

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO

Civil Action No. **04-cv-02042-LTB-OES**

NELSON B. PHELPS,

Plaintiff,

vs.

QWEST EMPLOYEES BENEFIT COMMITTEE,

Defendant.

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**PLAINTIFF'S BRIEF IN OPPOSITION TO [Docket No. 11]  
Defendant's MOTION FOR SUMMARY JUDGMENT**

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Counsel for Plaintiff NELSON B. PHELPS submits PHELPS's brief in opposition to Defendant's Rule 56 Motion for Summary Judgment filed on August 5, 2005. In its opening brief, Defendant begins by stating, "[t]his case involves one very narrow and technical question: Is Qwest required to provide certain documents to Plaintiff pursuant to § 104(b)(4) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001, *et seq.* ("ERISA")? The answer is "yes." Therefore, Plaintiff's case should not be dismissed as a matter of law.

**I. PRELIMINARY STATEMENT**

PHELPS incorporates herein all of the allegations, claims and requested relief set forth in the Complaint. He is a participant in both the Qwest Pension Plan and Qwest Health Care Plan. In this civil action, PHELPS asserts two claims for relief based upon ERISA Section 502(c)(1)(B), 29 U.S.C. § 1132(c)(1)(B), which section provides for penalties of up to \$110 a day against a plan administrator personally for the administrator's 'failure or refusal' to provide

any of the plan documents the administrator is required by law to provide to participants and beneficiaries. PHELPS made written demand for copies of: 1) investment policies and guidelines for the Qwest Pension Plan; and 2) proxy voting policies for both the Qwest Pension Plan and the Qwest Health Care Plan. Defendant, the named plan administrator for both plans, refused to provide PHELPS the requested documents.

PHELPS, by and through the undersigned counsel, faxed and regular mailed a letter to Defendant, in which letter PHELPS made a request for a copy of:

“Qwest Pension Plan **investment policy guidelines** or blueprint used in the design and implementation of Qwest Pension Plan investment program in effect during year 2001. . We would expect the policy to outline the Qwest Pension Plan's principle objectives and the procedures to be utilized in making and documenting investment decisions. What protocol was used for making a determination concerning the suitability of the Plan's investment in the short term put options? Surely, there were written guidelines that the Qwest Asset Management team had to follow for such a peculiar investment alternative. Mr. Phelps wishes to know the investment policy criteria against which the propriety of the put options investment was determined and approved.”<sup>1</sup>

PHELPS wished to know the investment policy criteria against which the propriety of a \$67 million put options investment was determined and approved. By letter dated February 13, 2004, Defendant refused PHELPS's request stating, “*we decline to provide [the requested investment policy guidelines] at this time.*” To date, Defendant has refused to provide PHELPS the requested documents.

Likewise, PHELPS made a written request for the trust proxy voting guidelines, all amendments, revisions and successor documents. By letter dated May 10, 2004, Defendant again refused PHELPS's request stating, QWEST “*declines to provide the documents to you at*

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<sup>1</sup> It is undisputed that the demand letters and response letters are fully reproduced and set forth in the text of the Complaint.

*this time.*” To date, Defendant has refused to provide PHELPS the requested documents.

ERISA Section 104(b)(4), 29 U.S.C. § 1024(b)(4), requires Defendant, as Plan Administrator, to honor within 30 days a written request of any participant or beneficiary for a copy of any “instrument under which the [employee benefit plan and trust] is established or operated.” It is PHELPS’s contention that Defendant did not comply with this ERISA requirement. PHELPS contends that each requested documents is an “instrument” under which the plans are “established or operated,” within the meaning of ERISA Section 104(b)(4).

In his first claim for relief, PHELPS seeks a judgment, pursuant to ERISA Section 502(c)(1)(B), 29 U.S.C. § 1132(c)(1)(B), assessing penalties against Defendant based upon the maximum \$110 per diem rate for failure to comply within 30 days after PHELPS’s January 9, 2004 written demand for a copy of the Qwest Pension Plan investment policy guidelines.

In his second claim for relief, PHELPS seeks a judgment, pursuant to ERISA Section 502(c)(1)(B), 29 U.S.C. § 1132(c)(1)(B), assessing penalties against Defendant based upon the maximum \$110 per diem rate for failure to comply within 30 days after PHELPS’s April 22, 2004 written demand for a copy of the pension plan and health care plan investment proxy policies.

**II. STATEMENT OF AGREED UNDISPUTED FACTS** In the February 3, 2005 Scheduling Order (Docket No. 6), the parties agreed the following facts are undisputed:

1. PHELPS was formerly employed as a management employee of U S WEST, Inc. He retired from U S WEST, Inc. effective February 28, 1990.
2. PHELPS is a “participant,” as defined by ERISA § 3(7), 29 U.S.C. § 1002(7), of the Qwest Pension Plan and he receives a service pension in the form of a monthly annuity.

3. PHELPS is also a “participant,” as defined by ERISA § 3(7), 29 U.S.C. § 1002(7), of the Qwest Health Care Plan and he receives lifetime medical benefits coverage.

4. The Qwest Pension Plan (“PENSION PLAN”) is an “employee pension benefit plan,” pursuant to ERISA Section 3(2)(A), 29 U.S.C. § 1002(2)(A).

6. The Qwest Health Care Plan (“HEALTH PLAN”) is an “employee welfare benefit plan,” pursuant to ERISA Section 3(1), 29 U.S.C. § 1002(1).

7. Defendant QWEST EMPLOYEES’ BENEFIT COMMITTEE (EBC) is, pursuant to ERISA §§ 3(21) and 3(16), 29 U.S.C. §§ 1002(21) and 1002(16), the named “fiduciary” and “administrator” of both the PENSION PLAN and HEALTH PLAN.<sup>2</sup> Defendant is comprised of at least one person, but not more than seven persons. Defendant’s principle place of business is Denver, Colorado. Qwest Communications International, Inc., the sponsor of both the PENSION PLAN and the HEALTH PLAN, appoints the EBC. The EBC has been designated certain fiduciary and administrative functions.

8. Defendant received the two letters from PHELPS or his counsel which letters are reproduced in full in paragraphs 14 and 17 of the Complaint.

9. Defendant’s representative Attorney Felicity O’Herron sent PHELPS and his counsel the letter that is reproduced in full in paragraph 15 of the Complaint.

10. Defendant received the letter from PHELPS or his counsel which letter is reproduced in full in paragraph 17 of the Complaint.

