WHAT TRUSTEES CAN DO UNDER ERISA
(the Employee Retirement Income Security Act)

A study of permissible trustee activism

by

Kristen Snow Spalding, Esq.
Labor Policy Specialist
Center for Labor Research and Education
Institute of Industrial Relations
University of California at Berkeley

and

Matthew Kramer, Ph.D.
Candidate for Juris Doctor degree
University of California at Berkeley
School of Law

"There is nothing in ERISA . . . requiring that an investment decision be wholly uninfluenced by the desire to achieve social or incidental objectives if the investment, when judged solely on the basis of its economic value to the plan, is equal or superior to alternative investments otherwise available." Dennis Kass, Assistant Secretary of Labor, 1986.

"Every pension fund has a legal responsibility to produce a competitive rate of return for its participants. But with $4.6 trillion in assets, pension funds are in a unique position to simultaneously boost the long-term vitality of the American economy." Secretary of Labor Robert Reich, 1994.

I. INTRODUCTION

This paper, undertaken with a grant from the Ford Foundation, explores the ERISA boundaries for pension fund trustees who seek true capital stewardship over their pension assets. The paper examines the potential, under the law, for trustees to guide their investment managers and clears the air of misconceptions about the trustees' rights and obligations within their role as responsible fiduciaries. To be frank, we are exploring the ways that trustees can be activists, activists for improved pension benefits, for job creation, for improved working conditions and for building local economies. In several formal opinion letters, the United States Department of Labor (DOL) has set out the duties and obligations of pension fund trustees in relation to fund managers. Those letters show clearly that trustees may, and under certain circumstances must, play an active role in directing their managers to invest the funds properly and consistently with the trustee's orders. Several recent court decisions support the DOL's views.

The importance of such direction on the part of trustees cannot be overstated. With nearly five trillion dollars worth of pension fund assets in the United States, trustees have an incredible -- and as yet mostly untapped -- source of power at their fingertips.

II. ERISA'S FIVE REQUIREMENTS

ERISA contains five primary requirements for pension fund fiduciaries. Trustees can monitor their investment managers, be active shareholders, pool and target investments, as long as they meet those five provisions.

A. ***Sole Interest Requirement***: A fiduciary must discharge his duties solely in the interests of the plan participants and beneficiaries. (ERISA 404(a)(1)(A)).

B. Exclusive Purpose Requirement: The fiduciary must discharge his duties for the exclusive purpose of

i. providing benefits to participants and their beneficiaries; and

ii. defraying reasonable expenses of administering the plan.

C. ***Prudence Requirement***: A fiduciary must act with the care, skill 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. (29 U.S.C. § 1104(a)(1)(B) (1994). Prudent investors must consider the following issues:

i. *Diversification*: The composition of the portfolio in terms of diversification;

ii. *Relative Return*: The liquidity and current return of the portfolio relative to the anticipated cash flow requirements of the plan;

iii. *Projected Return*: The projected return of the portfolio relative to the funding objective of the plan;

iv. *Expected Return*: Consideration of the expected return on alternative investments with similar risks available to the plan. (DOL Interpretative Bulletin 94-1).

Courts have ruled that prudent investing does not mean maximizing returns for the least amount of risk. See, for example, Foltz v. U.S. News & World Report, Inc., Anderson v. Mortell, and Ershick v. United Missouri Bank.

In addition, the DOL has indicated that fiduciaries need not invest only in conservative investments. "The relative riskiness of a specific investment . . . does not render such investment either per se prudent or per se imprudent . . . Although securities issued by a small or new company may be a riskier investment than securities issued by a 'blue chip' company, the investment in the former company may be entirely *MK check* under the Act's 'prudence' rule." (*Preamble to Rules and Regulations for Fiduciary Responsibility; Investment of Plan Assets under the "Prudence" Rule*, 44 Fed. Reg. 37,221 (June 26, 1976))

Prudence is not judged by the success of the investment viewed in hindsight. Prudence is determined by the procedural process by which the investment decision was made. (Marshall v. Glass/Metal Association)

In addition, investors are protected by the *Safe Harbor Rule*: If a fiduciary complies with the prudence regulation, the investment will be deemed prudent. If the fiduciary does not comply with that regulation, the investment is not imprudent per se. ("Preamble to Rules and Regulations for Fiduciary Responsibility: Investment of Plan Assets under the 'Prudence' Rule," 44 Fed. Reg. 37,221 (June 26, 1979).

D. ***Diversification Requirement***: A fiduciary must diversify the plan investments so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so. (ERISA 404(a)(1))

E. ***Plan Document Rule***: A fiduciary must discharge his duties in accordance with the documents and instruments governing the plan insofar as the documents and instruments are consistent with the provisions of ERISA and Title IV. (ERISA 404(a)(1)(D)) Plan documents include the plan description, summary plan description, collective bargaining agreement, trust agreement, contract, investment management agreement, investment guidelines, and other instruments under which the plan was established or is operated.

III. YOU CAN MONITOR THE FUND PROFESSIONALS

The first step to becoming an activist trustee is for the trustees to have a clear understanding of what their fund is doing, where the fund is investing and how those investments are being managed. This means hiring responsive professionals, professionals who will answer trustee questions, explore the investment options that trustees want them to explore, and who will respond to trustee concerns about the ancillary benefits of investments as well as the prudence of investments in terms of comparative risk and return.

As a pension fund trustee, you have the right and responsibility to ask questions to ensure that your investment manager has the qualifications and experience requisite to the manager's job. Once you hire a particular manager, you must monitor the manager to ensure that the manager's investments comply with both ERISA and with the plan documents that you as a Board of Trustees have established.

A. You Have a Duty to Select Qualified Professionals

A qualified professional is not just one who has experience managing other Taft-Hartley funds. A qualified professional is one who has the skill and experience meet your particular investment guidelines. You can make sure that your investment manager will respond to your concerns about ancillary and primary benefits of each investment decision before you hire the manager.

The ERISA Advisory Council Working Group recently released a set of guidelines for selecting and monitoring service providers (11/13/96). The Working Group concluded that a plan fiduciary has a duty to interview the most qualified investment manager for the task at hand. Once the fiduciary hires the manager, he has an ongoing duty to monitor and evaluate the performance of the service providers that the fiduciary selects. The report contains examples of questions that fiduciaries should ask potential service providers and investment managers before hiring. Some of those questions include:

> Does this service provider have the objective qualifications to properly provide the service that is necessary and/or appropriate for the Plan?
> Are the service provider's fees reasonable when compared to industry standards in view of the services to be performed, the provider's qualifications and the scope of the service provider's responsibility?
> Does the plan have a conflict of interest policy that governs business and personal relationship between fiduciaries and service providers and among service providers?

