



U.S. CHAMBER OF COMMERCE

1615 H Street, NW
Washington, DC 20062-2000
www.uschamber.com

November 11, 2014

The Honorable Thomas Perez
Secretary
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Re: “Impact Investing” and Interpretive Bulletins 2509.08-1 and 08-2

Dear Secretary Perez:

On behalf of the U.S. Chamber of Commerce (“Chamber”), the world’s largest business federation, representing the interests of more than 3 million businesses and organizations of every size, sector, and region, I want to thank you for inviting us to participate in the “Investing for the Future Roundtable Conversation” on October 22, 2014. We look forward to remaining part of this discussion and hope that other stakeholders can be invited to make the group more representative. Per your request, we are providing you with an overview of the Chamber’s view regarding Interpretive Bulletins 2509.08-1 and 08-2 and the question of whether changes are needed in this guidance to permit “Impact Investing”.

A large part of the conversation revolved around defining the term “Impact Investing”. During the course of the conversation several additional terms were discussed—Social Investing, Economically Targeted Investments, and ESG Investments. While there are similarities between these terms there are also differences—as well as differences in interpretation of the terms. For our purposes, however, the particular terms are irrelevant since we believe the guidance represents the intent of ERISA regardless of the term used to describe the investment policy.

As you know, the Employment Retirement Income Security Act of 1974 (“ERISA”) was passed following a number of defaults by companies with underfunded pension plans that were incapable of paying the full benefits their

workers had earned and were depending on for retirement. ERISA was designed to protect private retirement plan assets so that they would be available to support participants and beneficiaries of plans when they retired. To ensure that the policy goal of protecting plan assets for participants and beneficiaries would never be subordinated to other interests, section 404(a) (1) (A) of ERISA requires that a fiduciary act *solely* in the interest of a plan's participants and beneficiaries. ERISA further provides that the "assets of a plan shall never inure to the benefit of any employer and shall be held for the *exclusive* purposes of providing benefits to participants in the plan and their beneficiaries."¹ ERISA's plain text therefore establishes a clear rule and priority for trustees: in the course of discharging their duties, they may never subordinate the economic interests of the plan to unrelated objectives, regardless of their broader social utility or their benefit to plan sponsors or other third parties.

In passing ERISA, Congress chose not to include any provision that would allow plan assets to be used to pursue any societal purpose other than protecting plan assets. To the contrary, Congress included Section 404(a) "in order to make the law of trusts applicable to the plans and to eliminate 'such abuses as self-dealing, imprudent investing, and misappropriation of plan funds.'"²

Consistent with ERISA's emphasis on securing benefits for participants and beneficiaries, when fiduciaries are selecting investment alternatives for plan assets they may consider factors other than the economic interest of the plan only in the narrowest of circumstances. These circumstances exist when fiduciaries have investment alternatives before them that are "economically indistinguishable" in terms of protecting plan assets for participants and beneficiaries. Since 1979, the U.S. Department of Labor ("DOL") has consistently issued guidance illustrating the appropriate consideration of factors beyond the economic interest of the plan. Interpretive Bulletins 08-1 and 08-2 confirm previous guidance by making clear that such factors can never be a basis to dilute or subordinate the obligation of a fiduciary to first establish that each investment under consideration is "truly equal, taking into

¹ Employment Retirement Income Security Act of 1974, §403(c) (1) (1974) (emphasis added).

² *Boyle v. Anderson*, 68 F.3d 1093, 1102 (8th Cir. 1995) (quoting *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 15 (1987)).

account a quantitative and qualitative analysis of the economic impact on the plan” to other alternatives.³

Congress has not enacted legislative changes to the duties and responsibilities of trustees that were incorporated into Section 404(a) of ERISA. Such changes cannot be made through amending existing Interpretive Bulletins, and as such, there is no need to alter the language of Interpretive Bulletin 08-1 or 08-2. Amendments along the lines discussed at our meeting could seemingly distract fiduciaries from ERISA’s clearly-stated intent to ensure plan assets are protected, potentially causing economic harm to pension plans and their beneficiaries. As the Chamber stated at the meeting, we believe that any data and facts DOL may have relating to the application of Interpretive Bulletins 94-1, 94-2, 08-1, and 08-2 over their 20 year histories, would be helpful for these discussions and provide context for any desired changes.

Some of the arguments being made to amend Interpretive Bulletins 08-1 and 08-2 are related to an ongoing debate regarding the corporate governance of public companies. For instance, this past July, the Securities and Exchange Commission (“SEC”) issued guidance tying the dispensation of proxy advice to the fiduciary duty of funds voting shares.⁴ These issues are interrelated with the discussion surrounding Interpretive Bulletins 08-1 and 08-2, and we encourage DOL to engage in discussion with the SEC to avoid any potential unintended consequences.

Most everyone at our meeting—including the Chamber—agreed Interpretive Bulletins 08-1 and 08-2 do not directly prohibit Impact Investments. Rather, the guidance affirms that such investments must be evaluated and documented in a manner that objectively demonstrates compliance with the fiduciary standards imposed by ERISA. Any proposal from DOL to alter Interpretive Bulletins 08-1 and 08-2 and thus, in effect, weaken the plain language of ERISA would encourage trustees to undertake investments that may intentionally or unintentionally give primacy to interests other than those of pension plan participants and beneficiaries. This would contravene the letter and spirit of ERISA, and undermine the protection of plan participants and beneficiaries.

³ Interpretive Bulletin Relating to Investing in Economically Targeted Investments, 72 Fed. Reg. 61,735 (Oct. 17, 2008).

⁴ See SEC Staff, Legal Bulletin No. 20 (June 30, 2014) explaining actions investment advisers should undertake in fulfilling their duty of care and loyalty with respect to services on behalf of clients, including proxy voting.

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Once again, thank you for including us in your most recent roundtable discussion. We look forward to continuing this conversation and would welcome the opportunity to provide you with some additional information on this subject in the future.

Respectfully,



David Hirschmann
President and Chief Executive
Officer
Center for Capital Markets
Competitiveness
U.S. Chamber of Commerce



Randel K. Johnson
Senior Vice President
Labor, Immigration and Employee
Benefits
U.S. Chamber of Commerce

cc: The Honorable Phyllis Borzi, Assistant Secretary for Employee Benefits Security
Administration
Ms. Judith Mares, Deputy Assistant Secretary for Employee Benefits Security
Administration