11. Defendant’s representatives Attorney Karen DuWaldt and Attorney Cynthia

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<sup>2</sup> The Qwest Pension Plan at Section 1.56 identifies the “Plan Administrator” to be the “Committee.” Section 1.54 explains “Committee” means the [Qwest] Employee Benefits Committee, the Defendant herein. (See Defendant’s **Exhibit B**).

Delaney sent PHELPS's counsel the letter that is reproduced in full in paragraph 18 of the Complaint.

12. Defendant received the email that is reproduced in full in paragraph 19 of the Complaint.

13. Defendant received the letter that is reproduced in full in paragraph 22 of the Complaint.

14. Defendant's representative Attorney Cynthia Delaney sent PHELPS's counsel the letter that is reproduced in full in paragraph 24 of the Complaint.

### **III. RESPONSE TO DEFENDANTS' STATEMENT OF "RELEVANT FACTS."**

Pursuant to Rule 56.1A of the Local Rules of Practice, PHELPS states the following response corresponding to Defendant's list set forth in ¶s 1-17 on pages 1-6 of Defendant's Brief, Section II entitled "RELEVANT FACTS:"

1-17. Admitted as to facts stated by Defendant, but not the stated arguments.

Furthermore, to the extent the facts are summaries of the parties' correspondence, PHELPS objects on the grounds the documents speak for themselves and the text of each of those letters is fully reproduced in the Complaint.

### **IV. PLAINTIFF'S STATEMENT OF ADDITIONAL UNDISPUTED MATERIAL**

**FACTS."** PHELPS states additional undisputed material facts which **undercut** Defendant's arguments for a summary judgment.

1. PHELPS is the Executive Director of a non-profit retiree organization called "Association of U S WEST Retirees" ("AUSWR"), which membership includes over 20,000

retiree participants in the Qwest Pension Plan. <sup>3</sup> (**Exhibit 1**, Phelps Aff. ¶ 2).

2. In late August 2003, PHELPS first learned that Qwest Pension Plan fiduciaries had made what he considered to be a highly risky unusual \$67 million investment in “put options” which investment lost over \$66 million in less than two months during late 2001. (*Id.*, Phelps Aff. ¶ 4). PHELPS was asked by the AUSWR organization to seek information and documents about this investment from the fiduciaries of the Qwest Pension Plan. (*Id.*) Starting in August 2003 and continuing into January 2004, PHELPS made written inquiries, through his counsel, sent to agents and attorneys for Defendant Qwest Employee Benefits Committee. (*Id.*).

3. All of the written communications concerning PHELPS’s request for pension plan documents and the subject matter of this civil action are accurately reproduced and set forth in the Complaint filed herein. (*Id.*, Phelps Aff. ¶ 5).

4. By letter dated February 13, 2004, Defendant Qwest Employee Benefits Committee refused PHELPS’s request stating, “we decline to provide [the requested investment policy guidelines] at this time. To date, Defendant has refused to provide PHELPS the requested documents. (*Id.*, Phelps Aff. ¶ 6).

5. By letter dated May 10, 2004, Defendant Qwest Employee Benefits Committee refused PHELPS’s request for documents concerning proxy voting stating, Qwest “declines to provide the documents to you at this time.” To date, Defendant has refused to provide PHELPS the requested documents. (*Id.*, Phelps Aff. ¶ 7).

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<sup>3</sup> The official website for the Association of U S WEST Retirees ([www.uswestretiree.org](http://www.uswestretiree.org)) reports that it is the umbrella organization of six separate retiree groups within the former U S WEST area consisting of fourteen states. The umbrella organization was formed in August 1999. The Board of directors of AUSWR consists of leaders from each of the six retiree organizations. AUSWR states: “**Our purpose is to protect and enhance the benefits and related interests of U S WEST retirees.**”

6. Defendant Qwest Employee Benefits Committee's refusal to provide PHELPS the requested documents has thwarted and, otherwise completely undermined, both his and the AUSWR organization's efforts and intentions to police their Qwest Pension Plan and to determine whether there has been any breaches of fiduciary duty. (Id., Phelps Aff. ¶ 8).

7. During formal discovery in this civil action, PHELPS served upon Defendant Qwest Employee Benefits Committee a document request for the very documents Defendant previously refused to provide PHELPS before his Complaint was filed. (Id., Phelps Aff. ¶ 9). Defendant fully refused to comply with PHELPS's request for production of documents. (Id.).

8. Since Defendant Qwest Employee Benefits Committee has neither made sufficient voluntary disclosures in this case nor complied with any of my formal document discovery requests, PHELPS cannot present necessary evidence about the specifics of the undisclosed documents that he had requested. (Id., Phelps Aff. ¶ 10).

## V. ARGUMENT.

### A. Defendant Was Required to Produce to PHELPS the Requested Investment Policy Guidelines.

PHELPS claims Defendant violated ERISA Section 104(b)(4), 29 U.S.C. § 1024(b)(4), which federal law provides in pertinent part:

**“The administrator shall upon written request of any participant or beneficiary, furnish a copy of the latest updated summary plan description, and the latest annual report, any terminal report, the bargaining agreement, trust agreement, contract, or other instruments under which the plan is established or operated.”** (emphasis added).

PHELPS agrees with Defendant's argument on page 7 of Defendant's brief stating that “the documents contemplated by § 104(b)(4) are those that allow ‘the individual participant [to] know

[] exactly. . who are the persons to whom the management and investment of his plan funds have been entrusted.” *Hughes Salaried Retirees Action Comm. v. Adm’r of the Hughes Non-Bargaining Ret. Plan*, 72 F.3d 686, 689 (9<sup>th</sup> Cir. 1995) (quoting S. Rep. No. 127, 93<sup>rd</sup> Cong., 2d Sess. (1974), reprinted in 1974 U.S.C.C.A.N. 4838, 4863). The Supreme Court has said that “it could be argued that. . .[a fiduciary] is obligated to disclose characteristics of the plan and of those who provide services to a plan, if that information affects beneficiaries’ material interests.” *Pegram v. Herdrich*, 120 S.Ct. 2143, 2154 n. 8 (2000).

Defendant admits that there are several investment guidelines issued to the Qwest Asset Management Company and several Investment Managers charged with specific responsibility for certain investment portfolios. (See Defendant’s “Relevant Facts” ¶11).<sup>4</sup> The information requested by PHELPS would have told him what the investment instructions were and would have identified the specific investment managers, the very information Defendant admits ERISA § 104(b)(4) intends should be disclosed to a requesting plan participant.

