Investor Network on Climate Risk Action Plan

Capitalizing the New Energy Future: Minimizing Climate Risks, Seizing Opportunities

Given the sweeping nature of climate change, climate risks are embedded in every investment portfolio. As fiduciaries entrusted with trillions of dollars of fund assets, we remain firmly convinced that climate change presents both material risks and significant opportunities for investment portfolios.

Since the last Investor Network on Climate Risk (INCR) action plan in 2005, more investors have been taking steps to engage companies and reduce climate risks in their portfolios. More businesses, responding to investor concern, have started to disclose their climate risks and account for the impacts of climate change on their financial performance and competitiveness. More investors and companies have called on political leaders to enact legislation that would provide greater regulatory certainty, provide incentives for climate solutions, and minimize the risks that climate change poses to businesses, investors, and the economy. But greater efforts are needed.

As fiduciaries and long-term investors, we see significant short and long-term risks from climate change to the value and security of our investments and capital markets more broadly. And we recognize that the impacts of climate change will continue to be multi-dimensional – affecting corporations' abilities to secure the full range of necessary resources such as energy and water. At the same time, we also see opportunities presented by the transition to a low-carbon future.

Prudence, common sense, and fiduciary duty compel us to renew our efforts to examine and address the financial ramifications of climate change and to respond to climate challenges and opportunities. Accordingly, we hereby state our intentions to manage our investments; to engage companies, investors, and others; and to support policy action to the best of our abilities, in line with the following agenda:

Managing Our Investments

1. **Require that our asset managers, consultants, and financial advisors consider climate risks and opportunities.** To ensure that our investments are managed by firms and individuals that are aware of the financial threats presented by climate change, it is important that we evaluate the ability of investment consultants, advisors, and managers to assess climate risks and opportunities. Accordingly, we will:
   - Require and validate that relevant investment managers currently managing or seeking to manage our fund assets, as well as investment consultants and advisors, report on how they are assessing the risks and opportunities associated with climate change. Such a requirement can be accomplished through Requests for Proposals (RFPs), by making climate risk assessment a required part of regular manager reviews, by requiring managers to use a sustainability or climate risk screen, or by other methods.
2. **Invest capital in companies developing and deploying clean technologies.** We believe investments in clean, climate-friendly technologies – such as energy efficiency and renewable energy – represent significant opportunities and will ultimately enhance and sustain the long-term viability of corporate assets and shareholder value by broadening and deepening the range of tools available to help the world avoid the worst impacts of climate change. Accordingly, we will:
   - Seek investment opportunities in all appropriate asset classes to support clean technology efforts. Our goal is to deploy $10 billion collectively in additional investment over the next 2 years.

3. **Improve the energy performance of real estate portfolios and investments.** Studies demonstrate that enormous opportunities exist to improve building energy efficiency while enhancing the value of real estate assets. Accordingly, we will:

   - Aim for a 20% reduction over a three-year period in energy used in core real estate investment portfolios, using standardized units of measurement, performance baselines, and regular reporting on measures taken and actual energy performance.
   - Incorporate green building standards (such as LEED and Energy Star) as a factor in making investment decisions.

Engaging Companies, Investors, and Others

4. **Urge comprehensive corporate responses to climate risks.** As investors in publicly-held companies in the auto, electric power, coal, oil & gas, insurance, real estate, construction, financial, forestry, and many other sectors, we desire greater information and action from companies on climate risks and opportunities, recognizing the broader sustainability context. Accordingly, we will:

   - Urge companies to elevate climate change as a governance priority, using the Ceres "Climate Change Governance Checklist."
   - Urge companies to provide better disclosure about the financial and material risks posed by climate change and to explain how they are factoring carbon costs into operational and capital-planning decisions. Such disclosure should follow the Global Reporting Initiative (GRI) guidelines and the Global Framework on Climate Risk Disclosure.
   - Support appropriate shareholder resolutions, company engagements, and other efforts to encourage companies to reduce their carbon footprint, seize new market opportunities, and ask corporate suppliers to disclose and reduce greenhouse gas emissions and energy use.

5. **Help investors evaluate and address corporate climate risks.** Investors often need additional information and guidance to better evaluate and engage companies on climate risks and opportunities. Accordingly, we will:

   - Urge companies to adhere to best practices in corporate governance on climate risk by producing and distributing through the Investor Network on Climate Risk (INCR) a new "Corporate Governance and Climate Change" report evaluating and scoring 100 leading global companies on their governance practices and responses to the risks and opportunities from climate change.
   - Produce and distribute through INCR a report evaluating how climate change is exacerbating water scarcity and evaluating how water-intensive sectors are managing water-related risks.
   - Develop and promote proxy voting guidelines that encourage support for reasonable shareholder proposals on climate risk.

6. **Expand climate risk scrutiny and collaboration by investors, stock market analysts, and others in the finance sector.** Investors around the world must work together to address the climate risks and opportunities that exist in every market and every asset class, and debt and equity analysts and others in the finance sector must start incorporating climate risk and opportunity into their routine financial analysis and company and portfolio valuation. Accordingly, we will:

   - Encourage debt and equity analysts, ratings agencies, and investment banks to incorporate climate risks and opportunities as part of their investment and valuation analysis, including analyzing and reporting on the potential impacts of foreseeable long-term carbon costs (in the range of \$20–\$40 per metric ton of CO_2eq.), particularly on carbon-intensive investments such as new coal-fired power plants, oil shale, tar sands, and coal-to-liquids projects.

- ✦ Encourage debt and equity analysts, ratings agencies, and investment banks to incorporate climate risks, opportunities, and carbon costs into their analysis of a new category of investment funds – infrastructure – including transportation, water, and other projects needed to support the growth of cities and the transition to a low-carbon economy.
- ✦ Engage with mutual funds, hedge funds, private equity firms, and others to promote increased understanding of, and actions in response to, climate risk.
- ✦ Support global information-sharing and collaboration by the growing number of institutional investors and organizations around the world concerned about climate risk.

