

DOL Determines That a Fiduciary's Use of ERISA Plan Assets to Promote Political Positions Through Proxy Resolutions Risks Violating ERISA

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On December 21, 2007, the Employee Benefits Security Administration (EBSA) of the Department of Labor (DOL) issued an advisory opinion (2007-07A) stating that plan fiduciaries risk violating ERISA by utilizing pension plan assets to promote political positions through proxy resolutions that have no connection to improving the value of the plan's investment in a company. This opinion conforms with and further clarifies the DOL's position in Interpretive Bulletin 94-2 (the Bulletin).

The advisory opinion responded to a U.S. Chamber of Commerce (the Chamber) request in which the Chamber expressed concern over the AFL-CIO's 2008 proxy campaign on conflicts of interests at company board levels involving healthcare issues. In the advisory opinion, EBSA takes the position that plan fiduciaries risk violating ERISA's exclusive purpose and prudence requirements under Section 404(a)(1)(A)-(B) by using proxy resolutions to pursue legislative, regulatory, or public policy positions that would provide no clear economic benefit to the plan. Although pension plans are typically affected by legislation and regulations that affect the national economy, this does not, in itself, provide a justification for spending plan assets to promote proxy positions that would not enhance the value of the investment. The advisory opinion points to the Bulletin, which alternatively provides that a plan fiduciary must use procedural prudence when considering a proxy proposal or engaging in activities that influence the management of a corporation. A fiduciary accomplishes this by first reviewing the cost of the action and thereafter moving forward only if the fiduciary concludes that the activity is reasonably likely to enhance the value of the investment and that it will not place unrelated (e.g., social or political) objectives ahead of the interests of plan participants and beneficiaries.

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