Defendant cannot hide behind the fact that there are several investment guidelines, as opposed to a single investment policy or single investment guideline. When PHELPS made his January 2004 written request, he clearly stated he wanted the “Qwest Pension Plan **investment policy guidelines** or blueprint used in the design and implementation of Qwest Pension Plan investment program in effect during year 2001.” He further asked:

“What **protocol** was used for making a determination concerning the suitability of the Plan’s investment in the [October 2001] short term put options? Surely, there were written guidelines that the Qwest Asset Management team had to

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<sup>4</sup> See also Exhibit 2 filed herewith, a “Document Log” prepared by Defendant for its initial disclosure statement, reporting that “[e]ach individual Investment Manager managing a portfolio or account that is part of the Qwest Pension Trust is subject to investment guidelines that related solely to that specific Investment Manager and a specific portfolio.”

follow for such a peculiar investment alternative. Mr. Phelps wishes to know the investment policy criteria against which the propriety of the put options investment was determined and approved.”

(See Complaint at ¶ 17). PHELPS was not asking too much. It was unreasonable for Defendant to fully deny his request and, now, feign that Defendant did not know which particular investment guideline or policy PHELPS was requesting be produced.

It was no secret to Defendant that PHELPS was seeking the information for the benefit of thousands of plan participants who are members of the Association of U S WEST Retirees (AUSWR). PHELPS disclosed that fact in his demand letters to Defendant’s cadre of agents and lawyers. In making his request, PHELPS was trying to help himself and his 20,000 member retiree organization police his pension plan, which conduct is exactly what ERISA contemplates. ERISA seeks “to safeguard the well-being and security of working men and women and to apprise them of their rights and obligations under any employee benefit plan.” *Donovan v. Dillingham*, 688 F.2d 1367, 1372 (11th Cir. 1982). The evils against which ERISA was enacted to guard against are insecurity, lack of knowledge, and inability to police plan administration. Defendant’s refusal to produce the very documents which governed the investment operations of the pension plan was done solely to thwart and severely prejudice PHELPS’s effort to police his pension plan and, thereby, determine whether the October 2001 \$67 million put option investment that he had learned about in August 2003 was in accordance with the governing investment rules and restrictions.

Defendant cites no federal appellate court case law for the proposition that investment policy guidelines need not be produced when specifically requested. At least one federal appellate court decision squarely supports PHELPS’s position. In *Faircloth v. Lundy Packing*

*Co.*, 91 F.3d 648, 653 (4th Cir. 1996), *cert. denied*, 519 U.S. 1077, 117 S.Ct. 738 (1997), the Fourth Circuit held that “other instruments under which the plan is established or operated encompasses formal or legal documents under which a plan is set up or **managed**.” Applying this standard, the Fourth Circuit ruled that the plaintiff plan participants were entitled to copies of the plan’s funding and investment policies. *Id.* at 656.

As in the *Faircloth* case, the Qwest Pension Plan specifically contemplates investment policies to be in place. Section 2.1(b) of the controlling Qwest Pension Trust Agreement, as amended and restated, effective as of June 12, 1998, specifically gives the Named Fiduciary the “power, responsibility and authority (iii) to deliver written investment policies, objectives and guidelines to the Trustee and to Investment Managers from time to time.” (See **Exhibit 3** filed herewith). Section 2.2(c) of the trust agreement provides that “[t]he investment discretion of an Investment Manager shall be subject to any general or specific investment guidelines which may be issued by the Named Fiduciary.” (*Id.* emphasis added). Accordingly, PHELPS’s request for the “investment policy guidelines” or the “protocol” for the plans investments gave “clear notice as to the information sought.” *Faircloth*, 91 F.3d at 656.

Other appellate courts agree with the *Faircloth* court reasoning. See e.g., *Board of Trustees of the CWA/ITU v. Weinstein*, 107 F.3d 139, 142-143 (2<sup>nd</sup> Cir. 1997) (holding that the meaning of “instruments under which [a] plan is operated” found in ERISA § 104(b)(4) encompasses document that sets out rights, duties or obligations and documents that “confine a plan’s operations.”); *Shaver v. Operating Eng. Local 428 Pension Trust Fund*, 332 F.3d 1198, 1202 (9<sup>th</sup> Cir. 2003) (ruling that ERISA § 104(b)(4) “mentions only legal documents that describe the terms of the plan, its financial status, and **other documents that restrict or govern**

**the plan's operation**”). Unlike the expenditure receipts requested in *Shaver* which were deemed to be merely evidence of the plan's operations, the investment guidelines that PHELPS requested actually govern and restrict the plan's operations. The requested investment guidelines meet the test of being one of the “documents which provide a plan participant with information concerning how the plan is *operated*.” *Allinder v. Inter-City Products Corp (USA)*, 152 F.3d 544, 549 (6<sup>th</sup> Cir. 1998).

It can not be disputed that the pension plan and the Qwest Pension Trust Agreement contemplates that each Investment Manager's discretion is to be *governed* by, *restricted* by and subject to general and specific investment guidelines, the very documents that PHELPS requested and are contemplated within the meaning of ERISA § 104(b)(4). (See **Exhibit 3** filed herewith).

Further support for PHELPS's position that the investment guidelines should have been disclosed to him pursuant to his written request under ERISA Section 104(b)(4) is found within the Department of Labor's (DOL) Interpretative Bulletin 94-2, which is **Exhibit 4** filed herewith.<sup>5</sup> In this Interpretative Bulletin, the DOL concludes that statement of investment policies and investment policy guidelines are documents and instruments governing a plan: The

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<sup>5</sup> Admittedly, interpretive bulletins do not rise to the level of a regulation and do not have the effect of law. A court is not required to give effect to an administrative interpretation. See *Batterson v. Francis*, 432 U.S. 416, 425 n.9 (1977) (citing *General Electric Co. v. Gilbert*, 429 U.S. 125, 141-145 (1976); *Morton v. Ruiz*, 415 U.S. 199, 231-37 (1974)). However, the DOL position as stated in an Interpretative Bulletin is entitled to deference because Congress specifically authorized the Secretary of Labor to interpret and enforce ERISA. *Hermann v. Nations Bank Trust Co.*, 126 F.3d 1354, 1363 (11th Cir. 1997); *Anweiler v. American Electric Power Service Corp.*, 3 F.3d 986, 993 (7th Cir. 1993). The level of deference given to an interpretative bulletin is governed by the bulletin's persuasiveness. See *Reich v. Gateway Press, Inc.*, 13 F.3d 685, 699 n.17 (3d Cir. 1994); *Goldberg v. Sorvas*, 294 F.2d 841, 847 and 847 n.11 (3d Cir. 1961). “While the interpretative bulletins are not issued as regulations under statutory authority, they do carry persuasiveness as an expression of the view of those experienced in the administration of the Act and acting with the advice of a staff specializing in its interpretation and application.” *Overnight Motor Co. v. Missel*, 316 U.S. 572, 580-581 (1941).

