund Management September 24-26, 2001, Managing Director, IDBI Capital Markets Limited, Slide 22.

[http://www1.worldbank.org/finance/html/presentations\\_ppfm.html](http://www1.worldbank.org/finance/html/presentations_ppfm.html)

<sup>82</sup> “Public Pension Fund Management in India,” by Nageshwar Rao, Conference on Public Pension Fund Management September 24-26, 2001, Managing Director, IDBI Capital Markets Limited, Slide 22.

[http://www1.worldbank.org/finance/html/presentations\\_ppfm.html](http://www1.worldbank.org/finance/html/presentations_ppfm.html)

<sup>83</sup> “Pension Fund Management in India: Issues of Return and Accountability” by G.V. Nageswara Rao, p. 4.

<sup>84</sup> Id.

<sup>85</sup> Id.

<sup>86</sup> A slightly different issue is the matter of how “guaranteed” the stated interest rates are. With regard to that the following has been remarked: “Despite the officially announced interest rates, the EPFO essentially orchestrates some smoothing. This technique substantially reduces members’ exposure to the volatility of purely market-based returns. The EPFO believes the smoothing is appropriate in the case of defined contribution accounts in which volatility would otherwise be borne directly by individual members and that it is especially appropriate for members approaching pensionable age and preparing to take their lump sum ‘pension.’” But EPFS members “bear[] the cost of the smoothing of the investment return...because investment return in a good year may be retained in the EPF’s Interest Suspense Account and then used to subsidize the lower return that may be earned in a later year.”

“Implementing an Inclusive and Equitable Pension Reform, Lessons from India’s New Pension Scheme,” by Cheolsu Kim, Landis MacKellar, Russell G. Galer, and Gautam Bhardwaj, Asian Development Bank and Routledge, 2012, p. 175

<http://www.adb.org/publications/implementing-inclusive-and-equitable-pension-reform-lessons-indias-new-pension-scheme>

<sup>87</sup> For example, changes made to EPFS, EPS and EDLIS announced on September 1, 2014 included increasing the mandatory minimum salary from Rs. 6,500 per month to Rs. 15,000 per month with respect to which compulsory contributions must be made. “Employee Provident Fund (EPF)-Changed rules from 1st Sept 2014,” by Rajesh Kumar Burra, SAP Community Network,



September 12, 2014. <http://scn.sap.com/docs/DOC-58022> In 2010, rules for withdrawals from the EPS by international workers were tightened. See “India – India Tightens Provident Fund Withdrawal for International Assignees,” Deloitte Tax, LLP, Global, Employer Services, November, 14, 2010.

<sup>88</sup> “No employer in relation to an establishment to which any Scheme or the Insurance Scheme applies shall, by reason only of his liability for the payment of any contribution to the Fund or the Insurance Fund or any charges under this Act or the Scheme or the Insurance Scheme, reduce, whether directly or indirectly, the wages of any employee to whom the Scheme or the Insurance Scheme applies or the total quantum of benefits in the nature of old age pension, gratuity, provident fund or life insurance to which the employee is entitled under the terms of his employment, express or implied.” EPFMFA, Section 12.

<sup>89</sup> For example, a federal law was enacted which authorized termination of the Social Security benefits of a person who had been a resident alien but was deported under certain circumstances. One such person who suffered that loss contended that the law was a violation of the Due Process Clause of the Fifth Amendment of the United States Constitution in that it deprived him an accrued property right. The Court rejected that claim *Flemming v. Nestor*, 363 U.S. 603 (1960).

[http://scholar.google.com/scholar\\_case?case=5373695872604515216&hl=en&as\\_sdt=6&as\\_vis=1&oi=scholar](http://scholar.google.com/scholar_case?case=5373695872604515216&hl=en&as_sdt=6&as_vis=1&oi=scholar)

<sup>90</sup> “Notification”, Ministry of Labour and Employment, New Delhi, the 27th September, 2013, [F. No. G-20031/1/2007/SS-II (Vol. II)] Arun Kumar Sinha, Addl. Secy. [www.kea.co.in/upload/circular-80-2013.pdf](http://www.kea.co.in/upload/circular-80-2013.pdf)

<sup>91</sup> While that sharp contrast is apt today, certainly with respect to public sector plans, it was different some thirty or forty years ago when investment could be made only consistent with “legal lists,” that is specific list of the only investments which were possible.

<sup>92</sup> Note that “[f]ailure to make investments as per directions of the Government shall ma[k]e the Board of Trustees separately and jointly liable to surcharge as may be imposed by the Central Provident Fund Commissioner or his representative.” Paragraph 17, Appendix A, EPFSA.

<sup>93</sup> India Trusts Act, Section 51.

<sup>94</sup> Id., Section 15.