Supporting Policy Action

7. **Push for guidance from the Securities and Exchange Commission (SEC).** Climate-related shareholder resolutions and new SEC guidance are each critical to improving corporate disclosure of climate risks and opportunities. Accordingly, we will:
    - ✦ Continue to engage the SEC and members of Congress on requiring companies to disclose material climate risks as part of their regular securities filings. Towards this end, we will ask investors and members of Congress to support the September 2007 Investor Petition to the SEC for "Interpretive Guidance on Climate Risk Disclosure."
    - ✦ Continue to call on the SEC to recognize shareholders' right to vote on resolutions related to climate change and to enforce existing rules requiring disclosure of material risks.
    - ✦ Call on the SEC to develop expertise on climate change risks, as well as other environmental and social issues that pose material financial risks to corporations and investors.
8. **Encourage companies and investors to support government action on climate policy.** As fiduciaries and leaders in the investment community, we recognize the need for policies that establish regulatory certainty, minimize climate risks, and provide strong incentives for investment in clean technology and other climate change solutions. Accordingly, we will:
    - ✦ Continue to call for a mandatory national policy to contain and reduce national greenhouse gas emissions economy-wide, making sizable, sensible, long-term cuts in accordance with the 60–90% reductions below 1990 levels by 2050 that scientists and climate models suggest are urgently needed to avoid the worst and most costly impacts from climate change.
    - ✦ Continue to call for the realignment of incentives and other state and national policies to achieve climate objectives, including a range of energy and transportation policy measures to stimulate research, development, and deployment of new and existing clean technologies at the scale necessary to achieve greenhouse gas reduction goals.
    - ✦ Call for strong U.S. leadership in the international negotiations for a successor to the Kyoto Protocol, including a binding target to reduce emissions significantly in the United States.
9. **Support policies to maximize energy efficiency.** As fiduciaries and long-term investors, we recognize that getting more use out of the energy we already produce is one of the fastest, easiest, and cheapest ways to significantly reduce emissions and to improve the bottom line of many companies in which we invest, especially with demand for energy increasing. Accordingly, we will:
    - ✦ Call for policies at the local, state, and national levels that promote a doubling of the historic rate of energy efficiency improvements in developed countries (to 2.5% per year) and significant energy efficiency improvements in rapidly industrializing and other major energy-using countries.

Investors Signed on to 2008 Action Plan *(as of February 13th)*:

Assets Under Management now signed-on: **$1.75 trillion**

Pension Funds, Labor, State Treasurers, State/City Comptrollers

John Chiang, California State Controller

Rob Feckner, Board President, California Public Employees' Retirement System (CalPERS)

Jack Ehnes, CEO, California State Teachers' Retirement System (CalSTRS)

Bill Lockyer, California State Treasurer

Denise L. Nappier, Connecticut State Treasurer

Alex Sink, Florida Chief Financial Officer

General Robert Milligan, Executive Director, Florida State Board of Administration (SBA)

Michael Goetz, Chairman of the Board, Illinois State Board of Investment

Nancy K. Kopp, Maryland State Treasurer

Tim Cahill, Massachusetts State Treasurer

Orin S. Kramer, Chair, New Jersey State Investment Council

William C. Thompson, Jr., New York City Comptroller

Thomas P. DiNapoli, New York State Comptroller

Richard Moore, North Carolina State Treasurer

Randall Edwards, Oregon State Treasurer

Robin L. Wiessmann, Pennsylvania State Treasurer

Frank T. Caprio, Rhode Island General Treasurer

Andrew Stern, President, Service Employees International Union

Bruce Raynor, President, UNITE HERE

Jeb Spaulding, Vermont State Treasurer

Financial Services Firms, Asset Managers, Other Leaders in Investing

Geeta Aiyer, President, Boston Common Asset Management

Barbara J. Krumsiek, President and CEO, Calvert Group, Ltd.

Michael Johnston, Executive Vice President, The Capital Group Companies *

Jeff Skoll, Chairman, Capricorn Management LLC

Amy L. Domini, Founder and CEO, Domini Social Investments LLC

Don Rolfe, President and CEO, Ethical Funds

Karina Litvack, Director, Head of Governance & Sustainable Investment, F&C Management Ltd.

Peter Knight, President, Generation Investment Management, US

Vinod Khosla, Founder, Khosla Ventures

L. John Doerr, Partner, Kleiner Perkins Caufield & Byers

Stephen Dodson, Chief Operating Officer, Parnassus Investments

Joe Keefe, CEO, Pax World Funds

Rev. William Somplatsky-Jarman, Presbyterian Church (U.S.A.)

Michael Crosby, OFMCap., Province of St. Joseph of the Capuchin Order, Milwaukee

Joan Bavaria, President, Trillium Asset Management

Timothy Brennan, Treasurer, Unitarian Universalist Association

Tim Smith, Senior Vice President, Walden Asset Management

Jack Robinson, President, Winslow Management Company

Foundations

Diane Edgerton Miller, President and CEO, Blue Moon Fund

Denis Hayes, President and CEO, Bullitt Foundation

Edith T. Eddy, Executive Director, Compton Foundation

Eric Heitz, President, The Energy Foundation

Jenny D. Russell, Executive Director, The Merck Family Fund

Lance E. Lindblom, President & CEO, Nathan Cummings Foundation

Stephen A. Foster, President and CEO, The Overbrook Foundation

Stephen B. Heintz, President, Rockefeller Brothers Fund

Richard Woo, CEO, The Russell Family Foundation

Sally Osberg, President, Skoll Foundation

Timothy E. Wirth, President, United Nations Foundation

Wren W. Wirth, President, The Winslow Foundation

Supporters in Principle:

Assets Under Management: **$6.5 trillion**

Rob Lake, Head of Sustainability, ABP investments

Donald MacDonald, Trustee, British Telecommunications Pension Scheme (BTPS)

Kevin Parker, CEO, Deutsche Asset Management & Member Group Executive Committee, Deutsche Bank

Peter Dunscombe, Chairman, Institutional Investors Group on Climate Change (IIGCC)

Howard Jacobs, Trustee, Universities Superannuation Scheme (USS)

* = *firm name listed for identification purposes only*

For more information on INCR or the Action Plan contact Christopher Fox at fox@ceres.org or 617-247-0700 ext. 15

ERISA 404

United States Code Annotated Currentness
Title 29. Labor
Chapter 18. Employee Retirement Income Security Program (Refs & Annos)
Subchapter I. Protection of Employee Benefit Rights (Refs & Annos)
Subtitle B. Regulatory Provisions
Part 4. Fiduciary Responsibility (Refs & Annos)

§ 1104. Fiduciary duties

(a) Prudent man standard of care

(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.

(2) In the case of an eligible individual account plan (as defined in section 1107(d)(3) of this title), the diversification requirement of paragraph (1)(C) and the prudence requirement (only to the extent that it requires diversification) of paragraph (1)(B) is not violated by acquisition or holding of qualifying employer real property or qualifying employer securities (as defined in section 1107(d)(4) and (5) of this title).

(b) Indicia of ownership of assets outside jurisdiction of district courts

Except as authorized by the Secretary by regulations, no fiduciary may maintain the indicia of ownership of any assets of a plan outside the jurisdiction of the district courts of the United States.

(c) Control over assets by participant or beneficiary

(1)(A) In the case of a pension plan which provides for individual accounts and permits a participant or beneficiary to exercise control over the assets in his account, if a participant or beneficiary exercises control over the assets in his account (as determined under regulations of the Secretary)--

(i) such participant or beneficiary shall not be deemed to be a fiduciary by reason of such exercise, and

(ii) no person who is otherwise a fiduciary shall be liable under this part for any loss, or by reason of any breach, which results from such participant's or beneficiary's exercise of control, except that this clause shall not apply in connection with such participant or beneficiary for any blackout period during which the ability of such participant or beneficiary to direct the investment of the assets in his or her account is suspended by a plan sponsor or fiduciary.