Interpretative Bulletin states, in pertinent part:

*“For purposes of this document, the term “statement of investment policy” means a written statement that provides the fiduciaries who are responsible for plan investments with guidelines or general instructions concerning various types or categories of investment management decisions, which may include proxy voting decisions. . . . [a] named fiduciary may expressly require, as a condition of the investment management agreement, that an investment manager comply with the terms of a statement of investment policy which sets forth guidelines concerning investments and investment courses of action which the investment manager is authorized or is not authorized to make. . . . Statements of investment policy issued by a named fiduciary authorized to appoint investment managers would be part of the ‘documents and instruments governing the plan’ within the meaning of ERISA §404(a)(1)(D).”*<sup>6</sup>

(**Exhibit 4**, 29 CFR § 2509.94-2).

Finally, Defendant’s belated argument that PHELPS’s request for the investment policy guidelines was actually a request for “outdated” documents is both disingenuous and not supported by the facts. This argument was never raised in the letters sent by Defendant’s team of agents and attorneys in response to PHELPS’s written demands. Moreover, the facts don’t support Defendant’s position. There is no statement by anyone that the investment policy guidelines used in late 2001 were no longer governing the plan when PHELPS first learned in late 2003 about the highly questionable and risky investment of \$67 million made in late 2001. Neither Defendant’s “Document Log” (**Exhibit 2** filed herewith) nor the Affidavit of Karen Frame (filed by Defendant as **Exhibit B**) sheds any light on the operative beginning and ending dates of the investment guidelines PHELPS requested. Ms. Frame equivocally states, “investment guidelines from 2001 have *likely changed, at least in some respects*, by the year

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Defendant concedes on page 8 of its summary judgment supporting brief that “documents that must be produced under that specific statutory section [ERISA Section 104(b)(4)] are documents that ‘govern the Plan.’” (citing *Ames v. American Nat’l Can Co.*, 170 F.3d 751, 758 (7<sup>th</sup> Cir. 1999).

2004.” (*Id.* at ¶ 4). Notably, she is careful to say nothing about changes, if any, to the investment guidelines or protocol controlling the particular investment portfolio where the \$67 million put option evaporated during year 2001. No doubt, that document was one of the particular ones PHELPS inquired about and demanded be produced.

Thus, the lower federal court cases cited by Defendant are inapposite as they all concerned written requests submitted for far outdated summary plan descriptions (SPD) having no bearing on the issues between the plan participants and the plan fiduciaries. For instance, in the case of *Jackson v. E.J. Brach Corp.*, 937 F.Supp. 735, 739 (N.D. Ill. 1996), the trial court found that the plan participant had demanded old SPDs which no longer existed and had nothing to do with determining his right to a certain contemporary severance benefit, the heart of the dispute in that case. Unlike the cases relied upon by Defendant, here the underlying inquiry made by PHELPS concerned whether or not pension plan investments were made in accordance with governing plan documents and rules – the very investment policy guidelines which Defendant’s agents conspired to secret from PHELPS and his retiree organization. When responding to PHELPS’s request, Defendant’s cadre of agents and lawyers did not tell him, “no, we can’t produce the requested documents, because they no longer exist.” Instead, Defendant decided to test PHELPS’s will and his retiree organization’s resolve and they told PHELPS the documents would not be produced “at this time.” Test him they did. Now, PHELPS seeks statutory penalties, plus reasonable attorney’s fees and costs.

Likewise, *Hickey v. Pennywitt*, 2004 U.S. Dist. LEXIS 10734 (N.D. Ohio 2004) is not on point. There the plan participant was only interested in the particular investment data to help him decide whether to make an investment in a particular fund. The plaintiff wasn’t trying to

police the fiduciaries' actions with respect to an abrupt highly unusual \$67 million investment loss.

Therefore, Defendant's motion for summary judgment on PHELPS's claim regarding the undisclosed, but requested, investment policy guidelines should be denied.

**A. Defendant Was Required to Produce to PHELPS the Requested Proxy Voting Guidelines.**

PHELPS claims Defendant violated ERISA Section 104(b)(4), 29 U.S.C. § 1024(b)(4), when Defendant refused his request to produce the proxy voting guidelines, because, again, these are documents under which both the Qwest Pension Plan and the Qwest Health Care Plan are operated.

PHELPS contends there is a fiduciary responsibility to vote proxies appurtenant to shares of corporate owned by both plans. The duty would lie exclusively with the trustee of an employee benefit plan except to the extent that either (1) the trustee is subject to the direction of a named fiduciary pursuant to ERISA §403(a)(1) or (2) the power to manage, acquire, or dispose of the relevant asset has been delegated to an investment manager pursuant to ERISA §403(a)(2). *Herman v. NationsBank Trust Co.*, 126 F.3d 1354, 1368 (11th Cir. 1997), *cert. denied*, 525 U.S. 816 (1998). With respect to monitoring an investment manager's actions in connection with voting proxies, the DOL states the following in Interpretative Bulletin 94-2:

*“The fiduciary duties described at ERISA §404(a)(1)(A) and (B), require that, in voting proxies, the responsible fiduciary consider those factors that may affect the value of the plan's investment, and not subordinate the interests of the participants and beneficiaries in their retirement income to unrelated objectives. These duties also require that the named fiduciary appointing an investment manager periodically monitor the activities of the investment manager with respect to the management of plan assets, including decisions made and actions taken by the investment manager with regard to proxy voting decisions. The*

*named fiduciary must carry out this responsibility solely in the interest of the participants and beneficiaries, and without regard to its relationship with the plan sponsor.*

*It is the view of the Department that compliance with the duty to monitor necessitates proper documentation of the activities that are subject to monitoring. Thus, the investment manager or other responsible fiduciary would be required to maintain accurate records as to proxy voting ... the proxy voting records must enable the fiduciary to review not only the investment manager's voting procedure ... but also to review the actions taken in individual proxy voting situations."*

**(Exhibit 4, 29 CFR §2509.94-2).**

Essentially, the government has determined that: • Proxies have value and are therefore plan assets and must be managed with "care, skill, prudence and diligence;" • Proxy voting is an investment act; • Investment managers must vote proxies consistent with Plan Sponsor Guidelines; • Trustees must monitor investment managers' proxy voting; • Fiduciaries should vote their proxies, document their voting rationale, show evidence that proxies were voted, and have a system for dealing with conflicts of interest.

