



December 4, 2009

Marcia S. Wagner
The Wagner Law Group
99 Summer Street, 13th Floor
Boston, MA 02110

2009-04A
ERISA SEC.
3(21)(B) & 401(b)(1)

Dear Ms. Wagner:

You requested an advisory opinion on behalf of Avatar Associates, LLC regarding the application of certain provisions of Title I of the Employee Retirement Income Security Act of 1974 (ERISA or the Act) to “target-date” or “lifecycle” mutual funds. The underlying assets of these funds, according to your request, typically consist of shares of other, affiliated mutual funds. Specifically, you ask whether the assets of target-date or lifecycle mutual funds constitute “plan assets” of investing employee benefit plans, and whether investment advisers to such mutual funds would be considered fiduciaries to the investing plans under ERISA. We assume that your request relates to mutual funds that are investment companies registered under the Investment Company Act of 1940, 15 U.S.C. section 80a-1 et. seq.

As noted in your request, ERISA expressly addresses investments in the shares of registered investment companies, such as mutual funds. Section 3(21)(B) provides that a plan’s investment in a registered investment company “shall not by itself cause such investment company or such investment company’s investment adviser or principal underwriter to be deemed to be a fiduciary or a party in interest as those terms are defined in [Title I of ERISA], except insofar as such investment company or its investment adviser or principal underwriter acts in connection with an employee benefit plan covering employees of the investment company, the investment adviser, or its principal underwriter.” In addition, section 401(b)(1) of ERISA provides that when a plan invests in a security issued by a registered investment company, “the assets of such plan shall be deemed to include such security but shall not, solely by reason of such investment, be deemed to include any assets of such investment company.”¹ Congress concluded that it did not need to apply ERISA’s fiduciary rules to the operation of mutual funds in addition to the Investment Company Act’s regulatory scheme. H.R. Rep. No. 1280, 93d Cong., 2nd Sess., at 296 (1974).

¹Section 4975(g) of the Internal Revenue Code of 1986 (Code) contains a provision that corresponds to section 401(b)(1) of ERISA. Under Reorganization Plan No. 4 of 1978, effective December 31, 1978, the authority of the Secretary of the Treasury to issue interpretations regarding Code section 4975 has been transferred, with certain exceptions not here relevant, to the Secretary of Labor. Therefore, references in this letter to specific sections of ERISA should be read to refer also to the corresponding sections of the Code.

As you point out, ERISA's exclusion for mutual funds is not absolute. It does not apply to a plan fiduciary's decision to invest plan assets in a mutual fund. *See* 29 C.F.R. § 2509.75-2. For example, an investment manager that invests plan assets in a mutual fund for which the manager is an investment adviser is a plan fiduciary as to that investment decision. Moreover, if an investment adviser is a plan fiduciary for a reason other than the investment in the securities of an investment company, the adviser remains a plan fiduciary. 29 C.F.R. § 2509.75-3.

In the Department's view, however, there is nothing in section 3(21)(B) or section 401(b)(1) of ERISA that suggests that a registered investment company's investment in the shares of affiliated mutual funds would, by itself, affect the application of the Act's exclusion.² Accordingly, the fact that a target-date or lifecycle mutual fund's assets consist of shares of affiliated mutual funds does not, on that basis alone, make the assets of the target-date or lifecycle mutual fund "plan assets" of investing employee benefit plans or the investment advisers to such mutual funds fiduciaries to the investing plans under ERISA.

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

Sincerely,

Louis J. Campagna
Chief, Division of Fiduciary Interpretations
Office of Regulations and Interpretations

² We note that the concept of mutual funds structured as "funds of funds" existed at the time of ERISA's enactment and, accordingly, had Congress intended a different rule to apply, it could have so provided. *See* Public Policy Implications of Investment Company Growth, H.R. Rep. No. 2337, 89th Cong., 2nd Sess., at 311-24 (1966).