U.S. Department of Labor

Employee Benefits Security Administration
Washington, D.C. 20210

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29 CFR 2510.3-101
404 & 406

Stephen M. Saxon
Andree M. St. Martin
Groom Law Group, Chartered
1701 Pennsylvania Ave., NW
Washington, DC 20006-5811

Dear Mr. Saxon and Ms. St. Martin:

This is in response to your request on behalf of the Principal Life Insurance Company ("Principal") for an advisory opinion regarding the status of certain revenue sharing payments Principal receives from third parties. Principal receives these payments in connection with investments by employee benefit plans for which Principal provides certain services. In particular, you ask whether the revenue sharing payments constitute "plan assets" of the client plans under ERISA.[1]

You state that Principal, a life insurance company, provides recordkeeping and related administrative services to retirement plans subject to Title I of ERISA, including 401(k) and other participant-directed defined contribution plans. Principal also makes available to plans a variety of investment options, including its own insurance company separate accounts and affiliated and unaffiliated mutual funds. Principal receives revenue sharing payments from these investments in the form of Securities and Exchange Commission Rule 12b-1 fees, shareholder and administrative services fees or similar payments. You state that although Principal retains all of the payments, it may agree with a client plan to maintain a bookkeeping record of revenue sharing received in connection with the plan's investments. The bookkeeping account reflects credits to the plan calculated by reference to the estimated revenue sharing payments. For example, in accordance with terms in the agreement or directions from a plan fiduciary, Principal will apply the credits to pay certain plan expenses, such as for the services of accountants, consultants, actuaries or attorneys to the plan. Alternatively, Principal may agree to deposit an amount equal to the credits directly into a plan account, periodically or on specified dates.

You state that Principal deposits the revenue sharing payments into its general asset accounts and does not establish a special bank or custodial account to hold the revenue

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[1] You have not asked for an opinion on, and this letter does not address, any fiduciary issues involved in selecting investment options that include revenue sharing expenses versus those that do not. This letter also does not address any fiduciary issues that may arise from the allocation of revenue sharing among plan expenses or individual participant accounts or where the employer has the obligation to pay plan expenses.

sharing payments. None of its agreements with the client plans call for Principal to segregate any portion of the revenue sharing payments for the benefit of any plan. You state also that Principal makes no representations to the plan fiduciaries or to any plan participants or beneficiaries that revenue sharing amounts it receives will be set aside for the benefit of the plan or represent a separate fund for payment of benefits or expenses under the plan.

Title I of ERISA does not expressly describe what constitutes assets of an employee benefit plan. The Department has promulgated regulations identifying plan assets when a plan invests in other entities (*see* 29 CFR 2510.3-101) and when a participant pays or has amounts withheld by an employer for contribution to a plan (*see* 29 CFR. 2510.3-102). In other situations, the Department has indicated that the assets of an employee benefit plan generally are to be identified on the basis of ordinary notions of property rights. *See, e.g.,* Advisory Opinion 94-31A (Sept. 9, 1994).

Applying ordinary notions of property rights, the assets of a plan generally include any property, tangible or intangible, in which the plan has a beneficial ownership interest. The identification of plan assets therefore requires consideration of any contract or other legal instrument involving the plan, as well as the actions and representations of the parties involved. For example, a plan generally will have a beneficial interest in particular assets if the assets are held in a trust on behalf of the plan, or in a separate account with a bank or other third party in the name of the plan, or if it is specifically indicated in documents or instruments governing the arrangement that separately maintained funds belong to the plan. *See* Advisory Opinion 92-24A (Nov. 6, 1992). Similarly, whether a plan has acquired a beneficial interest in specific assets also depends on whether an intent has been expressed to grant such a beneficial interest or a representation has been made sufficient to lead participants and beneficiaries of the plan reasonably to believe that such funds separately secure the promised benefits or are otherwise plan assets. *See* Advisory Opinion 99-08A (May 20, 1999). On the other hand, the mere segregation of a service provider's funds to facilitate administration of its contract or arrangement with a plan would not in itself create a beneficial interest in those assets on behalf of the plan.[2]

Due to the inherently factual nature of the inquiry, it is possible that revenue sharing amounts received by Principal in connection with a particular plan's investments are assets of the plan, depending on Principal's arrangements and communications with that plan.[3] Nothing in the circumstances described above, however, would lead us to conclude that amounts recorded in the bookkeeping account as representing revenue

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[2] *See, e.g.,* Advisory Opinion 92-24A (Nov. 6, 1992) (in the absence of any other actions or representations by an employer which manifest an intent to contribute assets to a plan, the mere establishment of an account in the name of the employer to be used exclusively in administering the plan would not create a beneficial interest in the plan).