Accordingly, the April 22, 2004 written request made on behalf of PHELPS and other individually named retiree plan participants, as set forth in the Complaint at ¶22 stated:

**"Prior to the merger and Qwest's assumption of the role of "plan sponsor" for the pension trust and health care trust, U S WEST maintained a policy called "U S WEST Trust Investment Proxy Voting Policy." Presumably, that policy has been renamed as a "Qwest" document. On behalf of Nelson Phelps, Mary Hull, Eldon Graham and Howard Rickman, plan participants in one or both trusts, **this request is made, pursuant to ERISA Section 104(b)(4), 29 U.S.C. § 1024(b)(4), for a copy of the U S WEST Trust Investment Proxy Voting Policy and all amendments, revisions and successor documents.****

Moreover, it is the position of the requesting plan participants that the fiduciary duties described set forth in ERISA Section 404(a)(1)(A) and (B), require that, in voting proxies held by the pension and health care trusts, the responsible party is a fiduciary and should consider those factors that may affect the value of the

plan's investment and not subordinate the interests of the participants and beneficiaries in their retirement income to unrelated objectives, such as the personal whims of certain directors. The requesting plan participants contend these duties also require that there be some periodic monitoring of the activities of the person in charge of proxy voting decisions. Thus, there should be proper accurate documentation of the proxy voting activities. Therefore, the requesting plan participants seek the records of the proxy voting activities for the past two years, including pension plan trust and health care trust proxy voting related to the upcoming annual Qwest meeting next month.”

In the May 10, 2004 letter penned by Attorney Cynthia Delaney, Defendant stated the requested documents would **not** be produced at this time. Still, almost 18 months later, Defendant refuses to produce the requested documents. This refusal prejudices PHELPS’s effort to police both the pension plan and the health care plan and, thereby, determine whether proxy voting has been conducted in the best interest of the plans’ participants and to guard against breaches of fiduciary duty.

For the same reasons PHELPS argues herein above that the investment policy guidelines constitute “instruments” under which the Qwest Pension Plan is “established or operated,” within the meaning of ERISA Section 104(b)(4), so too are the requested proxy voting guidelines.

Therefore, Defendant’s motion for summary judgment on PHELPS’s claim regarding the undisclosed, but requested, proxy voting policies should be denied.

**VI. CONCLUSION**

For all the foregoing reasons, and the reasons set forth in PHELPS's Rule 56(f) Affidavit submitted herewith, the Court should deny Defendant's motion for summary judgment.

DATED this 25<sup>th</sup> day of August, 2005.



**CURTIS L. KENNEDY**

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Denver, Colorado 80237-1741

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E-mail: CurtisLKennedy@aol.com

*Attorney for Plaintiff Nelson B. Phelps*

The Following Exhibits  
Are Submitted Herewith:

- |                         |   |
|-------------------------|---|
| <b><u>Exhibit 1</u></b> | Nelson B. Phelps Affidavit                          |
| <b><u>Exhibit 2</u></b> | "Document Log" - Defendant's initial disclosure     |
| <b><u>Exhibit 3</u></b> | Excerpts of Qwest Pension Trust Agreement           |
| <b><u>Exhibit 4</u></b> | DOL Interpretative Bulletin 94-2 (29 CFR 2509.94-2) |

**CERTIFICATE OF SERVICE**

I hereby certify that on the 25<sup>th</sup> day of August, 2005, a true and correct copy of the above and foregoing document was electronically filed with the Clerk of the Court using the CM/ECF system.

I also certified that on this 25<sup>th</sup> day of August, 2005, a true and correct copy of the above and foregoing document was delivered to Defendants' counsel of record via email as follows:

Beth Doherty Quinn, Esq.  
BAIRD LAW FIRM, LLC  
2036 E. 17th Avenue  
Denver, CO 80206  
Tele: 303-322-5334 direct  
Fax: 303-813-4501  
E-mail: [bquinn@bairdlawfirm.com](mailto:bquinn@bairdlawfirm.com)

Also, copy of the same was delivered via email to Plaintiff Nelson B. Phelps.

Nelson B. Phelps, Executive Director  
ASSOCIATION OF U S WEST RETIREES  
1500 So. Macon St.  
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/s/ Curtis L. Kennedy

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*Attorney for Plaintiff: Nelson B. Phelps*

# Exhibit 1

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO

Civil Action No. **04-cv-02042-LTB-OES**

NELSON B. PHELPS,

Plaintiff,

vs.

QWEST EMPLOYEES BENEFIT COMMITTEE,

Defendant.

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**RULE 56(f) AFFIDAVIT OF PLAINTIFF NELSON B. PHELPS**

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Plaintiff NELSON B. PHELPS, being duly sworn, deposes and states of his own personal knowledge and submits the following, pursuant to Rule 56(f) of the Federal Rules of Civil Procedure, in opposition to Defendant's Motion of Summary Judgment filed August 5 2005:

1. I am the Plaintiff, a United States citizen over the age of 21 years, and I reside at 1500 So. Macon St., Aurora, CO 80012-5141. I was formerly employed as an "Executive Director" within the Human Resources at U S WEST, Inc. I retired from U S WEST, Inc. effective February 28, 1990 and I am a participant of the Qwest Pension Plan. I receive a service pension in the form of a monthly annuity. I am a participant of the Qwest Health Care Plan.

2. I am the Executive Director of a non-profit retiree organization called "Association of U S WEST Retirees" ("AUSWR"), which membership includes over 20,000 retiree participants in the Qwest Pension Plan. <sup>1</sup>

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<sup>1</sup> The official website for the Association of U S WEST Retirees ([www.uswestretiree.org](http://www.uswestretiree.org)) reports that it is the umbrella organization of six separate retiree groups within the former U S WEST area consisting of fourteen states. The umbrella organization was formed in August 1999. The Board of directors of AUSWR consists of leaders from each of the six retiree organizations. AUSWR states: "**Our purpose is to protect and enhance the benefits and related interests of U S WEST retirees.**"

3. **Exhibit 3** submitted along with this Affidavit contains excerpts of the Qwest Trust Agreement, which document Qwest gave to me in August 2003.

4. In late August 2003, I first learned that Qwest Pension Plan fiduciaries had made what I considered to be a highly risky unusual \$67 million investment in “put options” which investment lost over \$66 million in less than two months during late 2001. I was asked by the AUSWR organization to seek information and documents about this investment from the fiduciaries of the Qwest Pension Plan. Starting in August 2003 and continuing into January 2004, I made written inquiries, through my counsel, sent to agents and attorneys for Defendant Qwest Employee Benefits Committee.

