U.S. Department of Labor

Assistant Secretary for
Employee Benefits Security Administration
Washington, D.C. 20210

AUG 9 - 2012

The Honorable Edward J. Markey
U.S. House of Representatives
Washington, DC 20515

Dear Congressman Markey:

Thank you for your letter concerning investment by pension plans in commodity index funds. Specifically, your letter states that you are concerned about the security of long-term investments in such funds for participants and retirees and the role such investments play in speculation in oil markets. You have asked for the Department of Labor's view on this matter and for specific information to better understand pension plan investments in commodity index funds and requirements relating to investments in them under the Employee Retirement Income Security Act of 1974 (ERISA).

The Department's Employee Benefits Security Administration is responsible for interpreting and enforcing Title I of ERISA. ERISA establishes standards of conduct for plan fiduciaries who are responsible for the administration and management of private employee benefit plans. Fiduciaries must invest pension assets solely in the interest of participants and beneficiaries, prudently, and by diversifying plan investments so as to minimize the risk of large losses (unless clearly prudent not to do so). Fiduciaries are personally liable for any losses resulting from a breach of these duties. ERISA provides an appropriate framework for fiduciary plan investment decisions and the Department would be concerned about policies that could interfere with its application such as by restricting plan investment choices.

In making investment decisions, plan fiduciaries must take into account all relevant information relating to the plan and plan investments. Within this framework, it is possible that commodity index funds may form part of a prudent and diversified portfolio. In any case, it is the responsibility of plan fiduciaries to gather and consider information necessary to determine the prudence of holding any particular investment. In determining whether to invest in a commodity index fund, fiduciaries must evaluate such funds and determine whether to make such an investment in preference to other investments. This should generally include an appropriate evaluation of anticipated performance, including risk, of such a potential plan investment, as compared with others. ERISA fiduciaries are not required to consider how their investment strategies may impact the general public or economy – their fiduciary duties run exclusively to their participants and beneficiaries.

You ask four specific questions concerning plan investments in commodity index funds.

First, you inquire whether the Department of Labor reviewed pension plan investments in commodity index funds and the circumstances under which it might require additional guidance to plan fiduciaries and under which it might constitute a violation of ERISA.

The Department has not yet conducted a review of plan investments focused on commodity index funds with a view to developing guidance or enforcement policies, but we appreciate receiving the information in your letter and will consider whether such a review would be advisable. Meanwhile, we believe that our 1996 letter on derivatives, which you cited, gives plan fiduciaries useful information on how ERISA's fiduciary rules apply to such investments. Although the nature of these funds may require a higher level of expertise on the part of plan fiduciaries than many other investments, the need for plan fiduciaries to understand the role that an investment option plays in the plan portfolio, as explained in the Department's regulation on investment duties, 29 C.F.R. § 2550.404a-1, would still apply.

Second, you ask if any of the ten largest private pension plans have 1% or more of their assets invested in or benchmarked to commodity index funds.

We have examined the ten defined benefit pension plans with the largest assets. The Western Conference of Teamsters Pension Plan has approximately 1.6% of its total assets invested in commodity funds that were benchmarked to commodity index funds.[1] Lockheed Martin Corporation Salaried Employee Retirement Program invests through a master trust and has more than 5% of its total assets invested in commodities, but it is unclear to what degree those are invested in index funds or funds benchmarked to index funds.[2] We are not aware of other plans that have at least 1% of their total assets invested in or benchmarked to commodity index funds. There may well be other investments in these types of funds held by these two plans or by other plans through a trust or other similar vehicles. Many of the largest pension plans invest some, or even the vast majority of their assets through a master trust, a common/collective trust, or similar investment vehicles. Information on how much of the investments the pension plans hold through these trusts or other similar vehicles are invested in or benchmarked to commodity index funds is generally not readily available. While each of these trusts files its own Form 5500, in the same manner as many pension plans, information about investments in commodities only appears on an attachment to the Form 5500's Schedule H. That attachment is not subject to data capture, because it is not currently submitted or processed in a form that facilitates such capture. For each trust, one would need to search through many pages of information, often by hand. Some trusts invest in other trusts, creating another layer of filings that would need to be reviewed.

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[1] Form 5500 filing for 2010 for the Western Conference of Teamsters Pension Plan. As of December 31, 2010 there were $370,064,673 invested in the Schroder Commodity Portfolio and $191,453,488 in Onshore Gresham A+ Fund; total assets were $35,680,377,056.

[2] Form 5500 filing for 2010 for Lockheed Martin Corporation Salaried Employee Retirement Program. As of December 31, 2010 there were $1,193,972,000 invested in commodities through a master trust; total assets were $22,671,488,086.

Third, you ask what information the Department has about the nature and size of private pension plan investments in commodity index funds.

It is difficult for us to describe the nature and size of defined benefit pension plan investments because many of the assets are invested through trusts or other similar vehicles, as described above. Even when a plan is directly invested in a commodity index fund or a fund benchmarked to a commodity index, that information is only listed on an attachment to the plan's Form 5500 filing. As previously noted, this attachment is not subject to data capture. For the ten largest plans, we reviewed the attachment by hand, but given that we have not done this for a larger number of plans, it would not be possible for us to quantify or estimate the extent of these types of investments on a wider scale.

Fourth, you ask what information the Department has regarding the nature and size of investment in commodity index funds by non-ERISA pension plans.

We do not track information on the investments of non-ERISA plans. Therefore, we do not have any information on non-ERISA pension plans beyond what has been published in the press and in the academic literature.

We appreciate your interest in these important issues and look forward to working with you to improve the retirement security of America's workers.

Sincerely,

Phyllis C Borzi

Phyllis C. Borzi
Assistant Secretary, Employee Benefits Security Administration