<sup>95</sup> See, for example, “ERISA’s Fundamental Contradiction: The Exclusive Benefit Rule,” by John H. Langbein and Daniel R. Fischel, 55 *University of Chicago Law Review* 1105 (1988). “Although ERISA’s spendthrift provision echoes the spendthrift trust, ... ERISA’s spendthrift provision is mandatory, whereas under conventional trust law a spendthrift restraint is exceptional and must be expressly invoked by the settlor” but “[o]n the other hand, ERISA tolerates greater departures from its spendthrift protection than is characteristic of a spendthrift trust,” that is, “ERISA allows loans and lump sum distributions in circumstances that seem to undercut the protective policy”; and “ERISA’s spendthrift provision also collides with a basic principle of black letter trust law, that the settlor of a trust may not impose spendthrift protections against his creditors for his own advantage.”), at 1124-1125

[http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1488&context=fss\\_papers](http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1488&context=fss_papers)

and “Two Hats, One Head, No Heart: The Anatomy of the ERISA Settlor/Fiduciary Distinction,” by Dana M. Muir and Norman P. Stein, April 1, 2014, *North Carolina Law Review*, Vol. 93, Forthcoming; Ross School of Business Paper No. 1233. (ERISA “[e]xplicit[ly] reject[s]...that aspect of the common law of trusts that permitted a trust agreement to modify the fiduciary standards that would otherwise apply as default law”: “provides that any plan or separate agreement purporting to relieve a fiduciary of a statutory duty is void as against public policy”; goes beyond “a general duty” imposed by the common law of trusts “The common law of trusts imposed a general duty on trustees to furnish beneficiaries with information concerning the administration of the trust and a separate duty to account to beneficiaries for the investment and disbursement of plan assets” to require “specific disclosure obligations on plan administrators”), at 18 and 20. <http://ssrn.com/abstract=24265> ERISA also allows for non-neutral fiduciaries; sets minimum standards for participation, vesting, benefit accrual and funding; and guarantees payment of certain benefits if a defined plan is terminated.

<sup>96</sup> “judgment,” Oxford Dictionaries. [http://www.oxforddictionaries.com/us/definition/american\\_english/judgment](http://www.oxforddictionaries.com/us/definition/american_english/judgment)

<sup>97</sup> “wisdom,” Oxford dictionaries. [http://www.oxforddictionaries.com/us/definition/american\\_english/wisdom](http://www.oxforddictionaries.com/us/definition/american_english/wisdom)

<sup>98</sup> The U.S. Senate version of the bill made no mention of diversification. The only words which came anywhere near it referred to the fiduciary discharging his duties “in such a manner as not to jeopardize any income or assets of the fund and even that language was ultimately dropped,” Section 501 (c) in Senate Bill 1179 as reported out by the Senate Committee on Finance on August 21, 1973. (The original version of the bill had no provisions relating to fiduciary duty.) And even for the House version – which was very close to the final version of the legislation the concern, though important was quite, narrowly focused. As the House version was described, the emphasis was that “the fiduciary should not invest the whole or an unduly large proportion of the trust property in type of securities or in various type of securities dependent upon the success of one enterprise or upon conditions in one locality, since the effect is to increase the risk of large losses.” “Private Pension Tax Reform,” Report of the Committee on Ways and Means, U.S. House of Representatives, Together with Supplemental Views on H.R. 12855,” Report No. 93-807. February 21, 1974. Indeed, in the context of a debate of an amendment on September 18, 1973 in the Senate to Senate Bill 4, Senator Long, in a response to a discussion about the permissibility of investment in employer company stock and real property remarked that “[d]iversifying the risk is the idea of a pension plan,” adding that “looking to a corporation both to money into a pension plan and to keep it solvent and also relying on that corporation for employment,...more or less amounts to putting all one’s eggs in one basket.” 21 Employee Benefit Security Act, Pension Reform Act of 1974, 1849.

<sup>99</sup> See discussion supra at p. 9.

<sup>100</sup> In recent years, though, as a matter of government policy there has been a recognition – reflecting the dramatic shift from defined benefit to defined contribution plans in the United States, that “although the term ‘pension’ traditionally has referred to a regular stream of income guaranteed for life, the nation’s private pension system has been steadily shifting away from lifetime retirement income payments to single-sum cash payments.” In turn, various policy prescriptions to facilitate such a stream of payments have been proposed” “Treasury Fact Sheet: Helping American Families Achieve Retirement Security by Expanding Lifetime Income Choices.” <http://www.treasury.gov/press-center/press-releases/Documents/020212%20Retirement%20Security%20Factsheet.pdf> For a reference to action at the time of completion of this paper, see “Treasury Issues Guidance to Encourage Annuities in 401(k) Plans,” U.S. Department of the Treasury, October 24, 2014. <http://www.treasury.gov/press-center/press-releases/Pages/12673.aspx>

<sup>101</sup> It should be noted that in connection with a lengthy interpretive regulation concerned in part with the control exception as it pertained to defined contribution plans the DOL stated: “[T]he act of limiting or designing investment options which are intended to constitute all or part of the investment universe of an ERISA 404(c) plan is a fiduciary function which, whether achieved through fiduciary designation or express plan language, is not a direct or necessary result of any participant direction of such plan.” Based on that view “the plan fiduciary has a fiduciary obligation [among others] to prudently select [the] investment vehicles.” “29 CFR Part



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2550, Final Regulation Regarding Participant Directed Individual Account Plans (ERISA Section 404(c) plans)", Pension and Welfare Benefits Administration, Department of Labor, 57 Fed. Reg. 46906-46937, 46924, note 27. This view is, of course, not dispositive of the matter, the U.S. Supreme Court being the final arbiter.