(B) If a person referred to in subparagraph (A)(ii) meets the requirements of this subchapter in connection with authorizing and implementing the blackout period, any person who is otherwise a fiduciary shall not be liable under this subchapter for any loss occurring during such period.

(C) For purposes of this paragraph, the term "blackout period" has the meaning given such term by section 1021(i)(7) of this title.

(2) In the case of a simple retirement account established pursuant to a qualified salary reduction arrangement under section 408(p) of Title 26, a participant or beneficiary shall, for purposes of paragraph (1), be treated as exercising control over the assets in the account upon the earliest of--

(A) an affirmative election among investment options with respect to the initial investment of any contribution,

(B) a rollover to any other simple retirement account or individual retirement plan, or

(C) one year after the simple retirement account is established.

No reports, other than those required under section 1021(g) of this title, shall be required with respect to a simple retirement account established pursuant to such a qualified salary reduction arrangement.

(3) In the case of a pension plan which makes a transfer to an individual retirement account or annuity of a designated trustee or issuer under section 401(a)(31)(B) of the Internal Revenue Code of 1986, the participant or beneficiary shall, for purposes of paragraph (1), be treated as exercising control over the assets in the account or annuity upon--

(A) the earlier of--

(i) a rollover of all or a portion of the amount to another individual retirement account or annuity; or

(ii) one year after the transfer is made; or

(B) a transfer that is made in a manner consistent with guidance provided by the Secretary.

(4)(A) In any case in which a qualified change in investment options occurs in connection with an individual account plan, a participant or beneficiary shall not be treated for purposes of paragraph (1) as not exercising control over the assets in his account in connection with such change if the requirements of subparagraph (C) are met in connection with such change.

(B) For purposes of subparagraph (A), the term "qualified change in investment options" means, in connection with an individual account plan, a change in the investment options offered to the participant or beneficiary under the terms of the plan, under which--

(i) the account of the participant or beneficiary is reallocated among one or more remaining or new investment options which are offered in lieu of one or more investment options offered immediately prior to the effective date of the change, and

(ii) the stated characteristics of the remaining or new investment options provided under clause (i), including characteristics relating to risk and rate of return, are, as of immediately after the change, reasonably similar to those of the existing investment options as of immediately before the change.

(C) The requirements of this subparagraph are met in connection with a qualified change in investment options if--

(i) at least 30 days and no more than 60 days prior to the effective date of the change, the plan administrator furnishes written notice of the change to the participants and beneficiaries, including information comparing the existing and new investment options and an explanation that, in the absence of affirmative investment instructions from the participant or beneficiary to the contrary, the account of the participant or beneficiary will be invested in the manner described in subparagraph (B),

(ii) the participant or beneficiary has not provided to the plan administrator, in advance of the effective date of the change, affirmative investment instructions contrary to the change, and

(iii) the investments under the plan of the participant or beneficiary as in effect immediately prior to the effective date of the change were the product of the exercise by such participant or beneficiary of control over the assets of the account within the meaning of paragraph (1).

(5) Default investment arrangements

(A) In general

For purposes of paragraph (1), a participant in an individual account plan meeting the notice requirements of subparagraph (B) shall be 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, are invested by the plan in accordance with regulations prescribed by the Secretary. The regulations under this subparagraph shall 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.

(B) Notice requirements

(i) In general

The requirements of this subparagraph are met if each participant--

(I) receives, within a reasonable period of time before each plan year, a notice explaining the employee's right under the plan to designate how contributions and earnings will be invested and explaining how, in the absence of any investment election by the participant, such contributions and earnings will be invested, and

(II) has a reasonable period of time after receipt of such notice and before the beginning of the plan year to make such designation.

(ii) Form of notice

The requirements of clauses (i) and (ii) of section 401(k)(12)(D) of Title 26 shall apply with respect to the notices described in this subparagraph.

(d) Plan terminations

(1) If, in connection with the termination of a pension plan which is a single-employer plan, there is an election to establish or maintain a qualified replacement plan, or to increase benefits, as provided under section 4980(d) of Title 26, a fiduciary shall discharge the fiduciary's duties under this subchapter and subchapter III of this chapter in accordance with the following requirements:

(A) In the case of a fiduciary of the terminated plan, any requirement--

(i) under section 4980(d)(2)(B) of Title 26 with respect to the transfer of assets from the terminated plan to a qualified replacement plan, and

(ii) under section 4980(d)(2)(B)(ii) or 4980(d)(3) of Title 26 with respect to any increase in benefits under the terminated plan.

(B) In the case of a fiduciary of a qualified replacement plan, any requirement--

(i) under section 4980(d)(2)(A) of Title 26 with respect to participation in the qualified replacement plan of active participants in the terminated plan,

(ii) under section 4980(d)(2)(B) of Title 26 with respect to the receipt of assets from the terminated plan, and

(iii) under section 4980(d)(2)(C) of Title 26 with respect to the allocation of assets to participants of the qualified replacement plan.

(2) For purposes of this subsection--

(A) any term used in this subsection which is also used in section 4980(d) of Title 26 shall have the same meaning as when used in such section, and

(B) any reference in this subsection to Title 26 shall be a reference to Title 26 as in effect immediately after the enactment of the Omnibus Budget Reconciliation Act of 1990.

U.S. Department of Labor Employee Benefits Security Administration
Washington, D.C. 20210

May 3, 2005

Jonathan P. Hiatt, General Counsel
AFL-CIO
815 16th Street, N.W.
Washington, D.C. 20036

Dear Mr. Hiatt:

In recent weeks, AFL-CIO officials have been reported to have suggested that fiduciaries of ERISA-covered plans could expend plan assets to inform participants about the current public debate on Social Security, and that plan trustees could make decisions on the hiring and firing of plans' service providers based upon their opinions on Social Security reform. The Department has grave concerns about these statements, and disagrees with any suggestion that plan assets could be used for any purpose other than to pay benefits and defray administrative expenses.

At a meeting with Department officials on April 5, 2005, you asserted that the AFL-CIO has neither received nor expended plan assets to express its views about Social Security reform, and that you have no knowledge of any investment advisor, money manager, or service provider being hired or fired on the basis of views about Social Security. You also supplied to the Department legal opinions provided to the AFL-CIO by your outside legal counsel addressing ERISA's fiduciary responsibility provisions in the context of (1) using pension plan assets to pay for communications to plan participants on options to reform Social Security, and (2) considering plan service providers' views on public policy issues as factors in determining whether to hire or retain them.

The Department is very concerned about the potential use of plan assets to promote particular policy positions. Under section 404(a)(1)(A) 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 are not complying with the exclusive purpose rule when they expend plan assets to communicate with plan participants to advocate a particular result in the current Social Security debate or to disseminate their views on matters of broad public policy such as Social Security reform. Fiduciaries must prudently manage plan assets to ensure that they are available to pay promised benefits. A fiduciary may never increase a plan's expenses, sacrifice the security of promised benefits, or reduce the return on plan assets, in order to promote its views on Social Security or any other broad policy issue.