The Working Group goes on to note that the Plan must have a Statement of Investment Policy and should consider the style and strategy of the investment manager being hired in relation to the Statement of Investment Policy. As activist trustees, you can set stringent investment guidelines and find managers who will meet those guidelines and review investment options with your concerns in mind.

B. You Can Ask Questions about Your Investments

Your role as a trustee does not stop once you have hired an investment manager. You can keep asking questions and get your investment managers to explore new investment options for your fund.

According to ERISA 404(a)(1)(D), trustees must both set out and periodically review plan documents to ensure that their investment managers are acting in accordance with them. They must also monitor plan investments to ensure that the limitations established in an investment policy statement or other plan document are not being violated.

According to the DOL Interpretive Bulletin 94-2, compliance with ERISA's prudence requirement requires maintenance of proper documentation of the activities of the investment manager and of the named fiduciary of the plan in monitoring the investment manager. Plan documents include the plan description, summary plan description, collective bargaining agreement, trust agreement, contract, investment management agreement, investment guidelines, and other instruments under which the plan was established or is operated.

Courts have consistently held that trustees must properly and diligently select their investment manager and then investigate their activities. In Whitfield v. Cohen, the court held that the trustees' failure to monitor the conduct of the investment adviser was a breach of fiduciary responsibility. The court noted that prudence in selecting and monitoring an investment manager requires trustees to:

1) Evaluate the individual's qualifications;

2) Ascertain the reasonableness of fees;

3) Review documents reflecting the nature of the relationship;

4) Ensure adequate, periodic accounting in the future.

The court added that if a fiduciary is negligent in selecting, instructing or supervising a provider, he will be held liable to the trust beneficiary for any resulting loss.

C. You Can Ask about the Rate of Turnover of Investments

Your investment manager has an obligation to provide you with information regarding the turnover, or "churning," rates of your pension funds investments.

According to the DOL Pension and Welfare Benefits Administration (PWBA), pension fund managers began pursuing high turnover rates in the 1980s. In 1987, 30 percent of defined benefit plans with 100 or more participants reported common stock turnover rates in excess of 100 percent. Forty-one percent of defined benefits plans with over $300 million in assets had turnover rates in excess of 100 percent. By contrast, ESOP turnover rates averaged 11 percent from 1981-87. Turnover rates for money purchase plans and defined benefit plans averaged 60 percent. (MATT HOW DOES THIS defined benefit STATISTIC DIFFER FROM THAT ABOVE.) Turnover rates for 401(k) plans averaged 35 percent. The DOL PWBA has found such high turnover does not yield high rates of return. You have a right to know what the turnover rate is, and you can direct your investment managers to minimize turnover when it is not clearly producing higher returns. Your investment manager must report the turnover rate on the form 5500 annual fund reports.

(See DOL PWBA, *Trends in Pensions, 1992*, chapter 22.)

D. You Can Ask for Alternative Investment Options

Some trustees report that their investment managers often offer the trustees three options, the first is outrageously low return, the second is outrageously high risk and the third is the only appropriate choice. But in the world of investments, you have many more than three options. You have a right to ask for options which both produce competitive rates of return and which offer ancillary benefits to your fund, the union, the signatory employers, the local economy and the plan participants .

As Assistant Secretary of Labor, Olena Berg, has noted, there is nothing in ERISA which prohibits you from seeking economically targeted investments, as long as these investments compare favorably to similar investments otherwise available to the plans. The key is that you can ask your managers for comparison of similar investments. In a 1986 opinion letter, the DOL noted that managers should provide objective standards that establish that the proposed investment will yield a fair market rate of return.

Pension trustees have in the last several years been active in seeking such investment opportunities. For example, trustees of the New York City Teachers Retirement System and the California Public Employee Retirement System promote investments that stimulate local economic activity while earning prudent returns. Similarly, the United Brotherhood of Carpenters pension fund has invested in three financial institutions in Boston, Oakland and Los Angeles whose lending practices are targeted towards union construction projects..

While the examples of this investment abound, the key is that the trustees must ask for information about these options, and then encourage their investment managers to critically compare these investments with other options before the trustees make their investment decisions.

E. You Can Get Information About the Employment Practices of the Companies You Invest In

Pension fund trustees and fiduciaries have the right to demand information regarding the companies in which the Fund is invested. Olena Berg has urged trustees and fiduciaries to become actively involved in corporate governance to ensure that Boards of Directors, as the representatives or shareholders, are demanding good corporate management over the long-term. Since responsible corporate management practices are linked to a company's performance, some advisors including Anthony Carfang, President of Covenant Investment Management, have suggested that it may be a violation of fiduciary duty to overlook corporate responsibility in selecting investments.. (*Id*., p. 10). Secretary of Labor Robert Reich, social investing research firm chair Steven Lydenberg, and Milton Moskowitz, coauthor of *The 100 Best Companies to Work for in America*, recently concluded that evaluation of a company's workplace practices should play a role in the decision whether to invest in that company. (*Business and Society Review*, Fall, 1994, No. 91, pp. 6-14).

ERISA not only permits you to ask for financial performance information, but also permits you to ask for and consider workplace practices and corporate governance before and after you choose the investment. You have a right to know how the companies you invest in are using your money.

IV. YOU CAN SET INVESTMENT AND PROXY VOTING GUIDELINES

A. ERISA's Guidelines Requirement

The plan document provision of ERISA (described above under II.E) requires that trustees provide plan documents governing investment decisions. According to ERISA 404(a)(1)(D), a fiduciary must discharge his duties in accordance with the documents and instruments governing the plan insofar as the documents and instruments are consistent with the provisions of ERISA and Title IV. Plan documents include the plan description, summary plan description, collective bargaining agreement, trust agreement, contract, investment management agreement, investment guidelines, and other instruments under which the plan was established or is operated. Plan documents may include investment and proxy voting guidelines.

B. Setting Investment Guidelines

ERISA does not require that plan documents include investment policy statements. However, in its Interpretive Bulletin 94-2, the DOL indicates that "such statements serve a legitimate purpose in many plans by helping to assure that investments are made in a rational manner and are designed to further the purpose of the plan." The DOL generally encourages the adoption of investment policy statements, and notes that such statements are consistent with the prudence rule. When drafting investment guidelines and proxy voting guidelines, fiduciaries must follow the prudence rule and "take into account factors such as the plan's funding policy and its liquidity needs as well as issues of prudence and diversification."

