U.S. Department of Labor

Employee Benefits Security Administration
Washington, D.C. 20210

December 21, 2007

Thomas J. Donohue
President and CEO
U.S. Chamber of Commerce
1615 H Street, NW
Washington, DC 20062-2000

2007-07A
ERISA SEC
404(a)(1)
29 CFR 2509.94-2

Dear Mr. Donohue:

This is in response to your recent letter in which you express concern about the use of pension plan assets by plan fiduciaries to further public policy debates and political activities through proxy resolutions that have no connection to enhancing the value of the plan's investment in a company. In view of the significance of the issues you have raised, we are responding to your letter in the form of an advisory opinion that further clarifies the application of Interpretive Bulletin 94-2 (29 CFR § 2509.94-2).

By way of background, section 404(a)(1)(A) and (B) of the Employee Retirement Income Security Act of 1974 (ERISA, or the Act) require that plan fiduciaries act prudently, solely in the interest of the plan's participants and beneficiaries, and for the exclusive purpose of paying benefits and defraying reasonable administrative expenses. Interpretive Bulletin 94-2 specifically addresses the application of section 404(a)(1), as well as sections 402 and 403 of ERISA, to proxy voting and shareholder-related activities. In that Bulletin, the Department, among other things, set forth its view that the fiduciary duties described in section 404(a)(1)(A) and (B) generally require that, in voting proxies, the responsible fiduciary must only consider those factors that affect the value of the plan's investment and may not subordinate the interests of the participants and beneficiaries in their retirement income to unrelated objectives.

The Bulletin provides that the fiduciary obligations of prudence and loyalty require responsible fiduciaries to vote proxies on issues that affect the value of the plan's investment. However, the Bulletin also recognizes that fiduciaries need to take into account the costs involved when deciding whether to exercise their shareholder rights. Such costs include, but are not limited to, expenditures related to developing proxy resolutions, proxy voting services, and the analysis of the likely net effect of a particular issue on the value of the plan's investment. The Bulletin indicates that fiduciaries must take all of these factors into account in determining whether the exercise of such rights (e.g., the voting of a proxy), independently or in conjunction with other shareholders, is expected to have an effect on the value of the plan's investment that will outweigh the cost of exercising such rights. This same principle applies to fiduciary activities that involve monitoring or influencing the management of a corporation. In this regard, the Bulletin provides that an investment policy that contemplates activities intended to monitor or influence the management of a corporation in which a plan owns shares is consistent with a fiduciary's obligations under ERISA only where the responsible fiduciary concludes that there is a reasonable expectation that such activities by the plan alone or in conjunction with other shareholders is likely to result in an enhancement of the value of the plan's investment in the corporation sufficient to outweigh the costs involved.

The Department has previously expressed strong concern about the use of plan assets to promote particular legislative, regulatory or public policy positions that have no connection to the payment of benefits or plan administrative expenses.[1] In this regard, the Department indicated that the mere fact that plans are important participants in the national economy, and are generally affected by legislation, regulations, actions and events that affect the economy as a whole, does not convert legislative, regulatory or policy proposals concerning the economy into a rationale for spending plan assets on the policy debate. The Department rejects a construction of ERISA that would render the Act's tight limits on the use of plan assets illusory, and that would permit plan fiduciaries to expend ERISA trust assets to promote myriad public policy preferences, and believes that these principles apply with equal force to a plan fiduciary's support or pursuit of a proxy proposal.

Under section 404(a)(1)(A) and (B) of ERISA, plan fiduciaries must act solely in the interest of participants and beneficiaries and for the exclusive purpose of paying benefits and defraying reasonable administrative expenses. In our view, plan fiduciaries risk violating the exclusive purpose rule when they exercise their fiduciary authority in an attempt to further legislative, regulatory or public policy issues through the proxy process when there is no clear economic benefit to the plan. In such cases, the Department would expect fiduciaries to be able to demonstrate in enforcement actions their compliance with the requirements of section 404(a)(1)(A) and (B).

The mere fact that plans are shareholders in the corporations in which they invest does not itself provide a rationale for a fiduciary spending plan assets to pursue, support, or oppose a proxy proposal unless the fiduciary has a reasonable expectation that doing so will enhance the value of the plan's investment. To the contrary, Interpretive Bulletin 94-2 makes it clear that plan fiduciaries, when considering whether to support or oppose a proxy proposal or to engage in activities intended to monitor or influence the management of corporations, must first take into account the cost of such action and the role of the investment in the plan's portfolio, and cannot act unless they conclude that the action is reasonably likely to enhance the value of the plan's investment and will not subordinate the interests of plan participants and beneficiaries to unrelated objectives. As the Department has indicated in other contexts, plan fiduciaries may not increase

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[1] See letter from Alan D. Lebowitz, Deputy Assistant Secretary for Program Operations, Employee Benefits Security Administration, U.S. Department of Labor, to Jonathan P. Hiatt, General Counsel, AFL-CIO (May 3, 2005) (copy attached).

expenses, sacrifice investment returns, or reduce the security of plan benefits to support or promote goals not directly related to the plan.

Consistent with these various pronouncements, the use of pension plan assets by plan fiduciaries to further policy or political issues through proxy resolutions that have no connection to enhancing the value of the plan's investment in a corporation would, in the view of the Department, violate the prudence and exclusive purpose requirements of section 404(a)(1)(A) and (B). For example, the likelihood that the adoption of a proxy resolution or proposal requiring corporate directors and officers to disclose their personal political contributions would enhance the value of a plan's investment in the corporation appears sufficiently remote that the expenditure of plan assets to further such a resolution or proposal clearly raises compliance issues under section 404(a)(1)(A) and (B).

This letter constitutes an advisory opinion under ERISA Procedure 76-1. Accordingly, it is issued subject to the provisions of that procedure, including section 10 thereof relating to the effect of advisory opinions.

Sincerely,

Robert J. Doyle,
Director of Regulations and
Interpretations

Attachment