1. The use of plan assets to express views or provide information on Social Security policy.

The Department disagrees with any suggestion that plan fiduciaries may expend plan assets on efforts to promote a particular point of view, or to advise, plan participants about the current Social Security debate. Such expenditures are neither for the payment of benefits nor for plan administration, and accordingly fall outside the limited scope of expenditures permitted by ERISA, even if, as the AFL-CIO asserts, current Social Security proposals could have a significant impact on the national economy, financial markets, and plan investments.

Plans are important participants in the national economy, and are generally affected by legislation, regulations, actions, and events which affect the economy as a whole, such as Social Security policy. This simple fact does not convert every legislative or regulatory proposal concerning the economy into a rationale for spending plan assets on the policy debate. If a fiduciary could characterize an "educational" expense as "plan administration" merely by positing some connection between the particular policy at issue and the broad economic interests of ERISA-covered plans, there would be virtually no limit to the range of such expenses that would be permissible. Federal policies concerning public debt, trade, exchange rates, interest rates, housing, the environment, labor, tax law, antitrust law, bankruptcy law, criminal law, civil rights, and myriad other matters have important effects on the economy and economic actors such as ERISA-covered benefit plans. The Department rejects a construction of ERISA which would render the Act's tight limits on the use of plan assets illusory, and which would permit plan fiduciaries to tap into ERISA trusts to promote myriad public policy preferences, rather than to pay benefits and engage in plan administration with undivided loyalty.

In certain very narrow circumstances, such as where a legislative proposal is near enactment and closely tied to plan issues, a fiduciary could decide to spend plan assets to educate participants about the need to take the legislation into account in making particular decisions about their options under the plan. If, for example, proposed changes to the tax code would have specific tax consequences for participants who are choosing between particular investment or distribution options, and such changes are reasonably believed by plan fiduciaries to be imminent, it may be appropriate for the plan's fiduciaries to advise participants of the potential consequences so that they could choose wisely. In such circumstances, plan administration appropriately includes educating participants about the information they need to make sensible decisions under the plan. See, e.g., 29 C.F.R. § 2509.96-1. Giving plan participants information directly relevant to particular plan choices, however, is very different from expressing views or providing information concerning broad issues of public policy like Social Security reform.

2. Consideration of service providers' views on Social Security as a factor in selection and retention decisions.

Section 404 imposes on plan fiduciaries the duty to act prudently measured against the highest standard of care and with an "eye single to the interests of the participants and beneficiaries." Donovan v. Bierwirth, 680 F.2d 263, 271 (2d Cir.), cert. denied, 459 U.S. 1089 (1982). Fiduciaries cannot subordinate the interests of the participants and beneficiaries to unrelated objectives. 29 C.F.R. § 2509.94-1

Under ERISA's stringent standards of prudence and loyalty, it would be unlawful for a plan fiduciary to review the plan's service providers based, not upon the quality and expense of their services, but rather upon their views on Social Security or any other broad area of public policy. Although your counsel's opinion points out that a fiduciary may consider such collateral factors only when choosing a service provider that is better than or equal to alternative providers (see also 29 C.F.R. § 2509.94-1), the Department is concerned that fiduciaries may nevertheless view the AFL-CIO's recent attention to the question as an invitation to judge service providers first for their positions on Social Security and only second for their ability to meet plans' particular needs.

For this reason, the Department reiterates its view that plan fiduciaries may not increase expenses, sacrifice investment returns, or reduce the security of plan benefits in order to promote collateral goals. A fiduciary's reconsideration of its current service providers based solely upon the service provider's views on Social Security would raise grave concerns about the prudence and loyalty of the fiduciaries' actions. Similarly, a fiduciary could not, consistent with the duties of prudence and loyalty, simply exclude qualified service providers from consideration in hiring based solely upon their views on Social Security policy.

The Department appreciates your willingness to meet on the issues discussed above, and hopes that this letter will encourage fiduciaries to adhere to ERISA's stringent duties of loyalty and care.. We request that you circulate this letter broadly to appropriate plan fiduciaries, especially to those who may have previously received and are relying upon the opinion you previously obtained from outside counsel. If you learn of any departure from the standards set forth in this letter, please advise the Department of the breach immediately.

Sincerely,

Alan D. Lebowitz
Deputy Assistant Secretary
for Program Operations

Remarks by John J. Sweeney
President, AFL-CIO
UN Summit on Climate Risk
New York, New York
February 14, 2008

Thank you, Mindy [Lubber]. Good afternoon. On behalf of the 56 unions and the 10 million working men and women of the AFL-CIO, I am deeply honored to be here at the United Nations. Since its founding, the UN has meant hope for peace and progress for the people of the world. I would like to recognize the United Nations Foundation, CERES, and the Investor Network on Climate Change for your leadership. The labor movement has been part of CERES' groundbreaking work since its inception, and the urgency of that work has never been greater.

We are here following the historic UN meeting on climate change in Bali. The global labor movement is proud to have been among those who called for decisive action at Bali. The results of Bali, while only a beginning, show the world can come together to take action on climate change.

Of course, it is daunting to follow in the footsteps of Vice President Al Gore. In this century, Al Gore has embodied America's better self. His service to his country and the world community shows what a positive force American leaders can be.

I want to talk with you today about how the labor movement views the challenge of global warming and the opportunity presented by investments in clean and efficient energy.

Let me begin with this: We hear again and again that we must choose between having a stable climate and having a strong global economy. This is a false choice.

The global economy cannot prosper unless we secure a stable climate and sustainable sources of energy. Global warming means global Depression, food and water shortages and drowned cities. I have stood in New Orleans' Ninth Ward and seen that future.

How serious is the economic threat from global warming? The British government's Stern Report in 2006 concluded that unless human behavior changes, global warming will lead to a reduction of global economic activity on the level of 10 to 20 percent by 2100. That's economic damage on the scale of the Great Depression. One can only imagine the social and political problems bestowed upon our children and grandchildren.

On the other hand, we can only take on climate change because of the wealth—the human and political capital – that comes from a broad based and prosperous global economy. Mobilizing that investment capital to meet the challenge of climate change is what brings us together today.

But global warming is hardly our only challenge.

Since 1850, cheap energy – largely due to oil – has made the world rich beyond the dreams of our ancestors. But the era of cheap, easily accessible oil is coming to an end. Global

oil production is reaching its limits just as growth in China, India and other developing nations intensifies the world's appetite for oil. Just how quickly it is ending is a matter of debate. But by any measure, we have the makings of a disaster if we do nothing.

Yet the colossal challenge of dealing with energy scarcity means opportunity. Enormous economic opportunities for developed and developing countries. Opportunities for investors across every asset class. And opportunities for workers--potentially high quality job opportunities for millions of workers.

This crisis and these opportunities are what I want to discuss over the next few minutes.