In his testimony before the DOL Working Group on Guidance in Selecting and Monitoring Service Providers, Joseph Craven, Senior Vice President of Putnam Investments, states that plan sponsors and trustees should have clearly written investment guidelines applicable to each class of investment managers. The guidelines should state unambiguously all restrictions and limitations placed on those managers. The AFL-CIO has suggested that investment guidelines should include diversification requirements as to industry, product and geographic area (Capital Strategies, p. 53.) It should also include quarterly reviews of portfolio performance and comparisons with appropriate indices or benchmarks. An investment consultant or internal staff should closely monitor the managers' compliance with the guidelines.

Failure to monitor the investment manager's decisions may result in legal repercussions for fund trustees. In Donovan v. Mazzola, the court held that pension fund trustees acted imprudently in exposing the pension fund to the large risk of loss resulting from the high concentration of assets in a single type of investment, thereby violating ERISA's diversification requirement. The trustees had failed to establish an investment policy and written guidelines. The court held that they should have adopted policies setting out various investment criteria, including the type of business activity in which borrowers of the loans at issue in the case were engaged.

C. Setting Proxy Voting Guidelines

Under ERISA, you, as a trustee, have three options for proxy voting. You can delegate your proxy voting authority to your investment manager and set proxy voting guidelines for that manager. You can reserve your proxy voting authority to yourselves (as a Board of Trustees) or your can take direction from another named fiduciary, like a proxy voting service. Whichever route you choose, the key is that you give general guidance to the fiduciary who will exercise the vote.

Proxy voting guidelines are particularly helpful where a fund employs several investment managers, because the guidelines might prevent investment managers from taking conflicting positions on the same proxy issue. In cases where the trusts invest in pooled accounts (like mutual funds), the managers of those pooled accounts must, to the extent possible, comply with all of their proxy voting policies. According to *MK fill in cite* where the policies conflict, the investment manager should vote the proxies "to reflect each policy in proportion to the respective plan's interest in the pooled account." If an investment manager cannot feasibly vote proxies according to each individual proxy voting guideline, then the manager may require all clients to agree to the manager's master proxy voting guideline.

The DOL has set out its policies regarding proxy voting in two formal opinions letters, referred to as the *Avon Letter* and the *Monks Letter*. Each of the letters contains several provisions that empower trustees to control proxy votes.

The *Avon* letter shows unambiguously that proxy voting is a fiduciary responsibility. To act prudently in the voting of proxies (as well as in all other fiduciary matters), a plan fiduciary must consider those factors which would affect the value of the plan's investment. Two examples of issues that may affect the value of stock include 1) a proposal to change the state of incorporation of a corporation in which a plan owned shares (thereby possibly affecting shareholders' rights to participate in the decision-making process of the corporation which, in turn, affects the value of their investment); 2) and a proposal to rescind "poison pill" arrangements with regard to various corporations in which a plan is invested.

According to Interpretive Bulletin 94-2 and the *Monks* letter, if the trustees implicitly or explicitly delegate their proxy voting authority, then their delegee has that exclusive fiduciary responsibility. An investment manager will not be relieved of his fiduciary responsibility merely because he follows directions of some other person as to the voting or proxies, or delegates such responsibility to another person. The *Monks* opinion suggests that trustees cannot delegate their proxy voting authority (to their investment manager or to a proxy voting service) and then take back the authority in a particular vote (for example because the vote involved a labor dispute). The trustees may set strict general guidelines and monitor compliance with those guidelines, but may not make a specific voting decision after delegating the authority. (*MK, am I right in this rephrasing?)

Under ERISA's general monitoring requirements, you have an obligation to monitor your investment manager's proxy voting record. You must be able to review not only the investment manager's proxy voting procedure, but also the actions taken in individual situations. Without such information, the named fiduciary would not be able to determine if the investment manager had fulfilled its fiduciary obligations in a manner that justified continuation of the appointment.

The key is that you have the right to set guidelines for the investment manger and then monitor the manager's compliance with the guidelines. Setting guidelines allows you to be an active shareholder. If trustees of many multi-employer trusts set the same proxy voting guidelines, these funds could exercise considerable control over the companies that they collectively own.

D. You Can Use Proxy Votes to be Active Shareholders

You can require your investment manager or proxy voting service to vote to ensure the long-term health of the company. In Interpretive Bulletin 94-2, the DOL maintains that proxy voting policies comprise a form of shareholder activism. According to the Bulletin, where proxy voting decisions may have an effect on the value of a plan's underlying investment, plan fiduciaries should make proxy voting decisions with a view to enhancing the value of the shares of stock, taking into account the period over which the plan expects to hold such shares. Such activism is consistent with a fiduciary's obligations under ERISA, where the responsible fiduciary concludes that there is a reasonable expectation that such monitoring or communication with management, by the plan along or together with other shareholders, is likely to enhance the value of the plan's investment in the corporation, after taking into account the costs involved. Appendix A below cites to some examples of proxy voting guidelines which are being adopted by multi-employer pension funds.

V. YOU CAN BE AN ACTIVE SHAREHOLDER

Several individuals and organizations, including Secretary of Labor Robert Reich, the DOL, and the AFL-CIO, have taken a strong position on shareholder activism. Shareholder activism encompasses monitoring investment professionals, voting proxies, and communication or even negotiations between shareholders and corporate managers. In addition, by shareholder activism we mean trustee involvement in corporate governance, high performance workplaces, CEO pay monitoring, and investment in companies that pay fair wages and provide worker benefits. All of these steps are not only permissible under ERISA, but in fact this sort of "capital stewardship" may be considered part of your fiduciary responsibility where these steps influence the rate of return of your investments.

In addition to the monitoring of investment professionals discussed above, the DOL Interpretive Bulletin 94-2 provides guidelines for monitoring the management of the companies which funds hold as investments. Those guidelines include monitoring the independence and expertise of candidates for the corporation's board of directors; assuring that the corporate board of directors has sufficient information to carry out its responsibility to monitor management; consideration of the appropriateness of executive compensation; the corporation's policy regarding mergers and acquisitions; the extent of debt financing and capitalization; the nature of long-term business plans; the corporation's investment in training to develop its work force; and other workplace practices and financial and non-financial measures of corporate performance.