<sup>102</sup> "Report of the Committee on Investment Pattern for Insurance and Pension Sector," Department of Financial Services, Ministry of Finance, Government of India, 2013 (hereinafter, "Report").

<http://financialservices.gov.in/Report%20of%20Bajpai%20Committee%20.pdf>

<sup>103</sup> Id. at 9.

<sup>104</sup> Id. at 10.

<sup>105</sup> Id. at 6.

<sup>106</sup> In the lengthy descriptive and analytic sections the only brief explicit references are on p. 69 of the document.

<sup>107</sup> Report, p. 72.

<sup>108</sup> Id. at 70. The Committee returns to this theme in its Recommendations section: "This committee would also like to address an issue of natural justice that eludes all investors investing in pension and insurance products. All citizens must get an opportunity to maximise their retirement income, regardless of where they work. In the interest of equity and natural justice, all citizens must be allowed freedom of individual choice to invest in whichever long-term retirement fund they want. Today, citizens covered by the mandatory Employees Provident Fund Organisation are locked in by the existing rules and are denied mobility. As a consequence, they are deprived of the higher returns available to other retirement products, such as the National Pension System (NPS) administered by the Pension Fund Regulatory and Development Authority. This is patently unfair." Id. at 85.

<sup>109</sup> Id.

<sup>110</sup> Id. at 19.

<sup>111</sup> Id. at 20.

<sup>112</sup> Id.

<sup>113</sup> Id. at 61.

<sup>114</sup> Id. at 50.

<sup>115</sup> Id. at 61.

<sup>116</sup> Id. at 19.

<sup>117</sup> Id. at 20.

<sup>118</sup> Id.

<sup>119</sup> Id. at 10.

<sup>120</sup> Id. at 20.

<sup>121</sup> Id. at 18.

<sup>122</sup> Id. at 59.

<sup>123</sup> Id. at 51.

<sup>124</sup> Id. at 69.

<sup>125</sup> At various points the Report refers to the "prudent investor" regime" id. at 10; the "[p]rudent person rule[]" id. at 51); "prudent-man rule" or the "prudent person rule" (that is as referring to the same thing) id. at 67); "prudent man" rule -- that is, assets should be invested in a manner that would be approved by a prudent investor" id at 52-53; contrasts "old prudent-man rule with the new prudent-investor rule" and how the "prudent-man" rule morphed or evolved into the "prudent-investor" rule." Id. at 69.

<sup>126</sup> Report, p. 72.

<sup>127</sup> Id.

<sup>128</sup> Id.

<sup>129</sup> See "id. (referring to "some of the building blocks before the PIR is adopted and Insurance and Pension Fund Manager (IPFM) is granted freedom to invest in various asset classes."), at 80.

<sup>130</sup> Id. at 73.

<sup>131</sup> Id. at 75.

<sup>132</sup> Id. at 79.

<sup>133</sup> See id. (referring to "the non-uniform development of capital markets, weaknesses in institutional and business environment and low financial access leaves room for inefficiencies across markets"), at 57.

<sup>134</sup> See id. (stating that "[t]he market also needs to improve, modernise and open up before the investment norms can be revamped.") at 70.

<sup>135</sup> Id. at 18.

<sup>136</sup> Id. at 92.

<sup>137</sup> Id. at 69.

<sup>138</sup> Id. at 92.

<sup>139</sup> Id. at 69.

<sup>140</sup> Id. at 35. "Numerous reports -- such as the R.H. Patil Committee Report -- have outlined what needs to be done to get a proper, deep and liquid corporate bond market. It is time that such a market was put in place, not only for increasing the pipeline of paper for insurance companies and pension funds, but to also provide an alternative and necessary platform for projects seeking a proper blend of funds." Id. at 88.

<sup>141</sup> Id. at 15. Interestingly, the survey cited in the report makes no explicit reference to either the "prudent man" or the prudent investor as such. See "2011 Survey of Investment Regulations of Pension Funds," Organisation for Economic Cooperation and Development, August, 2012. <http://www.oecd.org/daf/fin/private-pensions/2011SurveyOfInvestmentRegulationsOfPensionFunds.pdf>

<sup>142</sup> Report, p. 72. <http://financialservices.gov.in/Report%20of%20Bajpai%20Committee%20.pdf>

<sup>143</sup> Id. at 69.

<sup>144</sup> Id. at 79.

<sup>145</sup> Id. at 72 and 79.

