To: Administrative Committees of Enron Corp. Tax Qualified Pension Plans

From: Patrick Mackin

Date: December 2, 1996

Subject: Fiduciary Duties of Members of Committees

Enron Crop. sponsors three separate tax qualified pension plans: the Cash Balance Plan (formerly known as the Retirement Plan); the Savings Plan; and the Employee Stock Ownership Plan ("ESOP"). Each separate plan has a separate administrative committee. Each committee is a fiduciary of the plan it administers, as is the plan sponsor, Enron Corp. Committee members are fiduciaries of the plan. This is a summary of the fiduciary duties of members of the committees.

The Employee Retirement Income Security Act of 1974, as amended ("ERISA"), regulates the conduct of fiduciaries with respect to the benefit plans (both pension and welfare plans) for which they have investment and/or administrative responsibilities, by establishing certain basic standards of care they must follow in conducting plan business. ERISA requires that a plan fiduciary discharge his or her duties with respect to an employee benefit plan solely in the interest of the plan's participants and beneficiaries. ERISA Section 404(a)(1)

In the discharge of those duties, the fiduciary must act:

- for the exclusive purpose of providing benefits to participants and beneficiaries and defraying the reasonable expenses of administering the plan;
- with the care, skill, prudence, and diligence, under the circumstances then prevailing, that a prudent man acting in like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and like aims;
- by diversifying the investments of the plan to minimize the risk of large losses, unless, under the particular circumstances, it is clearly not prudent to do so; and
- in accordance with the documents and instruments governing the plan to the extent that those documents and instruments are consistent with the provisions of ERISA.

ERISA also contains rules:

- prohibiting certain transactions by plan fiduciaries;
- for investment duties, including those regarding the voting of proxies related to plan-owned corporate shares, statements of investment policy, and an investment policy that contemplates the monitoring of the management of corporations in which the plan has invested;

- for loans to and from plans; and

- for the provisions of other goods and services.

1. Exclusive purpose rule.

   Plan fiduciaries must discharge their duties to the plan solely in the interest of participants and beneficiaries and exclusively to provide benefits to them or to pay reasonable plan administrative costs. ERISA Section 404(a)(1)(A)(A)

   ERISA should not be read as a prohibition against decisions by an employer that have the obvious primary purpose and effect of benefiting employees but, in addition, the incidental side effect of being prudent from the employer's economic perspective. Plan fiduciaries do not violate their duties by taking action that, after careful and impartial investigation, they reasonably conclude best promotes the interests of participants and beneficiaries simply because the action incidentally benefits the employer or themselves. However, their decisions must be made with an eye fixed exclusively on the interests of the participants and beneficiaries. Donovan v. Bierwirth, (1982, CA2) 680 F2d 263, 3 EBC 1417, cert den (1982, S Ct) 459 US 1069, 74 L Ed 2d 631.

   Think of the exclusive purpose rule as a parable of hats. As a matter of circumstance and convenience, the members of each of the three separate administrative committees are the same. However, they can only wear one hat at a time. Each member has four hats: an Enron hat; a Cash Balance Plan hat; a Savings Plan hat; and an ESOP hat. When a fiduciary of one of the plans makes a fiduciary decision with respect to that plan, the fiduciary may wear only that plan's hat, not the Enron hat or the hat of another plan. The fiduciary's ERISA obligation, with respect to such decision, extends to that single plan only. The fiduciary cannot favor the plan sponsor or another plan to the disadvantage of the plan and its participants for which he makes a fiduciary decision.

   As plan sponsor, Enron Corp. is a fiduciary of its plans, but ERISA does not impose a fiduciary duty on an employer to act exclusively in the interest of its employees. Rather, an employer that is also a fiduciary may act in accordance with its own interests as employer when it is not administering a plan or investing its assets. Thus, for example, where benefits are contingent in nature, employers are free to alter or eliminate non-vested benefits unilaterally without consideration of the employees' interests. Owens v. Storehouse Inc, (1991, DC GA) 773 F.Supp. 416, 14 EBC 1550, affd (1993, CA11) 984 F2d 394.

2. Prudent man rule.

   In discharging his or her duties, a plan fiduciary must act with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in like

capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims. ERISA Section 404(a)(1)(B). The source of the prudent man standard is the objective prudent man test developed in the common law of trusts.