The crisis of securing a sustainable, clean energy future is global. Energy markets are global. So is our atmosphere. Everyone knows the disproportionate share of global carbon emissions generated by the United States' economy. Yet today, 25 percent of particulate matter in the skies over Los Angeles comes from China.

This global economy and the dire threat of a globally unstable climate requires global rules. We need common rules for all of us—worker protections, investor protections and environmental protections.

Sixty years ago, the United Nations declared that workers around the world must be guaranteed core labor rights. The right to an independent voice in our workplaces, made real through the right of workers to organize and bargain for a better life. And the right for all people to be free of the curses of child labor, forced labor and discrimination. More than ever, these standards must be enforced throughout the global economy. They must apply to the millions of new jobs that will be created as the global economy changes.

But for working people to prosper in the global economy, we need more than rules. We need thoughtful strategies at the national level—strategies that work for all of us, that create wealth and share that wealth broadly, combined with a global strategy for combating climate change.

This approach – rules plus strategies – is precisely the approach the global community must pursue in combating global warming. And this is the approach the International Trade Union Confederation – the labor movements of 153 countries representing 168 million workers – brought to the talks in Bali. Now, working together with the UN and the International Labor Organization, the ITUC is carrying on that work – tracking the growth of green jobs globally in an effort to move governments and private sector actors worldwide.

Our strategies must recognize that we have a window of opportunity. But the window is closing. If we act today, the petroleum-based wealth of the developed world can be deployed to take on these threats while we are prosperous. And if we act, the benefits can go far beyond addressing our energy and climate problems.

Here's what I mean. I have the honor of chairing the Trade Union Advisory Committee to the Organization for Economic Cooperation and Development, the OECD. The OECD countries are the nations of the developed world. All these nations are struggling to maintain

broad, middle class societies as billions of new workers from India and China and other countries enter the global labor market.

In the United States, inequality is soaring. We are the wealthiest society the world has ever seen. Yet tens of millions have no health care, and a secure retirement is becoming a luxury only the rich can hope for.

We need a new economic strategy and it cannot be, "Let our corporations make money and the rest will take care of itself." Our head start in accumulating capital will not let us live off profits from economic activity in other countries forever. The role sovereign wealth funds have played in bailing out U.S. financial institutions shows how quickly these patterns can change.

We cannot hide from the world or build walls. Rather, we need a new economic strategy that recognizes our interdependence on developing nations.

And I believe a key part of the answer – for the U.S. and other developed countries – lies in meeting the critical worldwide need for a solution to the energy and environmental crisis.

Successfully executing this new economic strategy opens enormous opportunities. It means opportunities for developed countries like the U.S., Japan and Europe, where millions of new jobs can result. And it means deliverance from an economic and environmental crisis for developing countries like India and China. Without solutions to these crises, the developing economies of Asia will hit a wall of skyrocketing energy costs and environmental limits. The consequences for those countries and for the world would be devastating.

Executing this strategy requires deploying our current human and financial capital to secure a future we want to live in. Much of that capital is workers' retirement funds. Trillions of dollars around the world are invested to provide retirement security and education to billions of people. In the U.S., $5 trillion is invested on behalf of union members.

These deferred wages of working people are the capital that can fuel the energy economy of the future.

This is not an issue of trading off investment returns for environmental protection. If we want healthy long term investment returns, we must solve the energy and the environmental crisis.

If we do nothing, the foundations of successful investing will come under increasing pressure. What are those foundations? They are the absolute basics of civilization -- reliable food supplies and reliable energy.

Looked at another way, for investors, the development and deployment of new energy technology that does not emit carbon is a fantastic old fashioned opportunity to make money – to be in on the ground floor of the future.

Now some will say this is really a problem for governments. And it is true that government must act. But the global investment community must not wait for governments.

Investors need to step forward in two ways. First, investors need to look at investments in new clean energy ventures and projects. Second, investors need to demand the information necessary to hold corporations accountable. Investors should ask the companies you invest in – first, are you taking responsibility for addressing the crisis? And second and most importantly, are companies taking steps to seize the opportunities created by this crisis?

Last year, a group of U.S. public pension funds asked the Securities and Exchange Commission for new rules requiring disclosures of business risk related to global warming. I applaud those who led this effort, many of whom are here today. Of course, the response has been silence from the SEC. But while we wait for an SEC ready to act, investors can use our power, our voice, to get companies to make these disclosures. That is of course what CERES is all about.

Investors should be looking at new technologies for generating usable energy. New technologies like solar, wind, and geothermal. And if we are serious about dealing with carbon emissions, we must expand our use of older carbon free energy sources. Older sources like hydro and nuclear power. But we can't stop there. We must pursue reengineering old energy sources such as carbon capture and sequestration for coal fired electrical generation plants.

Consider investments in renewable energy. A 10 year program to bring 18,500 megawatts of renewable energy on line annually could generate 2 million full-time equivalent jobs. And there are over 70,000 firms active in industries that could supply the components. The result? Twenty percent of our power capacity would come free of carbon emissions.

The same dynamics exist for nuclear and capturing coal emissions. These technologies require capital and developing them will create jobs—lots of jobs.

Each possible clean energy technology has its advocates and its detractors. But the urgency of the crisis requires that every solution that genuinely holds out the hope of reducing carbon emissions must be explored.

As important as energy generation is, it's not the whole story. A very big piece of the puzzle can be found in the area of increasing energy efficiency. More than one third of our energy goes to heat, cool and power buildings. Ten percent is for lighting. So dramatic cuts in carbon emissions can be as simple as compact fluorescent bulbs and more energy efficient building materials.

But to really begin to address this crisis, we must think big. A new strategy for the global economy has to mean speed and scale.

Consider just some aspects of what a greening of our entire energy system could include.

First, today we know how to build new buildings and retrofit existing buildings to save energy. That's what union pension dollars are doing at the $239 million Octagon apartment development on Roosevelt Island, right off the East Side of Manhattan, not far from where we are meeting today. All that's missing is the financing and project management to do it at scale across our real estate landscape.

Here's another example: We have the technology to build a highly energy efficient smart power grid — with digital high performance lines that recapture up to 30 percent of electrical energy generation that is currently lost over old tech low performance transmission lines.

But that's just the beginning. The savings from a smart grid could be used to power plug-in hybrid cars, and to manage the ups and downs in wind and solar power generation that come from rainy days and still nights. The result would be a dramatic reduction in carbon emissions.

So investors looking at real estate should be asking, how can we unlock the value in retrofitting commercial buildings to be energy efficient?

Investors looking at the utility sector should be asking companies, what are your plans for conversion to a smart grid?

The labor movement is an enthusiastic supporter of General Motors' commitment to plug-in hybrids by 2010. Investors should be pressing the auto sector to meet or exceed that timetable for advanced engine and battery technology.

In every area, the need is for scale and speed. Many talk about the need for massive government led investment – about superfunds and Manhattan projects. We support that line of thinking. But scale and speed should also come from private capital.