<sup>146</sup> See id. ("Drawing on the teachings of modern portfolio theory, the new prudent-investor rule...") at 50.

<sup>147</sup> In connection with that assertion the Report states that the MPT is "based" on the EMH (referred to as the ECMH in the remainder of this note). Id. at 50. However, one of the scholarly papers cited by the Report suggests to the contrary. The cited authors assert that "neither MPT nor the ECMH implies the other. Contrary to popular belief, the MPT does not rely on an

assumption of efficient markets. Indeed, MPT can be applied in efficient or inefficient markets, and MPT's development predates the promulgation of the ECMH by over twenty years!" "The Prudent Investor Rule: A Theoretical and Empirical Reassessment t," by Max M. Schanzenbach and Robert H. Sitkoff (unpublished manuscript), 2012, p. 8. They remark that "the ECMH...is not a theory but rather a conjecture to explain observed patterns in deep, transparent securities markets. The ECMH will stand or fall based on accumulating empirical evidence on the predictive powers of markets versus individuals." Id. at 9. Again, "the ECMH is not a *theory* [like the MPT] derived from first principles about investor behavior. Rather, the ECMH is a *hypothesis* about the behavior of publicly-traded securities prices." Id. at 17 (italics added). They elaborate further as follows later in the text :

"MPT and ECMH are mutually independent ideas. MPT was developed to answer the question of how to allocate portfolios. These could be portfolios of publicly traded or non-publicly traded goods. The classic formulation of the MPT applies even when an asset is not publicly traded. An extension of MPT, the Capital Asset Pricing Model (CAPM) was developed with regard to publicly traded assets, but again does not rely as such on ECMH. By contrast, the ECMH is not a theory derived from first principles about investor behavior. Rather, the ECMH is a hypothesis about the behavior of publicly-traded securities prices. It has crucial implications for investment strategies, but rejection or acceptance of the ECMH does not imply rejection or acceptance of MPT." Id. at 25.

The seeming incorrect assertion in the Report appears to result from a conflation of the characteristics of the EMT with those characteristics of the MPT. See reference to those supposed characteristics in the Report at 50. Notwithstanding the foregoing, the Report cites the authors in a manner which contradicts the "basis" contention: "In fact, there is even a debate whether the 'prudent-investor' rule should stay solely focused on the modern portfolio theory and whether there is a need to also include the efficient capital markets hypothesis." Id. at 69.

<sup>148</sup> See, for example *Rethinking Trust Law Reform: How Prudent is Modern Prudent Investor Doctrine*, by Stewart E. Sterk, 95 *Cornell Law Review*, 2010, (referring to the "pioneering" article *Market Funds and Trust-Investment Law*, by John H. Langbein and Richard A. Posner, *American Bar Foundation Research Journal*, 1976) 841-904, 812, note 52. Available at:

<http://scholarship.law.cornell.edu/clr/vol95/iss5/7>

<sup>149</sup> Although we cannot claim to have done a complete review of the entire legislative history of ERISA – running to thousands of pages – our canvas of many pages has not turned up a single reference to MPT.

<sup>150</sup> See "29 CFR Part 2550, Rules and Regulations for Fiduciary Responsibility; Investment of Plan Assets Under the 'Prudence' Rule. Department of Labor" 44 Fed. Reg. 37221-37225, 1979.

<sup>151</sup> "Proposed Regulation Relating to the Investment of Plan Assets Under the "Prudence" Rule, Department of Labor." 43 Fed. Reg. 17480-17482, 17481, 1978.

<sup>152</sup> Proposed § 2509.96–1(c)(3)) "Interpretive Bulletin 96–1, Participant Investment Education; Final Rule. Federal Register, 61(113), pp. 29586-29590, 29589, June 11, 1996. [www.dol.gov/ebsa/regs/fedreg/final/96\\_14093.pdf](http://www.dol.gov/ebsa/regs/fedreg/final/96_14093.pdf)

<sup>153</sup> Id. at 29587. That it was the "widely accepted" "principles" of MPT as such, not any version of MPT which were important.

<sup>154</sup> "Report of the Committee on Investment Pattern for Insurance and Pension Sector," Department of Financial Services, Ministry of Finance, Government of India, 2013 (italics added), p. 61.

<http://financialservices.gov.in/Report%20of%20Baipai%20Committee%20.pdf>

<sup>155</sup> See Report ("Drawing on the teachings of modern portfolio theory, the new prudent-investor rule directs the trustee to invest on the basis of risk and return objectives reasonably suited to the trust and instructs courts to review the prudence of individual investments not in isolation but in the context of the trust portfolio as a whole" and the "Prudent Investor Act [in the U.S.]...reflects a 'modern portfolio theory' and 'total return' approach to the exercise of fiduciary investment discretion" which "allows fiduciaries to utilise modern portfolio theory to guide investment decisions and requires risk versus return analysis." Namely to measure "a fiduciary's performance...on the performance of the entire portfolio, rather than individual investments" his or her "liability by comparing the portfolio's total return, whether positive or negative, with what the portfolio reasonably could expect to earn under an 'appropriate' investment programme.") at 69 and 73, respectively.