A. You Can Ask Questions About Corporate Governance In Interpretive Bulletin 94-2, the DOL also emphasizes communication between shareholders and management. According to the Bulletin, shareholder communication is proper on issues such as the Board of Directors and their policies, the company's business plans, the company's financing, the company's investment in its workforce and its practices with respect to its workforce (for example downsizing, or part-time to full-time workers ratios), and financial and non-financial measures of corporate performance.

The Bulletin also gives examples of the means by which shareholders can communicate with management. Monitoring and communication can be accomplished through correspondence, meetings with management, and exercising legal shareholder rights.

According to a recent article by John Wilcox in *Insights* (vol. 9, No. 12, December 1995), shareholder resolutions have increased dramatically since 1992. One of the most common methods by which shareholders present their resolutions to management is by establishing lines of communication with them to determine if the proposed resolution is negotiable.

> Shareholder activists are increasingly making strategic use of the proposal process for the purpose of highlighting underlying concerns with governance and performance. In fact, the use of shareholder proposals as a foot in the door -- to force a response from companies that ignore other negotiating initiatives -- is now more important than the use of proposals as policy instruments. (p. 6)

As a result of initiatives that shareholders took between 1987 and 1992, the SEC amended the shareholder communications rules and adopted new compensation disclosure rules. Those new rules freed shareholders to communicate and publicize their views outside the confines of shareholder meetings. In 1995, the number of shareholder proposals doubled over the previous year. According to Wilcox, the proposals reflect shareholders' attempts to establish lines of communication, not confrontation, with management. (pp. 7-8)

Interpretive Bulletin 94-2 reflects the DOL's support of "relational investing." (*MK or is it relationship investing?) Olena Berg recently defined relational investing as a long-term approach in which pension fund investors "own larger stakes in fewer companies, giving them more leverage [to negotiate issues of concern] with corporate management and the board of directors." Assistant Secretary Berg suggested that pension investors monitor the corporate performance of the companies in which they invest, assign "incentive pay for corporate executives, and influence[e] rule changes for those who serve on the boards."

On one level, relational investing is little more then improved communications between management and shareholders. On another, more extreme level, it anticipates that institutional investors like mutual funds and public employee pensions will acquire large ownership positions, voluntarily commit to hold stock for the long term, occupy seats on boards of directors, participate in corporate decision-making, and act like "owners" rather than investors. (*MK is this really OK?)

B. You Can Demand Investments in High Performance Workplaces

The buzz words “High Performance Workplace” have received a great deal of attention within the DOL. Under ERISA’s prudent investor standards, trustees can encourage the companies in which they hold stocks to engage in “high performance” practices which will improve the long term returns on the investments.

The DOL's Office of the American Workplace, founded by President Bill Clinton and Secretary of Labor Robert Reich, has recently published a book entitled *Road to High-Performance Workplaces: A Guide to Better Jobs and Better Business Results*. The book contains three primary theses:

> a) High performance companies view their workers as valuable assets and make investments accordingly. Training is viewed as continuous, with a commitment to life-long learning.
>
> b) High performance workplaces encourage workers to accept multiple new roles as problem-solvers, self-managers, and entrepreneurs. Management also invites workers to participate in the day-to-day activities of the company.
>
> c) High performance companies gain long-term worker commitment by creating compensation systems tying pay to individual, team, and corporate performance. Such companies also seek to make executives more responsive to shareholder concerns by linking executive compensation to longer-term corporate goals.

Olena Berg has also expressed unequivocal support for high performance workplace practices. In her keynote speech at the *Asset-Managers' Conference*, she observes that maximizing pension fund performance and investing pension fund assets in a manner that strengthens the American economy are not inconsistent. The best way to realize both goals is to invest in practices that maximize long-term performance. For example, investing in high quality, on-the-job training strengthens the economy and maximizes pension performance, since it is an indicator of long-term corporate performance. According to Assistant Secretary Berg, investment in human capital means better performance, which in turn means growth in stock prices. Pension fund investment managers should therefore look to invest in companies that promote human capital (with training programs, profit sharing, employee participation, workplace health and safety, and flexibility).

Assistant Secretary Berg adds that pension fund investments can play a key role in promoting such long-term performance. They can maintain a long-term perspective in investments; become actively involved in corporate governance to ensure that boards of directors demand good corporate management over the long term; and can gain competitive or superior risk-adjusted rates of return while providing ancillary economic benefits.

Corporate governance can have a significant impact on a company's performance, as shown by the recent CalPERS Experiment. CalPERS reports that it was actively involved in corporate governance of 42 companies over a five year period. During that period, the 42 companies beat the S&P 500 by 41%, while in the previous five years, they underperformed the S&P by 66%. (*MK cite)

Union and non-union pension funds have effectively pursued corporate governance practices to promote high performance workplaces or to cut CEO pay. The Teamsters challenged Roadway Services and other companies in which the members' pension funds are shareholders to adopt "high performance" workplace practices that include workplace democracy, meaningful worker participant in corporate decision-making, job security, and a supportive work environment. (*Capital Strategies*, p. 15)

Members of the Carpenter, Operating Engineer and IBEW unions teamed up to advocate broad-based corporate governance reforms at Federated Department Stores, a nation-wide department store chain. The negotiations resulted in major reforms, including the creation of a new board committee to review shareholder proposals and voluntarily adopt confidential shareholder voting. The advocacy also helped to generate a positive working relationship between the unions and the company, ultimately empowering worker-owners within a more democratic corporate governance. (*Capital Strategies*, p. 16).

Non-union pension funds have also adopted practices that promote high performance workplaces and worker democracy. The leading example of such practices is the CalPERS Responsible Contractor Policy, adopted in June, 1994. The Policy's purpose is to support and encourage fair wages and fair benefits for workers employed by CalPERS' contractors and subcontractors. In its formal policy statement, CalPERS indicates that the Policy reflects CalPERS' support of union ideals, and it encourages the participation by labor unions and their signatory contractors in the development and management of CalPERS' real estate investments. The Policy also demonstrates CalPERS' belief that an adequately trained and compensated work force delivers higher quality products and service.

As a trustee you can approach the “High Performance Workplace” issues from two directions. First you can direct your investment managers to look for high performance workplaces as investment options because these are the companies that are most likely to perform well in the long-term. Second, once you own share in a company, you can be active in pushing the company to adopt high-performance practices because these practices could have a substantial impact on the corporate returns.