In November the AFL-CIO -- together with the Apollo Alliance – convened a meeting of workers' pension trustees and money managers to discuss opportunities in all these new and clean energy technologies. The AFL-CIO is committed to a continuing effort to inform the stewards of our members' money about the investment opportunities in energy transformation. We plan to have further meetings this spring to follow up on the progress we hope all of you will make.

Finally, at every juncture, investors should be thinking about how labor and government fit into this picture. The labor movement is the primary source of advanced training for construction workers. We're ready to ramp up, but we need business and government partners. Together we need to train workers in the poorest and most marginalized parts of our country to take part in the great task ahead. And together we need to improve our public schools, so that young people leave school ready to take part in advanced job training programs.

More broadly, investors should join with labor and environmentalists to demand that government act to accelerate the pace of change. We all win when government finally puts the needed public investment into mass transit, advanced automotive technology and carbon emissions control technology.

We are a big society and a big economy. We need a new economic strategy that puts us at the center of the world's economy – but not as a borrower of money or a center for investment banking or a holder of patent rights.

We must be a provider of critical goods and services to what will likely be the mega-economies of the future in India and China. If we lead a transformation in how we generate and use energy we will be at the heart of building construction and transportation and manufacturing processes, as well as the energy industries themselves.

How far do we have to go? Though China has or soon will pass us as the world's largest emitter of carbon, the US remains the most energy intensive economy in the world.

In the United States today, approximately $3 billion is invested in alternative energy venture capital. That sounds like a big number until you realize that Americans put $9 billion a year into computer games and somewhere north of $100 billion annually on the war in Iraq.

The labor movement cannot accept the status quo – a status quo of no rules and no strategy.

We know where doing nothing leads. It leads to a planet of radical inequalities of wealth and power. It leads to global economic instability. To governments each looking to their armies to pursue the hopeless mission of seizing the world's dwindling supplies of energy. And all the while all of us will face the unstoppable, unknowable consequences of radical, accelerating global climate change.

But this need not be so.

We can build a better world. A world with a stable climate. A future built on sustainable sources of energy for both developed and developing countries. In that future our children will not die in futile wars over oil.

We can build a world of an expanding middle class globally. We will require the skills and labor of millions, trillions of dollars of investment capital, and real political leadership—and not someday or soon, but now.

Investors can lead, and make money by leading. The labor movement expects those who have been entrusted with our members' money to do just that.

Thank you.

U.S. Department of Labor

Advisory Opinion

Printer Friendly Version • PDF Version

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 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

Footnotes

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).

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Form **5500**

Department of the Treasury
Internal Revenue Service
Department of Labor
Employee Benefits Security Administration
Pension Benefit Guaranty Corporation

Annual Return/Report of Employee Benefit Plan

This form is required to be filed under sections 104 and 4065 of the Employee Retirement Income Security Act of 1974 (ERISA) and sections 6047(e), 6057(b), and 6058(a) of the Internal Revenue Code (the Code).

▶ Complete all entries in accordance with the instructions to the Form 5500.

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Part I Annual Report Identification Information

For the calendar plan year 2006 or fiscal plan year beginning and ending

A This return/report is for: (1) [X] a multiemployer plan; (2) [ ] a single-employer plan (other than a multiple-employer plan); (3) [ ] a multiple-employer plan; or (4) [ ] a DFE (specify) ________

B This return/report is: (1) [ ] the first return/report filed for the plan; (2) [ ] an amended return/report; (3) [ ] the final return/report filed for the plan; (4) [ ] a short plan year return/report (less than 12 months).

C If the plan is a collectively-bargained plan, check here ▶ [ ]

D If filing under an extension of time or the DFVC program, check box and attach required information. (see instructions) ▶ [X]

Part II Basic Plan Information - enter all requested information.

1a Name of plan
SEIU AFFILIATES OFFICERS AND EMPLOYEES PENSION PLAN

1b Three-digit plan number (PN) ▶ 001

1c Effective date of plan (mo., day, yr.) 10/01/1964

2a Plan sponsor's name and address (employer, if for a single-employer plan) (Address should include room or suite no.)
BD OF TRUSTEES SEIU AFFILIATES
OFFICERS AND EMPL PENSION PLAN

11 DUPONT CIRCLE
SUITE 900

WASHINGTON DC 20036-1202

2b Employer Identification Number (EIN) 52-0812348

2c Sponsor's telephone number 202-730-7500

2d Business code (see instructions) 813930

Caution: A penalty for the late or incomplete filing of this return/report will be assessed unless reasonable cause is established.

Under penalties of perjury and other penalties set forth in the instructions, I declare that I have examined this return/report, including accompanying schedules, statements and attachments, as well as the electronic version of this return/report if it is being filed electronically, and to the best of my knowledge and belief, it is true, correct and complete.

SIGN HERE [signature] 10-12-07 Andrew L. Stern
Signature of plan administrator — Date — Type or print name of individual signing as plan administrator

SIGN HERE [signature] 10-11-07 Douglas L. Hart
Signature of employer/plan sponsor/DFE — Date — Type or print name of individual signing as employer, plan sponsor or DFE

For Paperwork Reduction Act Notice and OMB Control Numbers, see the instructions for Form 5500. v9.1 Form **5500** (2006)

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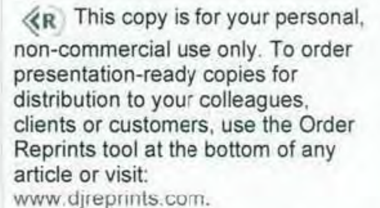
THE WALL STREET JOURNAL. ONLINE

July 16, 2008

REVIEW & OUTLOOK

Andy Stern's Pensions

July 16, 2008; Page A16



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The Service Employees International Union is staging nationwide rallies this week, vowing to "Take Back the Economy" from wealthy private equity firms. Based on the evidence of union policies, however, SEIU members would do better to take back their own pensions from their union chieftains.

SEIU President Andy Stern is the drama king of Big Labor, and Thursday's publicity blitz will feature all of his signature choreography: Rallies in 18 states and even overseas, in which thousands of union activists will march against companies and politicians they don't like. Themes include "Buyout Monsters On the Loose" and "The War on Greed." To listen to Mr. Stern, this is about getting Congress to close tax "loopholes" for private equity firms, while funding national health care and "middle class" tax cuts.

Andy Stern

That's a sideshow. The real targets are private equity firms such as Kohlberg Kravis Roberts and Carlyle Group, which own companies that have resisted SEIU attempts to organize their workers. Mr. Stern wants to pound these firms with bad publicity and political retribution until they break.

Mr. Stern's "middle class" spin would be more believable if the SEIU did more for its own members, especially their pensions. Public records based on the SEIU's own filings show that the SEIU National Industry Pension plan – which covers some 101,000 workers – was only 75% funded in 2006. Put another way, the plan had only three-fourths of the money it needs to meet its retirement obligations. And the national chapter is only the start. Some 13 local SEIU pension plans in 2006 were less than 80% funded; several didn't reach 65%.