<sup>156</sup> "The Prudent Investor Rule: A Theoretical and Empirical Reassessment," by Max M. Schanzenbach and Robert H. Sitkoff (unpublished manuscript), 2012, p. 9. <http://www.utexas.edu/law/wp/wp-content/uploads/centers/clbe/schzenback-the-prudent-investor-rule.pdf>

<sup>157</sup> Id. (italics added) at 9. With regard to the former, the authors' reference the "Uniform Prudent Investor Act," National Conference of Commissioners on Uniform State Laws, promulgated in 1994. As for the latter they refer to "Restatement (Third) of Trusts: Prudent Investor Rule," American Law Institute, 1992. Note, "[a]lthough officially promulgated in 1992, the Restatement (Third) was approved by the American Law Institute at its 1990 plenary meeting, subject to final editing." "Reversing the Nondelegation Rule of Trust-Investment Law," by John H. Langbein, 59 *Missouri Law Review* 105-119, 16 (1994). [http://digitalcommons.law.yale.edu/fss\\_papers/487/](http://digitalcommons.law.yale.edu/fss_papers/487/) See also "The Puzzling Persistence of the Constrained Prudent Man Rule," 62 *New York University Law Review*, 1987, pp 52-114, written roughly half-way along in the process of change, detailed the conceptual, legal, institutional and other factors which were in play in effecting that change.

<sup>158</sup> See "Prudent Investor Act Summary," Uniform Law Commission, The National Conference of Commissioners on Uniform State Laws. <http://www.uniformlaws.org/ActSummary.aspx?title=Prudent%20Investor%20Act> "Mandatory Rules in the Law of Trusts" John H. Langbein, 98 *Northwestern Law Review* ("the trust-investment provisions of the Second Restatement and was titled Restatement (Third) of Trusts: Prudent Investor Rule (1992)."), p. 1106, note 5. [http://digitalcommons.law.yale.edu/fss\\_papers/493](http://digitalcommons.law.yale.edu/fss_papers/493)

<sup>159</sup> "The Prudent Investor Rule: A Theoretical and Empirical Reassessment," by Max M. Schanzenbach and Robert H. Sitkoff (unpublished manuscript), 2012, p. 10. <http://www.utexas.edu/law/wp/wp-content/uploads/centers/clbe/schzenback-the-prudent-investor-rule.pdf>

<sup>160</sup> Id.

<sup>161</sup> Id. at 9-10.

<sup>162</sup> Id. at 11.

<sup>163</sup> Report at 69. See also id. at 74 ( "The approach for achieving [investment policy] objectives should satisfy the prudent investor regime, taking into account the need for proper diversification and risk management, the maturity of the obligations and the liquidity needs of the fund, and any specific legal limitations on portfolio allocation.")

<sup>164</sup> “The Prudent Investor Rule: A Theoretical and Empirical Reassessment,” by Max M. Schanzenbach and Robert H. Sitkoff (unpublished manuscript), 2012, p. 14. <http://www.utexas.edu/law/wp/wp-content/uploads/centers/clbe/schanzenbach-the-prudent-investor-rule.pdf>

<sup>165</sup> “The Prudent Investor Rule: A Theoretical and Empirical Reassessment,” by Max M. Schanzenbach and Robert H. Sitkoff (unpublished manuscript), 2012 (“We believe the UPIA itself has already addressed this objection through the expanded ability to delegate investment decisions provided for under § 9. Trustees, provided they understand the risks and returns involved, may delegate a portion of a trust portfolio to active investors, be they hedge funds, private equity funds, mutual funds, and the like.”), p. 14. <http://www.utexas.edu/law/wp/wp-content/uploads/centers/clbe/schanzenbach-the-prudent-investor-rule.pdf>

<sup>166</sup> Id. at 18.

<sup>167</sup> Id.

<sup>168</sup> Id. (italics added). For example, with regard to the first assumption they not only take note of behavior inconsistent with risk aversion but also concluded that “even if beneficiaries are not risk-averse, trust law requires trustees to treat them as if they were.”. As for the second, they appeal to “prevailing norms of investor behavior [which] will determine what estimation techniques and assumptions are best.” Id. With respect to the third, while they contend that “[t]he view that equities pay returns in excess of debt is not open to serious dispute” they describe the contested debate over the existence and extent of the “so-called ‘risk premium’ of equities.” Id.

<sup>169</sup> Id.

<sup>170</sup> The Report states: “While some of the assumptions of the efficient market hypothesis -- such as normally distributed asset returns, fixed correlation between assets, rational and risk-averse investors, symmetry of information, lack of transaction costs and taxes -- do not exactly hold true even in sophisticated and well-developed financial markets, the degree to which the modern portfolio theory is applicable is dependent on the degree to which these assumptions can be approximated as true.” Report, pp. 49-50. Notwithstanding the reference to the EMH the language used is that which pertains to MPT.

