

U.S. Department of Labor

Pension and Welfare Benefits Administration
Washington, D.C. 20210



MAR 30 1989

89-04A

Ms. Marjorie A. Dolan
Assistant Counsel
John Hancock Mutual Life Insurance Company
P.O. Box 111
Boston, MA 02117

Re: Identification Number: F-3767A

Dear Ms. Dolan:

This is in response to your letter of November 24, 1987, in which you request an advisory opinion concerning the application of the fiduciary responsibility provisions of the Employee Retirement Income Security Act of 1974 (ERISA) to proposed investments by employee benefit plans in Energy Investors Fund (EIF), a limited partnership.

You represent that EIF is a closed-end fund organized as a limited partnership, which will make equity-oriented investments in energy projects. The projects in which EIF invests may be organized as partnerships, corporations, trusts, or other organizations. Investors in EIF will include employee benefit plans.

You specifically request the Department's opinion that, when an employee benefit plan invests in EIF, the plan's assets include only its limited partnership interest in EIF but do not include any of the underlying assets of the partnership.

Department of Labor regulation section 29 CFR 2510.3-101 clarifies the definition of "plan assets" for purposes of title I of ERISA. In general, the regulation provides that, in the case of a plan's investment in an equity interest of an entity that is neither a publicly-offered security nor a security issued by an investment company registered under the Investment Company Act of 1940, its assets include both the equity interest and an undivided interest in each of the underlying assets of the entity, unless the entity is an operating company or equity participation in the entity by benefit plan investors is not significant.

The term "operating company" is defined in regulation section 29 CFR 2510.3-101(c) to mean an entity that is primarily engaged, directly or through a majority owned subsidiary or subsidiaries, in the production or sale of a product or service other than the investment of capital. The term "operating company" includes an entity which is a venture capital operating company or a real estate operating company.

Regulation section 29 CFR 2510.3-101(d), provides, in part, that an entity is a venture capital operating company if at least 50% of its assets are invested in venture capital investments, and the entity, in the ordinary course of its business, actually exercises management rights with respect to one or more of the operating companies in which it invests. As explained in regulation section 29 CFR 2510.3-101(d)(3), a venture capital investment is an investment in an operating company (other than a venture capital operating company) as to which the investor has or obtains management rights. The term "management rights" is defined under regulation section 29 CFR 2510.3-101(d)(3)(ii) to mean contractual rights directly between the investor and an operating company to substantially participate in, or substantially influence the conduct of, the management of the operating company.

With respect to your inquiry concerning whether EIF is a "venture capital operating company" within the meaning of regulation section 29 CFR 2510.3-101(d), please note that, in the Department's view, whether a particular company is a venture capital operating company under the final "plan assets" regulation is a factual question to be determined taking into account the particular characteristics of the entity under consideration. Accordingly, the Department expresses no opinion as to whether EIF is a venture capital operating company.

With respect to your inquiry concerning the type of legal entity which may qualify as a venture capital investment under regulation section 29 CFR 2510.3-101(d)(3)(i), it was not the Department's intention to limit the investments of venture capital operating companies to those entities organized in corporate form. Accordingly, it is the Department's opinion that a partnership or trust that is primarily engaged directly in the production or sale of a product or service other than the investment of capital may qualify as a venture capital investment under the plan assets regulation.

This portion of the Department's response constitutes an advisory opinion under ERISA Procedure 76-1. Accordingly, it is issued subject to the provisions of that procedure, including section 10 thereof, relating to the effect of advisory opinions.

Finally, you have asked whether certain types of management rights which EIF contemplates obtaining as an investor in operating companies will satisfy the definition of "management rights" in section 2510.3-101(d)(3)(ii) of the regulation. The Department notes that whether individual rights obtained by an entity constitute "management rights" under the regulation is an inherently factual question to be determined taking into account the particular facts and circumstances of each case. However, the Department also notes that both the preamble to the proposed plan assets regulation (50 FR 961, January 8, 1985) and the preamble to the final regulation (51 FR 41262, November 13, 1986) contained discussions regarding the Department's views on what constitutes "management rights" for purposes of the regulation.

Sincerely,

Robert J. Doyle
Director of Regulations and Interpretations