Social Investing

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Decision Making for Social Investing

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Introduction

Pension funds are as much a part of our social reality as banks and insurance companies. These funds have been growing at a predictable, constant rate and are expected to reach the $3 trillion mark in 15 years. Their assets are highly concentrated and, thus, represent enormous power. Both employees and employers are increasingly affected by pension funds. The employees are concerned with retirement support, and employers offering defined benefit plans are concerned with the substantial pension funding obligations that affect the employers' financial profile. It is not surprising, therefore, that pension funds have attracted increasing attention and that the question of who will control them and how their assets will be used is quickly becoming an important and widely discussed issue.

In recent years, there has been increasing debate about investing pension fund assets not only to meet financial goals, but also to achieve other social purposes. In a few cases involving primarily public funds, investment decisions have been made that reflect those other purposes, and pressure to continue this trend is expected to increase.

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The issue of pension fund investing to effect social purposes raises several interesting and important questions. These include not only preliminary questions, such as what social investment is and why it is considered attractive to some, but also legal, ethical, political, and economic questions, as well as more practical questions of implementation. This last question has not been discussed much in the literature on social investing. The author raises some of the critical questions that must be considered regarding the issue of implementation.

This paper was prepared as a preliminary outline of many of the major issues concerning the social investment of pension funds. It also offers tentative conclusions of the author on the subjects raised, to inform, to contribute to the debate, and to assist those who face these issues and think about them. The paper is presented as the foundation for further work which will explore these questions more thoroughly.

Finally, the author would like to disclose her bias to the reader, at the outset. The author believes that pension funds should be permitted to invest their assets for purposes other than pure profit maximizing, but that such investing should be carefully monitored and strictly limited to avoid the serious potential dangers and injuries that may result.

Issues and Definitions

Issues

The demand for social investing can be described as a call to reexamine both how pension plan investment decisions are made, and who should make them. The demand presents pressure to reallocate the power over pension fund investments and to change or interpret the rules governing them. Three questions are therefore pertinent to our subject. First, what is the current status? Does the law permit the decision makers to take social objectives into account, and if so, does the law permit the decision makers to sacrifice economic returns to the funds in order to attain social objectives? Second, should the law be changed? That is, what are the arguments for and against social investment? Third, if one accepts the argument that investment of pension assets should be made for purposes other than wealth maximization (perhaps even at loss to the funds), should the current power structure over pension funds be changed? Who should participate in the decision process, and how should the decision makers be made accountable for their choices, both on economic and social grounds? And finally, how should the new rules be enforced?

Definition : What is Social Investing?

The literature on social investing of pension funds uses different definitions to describe the term, thereby setting the focus and partial answers to the questions posed. Social investing may be defined as an investment that results in the sacrifice of return to the fund. This definition focuses on the *economic results* of the investment. A second definition describes the term as an investment objective aimed at achieving other than economic return to the fund, focusing on the *objective* of the investment. A third version states that social investing is aimed at benefiting society, or the fund participants, or a particular region, focusing on *who* the investment is designed to *benefit*. All of the above are components of a decision process which takes into consideration objectives other than wealth maximization and which may, but not necessarily does, result in lower than the highest return to the fund at a given risk level. We will call this decision process "social investing" as opposed to a process which takes into account only the *financial return to benefit the fund*. The latter will be called "economic investing".

Arguably the differences between economic and other objectives and benefits to the fund, as distinct from benefits to others, may not play as great a role in the real world as they do on paper. "Economic" and "social" objectives are not as insulated as may seem as first blush. Investment decisions are rarely one dimensional. They are affected by many considerations. Economic goals may carry the political, social, and personal convictions and prejudices of the decision makers. Similarly, every investment of pension assets that benefits (or harms) the fund will at the same time benefit or have adverse effects on others. When a pension fund (or any other investor) purchases the shares of a company, it benefits the sellers of the shares and affects the underlying company, perhaps enabling that company to establish a plant in a particular state, and thereby enhance the well-being of those employed in the plant, the surrounding community, and the state. The ripple effect of an investment generates various economic, political, and social benefits. Similarly, the same investment may produce an injurious ripple effect to other groups in society. The plant may produce hazardous waste, employ nonunion members at unfair wages, or disregard minimal ethical and even legal standards of treating minorities. In the long run, the investment in a company that operates such a plant will be socially inferior to an investment in a company manifesting a sensitivity to legally, socially, and ethically acceptable standards of operation, and, to the extent that society incorporates its distaste for such practices in its market and investment behavior, it will also be economically inferior. In this view, an investment will not be economically sound unless the operating or portfolio company is socially responsible. Additionally, an investment that produces a near-term inferior return, but provides substantial benefits to society or to the participants, employers, and unions, may, in the long run, produce an aggregate benefit far exceeding the immediate economic loss to the fund. In the long run, even this loss to the fund can be made up by gains to it.

Despite the frequently blurred boundaries between economic and social benefits, it is accepted practice to distinguish between them—probably, in part, because of the difficulty of measuring social return. And the conceptual distinctions between them plays a critical role in the process of determining investment choices. One other note should be added to the discussion of definitions for both social and economic investing. The definition focuses on the decision process, the considerations of the decision maker, and the objective he attempts to achieve—not the results achieved.

What Is the Current Legal Status Of Social Investing?

The debate about social investment must be discussed within the context of the law governing pension fund investments. This section explores that question, examining ERISA, the Employee Retirement Income Security Act of 1974.

The Problem which Pension Investment Poses

Pension funds incur long-term financial obligations to employees. The funds hold current contributions, set aside and invested, to meet future obligations. To make effective investments of these pension assets, managers must have broad discretion and authority. Yet, that same discretion over large pools of liquid assets makes the funds especially vulnerable to mismanagement. Managers can use these funds to benefit themselves or the parties who can influence the management of the funds, such as employers and unions. Therefore, the law augments private controls on the managers responsible for the funds' administration and investment to ensure that their broad power will be used exclusively for the purposes for which these powers were granted.

Prior to 1974, the legal status of pension claims and participants' access to judicial assistance against mismanagement was far from established. The controls over pension fund fiduciaries and other parties who retained influence over the funds were deemed inadequate to prevent fund mismanagement. In 1974 Congress passed ERISA to substantially strengthen these controls for private-sector funds.

