

PWBA Office of Regulations and Interpretations

Advisory Opinion

May 28, 1998

William M. Tartikoff
Senior Vice President and
General Counsel
Calvert Group Ltd.
4550 Montgomery Avenue
Bethesda, Maryland 20814

98-04A
ERISA SEC.
404(c)

Dear Mr. Tartikoff:

This is in response to your request, on behalf of the Calvert Group, Ltd., for an advisory opinion concerning the application of the fiduciary responsibility rules of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"). Specifically, you have requested the Department's views concerning whether a plan fiduciary's selection of a "socially- responsible fund" as a plan investment or a designated investment alternative for a section 404(c) plan would, in itself, violate the general fiduciary duties and responsibilities of sections 403(c) and 404(a)(1) of ERISA.

A "socially-responsible fund", as described in your letter, is a mutual fund registered with the Securities and Exchange Commission under the Investment Company Act of 1940 and, as such, is subject to the Act and the rules and regulations thereunder. You represent that such funds are designed to achieve a defined investment goal through the use of traditional investment processes and, in addition, by investing in enterprises that the fund managers believe make a significant contribution to society through their products and services and the way they do business. In this regard, you indicate that potential investments are first screened for their financial soundness and, after the financial screening is complete, the investments are evaluated according to the particular fund's social criteria. Evaluation of social criteria may include considering such facts as the effect of a company's products and services on the natural environment, whether the company being invested in is managed with participation of its employees, whether the company negotiates fairly with its workers and provides a good working environment, and whether the company fosters a commitment to human goals such as creativity and productivity. Managers of "socially-responsible" funds also may engage in pro-active dialogues with the management of portfolio holdings on social issues or submit proxy proposals. These policies and criteria are described in the fund's prospectus.

You represent that the social criteria vary from fund to fund, and that, as with any mutual fund, performance is evaluated using standard market indices. The relevant benchmarks are described in the annual reports of the funds sent to shareholders, thereby allowing the shareholders to evaluate fund performance against the same measures used for funds that do not employ social screens.

Sections 403(c) and 404(a)(1) of ERISA require, among other things, that a plan fiduciary act prudently, solely in the interest of the plan's participants and beneficiaries and for the exclusive purpose of providing benefits to their participants and beneficiaries. These fiduciary standards apply to the selection and monitoring of both plan investments and designated investment alternatives in a participant directed individual account plan.¹

The Department has expressed the view that the fiduciary standards of sections 403 and 404 do not preclude consideration of collateral benefits, such as those offered by a "socially-responsible" fund, in a fiduciary's evaluation of a particular investment opportunity. However, the existence of such collateral benefits may be decisive only if the fiduciary determines that the investment offering the collateral benefits is expected to provide an investment return commensurate to alternative investments having similar risks. In this regard, the Department has construed the requirements that a fiduciary act solely in the interest of, and for the exclusive purpose of providing benefits to participants and beneficiaries, as prohibiting a fiduciary from subordinating the interests of participants and beneficiaries in their retirement income to unrelated objectives. In other words, in deciding whether and to what extent to invest in a particular investment, or to make a particular fund available as a designated investment alternative, a fiduciary must ordinarily consider only factors relating to the interests of plan participants and beneficiaries in their retirement income. A decision to make an investment, or to designate an investment alternative, may not be influenced by non-economic factors unless the investment ultimately chosen for the plan, when judged solely on the basis of its economic value, would be equal to or superior to alternative available investments.²

In discharging investment duties, it is the view of the Department that fiduciaries must, among other things, consider the role the particular investment or investment course of action in the plan's investment portfolio, taking into account such factors as diversification, liquidity, and risk/return characteristics. Because every investment necessarily causes a plan to forgo other investment opportunities, fiduciaries also must consider expected return on alternative investments with similar risks available to the plan.³

Your letter requests guidance concerning the application of the above standards to a plan fiduciary's selection of a "socially-responsible" mutual fund as a plan investment or as a designated investment alternative for an ERISA section 404(c) plan.

With regard to your request, it is the view of the Department that the same standards set forth in sections 403 and 404 of ERISA governing a fiduciary's investment decisions, discussed above, apply to a fiduciary's selection of a "socially-responsible" mutual fund as a plan investment or, in the case of an ERISA section 404(c) plan, a designated

investment alternative under the plan. Accordingly, if the above requirements are met, the selection of a "socially- responsible" mutual fund as either a plan investment or a designated investment alternative for an ERISA section 404(c) plan would not, in itself, be inconsistent with the fiduciary standards set forth in sections 403(c) and 404(a)(1) of ERISA.

In issuing this opinion, the Department is not expressing any view as to the appropriateness of any particular fund or investment alternative. Whether a particular fund or investment alternative satisfies the requirements set forth in sections 403 and 404 of ERISA is an inherently factual question, and the Department generally will not issue opinions on such questions. The appropriate plan fiduciaries must make this determination, based on all the facts and circumstances of the individual situation.

This letter constitutes an advisory opinion under [ERISA Procedure 76-1](#), 41 Fed. Reg. 36281 (1976). Accordingly, this letter is issued subject to the provisions of that procedure, including section 10 thereof, relating to the effect of advisory opinions.

Sincerely,

Robert J. Doyle, Director
Office of Regulations and
Interpretations

¹In connection with the publication of the final rule regarding participant directed individual account plans, the Department emphasized that the act of designating investment alternatives in an ERISA section 404(c) plan is a fiduciary function to which the limitation on liability provided by section 404(c) is not applicable. 57 Fed. Reg. 46922 (October 13, 1992).

²*See*, letters from the Department of Labor to Theodore Groom (January 16, 1981); to William Chadwick (January 21, 1982); Ralph Katz (March 15, 1982 and October 23, 1985); James S. Ray (July 8, 1988); to Stuart Cohen (May 14, 1993); and Advisory Opinions Nos. 85- 36A and 88-16A. *Also see* [29 CFR §2509.94-1](#).

³ *See* [29 CFR §§2550.404a-1](#) and 2509.94-1.