<sup>171</sup> “[T]he ‘prudent-investor’ rule’ is by no means the end-point or the final destination in the journey of investing philosophies. The rule has been subject to refinements and fine-tuning, especially in the aftermath of the 2008 financial crisis and the resultant global economic slowdown. Some of the assumptions are under scrutiny while some others are being reinforced.” Report, p. 69

<sup>172</sup> “The Prudent Investor Rule: A Theoretical and Empirical Reassessment,” by Max M. Schanzenbach and Robert H. Sitkoff (unpublished manuscript), 2012, p. 24. <http://www.utexas.edu/law/wp/wp-content/uploads/centers/clbe/schanzenbach-the-prudent-investor-rule.pdf>.

<sup>173</sup> Id.

<sup>174</sup> “The Special and General Theory of Relativity,” by Thomas D. Le, December 21, 2012, p. 12.

<http://thehuuvandan.org/relativity.html>

<sup>175</sup> See for example, Comments on “George Feiger’s ‘Modern Portfolio Theory Meets the Real World’ prepared by Mike Rafferty, ARC Future Fellow (2012-2016), University of Sydney and Professor Dick Bryan, University of Sydney as the basis for remarks offered by Mike Rafferty at the 11th Annual Conference of the Pensions and Capital Stewardship Project, May 1-3, 2012 (discussing “MPT in terms of the interaction between finance theory and the historical development of finance and financial markets.”).

[http://www.law.harvard.edu/programs/lwp/pensions/conferences/pension5\\_13/pensions\\_5\\_2013.html](http://www.law.harvard.edu/programs/lwp/pensions/conferences/pension5_13/pensions_5_2013.html) The cited paper by Feiger is “Modern Portfolio Theory Meets the Real World” Remarks prepared by Professor George Feiger, Executive Dean, Aston Business School, Birmingham UK For the 11th Annual Conference of the Pensions and Capital Stewardship Project, May 1-3, 2012, Draft: April 16, 2013.” [http://www.law.harvard.edu/programs/lwp/pensions/conferences/pension5\\_13/pensions\\_5\\_2013.html](http://www.law.harvard.edu/programs/lwp/pensions/conferences/pension5_13/pensions_5_2013.html)

<sup>176</sup> That is, it was not merely or only the intellectually compelling character of the Markowitz or other version of MPT.

<sup>177</sup> Id. at 29587. That it was the “widely accepted” “principles” of MPT as such, not any version of MPT which were important.

<sup>178</sup> Report, p. 87. “The Report does not use the phrase “product investor” anywhere else. There probably was a typographical error by which “product” replaced “prudent.”

<sup>179</sup> Id.

<sup>180</sup> Id.

<sup>181</sup> Id.

<sup>182</sup> Id.

<sup>183</sup> Id. The Report does remark that the next to final phase is one “when financial markets get ready to offer [a/the] full basket of product for IPFM to choose from.” Id.

<sup>184</sup> See “Rules and Regulations for Fiduciary Responsibility, Proposed Regulation Relating to the Investment of Plan Asset Under the ‘Prudence’ Rule,” U.S. Department of Labor, 43 Fed. Reg. 17480-82, note 5, 17481 (1978) (citing testimony by Secretary of Labor Schulz at a 1970 House committee hearing on a version of the “prudence” rule very similar to that which was enacted, characterizing the rule “as providing a standard ‘with a built in flexibility ...which recognizes the vast diversity and other characteristics of private pension and welfare plans.”

<sup>185</sup> See id. for brief references to testimony by others along those lines and also 1979 DOL text in support of interpretive regulation, e.g., reference to H.R. Rep. No. 1289, 93d Cong., 2d Sess. 302 (1974) “Rules and Regulations for Fiduciary Responsibility, Investment of Plan Assets Under the ‘Prudence Standard’,” U.S. Department of Labor, 43 Fed. Reg. 37221-37225, 37222, note 3 (1979).

<sup>186</sup> Again insofar as ERISA relied heavily on trust law, the institutional “stamp of approval” of practicing lawyers and academics for a transition to a PIR-like regime in that context was only given in the early 1990s.

<sup>187</sup> “Rules and Regulations for Fiduciary Responsibility, Investment of Plan Assets Under the ‘Prudence Standard’,” U.S. Department of Labor, 43 Fed. Reg. 37221-37225, 37225 (1979). Moreover, despite requests by commentators for clarification of the term “return” in light of concern about certain non-income producing investments – e.g., those investments in “small or recently formed companies” or “precious metals and objects of art” – which had “not been viewed with favor, traditionally as trust investments” in part because of “the traditional principle that trust investments should be income-producing,” the DOL responded that “defining ‘return’ would be beyond the appropriate scope of this regulation.” Id. at 37224 and 37225. However, it asserted without further comment – though, in effect, ignoring that principle – that “the ‘prudence’ rule does not require that every plan investment produce current income under all circumstances.” Id. at 37225.