5. All of the written communications concerning my request for pension plan documents and the subject matter of this civil action are accurately reproduced and set forth in the Complaint filed herein.

6. By letter dated February 13, 2004, Defendant Qwest Employee Benefits Committee refused my request stating, “we decline to provide [the requested investment policy guidelines] at this time.” To date, Defendant has refused me the requested documents.

7. By letter dated May 10, 2004, Defendant Qwest Employee Benefits Committee refused my request for proxy voting guidelines stating, Qwest “declines to provide the documents to you at this time.” To date, Defendant has refused me the requested documents.

8. Defendant Qwest Employee Benefits Committee’s wholesale refusal to provide me the requested documents which are the subject of this civil action has thwarted and otherwise completely undermined both mine and the AUSWR organization’s efforts to police our Qwest Pension Plan and to determine whether there has been any breach of investment fiduciary duty.



# Exhibit 2

## DOCUMENT LOG

Date	Title	Adopted By	Description
8.20.04	Proxy Voting Policy	Proxy Policy Committee of Mellon Financial Corporation, the parent corporation of the Mellon Trust of New England, NA, Trustee of the Qwest Pension Fund <sup>1</sup> ; adopted by investment advisory subsidiaries of Mellon Financial Corporation and used to vote proxies for all clients	Outlines some general philosophies regarding corporate governance, discusses record keeping and disclosure obligations, and sets forth the general process by which written proxy voting guidelines are adopted and utilized.
3.05.02	Qwest Asset Management Committee Derivatives Policy for Qwest Trusts	Investment Committee of Qwest Communications International, Inc.	Addresses the use of one type of financial instrument, derivative instruments, within all Qwest employee benefit trusts.
Varying dates	Generic title: portfolio specific investment guidelines (these are multiple, separate documents)	Qwest Asset Management Company and each individual Investment Manager	Each individual Investment Manager managing a portfolio or account that is part of the Qwest Pension Trust is subject to investment guidelines that relate solely to that specific Investment Manager and a specific portfolio.

<sup>1</sup> It is the policy of Qwest Asset Management not to vote proxies and, instead, to delegate that responsibility to external managers and, for internally managed assets, to the Trustee. The policy listed here is that of the Trustee. In addition to Mellon Financial Corporation's policy, independent investment managers hired by Qwest Asset Management to manage U.S. and International Equities held by the Qwest Pension Fund would have similar policies and/or written guidelines. As with the Mellon Financial Corporation policy and guidelines, these are not policies or guidelines that are authored, adopted or utilized by any Qwest entity.

# Exhibit 3

**U S WEST  
PENSION TRUST AGREEMENT**

**As Amended and Restated  
Effective as of June 12, 1998**

The global custodian is authorized to perform any other actions necessary to carry out the intent of this Section 1.6

Any charges or expenses incurred in connection with acts permitted under this Section 1.6 shall be paid by the Trust.

## ARTICLE II

### Section 2.1. Named Fiduciaries.

(a) The Plan of which this Trust forms a part provides for one or more fiduciaries named in the Plan, or identified as a fiduciary by the Company pursuant to a procedure specified in the Plan, which have been allocated the power to manage and control the assets of the Plan to the extent of its authority set forth herein (heretofore and hereinafter referred to individually as "a Named Fiduciary," and collectively as "the Named Fiduciary"), as set forth in Exhibit B to this Agreement. The Company shall furnish the Trustee from time to time with certified copies of resolutions of its Board of Directors evidencing the appointment, identity and termination of office of any persons authorized to act as a Named Fiduciary, or constituting the members of the Named Fiduciary. The Trustee may rely on prior written notice of the appointment of any person authorized to act on behalf of the Named Fiduciary and the scope of such person's authority until it has received written notice to the contrary from the Named Fiduciary, provided, however, that all directions given by the Named Fiduciary shall be in writing, and provided, further, that the Trustee may accept from the Named Fiduciaries oral directions for the purchase or sale of securities, or transfers of assets between and among Investment Managers appointed in accordance with Sections 2.2 and 2.3 of this Agreement (including the Trustee or the Named Fiduciary), subject to confirmation in writing, and upon such terms as shall be mutually agreed upon between the Trustee and the Named Fiduciary

(b) In addition to any other powers and responsibilities set forth herein, and solely in accordance with the Plan, ERISA, and any other applicable law, the Named Fiduciary shall have the power, responsibility and authority:

(i) to administer, manage and control the assets of the Plan and the Trust Fund;

(ii) to appoint one or more Investment Managers (as defined in Section 2.2 below) to manage such portions of the Trust Fund as the Named Fiduciary shall designate to the Trustee, and to remove such Investment Managers;

(iii) to deliver written investment policies, objectives and guidelines to the Trustee and to Investment Managers from time to time; and

(iv) to designate a person to inspect and audit the accounts, books and records of the Trustee relating to all investments, receipts, disbursements and other transactions under the Agreement.

Section 2.2. Investment Managers.

(a) Appointment. The Named Fiduciary may appoint one or more Investment Managers, which may include the Trustee and the Named Fiduciary, to manage and invest (including the power to acquire and dispose of) all or a portion of the assets of the Trust Fund. Each Investment Manager (other than the Named Fiduciary) shall at all times qualify as an "investment manager" as defined in section 3(38) of ERISA. Each such Investment Manager (other than the Named Fiduciary) shall acknowledge in writing that it is a fiduciary with respect to the Plan assets under its management. The Named Fiduciary promptly shall give written notice of said appointment (and copies of any Investment Manager Agreement) to the Trustee. Upon the appointment of each such Investment Manager, the Trustee shall segregate such portion of the assets of the Trust to be managed by such Investment Manager into one or more Investment Manager Accounts (each an "Investment Manager Account"), as directed by the Named Fiduciary. The Named Fiduciary shall not be responsible or liable for any acts or omissions of an Investment Manager (or the Trustee, to the extent the Trustee exercises any investment management discretion over any Trust assets) other than the Named Fiduciary.

(b) Removal. The Named Fiduciary by written notice to the Trustee may at any time notify the Trustee of the termination of an Investment Manager, in which event the Named Fiduciary may appoint one or more successor Investment Managers to manage such Investment Manager account, provided, however, that pending such appointment, the Named Fiduciary shall assume the duties and responsibilities of the Investment Manager with respect to such Investment Manager Account, in accordance with Section 2.3 of this Agreement.