VI. ECONOMICALLY TARGETED INVESTMENTS (ETIs)

A. You Can Look for Economically Targeted Investments

ETIs have recently become the subject of heated political debate. In May 1995, the Joint Economic Committee on Economically Targeted Investments of the U.S. Congress held a hearing on economically targeted investments in response to H.R. 1594, a bill that would "place restrictions on the promotion by the Department of Labor . . . of economically targeted investments in connection with employee benefit plans." In September, 1995, the House passed H.R. 1594. One day later, the Senate appropriations subcommittee incorporated into its appropriations report portions of S. 774, a bill designed to ban the DOL's promotion of ETIs.

At the same time, the Joint Economic Committee submitted its report "The Economics of ETIs: Sacrificing Returns for Political Goals." The report concluded that on the average, ETIs earn 2 percentage points less than traditional investments, which results in a lifetime loss of $43,298 per participant. The DOL has attacked the report on the grounds that it is based on the flawed assumption that pension investors are legally permitted to make below-market investments.

In October, 1995, the Heritage Foundation published a booklet called "How to Close Down the Department of Labor." It recommended that Congress move the Pension and Welfare Benefit Administration to Social Security. The foundation also advised that Congress eliminate the Economically Targeted Investment Clearinghouse, since it is "misguided and jeopardizes the safety of pension plan assets."

Despite the controversy, DOL policy statements and court cases show unequivocally that ETIs are permissible under ERISA, Further, several studies and investment plans reveal that ETIs bear competitive rates of return while at the same time providing low income housing, jobs, and infrastructure improvements.

B. The "All Things Being Equal" Test

According to the DOL Interpretive Bulletin 94-1, ETIs are governed by the same standards applicable to other plan investments. They therefore must have an expected rate of return commensurate with comparable investments having similar risks.

In addition to ERISA's five basic provisions governing pension fund investments, described under section II above, the DOL has established an "all things being equal" test for ETIs. All things being equal, a pension plan may make an investment that bears a collateral or social benefit. The "all things being equal" test has two components.

1. The ETIs expected rate of return must be commensurate with rates of return of alternative investments with similar risk characteristics. (DOL Interpretive Bulletin 94-1).
2. The ETI must be an appropriate investment in terms of diversification and the plan's investment policy. (DOL Interpretive Bulletin 94-1).

C. What is an ETI?

The Department of Labor has consistently defined ETIs as "investments selected for the economic benefits they create apart from their investment return to the employee benefit plan." Collateral benefits include "expanded employment opportunities, increased housing availability, improved social service facilities, and strengthened infrastructure." (DOL Interpretive Bulletin 94-1). In the "ERISA 1994 Report to Congress," the DOL indicated that an ETI is an investment that provides ancillary benefits, such as affordable housing, infrastructure improvements and jobs, in addition to a competitive risk-adjusted return. The DOL Advisory Council Work Group on ETIs adds that ETIs target a capital gap.

In a recent address at the Asset-Managers' Conference, Olena Berg has reiterated and condensed those formulations by defining an ETI as an investment opportunity that, <u>while providing competitive and often superior risk-adjusted rates of return</u> by exploiting market inefficiencies, also provides ancillary economic benefits. The investments must meet all of the standard requirements set out in ERISA and discussed below.

In its "Guide to Pension Investment and Proxy Voting," the AFL-CIO defines ETIs to include any prudent investment pursued to provide a financial return commensurate with its inherent risk, that fits into the overall portfolio in terms of the fund's ability to meet benefit obligations, *and that provides a corollary benefit to the fund's plan participants and beneficiaries*, geographic area, demographic group or industry. (53).

There are several examples of ETIs that have successfully generated competitive, above-market rates of return while creating collateral benefits. Some of these investment vehicles are discussed in the Appendix B to this paper.

VII. CONCLUSION

We sympathize with the ERISA attorneys, pension consultants, administrators, investment managers and even academics studying pension funds who are tempted to tell trustees that they run a grave risk of breaching their fiduciary responsibility if they do anything other than vote to invest according to a conservative investment plan that will maximize returns for participants. These professionals have read or experienced the horror stories of pension trustees who have bankrupted their trust funds by risky investments, of trustees who have been found personally liable for fiduciary breaches or of trustees who have subjected their fellow fiduciaries to DOL lawsuits, investigations and negative monetary judgments. These fears are legitimate, and the requirements that trustees act as fiduciaries must be foremost in every trustee’s mind at every decision.

But ERISA does not require that trustees who are not investment professionals sit quietly through Board meetings. As this paper has outlined, ERISA certainly permits and in some cases requires that trustees “get into” the management of these funds. ERISA requires trustees to know where their fund’s money is invested and what that money is doing--how it is growing and what risks it is taking.

Trustees would be naive to think that if they do not ask in their Board meetings what their fund money is doing, that the money is not having collateral effects on the economy. All investments have effects. The companies, banks, and bonds that are publicly traded or privately held by institutional investors like pension funds are all using their capital. They are using their capital for whatever purpose their Board of Directors choose.

This paper suggests some concrete ways that trustees can ask for information, information that will allow them to better meet their fiduciary obligations, but also may help them find investments that have collateral effects that will build our local economies, create better jobs, and improve the lives of the fund participants and beneficiaries.

As the Supreme Court's Amax Coal (MK* add to the source list) decision made clear, trustees cannot sit on trust funds as "representatives" of the companies or unions that appoint or elect them to these trustee positions, they sit as fiduciaries to the plan participants and cannot have divided loyalties. But trustees are not dividing their loyalty when they consider investment strategies which will produce the highest returns because they are investments in high performance companies provide good jobs, that respect the environment and that make a firm commitment to their surrounding communities.

We hope that this legal analysis will encourage the trustees to explore their investment options, and to bravely become "capital stewards" because doing so will build the multi-employer pension funds to provide strong retirement programs for today's workers and will produce a stronger national economy.

APPENDIX A

Proxy Voting Guidelines

This appendix briefly outlines some of the sources of sample proxy voting guidelines. This appendix does not analyze the ERISA legality of any particular proxy voting guideline models, but does suggest some guidelines which have been employed successfully by multi-employer pension funds.

One example of trustees' efforts to establish proxy voting guidelines is the 1993 AFL-CIO document *Investing in Our Future: An AFL-CIO Guide to Pension Investment and Proxy Voting*. The Guidelines comprise a response to the increasing lack of governmental and private sector investment in infrastructure, low income housing, and jobs. The goal of the Guidelines is to help trade unionists understand the role that their pension fund investments play in current domestic and international investment trends. They also provide guidance in dealing with those broader capital flows. They were drafted specifically for the occasion when trustees delegate proxy voting authority to another voting fiduciary, whether an investment manager, custodial bank, or other registered investment advisor.

