Employee Benefits Security Admin., Labor § 2509.08–2

has already made several other loans for con-
struction 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. How-
ever, 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 re-
turn on the bond, although equal to or great-
er than the alternatives, would not be suffi-
cient 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 fidu-
ciaries 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 alter-
atives.

A plan sponsor adopts an investment pol-
icy 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 invest-
ments that meet the plan’s prudent financial
criteria. The fiduciaries may apply the in-
vestment policy to eliminate a company
from consideration only if they appropri-
ately determine that other available in-
vestments 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 char-
acteristics are as favorable, or more favor-
able, to the plans as other available invest-
ment alternatives that would play a similar
role in their plans’ portfolios. The fund’s
managers may select investments con-
structed or improved with union labor, after
an economic analysis indicates that these in-
vestment options are equal or superior to
their alternatives. The managers will best be
able to justify their investment choice by re-
cordign 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 invest-
ments without regard to the union labor cri-
teron.

[73 FR 61735, Oct. 17, 2008]

§ 2509.08–2 Interpretive bulletin relating
to the exercise of shareholder
rights and written statements of in-
vestment policy, including proxy
voting policies or guidelines.

This interpretive bulletin sets forth the
Department of Labor’s (the Department) in-
terpretation of sections 402, 403 and 404 of the
Employee Retirement Income Security Act
of 1974 (ERISA) as those sections apply to
voting of proxies on securities held in em-
ployee benefit plan investment portfolios
and the maintenance of and compliance with
statements of investment policy, including
proxy voting policy. In addition, this inter-
pretive bulletin provides guidance on the ap-
propriateness under ERISA of active moni-
toring of corporate management by plan fi-
duciaries. The guidance set forth in this in-
terpretive bulletin modifies and supersedes
the guidance set forth in interpretive bul-
letin 94–2 (29 CFR 2509.94–2).

(1) Proxy Voting

The fiduciary act of managing plan assets
that are shares of corporate stock includes
the management of voting rights appur-
tenant to those shares of stock. 1 As a result,
the responsibility for voting or deciding not
to vote proxies lies exclusively with the plan
trustee except to the extent that either (1)
the trustee is subject to the direction of a
named fiduciary pursuant to ERISA Sec.
403(a)(1); or (2) the power to manage, acquire
or dispose of the relevant assets has been
degradated by a named fiduciary to one or
more investment managers pursuant to
ERISA Sec. 403(a)(2). Where the authority
to manage plan assets has been delegated to an
investment manager pursuant to Sec. 403(a)(2),
no person other than the invest-
ment manager has authority to make voting
decisions for proxies appurtenant to such
plan assets except to the extent that the
named fiduciary has reserved to itself (or to
another named fiduciary so authorized by
the plan document) the right to direct a plan
trustee regarding the voting of proxies. In
this regard, a named fiduciary, in delegating
investment management authority to an in-
vestment manager, could reserve to itself
the right to direct a trustee with respect to
the voting of all proxies or reserve to itself
the right to direct a trustee as to the voting

1See letter from the Department of Labor
to Helmut Fandl, Chairman of the Retire-
ment Board of Avon Products, Inc., dated
of only those proxies relating to specified assets or issues. If the plan document or investment management agreement provides that the investment manager is not required to vote proxies, but does not expressly preclude the investment manager from voting proxies, the investment manager would have exclusive responsibility for proxy voting decisions. Moreover, an investment manager would not be relieved of its own fiduciary responsibilities by following directions of some other person regarding the voting of proxies, or by delegating such responsibility to another person. If, however, the plan document or the investment management contract expressly precludes the investment manager from voting proxies, the responsibility for voting proxies would lie exclusively with the trustee. The trustee, however, consistent with the requirements of ERISA Sec. 403(a)(1), may be subject to the directions of a named fiduciary if the plan so provides.

The fiduciary duties described at ERISA Sec. 404(a)(1)(A) and (B), require that, in voting proxies, regardless of whether the vote is made pursuant to a statement of investment policy, the responsible fiduciary shall consider only those factors that relate to the economic value of the plan’s investment and shall not subordinate the interests of the participants and beneficiaries in their retirement income to unrelated objectives. Votes shall only be cast in accordance with a plan’s economic interests. If the responsible fiduciary reasonably determines that the cost of voting (including the cost of research, if necessary, to determine how to vote) is likely to exceed the expected economic benefits of voting, or if the exercise of voting results in the imposition of unwarranted trading or other restrictions, the fiduciary has an obligation to refrain from voting.2 In making this determination, objectives, considerations, and economic effects unrelated to the plan’s economic interests cannot be considered. The fiduciary’s duties under ERISA Sec. 404(a)(1)(A) and (B) also require that the named fiduciary appointing an investment manager periodically monitor the activities of the investment manager with respect to the management of plan assets, including decisions made and actions taken by the investment manager with regard to proxy voting decisions. The named fiduciary must carry out this responsibility solely in the participants’ and beneficiaries’ interest in the economic value of the plan assets and without regard to the fiduciary’s relationship to the plan sponsor.

It is the view of the Department that compliance with the duty to monitor necessitates proper documentation of the activities. The fiduciary obligations of prudence and loyalty to plan participants and beneficiaries require the responsible fiduciary to vote proxies on issues that may affect the economic value of the plan’s investment. However, fiduciaries also need to take into account costs when deciding whether and how to exercise their shareholder rights, including the voting of shares. Such costs include, but are not limited to, expenditures related to developing proxy resolutions, proxy voting services and the analysis of the likely net effect of a particular issue on the economic value of the plan’s investment. Fiduciaries must take all of these factors into account in determining whether the exercise of such rights (e.g., the voting of a proxy), independently or in conjunction with other shareholders, is expected to have an effect on the economic value of the plan’s investment that will outweigh the cost of exercising such rights. With respect to proxies appurtenant to shares of foreign corporations, a fiduciary, in deciding whether to purchase shares of a foreign corporation, should consider whether any additional difficulty and expense in voting such shares is reflected in their market price.