(c) Authority. Except to the extent that any agreement entered into between the Named Fiduciary and the Investment Manager shall provide otherwise, and subject to the Plan, the requirements of ERISA and all other applicable laws, the Investment Manager shall have and may exercise, or shall direct the Trustee to exercise, with respect to such Investment Manager Account, the powers granted to the Trustee by paragraphs (a) through (h), (o), (p), (s) and (t) of Section 1.3, subject, however, to the limitations contained therein. The Investment Manager shall not have the right to exercise, or be responsible for the exercise of, any of the powers enumerated in the immediately preceding sentence specifically reserved to the Trustee or delegated to another Investment Manager. The investment discretion of an Investment Manager shall be further subject to any general or specific investment guidelines which may be issued by the Named Fiduciary.

(d) Procedures. All transactions by the Investment Manager shall be made upon such terms and conditions and from or through such principals and agents as the

**AMENDMENT 2001-1**  
**U S WEST PENSION TRUST AGREEMENT**

The U S WEST Pension Trust Agreement as amended and restated as of June 12, 1998 is hereby amended effective immediately as follows:

1. Effective immediately, this Agreement is renamed the "Qwest Pension Trust Agreement" and all references to "U S WEST Pension Trust Agreement" shall hereinafter deemed a reference to the Qwest Pension Trust Agreement.

2. All references to the U S WEST Pension Plan with respect to periods of time on or after the date hereof are changed to the Qwest Pension Plan.

3. In Appendix A, the definitions of "Agreement," "Company," "Plan," and "Trust" are amended to read as follows:

"Agreement" means this Qwest Pension Trust Agreement.

"Company" means Qwest Communications International Inc. and any successors thereto.

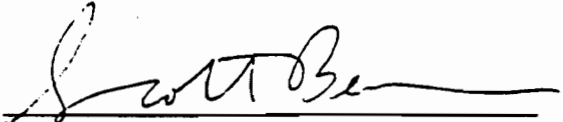
"Plan" means the Qwest Pension Plan.

"Trust" means the Qwest Pension Trust.

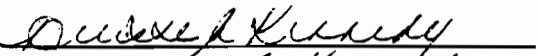
4. In the first sentence of the last paragraph of Appendix B, the reference to "U S WEST Investment Management Company ("IMC")" is changed to "Qwest Asset Management Company ("QAM")."

Executed this 9<sup>th</sup> day of FEBRUARY, 2001.

QWEST COMMUNICATIONS  
INTERNATIONAL INC.

By:   
Scott A. Berman  
Vice President and Treasurer

BOSTON SAFE DEPOSIT AND TRUST  
COMPANY

By:   
Melissa A. Kennedy  
Vice President

# Exhibit 4



# U.S. Department of Labor

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**Content Last Revised: 7/29/94**



---DISCLAIMER---

**CFR** Code of Federal Regulations Pertaining to U.S. Department of Labor

↳ **Title 29** Labor

↳ **Chapter XXV** Pension and Welfare Benefits Administration, Department of Labor

↳ **Part 2509** Interpretive Bulletins Relating to the Employee Retirement Income Security Act of 1974

## 29 CFR 2509.94-2 - Interpretive bulletin relating to written statements of investment policy, including proxy voting policy or guidelines.

- **Section Number:** 2509.94-2
- **Section Name:** Interpretive bulletin relating to written statements of investment policy, including proxy voting policy or guidelines.

This interpretive bulletin sets forth the Department of Labor's (the Department) interpretation of sections 402, 403 and 404 of the Employee Retirement Income Security Act of 1974 (ERISA) as those sections apply to voting of proxies on securities held in employee benefit plan investment portfolios and the maintenance of and compliance with

statements of investment policy, including proxy voting policy. In addition, this interpretive bulletin provides guidance on the appropriateness under ERISA of active monitoring of corporate management by plan fiduciaries.

#### (1) Proxy Voting

The fiduciary act of managing plan assets that are shares of corporate stock includes the voting of proxies appurtenant to those shares of stock. As a result, the responsibility for voting proxies lies exclusively with the plan trustee except to the extent that either (1) the trustee is subject to the directions of a named fiduciary pursuant to ERISA Sec. 403(a)(1); or (2) the power to manage, acquire or dispose of the relevant assets has been delegated by a named fiduciary to one or more investment managers pursuant to ERISA Sec. 403(a)(2). Where the authority to manage plan assets has been delegated to an investment manager pursuant to Sec. 403(a)(2), no person other than the investment manager has authority to vote proxies appurtenant to such plan assets except to the extent that the named fiduciary has reserved to itself (or to another named fiduciary so authorized by the plan document) the right to direct a plan trustee regarding the voting of proxies. In this regard, a named fiduciary, in delegating investment management authority to an investment manager, could reserve to itself the right to direct a trustee with respect to the voting of all proxies or reserve to itself the right to direct a trustee as to the voting of only those proxies relating to specified assets or issues.

If the plan document or investment management agreement provides that the investment manager is not required to vote proxies, but does not expressly preclude the investment manager from voting proxies, the investment manager would have exclusive responsibility for voting

proxies. Moreover, an investment manager would not be relieved of its own fiduciary responsibilities by following directions of some other person regarding the voting of proxies, or by delegating such responsibility to another person. If, however, the plan document or the investment management contract expressly precludes the investment manager from voting proxies, the responsibility for voting proxies would lie exclusively with the trustee. The trustee, however, consistent with the requirements of ERISA Sec. 403(a)(1), may be subject to the directions of a named fiduciary if the plan so provides.

The fiduciary duties described at ERISA Sec. 404(a)(1)(A) and (B), require that, in voting proxies, the responsible fiduciary consider those factors that may affect the value of the plan's investment and not subordinate the interests of the participants and beneficiaries in their retirement income to unrelated objectives. These duties also require that the named fiduciary appointing an investment manager periodically monitor the activities of the investment manager with respect to the management of plan assets, including decisions made and actions taken by the investment manager with regard to proxy voting decisions. The named fiduciary must carry out this responsibility solely in the interest of the participants and beneficiaries and without regard to its relationship to the plan sponsor.

It is the view of the Department that compliance with the duty to monitor necessitates proper documentation of the activities that are subject to monitoring. Thus, the investment manager or other responsible fiduciary would be required to maintain accurate records as to proxy voting. Moreover, if the named fiduciary is to be able to carry out its responsibilities under ERISA Sec. 404(a) in determining whether the investment manager is fulfilling its fiduciary obligations in investing plans assets in a manner that justifies the continuation of the

management appointment, the proxy voting records must enable the named fiduciary to review not only the investment manager's voting procedure with respect to plan-owned stock, but also to review the actions taken in individual proxy voting situations.

