

any statement of proxy voting policy, before they are allowed to invest, which may help to avoid such potential conflicts. As with investment policies originating from named fiduciaries, a policy initiated by an investment manager and adopted by the participating plans would be regarded as an instrument governing the participating plans, and the investment manager's compliance with such a policy would be governed by ERISA Sec. 404(a)(1)(D).

### (3) Shareholder Activism

An investment policy that contemplates activities intended to monitor or influence the management of corporations in which the plan owns stock is consistent with a fiduciary's obligations under ERISA where the responsible fiduciary concludes that there is a reasonable expectation that such monitoring or communication with management, by the plan alone or together with other shareholders, will enhance the economic value of the plan's investment in the corporation, after taking into account the costs involved. Such a reasonable expectation may exist in various circumstances, for example, where plan investments in corporate stock are held as long-term investments or where a plan may not be able to easily dispose such an investment. Active monitoring and communication activities would generally concern such issues as the independence and expertise of candidates for the corporation's board of directors and assuring that the board has sufficient information to carry out its responsibility to monitor management. Other issues may include such matters as consideration of the appropriateness of executive compensation, the corporation's policy regarding mergers and acquisitions, the extent of debt financing and capitalization, the nature of long-term business plans, the corporation's investment in training to develop its work force, other workplace practices and financial and non-financial measures of corporate performance that are reasonably likely to affect the economic value of the plan. Active monitoring and communication may be carried out through a variety of methods including by means of correspondence and meetings with corporate management as well as by exercising the legal rights of a shareholder. In creating an investment policy, a fiduciary shall consider only factors that relate to the economic interest of participants and their beneficiaries in plan assets, and shall

not use an investment policy to promote myriad public policy preferences.<sup>4</sup>

### (4) Socially-Directed Proxy Voting, Investment Policies and Shareholder Activism.

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. 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 to spend plan assets to pursue, support, or oppose such proxy proposals. Because of the heightened potential for abuse in such cases, the fiduciaries must be prepared to articulate a clear basis for concluding that the proxy vote, the investment policy, or the activity intended to monitor or influence the management of the corporation is more likely than not to enhance the economic value of the plan's investment before expending plan assets.

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 economic 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 economic 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).<sup>5</sup>

Signed at Washington, DC, this 9th day of October, 2008.

**Bradford P. Campbell,**

*Assistant Secretary, Employee Benefits Security Administration, Department of Labor.*

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<sup>4</sup> See Advisory Opinion No. 2008-05A (June 27, 2008) and letter from Department of Labor to Jonathan P. Hiatt, General Counsel, AFL-CIO (May 3, 2005).

<sup>5</sup> See Advisory Opinion No. 2007-07A (December 21, 2007).

## DEPARTMENT OF LABOR

### Employee Benefits Security Administration

#### 29 CFR Part 2509

RIN 1210-AB29

#### Interpretive Bulletin Relating to Investing in Economically Targeted Investments

**AGENCY:** Employee Benefits Security Administration, Labor.

**ACTION:** Interpretive bulletin.

**SUMMARY:** This document sets forth the views of the Department of Labor concerning the legal standards imposed on fiduciaries of employee benefit plans by sections 403 and 404 of Title I of the Employee Retirement Income Security Act (ERISA) when considering investments in "economically targeted investments." These guidelines affect fiduciaries of employee benefit plans, including trustees, investment managers and others responsible for the management of employee benefit plan assets.

**DATES:** This interpretive bulletin is effective on October 17, 2008.

**FOR FURTHER INFORMATION CONTACT:** Office of Regulations and Interpretations, Employee Benefits Security Administration, (202) 693-8500. This is not a toll free number.

