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ALLOCATING EXPENSES IN DEFINED CONTRIBUTION PLANS

This Benefits Brief updates our January 2001 Benefits Brief regarding expenses that are properly payable with the assets of an employee benefit plan. To view our chart that provides general guidelines for common types of plan expenses which may be payable from plan assets, please click [here](#).

On May 19, 2003, the U.S. Department of Labor (the "DOL") issued Field Assistance Bulletin 2003-3 (the "Bulletin") to answer questions about the proper allocation of expenses among participant accounts in defined contribution plans. The Bulletin addresses different allocation methods by which expenses may be shared among plan participant accounts and, most importantly, concludes that in certain circumstances, it is permissible to charge reasonable plan administrative expenses incurred on behalf of a specific participant to such participant's account. In allowing certain expenses to be charged to individual participant accounts, the DOL reverses its previous position which prohibited the allocation of expenses related to a qualified domestic relations order ("QDRO") to the participant's account which was subject to the QDRO.

Methods of Allocating Expenses to All Participants

Where the plan document specifies a particular method of allocation, plan fiduciaries must comply with such method. If a plan does not provide a particular method of allocation, then fiduciaries may use any allocation method that is (i) prudent, taking into account the competing interests of various participants and the effects of various allocation methods on those interests, and (ii) solely in the interest of participants. The Bulletin clarifies that an allocation method does not fail to be solely in the interest of participants if it disfavors a particular class of participants, as long there is a rational and reasonable basis for choosing the allocation method.

The Bulletin suggests that while the pro rata method (e.g., allocation based on assets in individual accounts) of allocating expenses is generally equitable, a per capita method (e.g., allocation to each account equally) of allocating expenses can also be a reasonable method of expense allocation, particularly for fixed administrative expenses such as recordkeeping, legal, auditing, annual reporting and other similar expenses. The Bulletin also states that it may be appropriate in certain situations to allocate expenses related to investment advice services to participant accounts based upon each participant's utilization of the services.

Allocation of Expenses to a Particular Participant

Most significantly, the Bulletin reverses a prior DOL advisory opinion letter, Advisory Opinion 94-32A, in which the DOL concluded that charging the costs of a QDRO determination solely to the participant's account which was the subject of the QDRO rather than the whole plan violates the Employee Retirement Income Security Act of 1974, as amended ("ERISA").

In reversing its position, the DOL reasoned that, upon further review and analysis, ERISA does not preclude the allocation of reasonable plan administrative expenses to the accounts of the participants on whose behalf expenses are incurred as long as the allocation is prudent, taking into account the competing interests of various participants and the effects of various allocation methods on those interests, and solely in the interest of participants. The Bulletin provided the following examples of circumstances in which expenses could be allocated only to the accounts of participants on whose behalf the expenses were incurred:

- Fees related to QDROs, QMCSOs (qualified medical child support orders) and hardship withdrawals,
- Fees related to the calculation of benefits payable under different plan distribution options, and
- Administrative fees attendant to benefit distributions, such as monthly check writing.

The Bulletin also clarifies that because payment of some expenses by a plan sponsor on behalf of certain plan participants is equivalent to the plan sponsor providing an increased benefit to those employees, a plan may charge vested separated participant accounts the account's share of reasonable plan expenses, regardless of whether the accounts of active participants are charged with such expenses. However, no matter how a plan sponsor or fiduciary decides to allocate administrative expenses, any fees or expenses chargeable to participants' accounts which may affect their benefit entitlements must be described in the plan's summary plan description.

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