The fiduciary obligations of prudence and loyalty to plan participants and beneficiaries require the responsible fiduciary to vote proxies on issues that may affect the value of the plan's investment. Although the same principles apply for proxies appurtenant to shares of foreign corporations, the Department recognizes that in voting such proxies, plans may, in some cases, incur additional costs. Thus, a fiduciary should consider whether the plan's vote, either by itself or together with the votes of other shareholders, is expected to have an effect on the value of the plan's investment that will outweigh the cost of voting. Moreover, a fiduciary, in deciding whether to purchase shares of a foreign corporation, should consider whether the difficulty and expense in voting the shares is reflected in their market price.

## (2) Statements of Investment Policy

The maintenance by an employee benefit plan of a statement of investment policy designed to further the purposes of the plan and its funding policy is consistent with the fiduciary obligations set forth in ERISA section 404(a)(1)(A) and (B). Since the fiduciary act of managing plan assets that are shares of corporate stock includes the voting of proxies appurtenant to those shares of stock, a statement of proxy voting policy would be an important part of any comprehensive statement of investment policy. For purposes of this document, the term ``statement of investment policy'' means a written statement that provides the fiduciaries who are responsible for plan investments with guidelines or general instructions concerning various types or

categories of investment management decisions, which may include proxy voting decisions. A statement of investment policy is distinguished from directions as to the purchase or sale of a specific investment at a specific time or as to voting specific plan proxies.

In plans where investment management responsibility is delegated to one or more investment managers appointed by the named fiduciary pursuant to ERISA Sec. 402(c)(3), inherent in the authority to appoint an investment manager, the named fiduciary responsible for appointment of investment managers has the authority to condition the appointment on acceptance of a statement of investment policy. Thus, such a named fiduciary may expressly require, as a condition of the investment management agreement, that an investment manager comply with the terms of a statement of investment policy which sets forth guidelines concerning investments and investment courses of action which the investment manager is authorized or is not authorized to make. Such investment policy may include a policy or guidelines on the voting of proxies on shares of stock for which the investment manager is responsible. In the absence of such an express requirement to comply with an investment policy, the authority to manage the plan assets placed under the control of the investment manager would lie exclusively with the investment manager. Although a trustee may be subject to the directions of a named fiduciary pursuant to ERISA Sec. 403(a)(1), an investment manager who has authority to make investment decisions, including proxy voting decisions, would never be relieved of its fiduciary responsibility if it followed directions as to specific investment decisions from the named fiduciary or any other person.

Statements of investment policy issued by a named fiduciary authorized to appoint investment managers would be part of the ``documents and instruments governing the plan'' within the meaning of ERISA Sec. 404(a)(1)(D). An investment manager to whom such investment

policy applies would be required to comply with such policy, pursuant to ERISA Sec. 404(a)(1)(D) insofar as the policy directives or guidelines are consistent with titles I and IV of ERISA. Therefore, if, for example, compliance with the guidelines in a given instance would be imprudent, then the investment manager's failure to follow the guidelines would not violate ERISA Sec. 404(a)(1)(D). Moreover, ERISA Sec. 404(a)(1)(D) does not shield the investment manager from liability for imprudent actions taken in compliance with a statement of investment policy.

The plan document or trust agreement may expressly provide a statement of investment policy to guide the trustee or may authorize a named fiduciary to issue a statement of investment policy applicable to a trustee. Where a plan trustee is subject to an investment policy, the trustee's duty to comply with such investment policy would also be analyzed under ERISA Sec. 404(a)(1)(D). Thus, the trustee would be required to comply with the statement of investment policy unless, for example, it would be imprudent to do so in a given instance.

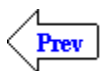
Maintenance of a statement of investment policy by a named fiduciary does not relieve the named fiduciary of its obligations under ERISA Sec. 404(a) with respect to the appointment and monitoring of an investment manager or trustee. In this regard, the named fiduciary appointing an investment manager must periodically monitor the investment manager's activities with respect to management of the plan assets. Moreover, compliance with ERISA Sec. 404(a)(1)(B) would require maintenance of proper documentation of the activities of the investment manager and of the named fiduciary of the plan in monitoring the activities of the investment manager. In addition, in the view of the Department, a named fiduciary's determination of the terms of a statement of investment policy is an exercise of fiduciary responsibility and, as such, statements may need to take into account

factors such as the plan's funding policy and its liquidity needs as well as issues of prudence, diversification and other fiduciary requirements of ERISA.

An investment manager of a pooled investment vehicle that holds assets of more than one employee benefit plan may be subject to a proxy voting policy of one plan that conflicts with the proxy voting policy of another plan. Compliance with ERISA Sec. 404(a)(1)(D) would require such investment manager to reconcile, insofar as possible, the conflicting policies (assuming compliance with each policy would be consistent with ERISA Sec. 404(a)(1)(D)) and, if necessary and to the extent permitted by applicable law, vote the relevant proxies to reflect such policies in proportion to each plan's interest in the pooled investment vehicle. If, however, the investment manager determines that compliance with conflicting voting policies would violate ERISA Sec. 404(a)(1)(D) in a particular instance, for example, by being imprudent or not solely in the interest of plan participants, the investment manager would be required to ignore the voting policy that would violate ERISA Sec. 404(a)(1)(D) in that instance. Such an investment manager may, however, require participating investors to accept the investment manager's own investment policy statement, including any statement of proxy voting policy, before they are allowed to invest. As with investment policies originating from named fiduciaries, a policy initiated by an investment manager and adopted by the participating plans would be regarded as an instrument governing the participating plans, and the investment manager's compliance with such a policy would be governed by ERISA Sec. 404(a)(1)(D).

### (3) Shareholder Activism

An investment policy that contemplates activities intended to monitor or influence the management of corporations in which the plan owns stock 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 alone 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. Such a reasonable expectation may exist in various circumstances, for example, where plan investments in corporate stock are held as long-term investments or where a plan may not be able to easily dispose such an investment. Active monitoring and communication activities would generally concern such issues as the independence and expertise of candidates for the corporation's board of directors and assuring that the board has sufficient information to carry out its responsibility to monitor management. Other issues may include such matters as 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, other workplace practices and financial and non-financial measures of corporate performance. Active monitoring and communication may be carried out through a variety of methods including by means of correspondence and meetings with corporate management as well as by exercising the legal rights of a shareholder. [59 FR 38863, July 29, 1994]



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