Some of this might be the result of poor investment performance, but the main problem is that the SEIU hasn't negotiated adequate employer contributions to the plans. This is a common practice: Unions and management take credit for bargaining deals that promise generous retirement benefits, even as they ignore how they'll be funded.

On the other hand, SEIU leaders are highly attentive to their own pension funding. A separate fund run by the national union, this one covering the benefits of SEIU officers, was 103% funded in 2006. The top SEIU guns are set for their golden years.

The SEIU is now disputing some of these figures, claiming the information it publicly filed is wrong. It now claims its national plan was 92% funded in 2006, and as of January 1, 2008, was 96% funded. Here's the catch: The union says these new numbers are based on calculations required under a 2006 pension reform that hasn't yet taken effect. It didn't release its new math either, though we're eager to see it.

By the way, fear of damage to pension-fund returns caused Mr. Stern's fellow labor leaders to thwart his

initial campaign against private equity earlier this year. The SEIU had pushed for a California law to restrict state pension funds from investing in sovereign wealth funds that in turn invest in SEIU targets like KKR. Both the California Public Employees' Retirement System (Calpers) and the California State Teachers' Retirement System estimated that such a ban could cost them billions of dollars in foregone investment returns. This has earned Calpers the honor of a protest tomorrow too.

Good for them. As always with these political campaigns, it pays to look behind the union libel.

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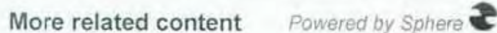


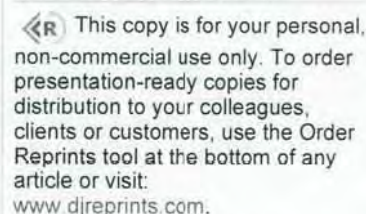
THE WALL STREET JOURNAL. ONLINE

May 22, 2008

REVIEW & OUTLOOK

The Exxon Fight, Round 2

May 22, 2008; Page A14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Who wins in a shareholder war between green-collar activists and blue-collar union pensioners? Hard to say. But round two in the battle over the fiduciary responsibilities of corporate giant Exxon Mobil ought to be illuminating for investors.

The heirs of John D. Rockefeller's Standard Oil empire made a media splash recently when they demanded that the oil giant diversify out of oil, of all things. When Exxon holds its annual shareholder meeting next week, the Rockefeller clan will push proxy resolutions requiring the company to invest in noncarbon energy sources, and to create more board of director "independence" from management by splitting the role of chairman and chief executive. To hear the wealthy heirs tell it, Exxon will thus be better positioned to take advantage of the eco-opportunities of the future.

The counterpunch from other, nonwealthy shareholders has now arrived in the form of a letter from union chief Chuck Canterbury. He's president of the National Fraternal Order of Police, whose 324,000 members have plenty of pension-fund dollars invested in Exxon. In a May 17 letter to Exxon Chairman and CEO Rex Tillerson, Mr. Canterbury made clear he and his members don't agree that Exxon should be used to promote social goals if it means putting worker retirements at risk.

"ExxonMobil is an example of how hard work, efficient management and innovative entrepreneurism breed success," Mr. Canterbury wrote, noting this was why many union pension funds have invested in the oil company. "The Rockefeller resolutions threaten to degrade the value of ExxonMobil."

And more: The family would impose "rigid, ideologically-based conditions on the company's future," would nullify "the judgment of a highly successful management team," and would "undercut every project and business operation." This would "hamstring ExxonMobil's profitability and growth, thus directly harming the police officers, firefighters, teachers and public employees whose retirement savings are invested in the company."

Mr. Canterbury seems to understand how capitalism works better than do the ostensibly capitalist Rockefellers. His letter is a reminder that Exxon's legal obligation is to maximize returns to shareholders, and that over the years it has done that by taking calculated risks in drilling for fossil fuels. Many investors put their money into Exxon precisely because the company does that so well.

Similar corporate governance reforms haven't helped the returns of other oil giants. Royal Dutch Shell and BP have both split the roles of chairman and chief executive, without any discernible benefit to shareholders. Since 2006, when Mr. Tillerson assumed the top roles at Exxon, the company's stock has climbed 57%, compared with 12% for Royal Dutch Shell and 4% for BP. Over the past 10 years, Exxon has consistently outpaced those rivals and the industry average in annual average returns on investment.

Then again, maybe this Exxon "reform" campaign isn't really about investors. Perhaps it's a political exercise hiding under the banner of corporate governance. Look no further than Denise Nappier, the ambitious Connecticut State Treasurer who also recently joined the Exxon fun. The Democrat oversees pension dollars on behalf of thousands of teachers and state and municipal employees, and she has also recently denounced the oil company's "addiction to oil."

In supporting the Rockefellers, Ms. Nappier explained that her alternative-energy ideas would be better for Exxon than are the investment plans of Exxon's executives. If Exxon ever took her advice, we'd recommend putting in an immediate sell order on its shares. But it's more likely that the future candidate for Governor is merely angling for some easy green publicity as she and the state's pensioners continue to benefit from their investment in Exxon's substantial oil profits. She'd be violating her own fiduciary duty to those pensioners if she pursued an ideological agenda that hurt returns.

The Rockefellers and most of their allies are wealthy enough to survive any Exxon decline. The same can't be said for retired police officers. Exxon will do more for its shareholders, and for society, if it avoids political fads and keeps its focus on investments that promise the highest return on shareholder capital.

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Chapter XXV. Employee Benefits Security Administration, Department of Labor (Refs & Annos)
Subchapter A. General
Part 2509. Interpretive Bulletins Relating to the Employee Retirement Income Security Act of 1974 (Refs & Annos)

§ 2509.08-1 Supplemental guidance relating to fiduciary responsibility in considering economically targeted investments.

This Interpretive Bulletin sets forth the Department of Labor's interpretation of sections 403 and 404 of the Employee Retirement Income Security Act of 1974 (ERISA), as applied to employee benefit plan investments in "economically targeted investments," that is, investments selected for the economic benefits they create apart from their investment return to the employee benefit plan. The guidance set forth in this interpretive bulletin modifies and supersedes the guidance set forth in interpretive bulletin 94-1 (29 CFR 2509.94-1).

ERISA requires that a fiduciary act solely in the interest of the plan's participants and beneficiaries and for the exclusive purpose of providing benefits to their participants and beneficiaries. The Act specifically states, in relevant part, that:

• "[A]ssets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries.* * *" [FN1]

[FN1] Sec. 403(c)(1), 29 U.S.C.A. 1103(c)(1).

• "[A] fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and for the exclusive purpose of providing benefits to participants and their beneficiaries." [FN2]

[FN2] Sec. 404(a)(1)(A)(i), 29 U.S.C.A. 1104(a)(1)(A)(i).

ERISA's plain text thus establishes a clear rule that in the course of discharging their duties, fiduciaries may never subordinate the economic interests of the plan to unrelated objectives, and may not select investments on the basis of any factor outside the economic interest of the plan except in very limited circumstances enumerated below.

