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

February 3, 2011

James Dudley Hyde, Esq. 2011-05A
McAfee & Taft ERISA SEC.
211 North Robinson 403 - 404
Oklahoma City, Oklahoma 73102-7103

Dear Mr. Hyde:

This is in response to a letter and subsequent information you submitted on behalf of J.B. Hunt Transport Services, Inc. (J.B. Hunt) requesting an advisory opinion under the Employee Retirement Income Security Act of 1974, as amended (ERISA). In particular, you requested guidance regarding the use of demutualization proceeds that were received by the J.B. Hunt Transport Services, Inc. Employee Benefits Plan (Plan).

You made the following representations in support of your request. J.B. Hunt is a publicly traded diversified transportation services company. As a consequence of the transportation business, J.B. Hunt experiences a high rate of turnover in its employee workforce. The Plan is an employee welfare benefit plan sponsored by J.B. Hunt to provide specified medical, dental, vision, life, healthcare and other welfare benefits to its participants, all of whom are employees of J.B. Hunt. In September 2001, the Plan's trust – known as the J.B. Hunt Transport Services, Inc. Benefit Plan Trust (Trust) - received approximately $800,000 of Prudential Financial, Inc. (Prudential) common stock as "demutualization proceeds" in connection with Prudential's mutual-to-stock conversion.

The demutualization proceeds were attributable to a group insurance policy that was purchased by the Plan from Prudential to provide voluntary term life and driver disability insurance for certain participants in the Plan, who desired such coverage. J.B. Hunt did not make any employer contributions to the Plan to purchase this insurance. Premiums paid by the Plan for the insurance were funded entirely by participant contributions made to the Plan. As a result, the Plan's trustees determined that the entire amount of the demutualization proceeds received by the Trust were "plan assets" of the Plan and, as such, were subject to the fiduciary responsibility provisions of ERISA. However, very few of the J.B. Hunt employees who actually contributed, as Plan participants, toward the premium payments for insurance policies issued by Prudential to the Plan, which resulted in the Plan's receipt of demutualization proceeds from Prudential, were participants in the Plan at the time of the Plan's receipt of such proceeds.

J.B. Hunt hired various consultants whose fees it paid as part of the process of determining how to appropriately use the Plan's demutualization proceeds. After considering the consultants' advice, J.B. Hunt decided to amend the Plan to provide for a wellness program to enhance the health care benefits available to current Plan participants. The Plan, as

amended, paid for benefits and related administration expenses under the Wellness Program until the demutualization proceeds were exhausted, at which time J.B. Hunt became liable under the terms of the Plan for the cost of providing those benefits and related administrative expenses.

You requested guidance as to whether it was permissible to use the demutualization proceeds to provide for the Wellness Program under the amended terms of the Plan as a benefit for current Plan participants rather than using the demutualization proceeds in a way that would benefit only those current and former Plan participants who contributed monies toward premiums payments made to Prudential for the insurance contract that generated the Plan's receipt of demutualization proceeds. You further asked whether the payment of expenses allocable to the amendment of the Plan to establish the Wellness Program would have been proper plan expenses that were payable from the demutualization proceeds.

Section 403(a) of ERISA provides that all assets of an employee benefit plan shall be held in trust by one or more trustees pursuant to a written trust agreement unless subject to one of the exceptions in section 403(b) of ERISA. Section 403(c)(1) of ERISA provides, in part and subject to certain exceptions, that the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purpose of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan.

Section 404(a)(1)(A) of ERISA requires that a fiduciary of a plan discharge his or her duties with respect to the plan solely in the interest of the participants and beneficiaries, and for the exclusive purpose of providing benefits to participants and their beneficiaries and defraying reasonable expenses of administering the plan. ERISA section 404(a)(1)(B) requires plan fiduciaries to act with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims. Section 404(a)(1)(D) of ERISA provides that fiduciaries shall discharge their duties in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of Titles I and IV of ERISA.

In Advisory Opinion 2001-02 (Feb. 15, 2001) and an information letter to Theodore R. Groom dated February 15, 2001 (Groom Information Letter), the Department stated that in the case of an employee pension benefit plan, or where any type of plan or trust is the policyholder, or where the policy is paid for out of trust assets, all of the proceeds received by the policyholder in connection with a demutualization would constitute plan assets. Further, the Department stated that in the case of an employee welfare benefit plan with respect to which participants pay a portion of the premiums, appropriate plan fiduciaries

must treat as plan assets the portion of the demutualization proceeds attributable to participant contributions.

The Department has taken the position that there is a discreet class of discretionary activities which relate to the formation, rather than the management or operation of an employee benefit plan. These so-called settlor functions include decisions relating to the establishment, design and termination of a plan and generally are not fiduciary activities governed by ERISA. The U.S. Supreme Court has held that an employer does not violate ERISA by amending an overfunded pension plan to provide additional benefits to plan participants, even when the employer may benefit indirectly from the amendment. *Hughes Aircraft* v. *Jacobson*, 525 U.S. 432 (1999); *Lockheed Corp.* v. *Spink*, 517 U.S. 882 (1996). Similarly, in the Department's view, and assuming there are no plan terms that would limit the employer's authority to so amend the plan, an employer would not violate ERISA by amending a plan as you described so that demutualization proceeds are used exclusively to provide additional benefits to current plan participants. In fact, in the Groom Information Letter, the Department observed that "prior to or simultaneous with the distribution of demutualization proceeds constituting plan assets, such assets could be applied to enhancing plan benefits under existing, supplemental or new insurance policies or contracts . . .". This conclusion would not be altered by the fact that the employer in your case may receive incidental benefits, such as lower plan costs, as a result of the wellness benefits being added to the Plan.[1] As a plan provision, pursuant to section 404(a)(1)(D) of ERISA, a fiduciary would be required to follow such a provision unless the fiduciary could articulate well-founded reasons why doing so would give rise to violations of title I and IV of ERISA, including, for example, the prudence and exclusive benefit requirements of section 404 of ERISA.

Thus, absent plan terms to the contrary, in our view, fiduciaries of an employee welfare benefit plan may use demutualization proceeds that are plan assets for the benefit of all current participants and beneficiaries, rather than only for those who actually contributed to premium payments for the insurance policies. In the situation you describe, ERISA does not require plan fiduciaries to consider the interests of individuals who are no longer covered under the plan in deciding how to use such demutualization proceeds.

With respect to your first question, this letter constitutes an advisory opinion under ERISA Procedure 76-1 and is subject to the provisions of that procedure, including section 10 thereof relating to the effect of advisory opinions. Because of the inherently factual nature of your second question, in accordance with section 5.01 of ERISA Procedure 76-1, we have determined that it is appropriate to respond to your inquiry by providing the following general information.

Reasonable expenses incurred by plan fiduciaries in determining how best to carry out their fiduciary duties may be legitimate expenses of the plan. However, expenses incurred

[1] *See* Advisory Opinions 2001-01A (Jan. 18, 2001) and 2003-04A (Mar. 26, 2003).

in connection with performance of a settlor function (e.g., costs of consultant studies as to whether to provide or terminate the wellness benefit and the amendment of the plan itself to provide the benefit) would not be considered a proper plan expense. Administrative and operational expenses (e.g., plan administration; communications to employees regarding the benefits; and the payment of the benefits) incurred in the ordinary course of implementing and maintaining a plan, once a settlor decision has been made, would be considered proper plan expenses, provided that amounts expended are reasonable.[2]

Sincerely,

Louis J. Campagna
Chief, Division of Fiduciary Interpretations
Office of Regulations and Interpretations

---

[2] *See* Advisory Opinion 2001-01A, *supra*.