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