[3] *See* Revision of Annual Information Return/Reports, 72 FR 64731, 64744 (Nov. 16, 2007).

sharing payments are assets of a client plan before the plan actually receives them. As noted above, however, the assets of a plan may include any type of property, tangible or intangible. Thus, the client plan's contractual right to receive the amounts agreed to with Principal, or to have them applied to plan expenses, would be an asset of the plan. Similarly, if Principal should fail to pay amounts as required by the contract or arrangement with the plan, the plan would have a claim against Principal for the amount owed and the claim itself would be an asset of the plan.[4]

Regardless of whether the revenue sharing payments are plan assets, the arrangement between Principal and its client plans would be subject to certain provisions of ERISA. As a provider of services to a plan, Principal would be a party in interest with respect to the plan pursuant to section 3(14)(B) of ERISA. The furnishing of goods, services or facilities between a plan and a party in interest is generally prohibited under section 406(a)(1)(C) of ERISA. However, section 408(b)(2) of ERISA exempts certain arrangements between plans and service providers that otherwise would be prohibited transactions under section 406(a)(1)(C) of ERISA. Specifically, section 408(b)(2) provides relief from ERISA's prohibited transaction rules for service contracts or arrangements between a plan and a party in interest if the contract or arrangement is reasonable, the services are necessary for the establishment and operation of the plan, and no more than reasonable compensation is paid for the services. Regulations issued by the Department clarify each of these conditions to the exemption.[5]

The Department's regulations provide that section 408(b)(2) of ERISA does not extend to acts described in section 406(b). *See* 29 CFR 2550.408b-2(a). As explained in 29 CFR 2550.408b-2(e)(1), if a fiduciary uses the authority, control, or responsibility which makes it a fiduciary to cause the plan to enter into a transaction involving the provision of services when such fiduciary has an interest in the transaction which may affect the exercise of its best judgment as a fiduciary, a transaction described in section 406(b)(1) would occur. Section 408(b)(2) does not provide an exemption for a fiduciary's use of its authority to affect its own compensation.

The regulation explains, however, that a fiduciary does not engage in an act described in section 406(b)(1) if the fiduciary does not use any of the authority, control, or responsibility which makes such person a fiduciary to cause a plan to pay additional fees for a service furnished by such fiduciary or to pay a fee for a service furnished by a person in which such fiduciary has an interest which may affect the exercise of such

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[4] This analysis is similar to the position of the Department described in Field Assistance Bulletin 2008-01 with respect to the plan asset status of a plan's claim against an employer for delinquent employer contributions.

[5] *See* 29 CFR 2550.408b-2. Recent amendments to this regulation requiring expanded disclosures regarding the contract or arrangement, including disclosures regarding direct and indirect compensation received by covered service providers, became effective on July 1, 2012. See 77 Fed. Reg. 5632 (Feb. 3, 2012) for more information.

fiduciary's best judgment as a fiduciary. For example, if Principal, in its provision of services to a client plan, is a fiduciary within the meaning of section 3(21)(A) of ERISA, including by virtue of providing investment advice for a fee as described under section 3(21)(A)(ii) of ERISA, and uses any of the authority, control or responsibility which makes it a fiduciary to cause a plan to invest in funds which pay Principal revenue sharing or other fees, a violation of section 406(b) of ERISA would occur which would not be exempted by section 408(b)(2).[6] In that case, the responsible plan fiduciaries would have to evaluate whether Principal's revenue sharing or other fee arrangements involving the plan give rise to any non-exempted prohibited transactions under section 406(b) of ERISA.

ERISA's general standards of fiduciary conduct also apply to the proposed arrangement. Under section 404(a)(1) of ERISA, the responsible plan fiduciaries must act prudently and solely in the interest of the plan participants and beneficiaries both in deciding whether to enter into, or continue, the above-described arrangement with Principal, and in determining which investment options to utilize or make available to plan participants or beneficiaries. In this regard, the responsible plan fiduciaries must assure that the compensation the plan pays directly or indirectly to Principal for services is reasonable, taking into account the services provided to the plan as well as all fees or compensation received by Principal in connection with the investment of plan assets, including any revenue sharing. It is the view of the Department that the responsible plan fiduciaries must obtain sufficient information regarding all fees and other compensation that Principal receives with respect to the plan's investments to make an informed decision as to whether Principal's compensation for services is no more than reasonable.

The plan fiduciaries must also act prudently and in the best interests of plan participants and beneficiaries in the negotiation of the specific formula and methodology under which revenue sharing will be credited to the plan and paid back to the plan or to plan service providers. Prudence requires that a plan fiduciary, prior to entering into such an arrangement, will understand the formula, methodology and assumptions used by Principal in arriving at the amounts to be returned to the plan or used to pay plan service providers following disclosure by Principal of all relevant information pertaining to the proposed arrangement. The plan fiduciaries also must be capable of periodically monitoring the actions taken by Principal in the performance of its duties to assure, among other things, that any amounts to which the plan may be entitled under the terms of the arrangement are correctly calculated and applied for the benefit of the plan. Thus, in considering whether to enter into an arrangement of this kind, the fiduciary should take into account its ability to oversee the service provider, including its ability to oversee and monitor the service provider's determinations under

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[6] *See* Advisory Opinion 97-15A (May 22, 1997); Advisory Opinion 97-16A (May 22, 1997); and Advisory Opinion 2003-09A (June 25, 2003).

the formula. In addition, plan fiduciaries must obtain sufficient information to assure that any service providers to the plan who are paid directly by Principal are paid no more than reasonable compensation for the services provided by them to the plan.

Whether the actions of plan fiduciaries satisfy these general fiduciary standard requirements is an inherently factual question, and the Department generally will not issue advisory opinions on such questions. The appropriate plan fiduciaries must make such determinations based on all the facts and circumstances of the individual situation.

This letter constitutes an advisory opinion under ERISA Procedure 76-1 and is issued subject to the provisions of that procedure, including section 10 thereof relating to the effect of advisory opinions.

Sincerely,

Louis J. Campagna
Chief, Division of Fiduciary Interpretations
Office of Regulations and Interpretations