(2) Statements of Investment Policy

The maintenance by an employee benefit plan of a statement of investment policy designed to further the purposes of the plan and its funding policy is consistent with the fiduciary obligations set forth in ERISA section 404(a)(1)(A) and (B). Because the fiduciary act of managing plan assets that are shares of corporate stock includes the voting, where appropriate, of proxies appurtenant to those shares of stock, a statement of proxy voting policy would be an important part of any comprehensive statement of investment policy. For purposes of this document, the term “statement of investment

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2See Advisory Opinion No. 2007-07A (December 21, 2007).

policy" means a written statement that provides the fiduciaries who are responsible for plan investments with guidelines or general instructions concerning various types or categories of investment management decisions, which may include proxy voting decisions. A statement of investment policy is distinguished from directions as to the purchase or sale of shares of stock or as to the voting of proxies on shares of stock for which the investment manager is responsible. Such guidelines must be consistent with the fiduciary obligations set forth in ERISA Sec. 404(a)(1)(A) and (B) and this Interpretive Bulletin, and may not subordinate the economic interests of the plan participants to unrelated objectives. In the absence of such an express requirement to comply with an investment policy, the authority to manage the plan assets placed under the control of the investment manager would lie exclusively with the investment manager. Although a trustee may be subject to the direction of a named fiduciary pursuant to ERISA Sec. 402(c)(3), inherent in the authority to appoint an investment manager, the named fiduciary responsible for appointment of investment managers has the authority to condition the appointment on acceptance of a statement of investment policy. Thus, such a named fiduciary may expressly require, as a condition of the investment management agreement, that an investment manager comply with the terms of a statement of investment policy that sets forth guidelines concerning investments and investment courses of action that the investment manager is authorized or is not authorized to make. Such investment policy may include a policy or guidelines on the voting of proxies on shares of stock for which the investment manager is responsible. Such guidelines must be consistent with the fiduciary obligations set forth in ERISA Sec. 404(a)(1)(A) and (B) and this Interpretive Bulletin, and may not subordinate the economic interests of the plan participants to unrelated objectives. In the absence of such an express requirement to comply with an investment policy, the authority to manage the plan assets placed under the control of the investment manager would lie exclusively with the investment manager. Although a trustee may be subject to the direction of a named fiduciary pursuant to ERISA Sec. 402(a)(1), an investment manager who has authority to make investment decisions, including proxy voting decisions, would never be relieved of its fiduciary responsibility if it followed the direction as to specific investment decisions from a named fiduciary or any other person.

Statements of investment policy issued by a named fiduciary authorized to appoint investment managers would be part of the "documents and instruments governing the plan" within the meaning of ERISA Sec. 404(a)(1)(D). An investment manager to whom such investment policy applies would be required to comply with such policy, pursuant to ERISA Sec. 404(a)(1)(D) insofar as the policy directives or guidelines are consistent with titles I and IV of ERISA. Therefore, if, for example, compliance with the guidelines in a given instance would be imprudent, then the investment manager's failure to follow the guidelines would not violate ERISA Sec. 404(a)(1)(D). Moreover, ERISA Sec. 404(a)(1)(D) does not shield the investment manager from liability for imprudent actions taken in compliance with a statement of investment policy unless, for example, it would be imprudent to do so in a given instance.

Maintenance of a statement of investment policy by a named fiduciary does not relieve the named fiduciary of its obligations under ERISA Sec. 404(a) with respect to the appointment and monitoring of an investment manager or trustee. In this regard, the named fiduciary appointing an investment manager must periodically monitor the investment manager's activities with respect to management of the plan assets. Moreover, compliance with ERISA Sec. 404(a)(1)(B) would require maintenance of proper documentation of the activities of the investment manager and of the named fiduciary of the plan in monitoring the activities of the investment manager. In addition, in the view of the Department, a named fiduciary's determination of the terms of a statement of investment policy is an exercise of fiduciary responsibility and, as such, statements may need to take into account factors such as the plan's funding policy and its liquidity needs as well as issues of prudence, diversification and other fiduciary requirements of ERISA. An investment manager of a pooled investment vehicle that holds assets of more than one employee benefit plan may be subject to a proxy voting policy of one plan that conflicts with the proxy voting policy of another plan. If the investment manager determines that compliance with one of the conflicting voting policies would violate ERISA Sec. 404(a)(1), for example, by being imprudent or not solely in the economic interest of plan participants, the investment manager would be required to ignore the policy and vote in accordance with ERISA's obligations. If, however, the investment manager reasonably concludes that application of each plan's voting policy is consistent with ERISA's obligations, such as when the policies reflect different but reasonable judgments or when the plans have different economic interests, ERISA Sec. 404(a)(1)(D) would generally require the manager, to the extent permitted by applicable law, to vote the proxies in proportion to each plan's interest in the pooled investment vehicle. An
investment manager may also require participating investors to accept the investment manager’s own investment policy statement, including 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 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. 4

4See 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).

(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 a 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). 5


§ 2509.75–2 Interprettive bulletin relating to prohibited transactions.

On February 6, 1975, the Department of Labor issued an interpretive bulletin, ERISA IB 75-2, with respect to whether a party in interest has engaged in a prohibited transaction with an employee benefit plan where the party in interest has engaged in a transaction with a corporation or partnership (within the meaning of section 7701 of the Internal Revenue Code of 1954) in which the plan has invested. On November 13, 1986 the Department published a final regulation dealing with the definition of “plan assets”. See §2510.3-101 of