The Guidelines state the AFL-CIO's policy on the control and ownership of pension assets, and they provide criteria by which trustees may develop and evaluate investment guidelines. Those criteria include voting consistently with the economic best interests of plan participants and beneficiaries, especially in terms of long-term gains. They also include promoting responsible investing in health care, human rights, the environment, and international businesses with repercussions for domestic workers.

The proxy voting guidelines aid trustees covered by ERISA in meeting the fiduciary responsibility provisions of that act. The Guidelines also provide numerous examples of how union pension funds have taken lead roles in infrastructure development, corporate responsibility, and ETIs.

In a speech at the Asset-Managers' Conference, Ian Lanoff, former Administrator of the DOL's Pension and Welfare Benefit Program, encouraged the drafting of proxy voting guidelines, such as the AFL-CIO's. He maintains that such guidelines can promote shareholder democracy and change management control in such a way that the fiduciary is required to conduct in-depth analysis of incumbent management's plans and prospects. Lanoff adds that trustees should draft guidelines trustees that include an analysis of the underlying financial issues surrounding votes and tenders of shares.

APPENDIX B

Economically Targeted Investments

This appendix gives some examples of economically targeted investments utilized by public, multi-employer and single employer retirement funds. This appendix does not analyze the ERISA legality of any particular investment for a particular pension fund, but merely seeks to illustrate the investment and ancillary benefits that these investment vehicles have offered to the pension funds that have used them.

1. The Use of Debt Financing

In his *Report to the Infrastructure Investment Commission on Encouraging Pension Fund Investment in Infrastructure* (10/92), Fenn Putnam of Lehman Brothers argues that debt financing, rather than equity, is the appropriate investment vehicle for the use of pension funds in ETIs because of the risk-averse nature of beneficiaries and plan sponsors. In addition, debt financing allows competitive rates of return and ancillary benefits. One example of the successful use of debt financing for ETIs is New York City's ETI program. The program sets out to achieve the traditional goals of ETIs. It is designed to produce a competitive rate of return commensurate with risk, while at the same time creating collateral economic return benefits for a targeted geographic area, group of people, or sector of the economy.

The ETIs implemented in the program are all debt-based, and are protected by guarantees of government-backed securities, (FNMA, GNMA, SBA, SONYMA). The pension funds do not directly issue loans. For mortgages, banks make the mortgages and either sell them to the pension funds or convert them into FNMA or GNMA securities. The pension fund then buys the securities, thus guaranteeing the mortgages.

The program has been highly successful in helping small businesses grow in creating affordable housing. The New York City Comptroller General's office recently concluded that the beneficiaries of the New York City pension funds profit from the improved quality of life and stimulation of the city's economy (a collateral benefit from the investments). The funds also profit from the above-market growth achieved for the funds by the City's "carefully-planned targeted investment program." (*Bull's Eye: How Targeted Investments Can Enrich Pension Funds and Help New York's Economy Grow*, 7/92).

2. Investing in Jobs

ETIs have helped increase employment in various sectors of the economy. Examples include:

1) AFL-CIO Housing Investment Trust (HIT) and Building Investment Trust (BIT). HIT and BIT projects require the use of 100% union labor. Since 1964, the programs have invested over $1.3 billion in real estate projects, funded more than 33,000 housing units, and created more than 19,000 union jobs. They have further supported over 222,000 jobs in the building and construction trades, and nearly 510,000 jobs across all industries. The projects' annualized return since its inception is 7.8%

2) HIT and BIT were recently combined with the Department of Housing and Urban Development and Fannie Mae to form the National Partnership for Community Investment. Over the next five years, the Partnership expects to fund construction of up to 12,000 affordable housing units and 1 million square feet of commercial real estate. The Partnership predicts that this construction will create 20,000 new jobs in construction and related industries.

3) Union Labor Life Insurance Company (ULLICO) began its "J for Jobs" program in 1977. It has assets of $650 million. 157 pension funds invest in the program. For every one million dollars invested by the J for Jobs program, 32,000 hours of construction work are created. The $650 million invested in the program translates into the ability to keep over 1800 carpenters, bricklayers, electricians and other individuals in the construction trades working full time for five years. The Program had an annualized rate of return of 9.75% for the period ending June 30,

1994. It was rated one of the top performers in Pension & Investments' Performance Evaluation Report.

4) CIGNA America Fund, created in 1994, has invested over $60 million in enterprises supporting organized labor. Its goal is to generate a competitive rate of return to union pension plans, while also making loans supporting enterprises with a substantial unionized work force.

5) In his testimony before the Commission on Infrastructure Investment, 11/19/92, Thomas Donahue argues that for every 100 jobs created in the construction trade industry, 30 more are created as a result of a multiplier effect. Infrastructure investment of pension funds could have an even more powerful effect on the economy.

6) While some argue that hiring union labor in the construction field increases costs, studies have shown that the contrary is true. The higher rates of pay that union workers may receive is more than offset by the added productivity that they bring to a job, productivity that derives from their job training and experience. Increased pay, then, does not lead to higher construction costs. (Testimony of Jeffrey Petersen, Exhibit B in Plaintiff's Disclosure of Rebuttal Expert Witnesses, McMorgan & Company v. First California Mortgage Co.).

In addition, increasing the number of union workers on projects helps expand pension funds, thereby providing continually more generous pensions. According to Teresa Ghilarducci, a labor economist and professor of economics at the University of Notre Dame, funds that do not grow have an ever-increasing ratio of retirees to workers. The pension fund becomes increasingly dependent on income from finance markets and not on contributions and finance markets together. Since finance markets decline when unemployment falls and vice-versa, a well-diversified fund has income from both sources. It is irresponsible for a trustee to allow its funds to become top-heavy with retirees and depend on income flows from single sources.

Professor Ghilarducci concludes that widows and retirees have a vested interest in a growing pension fund, job creation in the industry, and an increasing number of participants.

(Testimony of Teresa Ghilarducci, Exhibit A in Plaintiff's Disclosure of Rebuttal Expert Witnesses, McMorgan & Company v. First California Mortgage Co.).

