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Revenue Sharing Payments as Plan Assets

The Department of Labor (DOL) recently issued Advisory Opinion 2013-03A, which addressed whether revenue sharing payments are considered plan assets under ERISA. The Opinion was issued in response to a request on behalf of Principal Life Insurance Company (Principal) regarding Principal's receipt of revenue sharing payments in connection with plan investments. Under the arrangement described in the request, Principal retained all revenue sharing payments, but in some cases maintained a bookkeeping account reflecting credits to the plan calculated by reference to the estimated revenue sharing payments. Depending on the specific arrangement, the credits would later be applied to plan expenses, or alternatively, deposited into the plan's account (often referred to as an "ERISA budget"). Based on the facts presented, the DOL concluded that the revenue sharing payments received by Principal were not plan assets under ERISA, stating that the possibility of a credit was not sufficient to constitute a plan asset before the plan actually received the credit.

Determining Plan Assets

According to the Opinion, the determination of plan assets is based on the ordinary notions of property law, unless expressly stated otherwise in the regulations promulgated by the DOL (*see* 29 CFR 2510.3-101, 102). Thus, whether a revenue sharing payment is a plan asset depends on whether the plan has a beneficial ownership interest in the funds. A beneficial ownership interest requires some sort of contractual right (either express or implied) to the funds.

Examples of Payments that ARE Plan Assets

Whether such a right exists is a question of fact which considers the service provider's arrangements and communications with the plan. The Opinion provided examples of when revenue sharing payments would become plan assets, including:

- The payments are held in a trust on behalf of the plan;
- The payments are held in a separate account with a bank or third party in the name of the plan;
- The agreement expressly provides that that the funds belong to the plan; and
- The service provider has expressed an intent or made a representation to grant such a beneficial interest to the plan that is sufficient to lead the participants and beneficiaries of the plan to reasonably believe that the funds separately secure the promised benefit or are otherwise plan assets.

Examples of Payments that ARE NOT Plan Assets

The DOL also acknowledged situations insufficient to create a beneficial ownership interest in the payments, including:

- The mere segregation of the service provider's funds to facilitate administration of its agreement with a plan; and
- The possibility of a credit before the plan actually receives the credit.

Additional Fiduciary Considerations

Whether a revenue sharing payment is a plan asset is important because the existence of plan assets helps to identify the plan's fiduciaries. The Opinion recognized this fact and included a discussion on fiduciary issues that may arise in connection with such payments. Specifically, if the service provider is a fiduciary under ERISA Section 3(21) as a result of providing investment advice for a fee as defined under Section 3(21), the service provider must ensure the arrangement does not result in a violation ERISA Section 406(b), which prohibits self-dealing transactions. Such violations would occur if the service provider used its authority, control or responsibility as a fiduciary to cause the plan to invest in funds which paid the service provider revenue sharing or other fees.

The DOL further noted that regardless of whether the revenue sharing payments are plan assets, the arrangement between the service provider and the plan is subject to:

- **ERISA Section 408(b)(2),** which requires a reasonable contract and arrangement for services that would otherwise be considered a prohibited transaction between a plan and party in interest. This requires that the compensation and fee disclosures be documented and that the compensation paid is no more than reasonable.
- **ERISA 404(a)(1)**, which requires that responsible plan fiduciaries act prudently and solely in the interest of the plan. In this regard, plan fiduciaries must assure that the compensation is reasonable, including the negotiation of the specific formula and methodology under which the revenue sharing will be credited to the plan. Plan fiduciaries must also be able to periodically monitor the service provider to ensure the agreed upon formula is being correctly applied and remains reasonable.