U.S. Department of Labor **Employee Benefits Security Administration**
Washington, D.C. 20210

June 27, 2008

David Chavern
Executive Vice President and COO
US Chamber of Commerce
1615 H Street, NW
Washington, DC 20062-2000

2008-05A
ERISA SEC
404(a)

Dear Mr. Chavern:

This is in response to your recent letter requesting guidance on whether the fiduciary rules of the Employee Retirement Income Security Act of 1974 (ERISA) prohibit the use of plan assets to promote union organizing campaigns and union goals in collective bargaining negotiations. Your inquiry was in addition to the issues the Department recently addressed in Advisory Opinion 2007-07A regarding the expenditure of plan assets by plan fiduciaries as shareholders of corporations in support of proxy resolutions.

By way of background, sections 404(a)(1)(A) and (B) of ERISA require each plan fiduciary to discharge his or her duties prudently and solely for the exclusive purpose of providing benefits to participants and beneficiaries and defraying reasonable expenses of administering the plan. The Department has long construed the requirement that a fiduciary act solely in the interests of, and for the exclusive purpose of providing benefits to, participants and beneficiaries as prohibiting a fiduciary from subordinating the interests of participants and beneficiaries in their retirement income to unrelated objectives.

The Department has also consistently rejected a construction of ERISA that would render ERISA's tight limits on the use of plan assets illusory and that would permit plan fiduciaries to expend trust assets to promote myriad public policy preferences. Rather, the Department has reiterated its view that plan fiduciaries may not increase expenses, sacrifice investment returns, or reduce the security of plan benefits in order to promote collateral goals.[1] Among other things, the Department has explained that the mere fact that plans are important participants in the national economy, and are generally affected by actions and events that affect the economy as a whole, does not convert policy proposals concerning the economy into a rationale for using plan assets on debates surrounding such proposals.[2]

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[1] *See* ERISA Advisory Opinion No. 2007-07A (December 21, 2007).

[2] See letter from Alan D. Lebowitz, Deputy Assistant Secretary for Program Operations, Employee Benefits Security Administration, U.S. Department of Labor, to Jonathan P. Hiatt, General Counsel, AFL-CIO (May 3, 2005) (copy attached).

The ERISA statute, and all subsequent guidance issued by the Department, makes it clear that in deciding whether and to what extent to make, or refrain from making, a particular investment, a fiduciary may only consider factors relating to the interests of plan participants and beneficiaries in their retirement income. A decision to make or refrain from making an investment may not be influenced by a desire to promote a particular industry or industry member, or to generate employment within that industry or industry member, unless the investment, when judged solely on the basis of its economic value to the plan, would clearly be equal or superior to alternative investments available to the plan. [3]

Similarly, the Department has made clear that the expenditure of plan assets to pay costs or expenses that should be borne by a plan sponsor or other entity in the ordinary course of its business or operation violates ERISA 's prudence and exclusive purpose requirements.[4]

The Department believes the use, or threat of use, of pension plan assets or plan management to achieve a particular collective bargaining objective is activity that subordinates the interests of participants and beneficiaries in their retirement income to unrelated objectives. Although union representation of plan participants and benefit related provisions of collective bargaining agreements may in some sense affect a plan, the fiduciaries may not, consistent with ERISA, increase expenses, sacrifice investment returns, or reduce the security of plan benefits in order to promote or oppose union organizing goals or collective bargaining objectives. In addition, expenditures of plan assets to urge union representation of employees in the collective bargaining process or to promote a particular collective bargaining demand may constitute a prohibited transfer of plan assets for the benefit of a party in interest, under section 406(a)(1)(D) and potentially an act of self-dealing under section 406(b)(1).

This letter 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.

Sincerely,

Robert J. Doyle
Director of Regulations
and Interpretations

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[3] *See, e.g.*, Letter to the Honorable Jack Kemp (November 23, 1990); ERISA Advisory Opinion 88-16A (December 19, 1988); Letter to James S. Ray (July 8, 1988); Letter to Reed Larson (July 14, 1986); Letter to Ralph P. Katz (March 15, 1982).

[4] *See* ERISA Advisory Opinion 2001-01A (January 18, 2001).