Trust law still regulates investment of public funds, (although a public ERISA is being considered by Congress), and still provides the guidance material for decisions pertaining to private funds.

ERISA

ERISA and Pension Investments. ERISA has achieved its regulatory aims by five types of provisions. The first type sets a standard for the qualifications that investment managers should possess. ERISA requires them to possess skills commensurate with the task which they have undertaken.

The second type of ERISA provisions set forth the managers' investment powers. The act gives managers broad discretion in the exercise of their investment decisions. Except for requiring diversification, it has left them free to act. It does not restrict them as to the choice of individual investments.

The third type of ERISA provisions restricts the broad investment discretion by (1) spelling out how the investment managers should make their decision: they must exercise diligence, prudence, and caution and exercise their skills to the best of their abilities; (2) enumerating the considerations that the investment manager must take into account in making investment decisions; and (3) setting forth the objectives that managers should seek to achieve.

A fourth type of ERISA provisions specifies in whose interests pension managers must act. The funds must be managed "solely in the interests of the participants". With minor exceptions, the assets of a plan should "never inure to the benefit of any employer and shall be held for the exclusive purpose of providing benefits to participants."

Finally, ERISA dictates who cannot deal with pension funds. It prohibits transaction and benefits flowing from the pension fund to certain "parties in interest". These parties include those who have influence over the funds' management, as well as direct managers. ERISA is unusually explicit and expansive in its list of prohibited transactions and the parties precluded from dealing with the pension funds.

Viewed as a whole, ERISA's provisions represent a balance. On the one hand, the act enables and even requires the pension fund investment manager to exercise his discretion and skills in the performance of his functions with little interference. On the other hand, ERISA marshalls that discretion to the service of specific interests, and limits the discretion to specific objectives. Finally, to prevent divergence from the service of these interests or from the objectives which the act directs the managers to achieve, the act balances the broad professional discretion with specifically detailed, prohibited transactions, which experience has shown are prone to abuse by fiduciaries. It prohibits these transactions altogether or permits them only after prior clearance by the Labor Department and the Internal Revenue Service.

How Does Social Investing Relate to ERISA Regulations?

Whereas social investing is not related to the standards of skill set forth for pension managers under ERISA (except, perhaps, to require the managers to be experts with respect to social investments as well), this kind of investing affects all other types of ERISA regulation.

The introduction of an additional (and perhaps open-ended) objective as an investment objective may affect ERISA regulation in various ways. First the social objective may undermine one other main objective of pension funds if it results in a sacrifice of financial goals to an extent that would endanger the maintenance of sufficient assets to satisfy pension claims. Secondly, social investing may broaden the range of discretion of fund managers if it permits the trust document to allow them to take general social objectives into account, or even to choose these objectives. The more objectives managers are permitted to pursue, the more choices they have. Third, the more freedom of choice managers have, the less control can be exerted over them. They have more flexibility in justifying their decisions and of complying with process-control mechanisms. Fourth, social investing permits fund managers to identify with interests other than those of the participants or the pension funds as a whole. Fifth, social investing opens the door to indirect benefits to parties in interest, watering down the strict ERISA provisions on prohibited transactions.

Prior to ERISA *Boyle* v. *Blankenship* held that a union may not use pension assets to further union objectives or union bank interests, and that such investments were in conflict of interest with and in violation of the fiduciary duties of the pension trustees. Recent cases, such as *Davidson* v. *Cook* and *Marshall* v. *Kelly* follow this holding. In both, however, the loans to the union were also imprudent. After ERISA, *Winters* v. *Teachers Retirement System of New York City* held, however, that an imprudent investment in highly speculative securities may be nonetheless permissible under certain circumstances, when the trustees' objective was to ensure the future contributions to the fund—a legitimate objective for a pension fund—and, secondly, when they acted only after a long and hard look at the proposal and any available alternative; in other words, after they had exercised due care. It is important to note, however, that even though the case has been treated as an authority in another ERISA case, this case was not decided under ERISA. Also, New York and federal statutes approved the transaction.

Arguably, the participants' interests may be interpreted broadly to include interests in their roles as taxpayers, consumers, employees, and members of communities, among others. If so, the managers may, for example, make loans or build houses or provide employment, nursing or day care for participants, for lower than an optimal return, so long as these investments benefit the participants in a general sense.

Even though the language of the act could be interpreted broadly, the legislative history and the other sections of the act indicate that the words *in the interests* and *for the benefit* of the participants should be construed to mean the interests and benefits of participants only in their role as current and future *recipients of pension payments*. First, attempts during congressional hearings on the act, and later, to expand the use of pension assets to housing, for example, have failed. Similarly, the *Withers* case, which could be interpreted as authorizing inferior investments to protect employment, expressly dispelled this notion. Second, ERISA was not enacted to *increase* the benefits to fund participants but to ensure that benefits *bargained for* will be paid. The amounts of the benefits were not subject to congressional concern (even though other conditions, such as forfeiture and vesting, were). Third, even though ERISA permitted loans of pension assets to participants, it required the loans to bear reasonable rates, prohibiting substantially lower rates.

In sum, the law does not seem to permit pension investment activities which involve financial sacrifice even though the benefits from these investments were to participants or to retirees. To the extent social investment increases the potential for conflict of interest on the part of fund managers or others involved, the requirement for scrutiny and soul-searching on the part of the managers and close supervision by the courts over the investment appears to be increased.

The position of the Department of Labor, which administers this portion of ERISA, has been that social objectives may be *considered* by pension managers so long as, and after, they have satisfied themselves that the economic objectives of the pension funds have not been adversely affected. Consequently, ERISA permits the decision makers to consider and follow both objectives, for example, to exclude offending stocks from the portfolio. The department's opinion is that ERISA prohibits the pension managers from sacrificing return to the fund for social objectives. Furthermore, the department expects the managers to examine proposed investments purely in light of the economic returns to the fund and satisfy themselves that such investments pass the test prior to other considerations.

Should the Law Be Amended to Permit Social Investing Beyond the Current Limits?

As stated, it seems fairly clear that current law does not permit pension fund investing which would sacrifice financial benefits to the fund. At this point the inquiry must move to an evaluation of the status quo. Should the law be changed to permit social investing with fewer constraints than currently imposed? In particular, should social investing be permitted at cost to the pension funds? This section explores the question in some detail.

