U.S. Department of Labor

Assistant Secretary for
Employee Benefits Security
Washington, D.C. 20210

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STATEMENT OF ANN L. COMBS, ASSISTANT SECRETARY
EMPLOYEE BENEFITS SECURITY ADMINISTRATION
"DUTIES OF FIDUCIARIES IN LIGHT OF RECENT MUTUAL FUND INVESTIGATIONS"

As significant investors in mutual funds, plan fiduciaries, understandably, are concerned about the impact of reported late trading and market-timing abuses on their pension plans and the steps that should be taken to protect the interests of their plans' participants and beneficiaries. Although investors generally could not anticipate the late trading and market-timing problems identified by Federal and state regulators, plan fiduciaries nonetheless are now faced with the difficult task of assessing the impact of these problems on their plans' investments and on investment options made available to the plans' participants and beneficiaries.

As fiduciaries conduct their review, it is important to remember that ERISA requires that fiduciaries discharge their duties prudently. The exercise of prudence in this context requires a deliberative process. In this regard, fiduciaries, deciding whether to make any changes in mutual fund investments or investment options, must make decisions that are as well informed as possible under the circumstances.

In cases where specific funds have been identified as under investigation by government agencies, fiduciaries should consider the nature of the alleged abuses, the potential economic impact of those abuses on the plan's investments, the steps taken by the fund to limit the potential for such abuses in the future, and any remedial action taken or contemplated to make investors whole. To the extent that such information has not been provided or is not otherwise available, a plan fiduciary should consider contacting the fund directly in an effort to obtain specific information. Fiduciaries of plans invested in such funds may ultimately have to decide whether to participate in settlements or lawsuits. In doing so, they will need to weigh the costs to the plan against the likelihood and amount of potential recoveries.

Late trading and market-timing abuses may extend to mutual funds and pooled investment funds beyond those currently identified by Federal and state regulators. For this reason, plan fiduciaries will need to consider whether they have sufficient

information to conclude that such funds have procedures and safeguards in place to limit their vulnerability to abuse.

The appropriate course of action will depend on the particular facts and circumstances relating to a plan's investment in a fund. Plan fiduciaries should follow prudent plan procedures relating to investment decisions and document their decisions. The guiding principle for fiduciaries should be to ensure that appropriate efforts are being made to act reasonably, prudently and solely in the interests of participants and beneficiaries.

In considering appropriate courses of action, plan sponsors and fiduciaries have raised questions as to the steps that can be taken at the plan level to address identified market-timing problems. In particular, questions have been raised as to whether a plan's offering of mutual fund or similar investments that impose reasonable redemption fees on sales of their shares would, in and of itself, affect the availability of relief under section 404(c) of ERISA[1]. Similarly, questions have been raised as to whether reasonable plan or investment fund limits on the number of times a participant can move in and out of a particular investment within a particular period would, in and of itself, affect the availability of relief under section 404(c).

Without expressing a view as to any particular plan or particular investment options, we believe that these two examples represent approaches to limiting market-timing that do not, in and of themselves, run afoul of the "volatility" and other requirements set forth in the Department's regulation under section 404(c), provided that any such restrictions are allowed under the terms of the plan and clearly disclosed to the plan's participants and beneficiaries. The imposition of trading restrictions that are not contemplated under the terms of the plan raises issues concerning the application of section 404(c), as well as issues as to whether such restrictions constitute the imposition of a "blackout period" requiring advance notice to affected participants and beneficiaries.

The Department will continue to work with other regulators, plan sponsors, fiduciaries, and participants to protect the retirement savings of America's workers.

[1] In general, ERISA section 404(c) relieves fiduciaries of individual account plans, such as 401(k) plans, from liability for the results of investment decisions made by plan participants and beneficiaries. See regulations at 29 CFR § 2550.404c-1.