



August 14, 2008

The Honorable Elaine Chao
Secretary, U.S. Department of Labor
200 Constitution Ave, NW
Washington, DC 20210

Dear Secretary Chao:

We are writing to ask that you uphold the Employee Retirement Income Security Act (ERISA) and revise the Department of Labor’s Interpretive Bulletins 94-1 and 94-2 to bring them in line with the statutory language of ERISA. We also request that you issue an advisory opinion within the next 30 days clarifying the criteria for selecting or retaining an investment manager. The ability of investment advisors to fulfill their fiduciary responsibilities has been inhibited due to a surge in shareholder activism by organized labor. Many activist efforts directly conflict with ERISA.

ERISA s403 and s404 set forth the prudential and fiduciary duties of plans selecting investments. The assets of a plan must “be held for the exclusive purpose of providing benefits to participants in the plan and their beneficiaries.” Under Secretary Robert

Reich, in 1994 the DOL issued Interpretive Bulletins 94-1 and 94-2. The impact was to water down this part of ERISA. The Bulletins held that it is possible to consider the economic benefits of a plan apart from its investment return, opening the door for fiduciaries to purchase investments benefitting persons other than the plan's participants and beneficiaries.

Unions often invest in businesses using their general funds, empowering them to introduce shareholder resolutions. To gain support for these resolutions, they routinely exercise influence over a much larger pool of shares held in their pension funds. Most pension funds delegate proxy voting authority to investment managers.

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) publishes a Key Vote Index on proxy issues and evaluates investment managers based on adherence to the index. Such an arrangement often requires investment managers to choose between adhering to the index and upholding the "exclusive purpose" clause. Not surprisingly, many assent to union wishes, damaging members' pensions in the process. For example, according to their IRS Form 5500, the Service Employees International Union (SEIU) National Industry Pension Fund, the largest union pension fund in the nation, underperformed the S&P 500 by more than 200 basis points from 1996 to 2006. The result is a loss of \$8,500 per worker. The loss to taxpayers who often have to bail out these underperforming funds is in the hundreds of billions of dollars.

Vulnerable industries are also harmed by shareholder activism. Investment managers for the American Federation of State, County, and Municipal Employees (AFSCME) recently attempted to pressure Citigroup to dissolve themselves. AFSCME also sought to require CA Inc., a software company, to pay "reasonable expenses" to shareholders who elected independent candidates to board seats. CA's attorneys opposed the resolution on legal grounds, and the Delaware Supreme Court sided with CA. Kara Scannell and Judith Burns noted in a Wall Street Journal article that, "[in] cases where dissidents run proxy contests motivated by personal or petty concerns... the board's hands would be tied."

In 2005, the DOL wrote to the AFL-CIO regarding its attempts to expend plan assets to inform participants about the public debate on Social Security. The letter stated that "it would be unlawful for a plan fiduciary to review the plan's service providers based... upon their views on Social Security." Despite this guidance, the AFL-CIO published a document entitled "Retirement Security: How Do Investors Stack Up?" on October 18, 2007 to pressure investment advisors to take a particular stand on Social Security.

On December 21, 2007, Robert Doyle, Director of Regulations and Interpretations for the DOL, issued an advisory opinion stating "[the] Department rejects a construction of ERISA that... would permit plan fiduciaries to expend ERISA trust assets [on] public policy preferences."

Pursuant to this sentiment, we ask that you uphold ERISA and revise Interpretive Bulletins 94-1 and 94-2 accordingly. We also request that you issue an advisory opinion within the next 30 days clarifying the criteria that a pension fund must use in selecting

or retaining an investment manager. Investment managers must be allowed to meet their fiduciary obligations under ERISA, and retirees must know that their pensions are managed in their best interest. We look forward to your prompt reply.

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American Shareholders Association

Grover Norquist
Americans for Tax Reform

Brian Johnson
Alliance for Worker Freedom

Kelsey Zahourek
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