The Arguments for Authorizing Social Investing

Social Objectives Do Not Necessarily Result in Losses. "Economic" Results Are Not Clearly Predictable nor Comparable. Investments motivated by social objectives may not necessarily detract from an investment's economic objectives, or may detract from the economic objectives only minimally. An investment policy that excludes, on moral grounds, the stocks of companies producing tobacco or liquor, or stocks of companies operating in South Africa without complying with the Sullivan Principles, need not reduce the return or decrease the diversification (thereby increasing the risk level) of the pension portfolio. This is because the world of investments is enormous and can expand; new kinds of investments to diversify the portfolio may be added by expert fund managers. This diversification can be achieved by providing explicit instructions to hired managers to exclude investments for social reasons while maintaining diversification, or by purchasing shares in some of the socially screened investment funds that are currently available.

Several arguments are offered to defend the notion that social objectives need not result in inferior investments. One assumes efficient capital markets; the other assumes inefficiently operated markets. In the first case, if the market is considered near perfect, then the price of these investments will always be right, and the fund will suffer no loss. Diversification can be maintained if the portfolio is appropriately designed, assuming that the list of excluded investments is not too long. It is not at all clear whether past investment-exclusion practices have resulted in losses beyond what could be expected for economically motivated investments. A few recent studies have attempted to test the effects of exclusion on the portfolio quality with no conclusive results.

In the second case where it is assumed that markets are not necessarily nor always efficient, and that they might not allocate resources optimally, social investing may be able to achieve market-level returns from overlooked investment opportunities. This argument is especially emphasized when long-term rather than short-term economic goals are considered. An institution such as pension fund, with long-term commitments and vast resources, can be most suited to make investments for which there may be no ready market because they are long-term and require vast resources.

This second argument is also offered when information about investment opportunities is deemed inadequate or inaccurate for some reason. In such circumstances, the attractiveness of the investment will depend on how costly and how certain is the evaluation of a portfolio or a particular investment. If the evaluation is difficult, those who propose the social objective may have to bear the costs of a reliable evaluation. If those who propose the social objectives also benefit from it, the conflict of interest may pose a danger serious enough to suggest that the investment objective or the investment form of the social investing should be changed or abandoned altogether. This is an issue that will be discussed more thoroughly in the following sections.

Pension Fund Assets Belong to the Workers. One of the arguments in support of the claim for social investing is that pension funds belong to the employees, since the contributions to the funds represent foregone wages. Therefore, the argument runs, the employees own their own pension funds, and they, directly or through their unions, should determine how the funds are to be invested.

The underlying assumption of this argument, with which I agree, is that full ownership of property entitles the owner, subject to legislative limitations, to determine how the property should be used. But the other conclusion, that because the contributions to the funds represent foregone wages the employees are entitled to control fund investments, requires substantial modifications after further inquiry. Who "owns" pension funds?

One approach to answering this question is by examining the trust form under which most pension funds operate. Another approach is to examine the actual claims that employees have under the trust agreement. A third approach is to focus on the dependence of retired employees on their pensions and on their entitlement to control the funds on which their livelihood at old age will depend.

We start with the trust approach. The trust is a flexible legal form, permitting the division of interests in property by a trustor, the prior owner of the property. The trust is usually created when a trustor transfers legal title to a trustee with instructions as to the dealing with the property. These instructions bind the trustee, and, once the property passes to him in trust, he must perform his functions under the trust document which is not subject to close control by others. Under the law of private trusts, the trustee has merely the legal title to trust property. The beneficiaries have the beneficial ownership. Trust property must be managed for their benefit and in their interest.

One argument is that the beneficial ownership of pension participants includes the satisfaction of choosing the social objectives for which trust assets ought to be invested. In other words, the fact that participants are beneficiaries under the pension trust vests in them the right to control the investment policies of the trust.

This argument is seriously flawed. It is based on a misconception of the nature of trust form and of the rights of trust beneficiaries. Under trust law beneficiaries do not have a claim to control the truste or dictate trust terms. The contrary is true. By definition, trust beneficiaries may not have such control. Beneficiaries may not amend trust terms, unless that power is reserved to them in the trust document. Even so, if they do exercise full control, the arrangement is not a trust (it may be an agency or partnership).

The rights of beneficiaries are twofold: to claim under the trust document and to enforce the trustee's fiduciary duties, including his duties to abide by the trust document. Consequently, the beneficiaries may seek judicial assistance to ensure that the trust property is managed for their benefit, not as they choose that benefit—but for their benefit as bestowed on them or bargained by them (or others for them) in the trust document. I submit that the claim to control investments based on participants' status as beneficiaries is not convincing.

Another argument based on the trust approach would cast the participants as "trustors" of the pension trust. Trustors can, within public policy constraints, set forth the investment policies which the trustees must follow. Trustors' entitlement to dictate the terms of a trust stems from their ownership of trust property prior to its establishment. Since the trustor may deal with the property as he wishes, he may also donate it in trust or bargain to put it in trust in exchange for benefits given to him by others.

Under this argument the question will be who is entitled to the contributions made by employers to the pension funds prior to their transfer to the trustee. As we saw, the argument is that pension contributions represent foregone wages, leading to the conclusion that they belong to the employees prior to their transfer to the trustees. However, pension funds vary on this score. They can be divided into three groups, two of which may be overlapping. Under some pension arrangements pension assets do in fact reflect deferred wages. The employee could take his wage and consume it or defer consumption and obtain tax benefits. Under this arrangement the trust is established only to ensure that consumption will, indeed, be deferred. Apart from the time limitation, pension assets represent not foregone wages but deferred wages. There is no moral or policy justification to prevent an employee under this arrangement from dictating the investment policies of his pension, through the trust instrument, or even directly, if the trust so provides. In fact pensions based on employee contributions are organized to give the employees choices of investment policies. Whatever limits are imposed on employees' choices in these cases result from the fact that the assets are pooled to provide diversification, economies of size, and expert management.

In most pension plans, however, foregone wages do not represent pension contributions nor pension assets, but pension claims. These claims are contingent on the employees' performance of their undertakings and on conditions over which the employees may have no control, such as being alive on retirement date. Furthermore, the pension assets represent a security for the payment of these claims though sometimes the only source for pension payments. Since the employees' claims are for a fixed-dollar amount, there is no direct relation between their pension payments and the amount of assets in the pension plan. In these situations it is difficult to see how the participants can be considered trustors by virtue of an entitlement to the employer's contributions to the pension trust.

