AMERICANS FOR
LIMITED GOVERNMENT

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December 30th, 2008

The Honorable Elaine L. Chao
U.S. Department of Labor
Frances Perkins Building
200 Constitution Ave., NW
Washington, DC 20210

Dear Secretary Chao,

The Investor Network on Climate Risk, INCR, a project of Ceres, announced on February 14, 2008 an 'Action Plan' to use investment assets to "engage companies and reduce climate risks in their portfolios." The Action Plan had 49 signers including leaders of pension funds, labor, state treasuries, state and city comptrollers, financial service firms, asset managers, and foundations. Particularly concerning are those signers responsible for the retirement security of pensioners. The 49 signers could be putting the retirement security of untold numbers of future pensioners in jeopardy by adhering to the terms of the Action Plan and putting the signer's view on climate above financial return. Some of these signers may be subject to the fiduciary duties of the Employee Retirement Income Security Act, ERISA, and may be violating those duties by advocating an investment course of action that is not exclusively for the benefit of their plan participants and beneficiaries. Please find the attached INCR action plan with a list of the 49 signers.

We are writing you today to request the Department of Labor, DOL, investigate the signers of the INCR action plan who are covered by ERISA for possible violations of the statute.

As you know consideration of any goals other than those for the "exclusive purpose of providing benefits to participants and their beneficiaries; and defraying reasonable expenses of administering the plan"[1] are violations of ERISA. Also DOL has repeatedly rejected "a construction of ERISA which would render the Act's tight limits on the use of plan assets illusory, and which would permit plan

[1] ERISA 404 (a)(1).

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."[2]

DOL has recently issued Interpretive Bulletin 08-1 further solidifying that "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 investment on the basis of any factor outside the economic interest of the plan… [except where such factors as diversification, liquidity, and risk/return characteristics make the investment unfeasible]"[3]. Further "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."[4]

Signers of the plan agreed "to require asset managers, consultants and financial advisers [to] consider climate risks and opportunities [when investing]… 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… Develop and promote proxy voting guidelines that encourage support for reasonable shareholder proposals on climate risk… Expand climate risk scrutiny and collaboration by investors, stock market analysts, and others in the finance sector… [and] encourage companies and investors to support government action on climate policy"[5].

On the day the Action Plan was released John Sweeny, President of the AFL-CIO spoke in support of using worker's retirement funds to support climate change initiatives saying,

> "Executing this strategy requires developing our current human and financial capital to secure a world we want to live in. Much of that capital is in worker's retirement funds… $5 trillion is invested on behalf of union members…"[6]

Andrew Stern, President of the Service Employees International Union, SEIU, and Plan Administrator of the SEIU Affiliates, Officers and Employee Pension Fund[7] is a signer of the Action Plan. Soon after the Action Plan was released a *Wall Street Journal* editorial revealed several of SEIU's pension funds

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[2] Department of Labor letter to Jonathan P. Hiatt, dated May 3, 2005; and Advisory Opinion to Thomas J. Donohue, dated December 21, 2007.

[3] 29 CFR 2509.08-1

[4] Id.

[5] Investor Network on Climate Risk a Project of Ceres Action Plan, February 13, 2008.

[6] John J. Sweeny, President AFL-CIO at the UN Summit on Climate Risk, February 14, 2008.

[7] See SEIU Affiliates, Officers and Employee Pension Fund Form 5500, for the year 2006.

were vastly underfunded and did not have enough funds to meet their retirement obligations.[8] Mr. Stern seems more concerned with combating climate change than with fulfilling his fiduciary duty to protect the retirement savings of his workers.

Some unions have already seen the danger in using their retirement savings to further climate change goals. On May 22, 2008 in the *Wall Street Journal* Chuck Canterbury, President of the Fraternal Order of Police expressed disapproval to Exxon on how an envisioned environmental reform proxy campaign could lead to " rigid, ideologically-based conditions on the company's future that would… hamstring Exxon Mobil's profitability and growth thus directly harming police officers, firefighters, teachers, and public employees whose retirement savings are invested in the company."[9]

Fiduciaries agreeing to promote climate risk proxy action to reduce carbon footprints and other actions regarding climate policy are clearly putting policy above their responsibilities to their investors.

We urge you to take the actions necessary to ensure the fiduciaries within your jurisdiction are complying with ERISA, are cognizant of the clarifications in Interpretive Bulletin 08-1, and are investing solely for the benefit of the participants and beneficiaries of their plans.

Sincerely,

William A. Wilson

William Wilson
President
Americans for Limited Government

[8] *Wall Street Journal*, "Andy Stern's Pensions," June 16, 2008.

[9] *Wall Street Journal*, "Exxon Fight, Round 2," May 22, 2008.