Most cases which have addressed the issue of prudence concern a fiduciary's plan investment decisions. ERISA's prudent man rule does not require that fiduciaries be expert in all matters of plan administration and investment. It does require that plan fiduciaries be competent enough to seek counsel and advice when appropriate. This is a reason why investment managers are engaged to manage the investment of assets of the Cash Balance Plan. While investment managers have their own separate fiduciary obligations, the Committee for the Cash Balance Plan (a defined benefit pension plan as distinguished from an individual account, defined contribution pension plan) cannot abdicate all responsibility to an investment manager. As would a prudent man, the Committee must review from time to time the performance of the investment managers the Committee appoints to manage plan assets. If the Committee does not have the expertise to review the performance of the investment managers, as would a prudent man, it should obtain help to conduct such a review.

3. Diversification of investments.

As a defined benefit plan, the Cash Balance Plan is subject to the diversification requirements of ERISA. A plan fiduciary must diversify plan assets to minimize the risk of large losses, unless it is clearly prudent not to do so. ERISA Section 404(a)(1)(C). In using the term "clearly prudent," Congress did not intend to establish a more stringent standard of prudence. Instead, it intended that in an action for plan losses based on breach of the diversification requirement, the plaintiff's initial burden would be to demonstrate that there had been a failure to diversify. The fiduciary would then have the burden of showing that his or her failure to diversify was prudent. Thus, the basic policy of the Act is to require diversification, and, if diversification on its face does not exist, the burden of justifying a failure to follow this general policy is on the fiduciary who engages in the conduct. H Conf Rept No. 93-1280 (93rd Cong., 2d Sess.), pp. 304, 305.

4. Duty to act in accordance with plan documents.

The fiduciary of a plan subject to ERISA must discharge his or her duties not only in the exclusive interests of beneficiaries and participants and with the diligence of a prudent person, but in accordance with the documents and instruments governing the plan. ERISA Section 404(a)(1)(D). Thus, although ERISA imposes some restrictions on plan provisions, it does permit a specific statement of an administrator's duties, and, if the plan contains such a statement, those provisions control. Offutt v. Prudential Insurance Co, (1984, CA5) 735 F2d 948.

Nonetheless, the fiduciary duty to act in accordance with plan documents does not override the fiduciary's foremost duty to serve the interests of plan participants and

beneficiaries by adhering to the exclusive purpose rule. Kuper v. Quantum Chem. Corp, (1994, DC OH) 852 F.Supp. 1389.

5. Review of Appeals.

Part of the administration of a pension benefit plan is the review of appeals of plan participants who think that their claims have been improperly denied. Sometimes, participants disagree about the facts or what provisions of the applicable plan documents mean. Sometimes, participants simply want an exception made because of what they think are extenuating circumstances.

With respect to a committee's review of appeals of denied benefits, it is the Committee's fiduciary responsibility to administer the plan according to its terms and provisions. If there is a discrepancy in the provisions of plan documents, the written plan document controls. For example, for the Enron sponsored plans, the summary plan description of the plans, which are distributed to employees, state that in the event of such a discrepancy, the plan document controls. Each plan is established pursuant to a written plan document, and each member of the committee should have copies of and be familiar with the provisions of the plan documents.

In reviewing an appeal, the committee needs to determine what the facts are and the applicable provisions of the plan document. In most cases, the participant making the appeal will submit a written statement explaining the reasons for the appeal. The committee has the duty to administer the plan according to the provisions of the plan document. If the provisions are ambiguous, it is the committee's duty to construe the meaning of an ambiguous word or phrase. The committee should not make exceptions to the provisions of the plan.

It is important for the committee to administer the plan in a uniform and consistent manner. The committee may not administer the plan in an arbitrary or capricious manner. It cannot administer the plan in a way that is contrary to the clear meaning of the provisions of the plan. In construing ambiguities, it has to administer the ambiguity the same way in similar circumstances.

It is not the objective of the committee to deny the payment of benefits which are payable under the plan. ERISA imposes on the committee a fiduciary obligation to administer the plan in the interests of the participants. If a benefit is payable under the plan, it should be paid. When the committee meets and makes determinations with respect to a plan, it is wearing its ERISA fiduciary hat, not an Enron hat.

This fiduciary status of the committee members does not require that all claims be paid or that all appeals be favorably resolved in favor of plan participants. The plan document controls. As plan sponsor, in establishing its pension plans, Enron intended for benefits to be paid when the provisions of the plan provided for payment. If the committee starts to approve payment of benefits in situations where Enron did not intend for benefits to be

paid, Enron has the ability to either fully terminate the plan or amend it to more clearly exclude payment of benefits in situations where Enron does not intend benefit to be paid.

This is an overview of your responsibilities as members of the committees of the Enron Corp. sponsored tax qualified pension plans. Remember that as committee members you are not wearing Enron hats. You are wearing ERISA plan fiduciary hats, and that you can only wear one hat at a time. Administer the plans according to their provisions. Make no exceptions. You job is not to make exceptions to the provisions of the plans, but to administer the plans according to such provisions.