Arguably the employees are trustors because they bargain with the employer for their pensions. Surely, if they bargain for investment policies, as some unions did, they are entitled to the rights they obtained, as reflected in the trust document. But it is not because of the trust format nor foregone wages only that they gained their rights, but because they bargained for them.

In sum, the fact that pension plans are funded through trusts administered for the participants' benefit does not in itself justify a claim by employees of the right to choose social objectives of pension investments.

The examination of the nature of pension claims leads to a similar analysis. Arguably, the entitlement to control investment policies can be appended to the parties affected (both positively and negatively) by the investment performance of the assets. Those who obtain the gains and bear the investment risk and the losses from the investment decision should be entitled to join in the decisions on investment policies, or at least participate in the establishment of the ground rules on which investments will be made. However, the division of risk and benefits from investments in pension funds varies with the kind of plan. Under defined benefits plans this division is diffuse. An employer's contribution to a defined benefit pension plan are affected by the investment performance of the funds, and, on termination of the plan, any excess inures to the employers, not the employees. The participants have no direct claim to fund-asset earnings. They bear the losses from investments only when the assets are insufficient to pay pensions and when the Pension Benefit Guaranty Corporation (PBGC) does not cover fully their claims. Indirectly, they may be affected by losses if the employer attempts in contract negotiations to shift these losses to the employees.

In defined contribution plans, participants as a group may be the only parties affected by investment performance of the funds' assets. Thus, as a group, they may be entitled to control fund investments. But individual members have claims to specific amounts only, as annuity contract holders have. The claims approach leads to the conclusion that there is no justification in recognizing participants' control rights over investments at least with respect to defined benefit plans. Those who bear the risk mainly as creditors are not usually granted control over the operation of the debtor enterprise, unless their risk is very high. The allocation of control should therefore be examined in the light of that risk.

The third approach is to justify the employees' entitlement to control pension fund investments on the ground that these funds are set aside for them as a source (sometimes the only source) of their sustenance at old age. Even if the employees start with contingent rights, just as savings can increase by adding dollars, savings can increase by performing functions to earn a pension. The argument is that the employees earn not an annuity—a claim to a specific amount of money—but a claim to the assets in the pension fund. Therefore, the right to a voice in the management of these funds starts with their employment, not with retirement; and they are entitled to determine which investments enhance their well-being. They are the appropriate group to determine the social choice. The entitlement approach does not consider who bears the cost of social investing if a financial loss is involved. It adopts a view of a society which guarantees its members a minimum income, at least upon retirement, a view which may not be predominant in the United States. More importantly, this argument may be persuasive with respect to the preservation and accumulation of pension funds to achieve the purpose of caring for retired employees. But the power to use pension funds for social purposes is not necessarily related to the employees' needs. The argument does not support employees' full property rights to pension funds, nor does it support employees' rights to risk funds at the expense of the employer in a defined benefit plan.

Pension Funds Should Act as Ethical Investors. Arguments for social investment are also grounded in morality and ethics. Like other institutional investors, pension funds should refrain from supporting illegal, immoral, and unethical activities. Moreover, they should influence the managements of portfolio companies to act in a socially responsible manner.

The attempt to reach a consensus on moral and ethical issues has not been fully successful. Not everyone subscribes to the same notions of good and bad, right and wrong. Consequently, the difficult question as to whose moral and ethical standards pension funds should follow is left unresolved. There is also no agreement as to the extent to which social and ethical purposes should overcome wealth-maximization objectives. Trade-offs may depend on the amounts sacrificed and the egregious behavior condemned.

Arguments Against Social Investing

Subversion of Tax Subsidies. Congressional policy encourages the establishment of pension plans to ensure the payment of benefits and pensions upon retirement, especially to lower-paid employees. If social investments result in losses to the funds, then these investments in fact indirectly transform fund assets from future into present use, in conflict with the public policy. This objection may be overcome if losses from social investing do not exceed the permissible tax-deferred contributions in any particular case, nor result in excess tax deferral.

Social Investing Can Result in Loss to Employer or Employees. In a defined benefit plan, the employers bear the investment risk of fund assets unless they shift the risk to nonvested employees. Employers will have to increase their contribution levels by the amount of profits which the fund has foregone. The risk that the employers may default on their contributions may vary with particular plans. Current retirees under defined benefit plans will be the least affected by income loss that results from social investment. By the time their pensions are due, the pensions are secured by the fund's assets, 30 percent of the employer's net worth, and the Pension Benefit Guaranty Corporation. For other participants, however, the risk of pension default may be greater, depending on their retirement age.

By contrast, in defined contribution plans, all the participants bear the investment risk, unless they can shift the risk to the employer, or the latter makes up the losses voluntarily. In both cases, however, the residual risk is borne by the participants. The risks discussed here are immediate. The long-term effects of losses may spread to the other parties to the pension arrangement, and it is difficult to forecast these effects.

Losses to the Pension Fund May Pose a Threat to Its Objectives. In defined benefit plans, social investing resulting in losses need not impair the funds' objectives, at least not immediately, if the employer is able to increase its contributions. Even in this case the risk to employees that their pensions will not be paid is increased. But in defined contribution plans, the adverse effect on these funds' objectives will be more immediate, because no one else will assure the participants of their pensions. Their risk therefore will increase substantially.

Dangers to Accountability. The introduction of a social objective, even if it does not result in financial losses to the fund, may weaken the controls over pension fund management.

Social investing may undermine the accountability of trustees and fund managers in the following ways. First, additional objectives may increase the alternatives open for investment at the discretion of the managers. Both additional alternatives and broadened discretion weaken controls or make them more costly to enforce.

Second, social investing may pose additional conflicts of interest. These objectives bring benefits of various kinds: moral satisfaction such as that which may be derived from the exclusion of South African operators; political satisfaction, such as that which arises when nonunion construction firms are excluded from mortgage financing; and economic benefits (other than maximization of returns to the fund), such as may arise from investing in the employer's stock to assist the employer to finance new plants, or from building low-cost housing for employees.

