



July 15, 2004

The Honorable Ann L. Combs
Assistant Secretary
Employee Benefits Security Administration
U. S. Department of Labor
Room S2524
200 Constitution Avenue, NW
Washington, DC 20210

Dear Ann:

The American Benefits Council (the Council) understands the Department of Labor (DOL) is considering issuing guidance on the fiduciary standards applicable to directed trustees of qualified retirement plans. Specifically, we understand that both Groom Law Group, on behalf of several clients, and the American Bankers Association have requested clarification of the "know or should know" standard previously articulated by the DOL as it applies to directed trustees when acquiring and holding company stock in a qualified plan.

As you know, the American Benefits Council is a public policy organization representing companies that sponsor retirement and health plans as well as companies that provide services to those plans. Collectively, the Council's members help provide benefits to more than 100 million participants. Therefore, the Council believes we can provide a unique and important perspective on this issue.

The DOL has stated its view, in the context of recent company stock litigation, that a directed trustee may follow the direction of a named fiduciary unless the directed trustee "knows or should know" that the direction to acquire company stock is contrary to ERISA. Without clarification, we are concerned that the "should know" standard could be read to require directed trustees to continually provide prudence reviews and second-guess every instruction received from the named fiduciary regarding company stock or other plan investments. The Council supports the advisory opinion request and believes the DOL should clarify the "knows or should know" standard.

The Council's plan sponsor members (who are often the named fiduciary of their respective plans) believe that a standard that requires continuous prudence evaluations by directed trustees is not in the interest of plans or participants. Not only would this standard require duplicative efforts by the named fiduciary and the directed trustee, it could also deadlock investment decisions. In addition, such a standard could result in significantly increased directed trustee fees (which often get passed along to plan

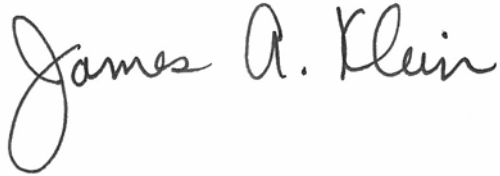
participants) as well as an increase in the number of trustees that will be unwilling to serve in that capacity when employer stock is an investment option and perhaps preferring, instead, to serve as a custodian. Council members believe strongly that a directed trustee should have no duty to act on publicly available information. In an efficient market, public information is already reflected in the price of the stock. Having the directed trustee second guess the named fiduciary's decision to keep the stock as a plan investment is unnecessary in this circumstance. The named fiduciary's decision to keep the plan investment and the participant's decision to invest in the stock, or maintain their investment in the stock, is made with that same knowledge by a person who is better positioned to make an informed judgment regarding the stock.

If a person serving in her or his capacity as a directed trustee becomes aware of non-public information that is credible and could have a material effect on the value of the company stock, at most the directed trustee should only have a duty to notify the named fiduciary and request that the fiduciary consider whether its instructions regarding company stock continue to be proper under ERISA.¹ If the directed trustee's duty extends beyond notification, it will likely result in adverse consequences for plans and plan participants. As previously indicated, named fiduciaries and directed trustees could become deadlocked over an investment decision. In addition, fees paid to directed trustees could increase considerably (resulting in more costs paid by the plan which are passed along to plan participants) and/or more directed trustees may refuse to take on the directed trustee role. This would likely result in more sponsoring company officials being compelled to assume the position of directed trustee although they may have little or no knowledge of ERISA.

¹ It should be noted that many directed trustees are heavily regulated entities subject to strict requirements that prohibit one area of the company from sharing inside knowledge with another area.

We appreciate the opportunity to provide our views on this matter as you consider providing additional guidance. If we can be of further assistance, please feel free to call me or have your staff contact Jan Jacobson, director, retirement policy, at 202-289-6700.

Sincerely,

A handwritten signature in black ink that reads "James A. Klein". The signature is written in a cursive style with a large, looping initial "J".

James A. Klein
President

cc: Robert J. Doyle
Lisa J. Bleier
Stephen M. Saxon
Jon W. Breyfogle