

July 12, 2013

DOL Opines on Plan Expense Reimbursement Credits

In [Advisory Opinion 2013-03A](#) (July 3, 2013), the Department of Labor opined that revenue sharing and similar amounts carried on the books of a retirement plan service provider as a credit due the plan, if properly structured, are not ERISA “plan assets” prior to receipt by the plan.

- It has become relatively common for retirement plan platform and certain other service providers that receive revenue sharing and similar amounts from plan investments to credit the plan some or all of those amounts, to be used for permissible plan purposes.
- Upon receipt by the plan, these amounts become ERISA “plan assets” subject to the “held in trust” and other applicable requirements of that statute.
- A question had arisen, however, whether these amounts, when received by the service provider and recorded on its books as a credit due the plan, become “plan assets” even before they are actually transferred to the plan.

DOL reasoned that such amounts recorded in a service provider’s bookkeeping account as a credit due the plan do not become “plan assets” unless, by reason of the terms of the arrangement or the communications or actions of the parties, the plan has a beneficial ownership interest in those amounts under ordinary notions of property rights. Under the arrangement described in the Advisory Opinion:

- The service provider agreed to maintain a bookkeeping account tracking the credit;
- These amounts were general assets of the service provider and not placed in a special bank or custodial account; and
- Neither the agreement with the plan nor any representation of the service provider provided that those amounts would be segregated or set aside as a separate fund for the benefit of the plan,

DOL found that nothing in this arrangement led to the conclusion that the amounts recorded in the bookkeeping account became “plan assets” prior to receipt by the plan.

DOL’s conclusion in this regard accords with both its views previously expressed on similar “plan asset” questions and the weight of opinion in the regulated community, and helpfully puts to rest any lingering concern on this point.

In addition to the principal “plan asset” question, DOL commented on several ancillary issues, including:

- The status of the plan’s contractual right to the credit, and of any claim resulting from a failure to pay over a credit when due and owing, as “plan assets”;
- The service provider’s status as an ERISA party in interest and the need for exemptive relief such as the §408(b)(2) necessary services exemption, and possibly additional relief if the service provider is acting as an ERISA fiduciary; and

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- The obligation of the responsible plan fiduciary, under the standards of ERISA §404, to ascertain the reasonableness of the compensation paid to and among service providers and to understand and monitor the methodology for calculating the credit due the plan.

The Advisory Opinion expressly does not address fiduciary issues related to the selection of plan investment options that do or do not provide revenue sharing or to the allocation of credits received by the plan to plan expenses or participant accounts.



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