Some of the additional conflicts of interest which social investing pose are most dangerous to the funds because the benefits may inure to those parties in interest which are prohibited from dealing with the funds altogether and because these benefits may be easily hidden.

The danger to the financial integrity of pension funds from social investing may depend, among other things, on the extent of the benefits to the parties in interest and on whether those parties in interest also bear the costs. The more they benefit exclusively without bearing the cost, the greater the danger to the fund objectives become. If parties in interest benefit from social investing, someone must see to it that the benefits are not overreaching, and that they do not corrupt the decision-making process in fund management. Third, if additional objectives are involved, there is currently no mechanism to make accountable those who choose and implement those objectives. Unless those who make the choice are fully entitled to the power which it invokes, someone must see to it that they account for their choice and its implementation.

Fourth, information is crucial to the control of managers. The costlier it is, the harder it is to make them accountable. Market mechanisms that improve accountability may not always be available for social investing. In fact, these investments are often desired because of market failure. If a particular social investment is in the form of securities traded on an active market, the problem of evaluating the security and comparing it to another investment in terms of liquidity, risk, and expected return are de minimus. Presumably, the informed market has priced the security accurately. But if social investment introduces securities which do not have a market, these investments may raise the cost of information about the other party to the transaction, the value of the property, and the costs of monitoring an on-going investment. The cost reduces accountability.

Investments based on social objectives may present hidden transaction terms and consequent costs. For example, if a pension fund conditions the grant of a loan on compliance with certain practices, the condition may be costly. If the borrower agrees to comply with the condition, he will seek compensation or advantages for compliance. Presumably the borrower's financial situation is weak, or some other term of the loan is less favorable to the fund than a usual term would be. On the other hand, if the borrower would otherwise comply with the requirement or has done so in the past, then, arguably, the grant of the loan does not result in hidden terms. The condition, however, requires further inquiry into the practices of the borrower, and that inquiry presents costs and reduces accountability.

Accountability for the economic objective of investments may be affected by the form which the investment takes. If the pension fund engages in the management and operation of enterprises, such as nursing homes and day-care centers, the fund changes its posture from a passive to an operating investor. Operating investments result in increased need for monitoring. It is far less costly to supervise investments in securities and other passive forms of investments than to supervise the operation of an enterprise involving personnel, purchasing property, and ongoing operations. It is difficult to evaluate the losses and expenses resulting from a change in the pension fund status for a passive to an operating investor, the risks of low liquidity, of unseasoned enterprises, and the recruiting of expert staff.

An example of a proposal which raises these problems is a recent plan to enable pension plan participants (or retirees) to sell their equity in their homes to the fund for an additional annuity, free occupancy until they die, free maintenance, property taxes, and utilities. This seemingly advantageous proposal raises questions of accountability. It poses a high degree of uncertainty for the fund as to the value of the real estate, future maintenance expenses, taxes and utilities, and it involves the fund in the business of monitoring real estate maintenance. It presents an enormous degree of uncertainty as to the amount and date of returns, and difficulties of discovering those who benefit, and the amounts of these benefits. It requires a close scrutiny to avoid mismanagement.

Fifth, information necessary to determine the social aspects of an investment, and whether and to what extent the social objectives have been achieved, may sometimes prove very costly. Such cost/benefit or social audit is expensive, complex, and usually inconclusive. Finally, social investing involves information costs on who benefits from it, and in what ways, to discover conflicts of interest.

A solution to this objection may be to require a clear accounting of investment losses and benefits to the fund, a reasoned decision on the choices of objectives, and a detailed examination of alternatives. If the form of the investment obscures the discovery of the above factors, alternative forms should be sought, or the investment should be prohibited altogether. On these grounds, for example, operating investments might be disallowed altogether.

Violation of the Law. Pursuit of various social objectives may involve violations of law such as antitrust and labor legislation. For example, a concentrated boycott of antiunion companies may raise antitrust questions even when the boycott is organized by unions. Similarly, the use of pension funds in connection with political elections and lobbying raises legal questions which await clarification. Although the advocates of social investing have not suggested the use of pension funds in this manner, the issue should be raised and explored, because it appears in other contexts of pooled funds.

Effect on Society May Be Negative and Positive. Social investing may also affect society at large. One example is the use of pension funds to ward off an attempt to take over the employer. This take over may enhance the efficiency of the enterprise, if investors acting as prudent investors, not as friends of the insurgents, judged the insurgent management to be more efficient. If, on the other hand, the insurgents intend to loot the company, a vote against the take over could be beneficial to society.

Similarly, a purchase of shares to change management's hostile attitude to unions raises the question of the effect of such an action on society, in addition to its effects on the enterprise. Like take overs, the unionization of a particular work force may further public policies (when the company has been violating the law) or economic advantages (when unionization raises worker morale and productivity). On the other hand, it may result in coercive unionization in contravention of public policy.

With high unemployment there is great incentive to use pension money in support of ailing industries. These investments, too, may either revive the industry eventually, or merely prolong its deterioration.

Social investing may also result in discrimination among participants of the same class. The financing of nursing homes may discriminate against those retirees who do not take advantage of the services, not because they subsidize the services (unless the take the investment risk) but because they would receive lower benefits than those who benefit from the services. Arguably, this unequal treatment may be justified because some members of the participant group need and are unable to purchase the particular service. Also, the provision of services, such as nursing homes, without proof of such a need, may be justified as a form of insurance. But then the most appropriate form for assuring the services is through insurance or welfare funds, paid for by the employer or employees.

Proposed Matrix. The overall effects of social investing could be put together in the following matrix. Each proposal must be evaluated on its merit, and the cost to the fund and dilution of accountability should be weighed against the benefits to the participants or to society.

Effect on Plan	Objectives	Increase/ Decrease	Extent of Effects: Actual/ Probable	Benefit from Social Investing
	Receipt of contribution			
	Liquidity, optimal rate of return			
	Accountability of managers			
Retirees	Annuity payments			
Employees	Funding of pension obligations			
Employers	Limiting liability for payments			
PBGC	Insuring against failure of funds			
IRS	Limits on tax deferral			
Society goals	Accountability, maximizing all above goals and any other benefits from investment.			