In another case involving McMorgan, Beutler Sheetmetal Works v. McMorgan, a California District Court held that contractual provisions conditioning mortgage financing of residential housing on the construction of the units by union craftspersons was not a per se violation of the Sherman Antitrust Act. However, the court was careful to distinguish the facts of Beutler from those of a similar case, Larry V. Muko v. Southwestern Pennsylvania Building and Construction Trades Council. In that case, the court found that the defendant corporation's active participation in formulating union-only contracting restrictions exposed it to antitrust liability. In Beutler, by contrast, neither the contractors nor lenders participated in formulating or implementing the trust fund restrictions regarding union-only labor. The trust fund, in association with McMorgan, had decided unilaterally to implement that restriction. The contractors and lenders could therefore not be liable for an antitrust violation.

7) Institutions have come to recognize the value of ETIs to promote jobs in the union sector. The leading example of such practices is the CalPERS Responsible Contractor Policy, adopted in June, 1994 (discussed above under IV (e), Shareholder Activism). The Policy's purpose is to support and encourage fair wages and fair benefits for workers employed by CalPERS' contractors and subcontractors. The Policy reflects CalPERS' support of union ideals, and it encourages the participation by labor unions and their signatory contractors in the development and management of CalPERS' real estate investments. The Policy also demonstrates CalPERS' belief that an adequately trained and compensated work force delivers higher quality products and service.

3. Investing in Low Income Housing

According to Jayne Zanglein, Professor of Law at Texas Tech University, real estate investments are considered ETIs if they create jobs that would otherwise not be created or if the investment targets a capital gap such as low income housing that would otherwise not be funded. The examples below show that pension fund investments in low income housing can yield competitive rates of return.

1) World Savings and the non-profit Bridge Housing Corporation, both of California, recently joined forces to form the World/Bridge Initiative. The Initiative will fund the construction of 4,000-5,000 very low, low and moderate income housing units over the next three years. Donald Terner, president of Bridge Housing, calls the project a "miracle." The Initiative has invested over $300 million in the project, $225 of which was invested by pension funds expecting a competitive rate of return. (See BUS. WIRE, March 14, 1994. Wells Fargo, Bank of America, and the Ford Foundation also invested in the Initiative.)

2) Congress created the Community Investment Demonstration Program in 1993. The Program offers incentives exclusively to pension fund investors to finance affordable multifamily rental or limited equity cooperative housing. Through the Program, pension funds can make loans subsidized by Section 8 rental income. The loans are later converted into Fannie Mae or Freddie Mac mortgage-backed securities. Coalitions between pensions, the federal government, and philanthropic funds allow pension funds to invest in affordable housing while still receiving a competitive rate of return.

3) New York City instituted an ETI program to support low income and affordable housing. The ETIs implemented in the program are protected by guarantees of government-backed securities, (FNMA, GNMA, SBA, SONYMA). The pension funds do not directly issue loans. For mortgages, banks make the mortgages and either sell them to the pension funds or convert them into FNMA or GNMA securities. The pension fund then buys the securities, thus guaranteeing the mortgages. The Comptroller's Office established guidelines requiring the pension funds to earn a market rate of return or higher. The Office concluded that the beneficiaries of the NYC pension funds profit from the improved quality of life and stimulation of the economy in NYC (a

collateral benefit from the investments). The funds also profit from the above-market growth achieved for the funds by the City's "carefully-planned targeted investment program." (*Bull's Eye: How Targeted Investments Can Enrich Pension Funds and Help New York's Economy Grow,* 7/92)

The DOL has indicated that the rate of return on an investment in low income housing must be consistent with the fair market rate for similar investments. In 1990 Elizabeth Dole, then Secretary of Labor, rejected an attempt by Jack Kemp, then Secretary of Housing and Urban Development, to seek approval for a plan to invest in low income housing that used Fannie Mae securities backed by insured mortgages priced to yield two percentage points below that available on conventional mortgage-backed securities. But assuming that the securities are “marking to market” they are entirely consistent with ERISA’s prudent fiduciary requirements.

4. Targeted CD's

According to Professor Zanglein, many funds in the construction industry have discovered that they can create union jobs and affordable housing with minimal risk by negotiating targeted certificates of deposit with local banks. Using targeted CDs as part of a diversified investment portfolio allows pension funds to take a more active role in their investment strategies. Some examples of this practice include:

1) In New York City, three employee benefit plans deposited more than $20 million in CD's at Brooklyn's Crosslands Savings Bank at competitive rates of return to create low risk affordable housing. The CD's financed 49 market-rate condos, 34 moderate income condos, 31 low-income, limited equity cooperative apartments ranging between $5,000 and $15,000. The State of New York Housing Trust Fund subsidized the low income housing units. The investment earned competitive rates of return for the CD's, and provided the union pension funds with collateral benefits in the form of jobs for their members and affordable housing.

2) Colorado has a program in which the State's pension puts assets into FDIC-insured CD's to provide small businesses with long-term fixed rate financing at a reasonable cost.

3) The Pennsylvania Treasury Department has created a linked deposit program to support economic development. The program's goal is to help create and retain jobs by placing deposits of Commonwealth funds in banks and savings & loan associations that will, in turn, make specific loans to new or expanding small businesses in Pennsylvania. Since its start, the program has created or saved over $12,000 jobs in Pennsylvania through investments in excess of $120 million.

4) In 1991, Pennsylvania implemented an "Invest in Pennsylvania" local bank program, designed to invest state retirement assets in Pennsylvania "Main Streets . . . instead of Wall Street." The program allows the state pension funds to purchase fully collateralized certificates of deposit from Pennsylvania banks. The one-year CD purchases provide funds to depositories to invest in job creation and retention in their communities. Over $100 million of pension fund assets have been invested into the program.

5. Investing in the High Performance Workplace

According to the AFL-CIO's *Capital Strategies*, pension fund shareholders are increasingly recognizing that when management relies on the knowledge and experience of its work force, and treats them with respect and dignity, the entire company prospers. Worker pension funds are increasingly promoting these high performance practices at U.S. companies through the shareholder process to improve returns on investments. (*Capital Strategies*, p. 24)

The AFL-CIO sets out concrete criteria for companies that invest in human capital: they emphasize long-term profits, not short term gains. They have long-term investment strategies. They invest in new technologies, research and development. They empower workers through high performance workplace practices (see discussion above under V. e), and they emphasize employer training. By contrast, companies not investing in human capital pursue short-term gain, engage in cost-slashing, reduce wages, downsize, limit research and development, and maintain old organizational structures. (*Capital Strategies*, p. 24)

Some examples of successful endeavors to invest in human capital include:

1) The IAM's "High Performance Work Organization" Program. The Program promotes labor-management partnership as a means of securing employment. It has allowed machinists to participate in developing long-term business growth plans. It also permits the union to share in decisions regarding outsourcing. Since its inception in 1986, the Program has been essential in saving jobs at such companies at Harley-Davidson, Bath Iron Works, USAir, and Air Canada.