With regard to investing plan assets, the Department has issued a regulation, at 29 CFR 2550.404a-1, interpreting the prudence requirements of ERISA as they apply to the investment duties of fiduciaries of employee benefit plans. The regulation provides that the prudence requirements of section 404(a)(1)(B) are satisfied if (1) the fiduciary making an investment or engaging in an investment course of action has given appropriate consideration to those facts and circumstances that, given the scope of the fiduciary's investment duties, the fiduciary knows or should know are relevant, and (2) the fiduciary acts accordingly. This includes giving appropriate consideration to the role that the investment or investment course of action plays (in terms of such factors as diversification, liquidity and risk/return characteristics) with respect to that portion of the plan's investment portfolio within the scope of the fiduciary's responsibility.

Other facts and circumstances relevant to an investment or investment course of action would, in the view of the

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Department, include consideration of the expected return on alternative investments with similar risks available to the plan. It follows that, because every investment necessarily causes a plan to forgo other investment opportunities, an investment will not be prudent if it would be expected to provide a plan with a lower rate of return than available alternative investments with commensurate degrees of risk or is riskier than alternative available investments with commensurate rates of return.

ERISA's plain text does not permit fiduciaries to make investment decisions on the basis of any factor other than the economic interest of the plan. Situations may arise, however, in which two or more investment alternatives are of equal economic value to a plan. The Department has recognized in past guidance that under these limited circumstances, fiduciaries can choose between the investment alternatives on the basis of a factor other than the economic interest of the plan. The Department has interpreted the statute to permit this selection because (1) ERISA requires fiduciaries to invest plan assets and to make choices between investment alternatives, (2) ERISA does not itself specifically provide a basis for making the investment choice in this circumstance, and (3) the economic interests of the plan are fully protected by the fact that the available investment alternatives are, from the plan's perspective, economically indistinguishable.

Given the significance of ERISA's requirement that fiduciaries act "solely in the interest of participants and beneficiaries," the Department believes that, before selecting an economically targeted investment, fiduciaries must have first concluded that the alternative options are truly equal, taking into account a quantitative and qualitative analysis of the economic impact on the plan. ERISA's fiduciary standards expressed in sections 403 and 404 do not permit fiduciaries to select investments based on factors outside the economic interests of the plan until they have concluded, based on economic factors, that alternative investments are equal. A less rigid rule would allow fiduciaries to act on the basis of factors outside the economic interest of the plan in situations where reliance on those factors might compromise or subordinate the interests of plan participants and their beneficiaries. 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. [FN3]

[FN3] See letters from the Department of Labor to Jonathan Hiatt dated May 3, 2005; to Thomas Donahue dated December 21, 2007 (A.O. 2007-07A); and to David Chavern dated June 27, 2008 (A.O. 2008-05A).

A plan fiduciary's analysis is required to comply with, but is not necessarily limited to, the requirements set forth in 29 CFR 2550.404a-1(b). In evaluating the plan portfolio, as well as portions of the portfolio, the fiduciary is required to examine the level of diversification, degree of liquidity, and the potential risk/return in comparison with available alternative investments. The same type of analysis must also be applied when choosing between investment alternatives. Potential investments should be compared to other investments that would fill a similar role in the portfolio with regard to diversification, liquidity, and risk/return.

In light of the rigorous requirements established by ERISA, the Department believes that fiduciaries who rely on factors outside the economic interests of the plan in making investment choices and subsequently find their decision challenged will rarely be able to demonstrate compliance with ERISA absent a written record demonstrating that a contemporaneous economic analysis showed that the investment alternatives were of equal value.

Examples:

A plan owns an interest in a limited partnership that is considering investing in a company that competes with the plan sponsor. The fiduciaries may not replace the limited partnership investment with another investment based on this fact unless they prudently determine that a replacement investment is economically equal or superior to the limited partnership investment and would not adversely affect the plan's investment portfolio, taking into account factors including diversification, liquidity, risk and expected return. The competition of the limited partnership with

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the plan sponsor is a factor outside the economic interests of the plan, and thus cannot be considered unless an alternative investment is equal or superior to the limited partnership.

A multiemployer plan covering employees in a metropolitan area's construction industry wants to invest in a large loan for a construction project located in the same area because it will create local jobs. The plan has taken steps to ensure that the loan poses no prohibited transaction issues. The loan carries a return fully commensurate with the risk of nonpayment. Moreover, the loan's expected return is equal to or greater than construction loans of similar quality that are available to the plan. However, the plan has already made several other loans for construction projects in the same metropolitan area, and this loan could create a risk of large losses to the plan's portfolio due to lack of diversification. The fiduciaries may not choose this investment on the basis of the local job creation factor because, due to lack of diversification, the investment is not of equal economic value to the plan.

A plan is considering an investment in a bond to finance affordable housing for people in the local community. The bond provides a return at least as favorable to the plan as other bonds with the same risk rating. However, the bond's size and lengthy duration raises a potential risk regarding the plan's ability to meet its predicted liquidity needs. Other available bonds under consideration by the plan do not pose this same risk. The return on the bond, although equal to or greater than the alternatives, would not be sufficient to offset the additional risk for the plan created by the role that this bond would play in the plan's portfolio. The plan's fiduciaries may not make this investment based on factors outside the economic interest of the plan because it is not of equal or greater economic value to other investment alternatives.

A plan sponsor adopts an investment policy that favors plan investment in companies meeting certain environmental criteria (so-called "green" companies). In carrying out the policy, the plan's fiduciaries may not simply consider investments only in green companies. They must consider all investments that meet the plan's prudent financial criteria. The fiduciaries may apply the investment policy to eliminate a company from consideration only if they appropriately determine that other available investments provide equal or better returns at the same or lower risks, and would play the same role in the plan's portfolio.

A collective investment fund, which holds assets of several plans, is designed to invest in commercial real estate constructed or renovated with union labor. Fiduciaries of plans that invest in the fund must determine that the fund's overall risk and return characteristics are as favorable, or more favorable, to the plans as other available investment alternatives that would play a similar role in their plans' portfolios. The fund's managers may select investments constructed or improved with union labor, after an economic analysis indicates that these investment options are equal or superior to their alternatives. The managers will best be able to justify their investment choice by recording their analysis in writing. However, if real estate investments that satisfy both ERISA's fiduciary requirements and the union labor criterion are unavailable, the fund managers may have to select investments without regard to the union labor criterion.

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SOURCE: 41 FR 1906, Jan. 13, 1976; 51 FR 41280, Nov. 13, 1986; 59 FR 32607, June 23, 1994; 61 FR 33849, July 1, 1996; 68 FR 16400, April 3, 2003; 69 FR 52125, Aug. 24, 2004; 72 FR 52006, Sept. 12, 2007; 73 FR 58447, Oct. 7, 2008, unless otherwise noted.

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29 C. F. R. § 2509.08-1, 29 CFR § 2509.08-1

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