Allocating Decision Power

The decision power regarding social investment may be allocated to the legislatures, the current power structure, and to those who bear the investment risk, as well as to the participants of the plan. Clearly the pension power structure need not be vested exclusively in one group or another, and each can play a role. In addition, to ensuring accountability, the power of supervising the decision makers must also be vested. The choice of decision makers may be guided by their qualification for making the decision, their current power position, which is preferable to a new, untested one, and the nature of the decision to be made. As argued below, the choice of social objectives should be made through a democratic process, whenever possible, either in society or within the pension community. The discussion here enumerates various choices of decision makers, and focuses on the other considerations in connection with these choices.

Who Should Participate in the Choice of Social Goals?

Legislatures. Legislatures are legitimate claimants to the power to choose socially desirable objectives for pension investments. Legislatures are experts in determining social needs, and they represent, at least in theory, the values and political judgments of the majority of the population. One objection to the vesting of this power in the legislature may be the concern that the political arm of the government should not be given additional economic power. But then, social investing is, by definition, a merger of economic and political power. Besides, the segregation of economics and politics has been more a theory and a concern than a practice in this country. "Legal lists" have in fact enabled trustees at least in part to investments for social purposes, such as housing. The pending bills S.1821 and S.1822 are a recent example. The legitimate claim of legislatures to choose the social objectives of pension investments should, however, be subject to the condition that those who bear the losses have consented to the arrangement, or have been compensated for their loss, and that the minimal rights of participants will be honored.

Should the Current Power Structure Be Duplicated to Allocate the Social Choice? It is preferable to use existing structures for new purposes, because these structures are more predictable. If they need improvements for whatever reasons, those reasons should not be hidden behind social investing goals. The question is therefore twofold: first, what is the power structure of pension funds? Second, how should the power to choose social goals be allocated and integrated into the current structure? Third, are there reasons for changing the status quo?

The Current Power Structure of Pension Funds

Investment decisions of pension assets are divided among various groups, and the allocation of decision power differs depending on the type of pension plans and on who sponsored them. The sponsors usually reserve for themselves the power to appoint and remove the funds' trustees (and sometimes the investment managers). In single-employer plans (whether of defined benefit or defined contribution vintage) the trustees are usually chosen by the employer. In Taft-Hartley fund plans, which are sponsored by the unions, even though the trustees are elected in equal numbers by the employers and the employees' union, the unions are the dominant force.

The actual investment decisions are made by the trustees or managers, who are bound to follow the trust provisions, and the directives of the Employee Retirement Income Security Act of 1974 (ERISA). The trustees are naturally influenced by the parties who have the power to choose and replace them. But their liabilities under ERISA shield them, so to speak, from pressures to make imprudent investments. (These liabilities, however, are sometimes ineffective when the trustee's interests are strongly in conflict with those of the fund.)

Subject to regulation by ERISA, the trust provisions are set forth by the sponsor, alone, or pursuant to an agreement with the union or the employees. It is important to note that ERISA does not regulate the bargaining process by which the trust document is determined nor the negotiating parties in connection with the bargaining. These aspects of pension funds are determined by labor law and other branches of the law. It is doubtful whether employers are under mandatory obligation to negotiate on social investing, although there is no authority on that point.

In sum, within the legal constraints, the employer and employees or their unions set up the ground rules and policies for pension plans, and the trustees, managers, and other plan fiduciaries implement these rules and policies.

The participants play a role, together with the Department of Labor and others, in enforcing ERISA, since the act granted them standing to sue for violations of the act. But they were not given decision-making power under the present structure.

(The diagram on page 153 illustrates in very general fashion the division of pension fund decision-making levels.)

What Are the Reasons for Changing the Status Quo with Respect to Social Investing?

It can be argued with much force that when the costs of social investing are minimal, and the objectives are designed to preclude the funds from supporting clearly illegal or unethical conduct, the present decision makers should have the power to establish and implement these policies to render pension funds socially responsible institutional investors. Presumably such

Type of Decision	Defined Benefit Plans	Defined Contribution Plans	Employees' Contributions Asset Accumulation Plan
Plan terms (trust terms)	Employer	Union/employer	Employees
Choice of trustees	Employer	Union/employer	Employer
Choice of manager	Trustees	Trustees	Employer/employees
Investment policy	Trustees	Trustees	Manager or employees
Investment strategy	Trustees	Trustees	Manager or employees
Choice of particular investment	Manager	Manager	Manager or employees

policies are either mandated, at least indirectly, by statute, or have a strong support, if not in society, then within the pension community.

With the exception noted above, however, it can be argued with equal force that professional fund managers should not determine social objectives but only implement them. First, these managers do not necessarily have the expertise to determine these objectives. Second, their self-interest does not provide a reliable balance between wealth maximization and social good. They have little interest in social investing: it puts constraints on their freedom to take economic aspects into account, namely on the exercise of their expertise. Their business is less affected by public opinion and community good will than by the wishes of those who can hire and fire them. Their interests are therefore heavily oriented towards wealth maximization. Pension trustees on the other hand usually identify with those who appointed them. Their careers are rarely based on their positions as pension trustees. They also identify less with the investment performance of the funds, especially when they are assured of constant growth through contributions.

The profit maximization theme in the pension enterprise is less prominent than in the corporation. Pension funds are not accumulated in order to make money. They have to make money because they are accumulated. Pension funds are also less committed to particular investments than operating enterprises which can ill afford to divert their funds to achieve purposes unrelated to their profit-maximizing enterprises, or to set aside substantial amounts for social good.

In sum, while pension funds managers should not make the social choices because they may tend to ignore them, pension trustees should not make these choices because they may tend to ignore the economic objectives of the funds. Both should merely implement, within reasonable limits, predetermined policies.

Those Who Bear the Investment Risk

The consent of those who bear the investment risk of pension-asset investments should be required before a choice of social objective can be made at these parties' expense.

It is unconscionable that a loss be inflicted without the consent of those who will bear it. Since the question of whether a loss occurs is sometimes hard to evaluate, one should err to protect the potential payers. Consequently, the consent of the party bearing the loss should be obtained whenever a social objective is planned and superimposed on the investment.