<sup>188</sup> See, for example, “Financial Economists, Financial Interests and Dark Corners of the Meltdown: It’s Time to set Ethical Standards for the Economics Profession,” by Gerald Epstein & Jessica Carrick-Hagenbarth, Political Economy Research Institute,

<sup>189</sup> For example, as part of its very extensive review and recommendations regarding fiduciary duty, the Law Commission concluded the following with respect to the role of plan members in consideration of non-financial issues:

“6.77 We think that any decision made on non-financial grounds is subject to both tests. Trustees should consider each issue. Do we have good reason to think that scheme members would share the concern? And does the decision involve a risk of significant financial detriment? If the decision fails either test, trustees should not proceed.

“6.78 However, we think that the ultimate decision should be looked at in the round, considering the evidence on both questions. For example, if trustees are faced with compelling evidence that members feel very strongly about the issue, then they may be justified in accepting a risk of some possible detriment, so long as that detriment is not significant. Conversely, if trustees receive clear professional advice that the decision is financially neutral, with some members agreeing and some indifferent, the trustees may still go ahead. The position may be different where only a modest level of agreement is combined with some risk of detriment.”

“Fiduciary Duties of Investment Intermediaries,” Law Commission, United Kingdom, 2014, p. 123.

[http://lawcommission.justice.gov.uk/docs/lc350\\_fiduciary\\_duties.pdf](http://lawcommission.justice.gov.uk/docs/lc350_fiduciary_duties.pdf)

<sup>190</sup> That is, for example, the definition of fiduciary necessarily reaches individuals who perform delegated responsibilities. See *supra* at pp. 8-9 and note 11. See also in this connection 29 U.S.C. s. 1002(38) (defining who an “investment manager is”).

<http://www.law.cornell.edu/uscode/text/29/1002>

<sup>191</sup> Issues along these lines are the subject of a current review by the Department of Labor. “2014 Issue Statement for the ERISA Advisory Council, Outsourcing Employee Benefit Plan Services.” Employee Benefits Security Administration, Department of Labor.

<http://www.dol.gov/ebsa/publications/2014issuestatement2.html>

<sup>192</sup> For example in the roughly analogous context of arguments over the permissible objectives – solely profit or profit plus others – of otherwise for-profit corporation state legislation for the chartering of corporations has been enacted which allows the founders to create so-called B corporations (rather than conventional one, ones which are committed not only to the pursuit of profit but also to other goals.

<sup>193</sup> <http://www.law.cornell.edu/uscode/text/29/1104>

<sup>194</sup> <http://www.law.cornell.edu/cfr/text/29/2550.404c-1>

<sup>195</sup> <http://www.law.cornell.edu/uscode/text/29/1104>

<sup>196</sup> <http://www.law.cornell.edu/cfr/text/29/2550.404c-5>

<sup>197</sup> EPFMPA, Section 5 (1)

<sup>198</sup> EPFMPA, Sections 6D and 7

<sup>199</sup> EPFMPA, Section 5 (1)

<sup>200</sup> EPFMPA, Section 5 (1B)

<sup>201</sup> EPFMPA, Schedule II 1.

<sup>202</sup> EPFMPA, Schedule II 2.

<sup>203</sup> EPFMPA, Schedule II 3.

<sup>204</sup> EPFMPA, Schedule II 6.

<sup>205</sup> EPFMPA, Schedule II 7.

<sup>206</sup> EPFMPA, Schedule II 9.

<sup>207</sup> EPFMPA, Schedule II 13.

<sup>208</sup> EPFMPA, Schedule II 18.

<sup>209</sup> EPFMPA, Section 6A (1)

<sup>210</sup> EPFMPA, Section 6A (7)

<sup>211</sup> EPFMPA, Section 6A (2)

<sup>212</sup> EPFMPA, Section 6A (4)

<sup>213</sup> EPFMPA, Section 6A (5)

<sup>214</sup> EPFMPA, Schedule III 1.

<sup>215</sup> EPFMPA, Schedule III 3.

<sup>216</sup> EPFMPA, Schedule III 4.

<sup>217</sup> EPFMPA, Schedule III 7.

<sup>218</sup> EPFMPA, Schedule III 10.

<sup>219</sup> EPFMPA, Schedule III 13.

<sup>220</sup> EPFMPA, Schedule III 14.

<sup>221</sup> EPFMPA, Section 6C (1)

<sup>222</sup> EPFMPA, Section 6C (2)

<sup>223</sup> EPFMPA, Section 6C (6)

<sup>224</sup> EPFMPA, Schedule IV 1.

<sup>225</sup> EPFMPA, Schedule IV 2.

<sup>226</sup> EPFMPA, Schedule IV 6.

<sup>227</sup> EPFMPA, Schedule IV 9.