**SUPPLEMENTARY INFORMATION:** On June 23, 1994, the Department of Labor (the Department) published Interpretive Bulletin § 2509.94-1 (29 CFR 2509.94-1) addressing the limited circumstances under which fiduciaries, consistent with the requirements of sections 404 and 404 of Title I of the Employee Retirement Income Security Act (ERISA), may, in connection with investment decisions, take into account factors other than the economic interests of the plan. The guidance provided in this document, Interpretive Bulletin § 2509.08-1, clarifies, through explanation and examples, that fiduciary consideration of non-economic factors should be rare and, when considered, should be documented in a manner that demonstrates compliance with ERISA's rigorous fiduciary standards. This guidance modifies and supersedes the guidance provided in interpretive bulletin 94-1.

#### List of Subjects in 29 CFR Part 2509

Employee benefit plans, Pensions.  
 ■ For the reasons set forth in the preamble, the Department is amending Subchapter A, Part 2509 of Title 29 of

the Code of Federal Regulations as follows:

**Subchapter A—General**

**PART 2509—INTERPRETIVE BULLETINS RELATING TO THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974**

■ 1. The authority citation for part 2509 continues to read as follows:

**Authority:** 29 U.S.C. 1135. Secretary of Labor's Order No. 1–2003, 68 FR 5374 Feb. 3, 2003). Sections 2509.75–10 and 2509.75–2 are also issued under 29 U.S.C. 1052, 1053, 1054. Section 2509.75–5 is also issued under 29 U.S.C. 1002.

**§ 2509.94–1 [Removed]**

■ 2. Part 2509 is amended by removing § 2509.94–1.

■ 3. Part 2509 is further amended by adding new § 2509.08–1 to read as follows:

**§ 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.\* \* \*"<sup>1</sup>

• "[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."<sup>2</sup>

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 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.<sup>3</sup>

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

<sup>3</sup> 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).

<sup>1</sup> Sec. 403(c)(1), 29 U.S.C.A. 1103(c)(1).

<sup>2</sup> Sec. 404(a)(1)(A)(i), 29 U.S.C.A. 1104(a)(1)(A)(i).

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 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.

Signed at Washington, DC, this 9th day of October 2008.

**Bradford P. Campbell,**

*Assistant Secretary, Employee Benefits Security Administration, Department of Labor.*

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## DEPARTMENT OF VETERANS AFFAIRS

### 38 CFR Part 3

**RIN 2900-AM28**

#### Accrued Benefits; Correction

**AGENCY:** Department of Veterans Affairs.

**ACTION:** Correcting amendment.

**SUMMARY:** This document contains a minor correction to the final regulations

that the Department of Veterans Affairs (VA) published in 71 FR 78368 on December 29, 2006. The regulation relates to the Payment of Benefits to Survivors of Estates of Deceased Beneficiaries. No substantive change to the content of the regulation is being made by correcting this amendment.

**DATES:** *Effective Date:* October 17, 2008.

**FOR FURTHER INFORMATION CONTACT:** Denise Kemp-Nichols, Regulations Staff (211D), Compensation and Pension Service, Veterans Benefits Administration, Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 461-9724.

**SUPPLEMENTARY INFORMATION:** VA published a final rule in the **Federal Register** on December 29, 2006 (See 71 FR 78368) revising its final rule eliminating the 2-year limitation on accrued benefits. In that document, VA failed to amend 38 CFR 3.816(f)(2). This document corrects that error by removing the entire first sentence of 38 CFR 3.816(f)(2) and in the second sentence, by removing the word "also" after words "accrued benefits."

#### List of Subjects in 38 CFR Part 3

Administrative, practice and procedures, Claims, Disability benefits, Health care, Pensions, Veterans, Vietnam.

Approved: October 10, 2008.

**William F. Russo,**

*Director of Regulations Management.*

■ For the reason set out in the preamble, VA is correcting 38 CFR part 3 as follows.

#### PART 3—ADJUDICATION

■ 1. The authority citation for part 3, subpart A continues to read as follows:

**Authority:** 38 U.S.C. 501(a), unless otherwise noted.

#### § 3.816 [Corrected]

■ 2. In § 3.816, paragraph (f)(2) is amended by removing the entire first sentence and in the second sentence removing the word "also".

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