Four questions arise in this context. First, since a party bearing the cost is entitled to consent to or veto the social choice, should it be permitted to use its veto only because of the potential or actual loss imposed on it, or also for any other reason, such as its disagreement with that choice? Second, if the participants bear the loss, as in the case of defined contribution plans, should each participant be entitled to veto the social choice, veto only his own behalf, or on behalf of the group, or should the majority of the participants be entitled to impose its choice of the dissenting minority? Third, since the party bearing the loss, can, by definition, veto the social choice, should it be permitted to bargain for benefits in consideration for its consent? In other words, should it be permitted to sell its consent to the highest bidder? Fourth, what is the status of the parties bearing a remote possibility of loss, such as the retirees, the PBGC with respect to an underfunded plan, or the Internal Revenue Service in the case of a well-funded plan?

Should the Party Bearing the Loss be Allowed to Veto for Whatever Reason or only by Virtue of the Potential Burden Imposed on It? Ideally, the party having a veto under these circumstances should be permitted to use that power only for the reason for which the power was granted; namely, to protect that party from financial burdens which it did not choose to make. The use of that power to block a particular social policy would in fact be unjustified under any other circumstances.

The question here is how to separate the economic justification for a veto from a political one. Analogous to this case is the use by minority shareholders of their veto power to extract benefits beyond the parties' original expectations. In most cases the minority's veto was not questioned; but in egregious cases the minority was precluded from using the veto power, sometimes as a basis for claim against the majority when that veto was circumvented. Similar limitations could be imposed on the veto power bearer here. However, since it is difficult to show motivation, the question of burden of proof becomes crucial. The burden should lie heavily on those who wish to negate the veto power. As between extortion and protection from added burdens, the latter should obtain priority.

The Case of Participants Bearing the Investment Loss. Arguably, if the party bearing the loss is a participant, somewhat different problems arise from his rights to veto social objective. Unlike a mere controlling person, a participant may act in his own interest. If he is a retiree, his self-interest may, in all probability, be in harmony with the paramount objective of the pension fund: the providing of retirement benefits. He will therefore gage the amount of risk to this purpose as against the desirable social objective. However, the retiree is concerned with present payments. He may extract higher consideration for his consent than the value of his increased risk. His trade-off may, therefore, be to the detriment of the fund's purposes by depleting fund assets for future retirees.

Employees' immediate self-interest in jobs and other benefits may also lead them to sacrifice the main objective of the fund in providing future retirement security. The problem concerning employees' consent differs from that of the employers' only in degree. The answer should also be the same as that pertaining to employers.

Should the Party at Risk be Allowed to Sell Its Consent? Arguably such a sale would benefit society. The party bearing the risk will contribute the amount needed for the pension obligations and be compensated for the additional contributions, reflecting the economic loss to it from the investments. The purchaser will choose the social objective, which it values more than the concessions which it has to make to seller. Under this scheme, each party, the employer (the one who would have the veto power, in defined-benefit plans), the employees, or all the participants, would obtain the choices which they value the most.

A market scheme for the right to choose social investing, however, raises serious questions of accountability and dangers to the funds' financial integrity, when those who sell their veto power control or influence the funds' investments. A market place is effective for allocating resources among those who control, benefit, and bear the risk of loss of property. Among those who may control but not bear the losses personally, the market model may open the door to weakened accountability and consequent mismanagement.

One answer to the difficulties raised by the sale of veto power is to prohibit it. It is difficult, however, to enforce a prohibition such as this. If the parties wish to agree on trade-offs, they can negotiate a contract in which that trade-off will be hidden with no opportunity for supervision by an outside independent party or by other means. Rather than prohibit, I would therefore opt for a supervised agreement.

The rights of dissenting minority members of the pension community deserve special treatment. Assuming that the employer does not bear the investment risk and the plan is a defined-contribution plan, or assuming the investment risk is borne by the participants, or that the employer agreed to the social objective, under what condition should a participant have the right to dissent from the choice and what are the consequences of this dissent?

Two analogies, that of corporate law and that of unions, are useful for focusing on the problem in the pension area. Shareholders have the right to bring proposals in certain areas of corporate activities. General social subjects, however, are not within the realm of these proposals. The management on the other hand, may use corporate funds not only to operate the enterprise with certain social policies, but also to make contributions to worthy charitable institutions of the management members' choice. Furthermore, corporate constitutional right of free speech has been interpreted so that corporations, through their managements, may spend corporate assets to convince the public on particular political issues, even when the issues are unrelated to the business of the corporation. The fact that shareholders can sell their shares played a role in the Supreme Court's majority opinion to protect the constitutional rights of corporation to free speech.

On the other hand, unions cannot use the dues of dissenting union or nonunion members for purposes other than representing the members in employer-union negotiations. If the unions choose to use the dues for other purposes, the dissenting members may have the right to be reimbursed. In addition to the coercive nature of the dues payment the court chose this solution because it allowed both minority and majority the freedom to use the dues as they wish.

Pension arrangements are arguably free of coercion although they may come with the compensation package. Even if we consider the employees free to avoid the pension arrangement, and therefore not coerced as dues payers would be, the cost of severing the relation with the pensions are far greater than those of selling tradeable stock. Consequently, pension participants are more similar to dues-paying members than they are to shareholders.

Nonetheless the solution of the Supreme Court in the case of union dues may be inappropriate for pension funds. The participants are usually locked into pension funds. They cannot terminate the relation even when they leave the employment. Thus, the right of withdrawal is not practicable in the pension situation. The minority dissenting participant seems to be bound to majority rule. In large pension plans, however, participants can be provided with choice of an alternative conventional fund. This choice may satisfy dissenters and majority without injury to the fund.

Since social investing may result in greater burdens to the PBGC or greater tax deductions to plan sponsors, the PBGC or IRS should also have a veto over social investing. However, in the case of these two agencies, veto should be exercised only on legitimate grounds of underfunding or overfunding results. Since government agencies are regulated with respect to considerations on which some of their decisions are based, the enforcement of the limitation on the veto power will be less problematic than in the case of the parties bargaining on the veto power. The burden of showing legitimate grounds for the exercise of veto power should therefore be on the agencies.

Conclusion. This discussion leads to the conclusion that there is in fact no person or group whose self-interest is closely identified with the main objectives of pension funds except, perhaps the retirees. Even they may have an interest in depleting the funds' assets for present consumption at the expense of future retirees. The extent to which the interest of each group conflicts with those of the pension fund as an institution may be so great as to make self-executing rules ineffective. In other words, social investing cannot be effectively introduced by giving an identifiable group within the pension community the power to choose the objectives and balance society's good with the main purpose of pension funds.