<sup>228</sup> EPFMPA, Section 5A (1)

<sup>229</sup> EPFMPA, Section 5A (3)

<sup>230</sup> EPFMPA, Section 5A (4)

<sup>231</sup> EPFMPA, Section 5AA (1) and (2)

<sup>232</sup> EPFMPA, Section 5B (1)

<sup>233</sup> EPFMPA, Section 5B (2)

<sup>234</sup> Indian Trusts Act, 1882, Section 20.

<http://www.helpinelaw.com/docs/THE%20INDIAN%20TRUSTS%20ACT.%201882/CHAPTER%20III%20OF%20THE%20DUTIES%20AND%20LIABILITIES%20OF%20TRUSTEES>

<sup>235</sup> 29 U.S. Code § 1002 – Definitions. <http://www.law.cornell.edu/uscode/text/29/1002>

<sup>236</sup> “‘Information Letter’ from Dennis M. Kass Assistant Secretary to Labor to John Erlenborn,” March 13, 1986.

<http://www.dol.gov/ebsa/regs/ils/il031386.html> The letter went on to add that “[i]n Congressional testimony, the Department has consistently taken the position that the decision to terminate a pension plan is such a settlor, or business activity and is therefore not subject to ERISA’s fiduciary duty requirements. Courts have agreed with the Department’s analysis in light of the voluntary nature of the private pension system and ERISA’s overall statutory scheme. See, for example, U.A.W. District 65 v. Harper & Row, Inc., 576 F. Supp. 1468 (S.D.N.Y. 1983); Walsh v. Great Atlantic and Pacific Tea Co., 96 F.R.D. 632 (D.N.J. 1983), aff’d 726 F.2d 956 (3rd Cir.); Washington-Baltimore Newspaper Guild v. Washington Star Co., 555 F. Supp. 257 (D.D.C. 1983).<sup>(1)</sup> Id.

<sup>237</sup> Id. Note, however, that the letter added that “[a]lthough the decision to terminate is generally not subject to the fiduciary responsibility provisions of ERISA, the Department has emphasized that activities undertaken to implement the termination decision are generally fiduciary in nature. As you are aware, fiduciary activities governed by Title I of ERISA are not restricted to activities undertaken by fiduciaries denominated as such.” Id.

<sup>238</sup> U.S. 514 73, 78 (1995).

<sup>239</sup> *Adams v. Avondale Industries, Inc.*, 905 F. 2d 943, 947 (CA6 1990). <http://openjurist.org/905/f2d/943>

<sup>240</sup> 517 U.S.882, 890 (1996).

<sup>241</sup> 517 U.S.882, 890 (1996)(quoting from *Johnson v. Georgia-Pacific*, 19 F. 3d 1164, 1188 (CA7 1994).

<sup>242</sup> *Varity Corp. v. Howe*, 516 U.S. 489, 505 (1996).

[http://scholar.google.com/scholar\\_case?case=404497419857368982&hl=en&as\\_sdt=6&as\\_vis=1&oi=scholar](http://scholar.google.com/scholar_case?case=404497419857368982&hl=en&as_sdt=6&as_vis=1&oi=scholar)

<sup>243</sup> *Hughes Aircraft Co. v. Jacobson*. 525 U.S. 432, 442 (1999) <https://supreme.justia.com/cases/federal/us/525/432/> Note that in *Hughes*, the Court rejected an argument by the plan members that “they should be regarded as cosettlors because they have contributed to the plan’s corpus.” To the Court, their doing so did “not make [them] akin to a settlor who is responsible for creating the plan” and there was no contention that the plan members had played such a role. *Hughes Aircraft Co. v. Jacobson*. 525 U.S. 432, 442 note 5 (1999)

<sup>244</sup> *Hughes Aircraft Co. v. Jacobson*. 525 U.S. 432, 442 (1999)

<sup>245</sup> *Beck v. PACE International Union*, 551 U.S. 996 (2007). <http://supremecourtobserver.com/cases/US/551/551US96/551us96.pdf>

<sup>246</sup> “Final Regulation Regarding Participant Directed Individual Account Plans” (ERISA Section 404(c) Plans), 57 Fed. Reg. 46,922, 46,924 n. 27 (Oct.13, 1992).

<sup>247</sup> That is, what is the nature of the financial claim which gives rise to the financial return.

<sup>248</sup> That is derivatives for which the underlying asset is a corporate share affords other ways to secure financial gain.

<sup>249</sup> “Business FAQ’s, What is a benefit corporation,” Benefit Corporation Center. <http://benefitcorp.net/business/business-faqs>

<sup>250</sup> See “Three Themes About Democratic Enterprises: Capital Structure, Education, and Spin-Offs,” by David Ellerman,” Chapter 12 in *Sharing Ownership, Profits and Decision-making in the 21<sup>st</sup> Century, Advances in the Economic Analysis of Participatory & Labor-Managed Firms, Volume 14*, Emerald Group Publishing Limited, pp. 329-355, 2013. <http://www.ellerman.org/three-themes-about-the-mondragon-cooperatives/>