2) In 1992, IUE Local 106 and Lockheed Martin agreed that if labor and management could work together to reduce costs through improved production systems, the company would end its plans to outsource production. Since striking the deal, productivity has vastly improved, and management has upheld its end of the bargain by halting its outsourcing practices.

3) Several years ago, the City of Berkeley, California, began to "reinvent" government by downsizing and union-bashing. A union coalition offered an alternative budget to the city, developed with input from city employees. As a result, no layoffs occurred, and the city council directed the city manager to avoid using layoffs and contracting out in future budgets. SEIU Local 535 reports that the coalition then helped create three labor-management committees to address the budget, job training and workplace practices. The committees are currently developing programs to promote a customer-oriented government that meets the needs of the citizens, provides management with highly trained employees, and gives workers the type of work environment they deserve.

A recent CalPERS study shows that high performance workplace practices can lead to improved long-term financial performance. Investing in companies that pursue such practices may benefit large indexed investors such as CalPERS. CalPERS' conclusion prompted Secretary of Labor Robert Reich, social investing research firm chair Steven Lydenberg, and Milton Moskowitz, coauthor of *The 100 Best Companies to Work for in America*, to determine whether an evaluation of a company's workplace practices should play a role in the decision whether to invest in that company. They concluded that such an evaluation should play a major role in making that decision. (*Business and Society Review,* Fall 1994, No. 91, pp. 6-14).

6. Investing In Human Rights and the Environment

Pension fund trustees have played active roles in directing their portfolios away from investments in politically, socially or environmentally destructive plans.

1) In the 1980s, several unions, including the UAW, stipulated that its pension fund trustees could not invest in South African companies that continue racially discriminatory practices. Ian Lanoff, speaking for the DOL, held that the UAW requirement did not violate any of ERISA's provision.

2) A coalition of unions, including AFSCME, OCAW, SEIU, the Mineworkers, the Carpenters, and the Teamsters challenged Chevron and Mobil on their activities in Nigeria. Pension funds covering union members have raised issues of labor and human rights violations, and environmental dangers that the companies may be supporting through their operations in that country. (*Capital Strategies*, p. 15)

3) The International Association of Machinists and Aerospace Workers in California was instrumental in the creation of CALSTART, a nonprofit consortium of public and private interested committed to developing an advanced transportation industry out of the state's crumbling defense industry. In the summer of 1995, the group announced the creation of the Amerigon electric car manufacturing facility, to be located on a former naval air station in Oakland. Designed to capitalize on California's clean air regulations, the facility will require

skilled machinists. The IAM is cooperating to create a high-performance work organization at the facility. (*Capital Strategies*, p. 15).

7. Pooling Your Investments

Pooled real estate accounts are the simplest forms of ETIs available to the investor. They provide liquid, diversified investments with certain guaranteed returns and subsidies.
Examples of pooled investments include:

1) AFL-CIO's HIT and BIT, which require the use of 100% union labor. Since 1964, the programs have invested over $1.3 billion in real estate projects, funded more than 33,000 housing units, and created more than 19,000 union jobs. They have further supported over 222,000 jobs in the building and construction trades, and nearly 510,000 jobs across all industries. The projects' annualized return since its inception is 7.8%

2) Multi-Employer Property Trust, a union-oriented real estate fund founded in 1982, currently has assets of $1.15 billion and 95 participating plans. The Trust invests in 100% union-built construction. It has created over 12 million hours of new work for building trades members across the U.S. Its portfolios contain 82 properties in 23 markets across the U.S., and its portfolio is 97 percent leased. The Trust targets its investments where participating pension plans are located. 107 pension plans invest in the Trust, and its fifteen-year track record is one of the best in American real estate. Its 5.6% annualized rate of return over the five year period ending on September 30, 1993, made it one of the top performing open-end pooled real estate equity funds.

3) ULLICO's J for Jobs Program, which has assets of $650 million. 157 pension funds invest in the program. For every one million dollars invested by the J for Jobs program, 32,000 hours of construction work are created. The $650 million invested in the program translates into the ability to keep over 1800 carpenters, bricklayers, electricians and other individuals in the construction trades working full time for five years. The Program had an annualized rate of return

of 9.75% for the period ending June 30, 1994. It was rated one of the top performers in Pension & Investments' Performance Evaluation Report.

4) Prudential Realty Group's Union Mortgage Account, which is an open-end commingled account that invests primarily in fixed-rate mortgages and construction loans on properties to be built or substantially renovated by contractors employing 100% union labor. Its annualized return for the three year period ending March 31, 1993 was 10.1 percent.

5) CIGNA America Fund is a recent player on the pooled account stage. Created in 1994, it has invested over $60 million in enterprises that support organized labor. Its goal is to generate a competitive rate of return to union pension plans, while also making loans supporting enterprises with a substantial unionized work force.

Under ERISAâ€™s statutory scheme, there are three categories of plaintiffs who have standing to sue plan trustees for breach of fiduciary duty: (i) the U.S. Department of Labor (DOL); (ii) participants and beneficiaries of the plan; and (iii) co-fiduciaries of the plan. See 29 U.S.C. Â§ 1132(a)(2); ERISA Â§ 502(a)(2). Rare is the case when trustees are settling a lawsuit in which all three categories are the plaintiffs.Â In some instances, the trustees can gain comfort from a potential statute of limitations defense. Absent allegations of fraud or concealment, which will extend the limitations period, ERISA breach of fiduciary duty claims will expire on the earlier of three years from when a plaintiff has actual knowledge of the claim or six years from when the claim accrued. ERISA'S FIVE REQUIREMENTS ERISA contains five primary requirements for pension fund fiduciaries. Trustees can monitor their investment managers, be active shareholders, pool and target investments, as long as they meet those five provisions. A. Sole Interest Requirement: A fiduciary must discharge his duties solely in the interests of the plan participants and beneficiaries.Â The plan document provision of ERISA (described above under II.E) requires that trustees provide plan documents governing investment decisions. According to ERISA 404(a)(1)(D), a fiduciary must discharge his duties in accordance with the documents and instruments governing the plan insofar as the documents and instruments are consistent with the provisions of ERISA and Title IV.