Yet both complex institutions and fiduciaries do carry on objectives with which they do not identify completely, and make decisions that do not always serve their own interests. The law has substantial and effective techniques to induce these institutions and fiduciaries to act in the furtherance of objectives other than their own.

The question is therefore how should this purpose be achieved?

Proposed Model

Social investing involves two types of decisions which will be called economic and political. They are not mutually exclusive, but they are sufficiently distinct to result in different decision makers, different decision processes, and different supervising and accountability processes. I call economic decisions those which lend themselves to objective standards, however, imprecise. I call political decisions those which are based predominantly on beliefs and value judgments. Political decisions may indeed be assigned quantifiable values and priorities. But these values and priorities are essentially matters of judgment. Another distinction between economic and political decisions pertains to their level of generality. While economic decisions involve day-to-day management of the pension fund which must be performed by a centralized management, a political decision such as the choice of a social objective, though not its implementation, can be made by a large number of persons, such as the membership of the participating group, depending only on the costs of the decision process.

Another distinction between the economic and political decision pertains to the form of implementation. In the case of an economic decision, standards are set and powers delegated on an ever-narrowing basis. The political model may include the delegation of the political decision fully or partially to the few, and the control of these decisionmakers through periodic elections. Further, the truthfulness of the information regarding political decisions to the numerous decision makers is assured in a different form from that pertaining to economic decisions. The political decision makers obtain facts, arguments, through a free flow of unrestricted information, ideas, and debates. The assumption is that conflicting interest groups will ensure the education of the voters and the truth of the information. When economic decisions are at stake, information may not be easily available nor easily understood, and the subject matter of the decision involves fewer value judgments and more provable data. There are standards against which economic performance can be measured. The truthfulness of the information can then be regulated by law.

Finally, economic and political decisions may be amenable to different processes of accountability. The courts and the judicial process are appropriate supervisory mechanisms for economic decision makers, while, barring standards, courts are not suitable to supervise political decisions. Political decision makers are accountable to their constituencies through the election system or to no one (if the decision makers are the voters).

Social investing comprises both economic and political decisions. These can be separated and should be dealt with in a different manner.

A plausible system would introduce the determination for the social objective in the following fashion. The employer is not required to bargain in good faith over the subject matter, and the unions can use only persuasive methods to induce the bargaining. But once the employer agrees to the bargain, the parties may then negotiate specific social policies, which the trustees and managers can implement.

The participants could either choose the social objectives or ratify (or veto) social choices made by the employer or the union officials or both. The participants could also determine, ratify, or veto the trade-offs between the economic and social objectives and or they should elect representatives who would make the decisions on the participants' behalf. The status of retirees in this set-up shoud be clarified. If their involvement in the process is justified, they should have a voice, a representation as a class or otherwise, in the scheme.

Experience with shareholders' democracy may raise questions as to the efficacy of participants to control the social choice. However, as compared with shareholders in a publicly held corporation, participants are less apathetic, in closer contact with each other and their union officials, more locked into the pension system, and easier to reach and communicate with. Information as to the choice of the social objective lends itself to the model of a political decision. Information as to the form and result of implementing the policy may well be governed by the model of an economic decision.

This proposal does not purport to create a new world but rather to include in the existing processes a new subject matter. When one examines the current controls and decision process in the pension fund, one recognizes the two types of decision processes at work. The management and investment of pension assets involves economic decisions for which the decision makers are accountable to their superiors and to the courts. The bargaining between the employer and employees (or their unions), the establishment of the ground rules regarding pension payments, and the choice of the trustees to implement those rules, all involve political decisions. The parties conducting the bargain are accountable to their constituencies—the unions to their employees, and employer management to the shareholders.

Enforcement

If social investing is permitted, various solutions to the problem of the accountability of the decision makers can be considered: (1) social investing can be prohibited unless a government agency, such as the Department of Labor or the courts, has approved it; (2) if the trustees or a certain percentage of the trustees are independent of both the employer and the employees or their union, and they approve it; (3) the participants approve it; or (4) if the trust document specifies a social objective, the trustees consider the objective, provided they observe standards set forth in the trust document.

A system of accountability may be designed in different degrees of intensity. Disclosure and scrutiny before the action, or an evaluation after the action, and/or a periodic review, by the independent trustees, by the courts, and by the Department of Labor.

Concluding Statement

The discussion in this paper does not render a clear, unequivocal answer on whether the law should be changed to permit social investing. There are weighty arguments for and against it. Perhaps the answer should not be a yes or no but a qualified yes. We can satisfy the argument for social investing if we eliminate or guard against the dangers that it poses. We can permit the use of pension funds for socially desirable goals if we minimize, if not eliminate completely, the dangers which social investing may pose to the primary goals of pension funds.

Since social investing raises serious problems, the introduction of social objectives to investment policies, even with the parties' consent, especially at the expense of profit maximization, should be permitted only after scrutiny by the courts—pursuant to special statute—or by an administrative agency. While the choice of policy could be determined through a democratic process, the economic evaluation could be subject to standards, such as prudence and perhaps a ceiling on anticipated losses.

There is little empirical data on the current practices of social investing, partially, perhaps, because some practices may be perceived to violate ERISA. It would be essential to the shaping of the law of the future to find out more about the subject: the extent of social investing; the social objectives chosen; the intended beneficiaries; whether the investment decisions are implemented by exclusion of particular investments (such as tobacco and liquor stocks or nonunion employers) or voting stock, or divestment of investments already made, or by investments actively pursued to achieve other than economic objectives, such as purchases of stock to combat or effectuate a takeover, or by investments which posit the funds as operating rather than active investors.

It would be helpful to find out how the decisions and choices of objectives are made, how a power is divided and accounted for, and what process is followed. Finally, and the most difficult question of all, it would be extremely important to evaluate the economic results of these investments in comparison to nonsocial investments. What, if any, are the connections between the economic results and the objectives, the forms of the investments, the decision makers, and the decision process.

The enormous size of pension funds, their predictable continued existence and growth, and their high concentration make the power struggle over the control of their assets inevitable. That struggle therefore, ought to be rationalized, channeled, and dissipated to avoid unnecessary friction and irresponsible actions. Rather than ignore or reject social investing altogether, we should investigate a way to try it, cautiously and judiciously.