

Allocating Fees Among Participant-Directed Plan Participants

A WHITE PAPER

by

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ALLOCATING FEES AMONG PARTICIPANT-DIRECTED PLAN PARTICIPANTS

EXECUTIVE SUMMARY

This White Paper explores two issues: first, the obligations of fiduciaries for the proper allocation of revenue sharing among participants in participant-directed plans; and, second, the obligation of fiduciaries to disclose information regarding that allocation to the participants.

Many 401(k) plans use revenue sharing to pay some or all of the plan's recordkeeping and administrative costs. The term "revenue sharing" refers to payments made by a mutual fund or its investment manager or affiliates to a third party (*e.g.*, a 401(k) recordkeeper) for assistance in keeping track of the ownership of the mutual fund's shares and other shareholder services. The revenue sharing payments are generally referred to as sub-transfer agency fees and/or administrative service fees; when we use the term "revenue sharing," we are using it in this sense.

Revenue sharing may be paid out of the fund's expense ratio, by the fund's investment manager or the fund's transfer agent. Regardless of the source, the payment is a reflection of the fact that when a recordkeeper makes the fund available on its platform, the burden on the fund to provide shareholder services and maintain share ownership records is significantly reduced, so that the fund is saving money. This savings is often passed on to the plan recordkeeper in the form of revenue sharing. Ultimately, the source of the revenue sharing is the mutual fund. This means that the participants who are invested in the mutual fund ultimately bear the expense of the revenue sharing and part of the administrative costs of the plan.

The amount of revenue sharing paid to a recordkeeper varies from fund to fund. To the extent the revenue sharing comes out of the fund itself, this almost always increases the expense ratio of the fund. Some plan investments — including company stock investments and self-directed brokerage accounts, and some mutual fund share classes with lower expense ratios -- make no revenue sharing payments at all. (For ease of reference, mutual funds, company stock investments, individual brokerage accounts and other 401(k) investments are referred to as "funds," unless the context

indicates otherwise.) Thus, participants whose accounts are invested in funds that make higher revenue sharing payments are essentially subsidizing administrative costs for participants who have invested in funds that pay little or no revenue sharing. This situation raises several issues for fiduciaries.

While the Employee Retirement Income Security Act of 1974 (“ERISA”) does not prohibit revenue sharing or specify how plan expenses should be allocated, the decisions regarding revenue sharing and recordkeeping fees are fiduciary ones subject to ERISA’s fiduciary duty and prohibited transaction rules.¹ In Field Assistance Bulletin 2003-03, the DOL indicated that allocating plan expenses is a fiduciary decision that requires fiduciaries to act prudently.² The most obvious approach is to allocate the recordkeeping fee on a pro rata basis³ (that is, so that when revenue sharing is taken into account, all participants are paying proportionately the same amount), by charging each participant account with its pro rata share of the cost and offsetting revenue sharing payments against the accounts of participants who have invested in funds that make such payments. Another approach would be to allocate recordkeeping costs on a per capita basis. Under either approach, the accounts of participants who invest in non-revenue sharing funds – *e.g.*, the company stock fund – would bear their pro rata share of the cost but with no offset. The accounts of participants who invest in a fund that pays revenue sharing may actually receive a credit to their accounts because their allocable share of the recordkeeping expense may be less than the revenue sharing offset.

Whatever allocation method is used, the failure by fiduciaries to engage in a prudent process to consider an equitable method of allocation of plan costs and revenue sharing would be imprudent and a breach of fiduciary duty. When a recordkeeper’s system can accommodate the pro rata method of allocating cost and offsetting of revenue sharing, adoption of the pro rata approach would seem to meet the requirements of ERISA. If the recordkeeper’s system is unable to make the pro rata allocation, the fiduciaries will need to ensure that they are engaging in a prudent process to adopt a reasonable alternative for allocating expenses and revenue sharing; and if the recordkeeper is unable to accommodate that alternative, the fiduciaries will need to consider changing recordkeepers.

The failure to prudently allocate plan expenses is probably the most significant fiduciary issue, but there are others that may affect fiduciaries who are themselves participants in the plan:

- If such a fiduciary participates in the selection of the plan’s investment alternatives and then invests his own account in funds that do not make revenue sharing payments (*e.g.*, funds that likely have lower expense ratios or company stock), the failure to consider a reasonable allocation among all participant accounts could be viewed as a prohibited transaction.⁴ ERISA prohibits fiduciaries from acting in their own self interest.⁵ In other words, if the fiduciaries allow some funds to subsidize the recordkeeping fees for the funds that they are invested in, they could be viewed as acting for their own best interest.⁶
- Further, qualified plans such as 401(k) plans may not discriminate in favor of highly compensated employees (HCEs) as to benefits, rights or features offered under the plan.⁷ Investing in a fund that does not pay any portion of a plan’s recordkeeping fee when other funds do, could be considered an “other right or feature” under this provision.⁸ If the funds that do not pay revenue sharing are primarily held by highly compensated employees, the plan could be treated as effectively discriminating in favor of HCEs.

Another major issue for fiduciaries to consider is the disclosure of the method of allocating revenue sharing to the participants. For example, if details about revenue sharing and the plan’s allocation approach are not disclosed to participants, they could claim a fiduciary breach. This issue has already been raised in various 401(k) fee lawsuits. At least one court has held that fiduciaries must disclose material information to participants, whether they request it or not⁹; and a solid case can be made that the revenue sharing payments and the allocation of such payments is material. (Note that another court has held that revenue sharing information is not material and does not need to be disclosed,¹⁰ but other courts may disagree.) Further, industry experts suggest that revenue sharing information is relevant to participants.¹¹

The 2007 ERISA Advisory Council’s Working Group on Fiduciary Responsibilities and Revenue Sharing Practices (the “Working Group”) found that allocating revenue sharing is, in fact, important and advised that the Department of Labor (the “DOL”) should issue guidance regarding the allocation and transparency of revenue sharing. Further, as part of recent DOL guidance regarding service

provider fees, the DOL requires service providers to disclose revenue sharing information to plan sponsors.¹² The DOL also finalized guidance regarding fee and expense disclosures to participants that requires plan administrators to explain that some of the plan's administrative expenses were paid from the operating expenses of one or more investment alternatives.¹³

Even if the failure to disclose the allocation of revenue sharing is not found to be a fiduciary breach, the failure to disclose could cause fiduciaries to lose protection under ERISA Section 404(c) because the allocation of revenue sharing may influence how a participant invests his or her account.¹⁴ Without that disclosure, participants may not be treated as having had sufficient information to enable them to exercise informed control over their investment decisions, which is required for the fiduciary protection of Section 404(c) to apply. In one case, the court rejected the plan sponsor's motion to dismiss a fiduciary breach claim based on a Section 404(c) defense in part because the revenue sharing arrangements were not disclosed.¹⁵

In order to comply with their ERISA fiduciary duties, it is important that (1) fiduciaries prudently consider the allocation of revenue sharing payments and plan expenses, and (2) communicate the methodology to participants. While there may be different approaches that are reasonable depending on the particular facts and circumstances, a pro rata allocation among the participants – so that all participants pay the same proportionate amount of plan expenses, taking into account the revenue sharing, if any, paid on the investments in their individual accounts – would, in our opinion, be considered prudent; and failure to consider the issue could be viewed as a breach of fiduciary duty. For a participant to make a well-informed investment decision, they must have all the facts regarding their investment choices, including how revenue sharing and plan expenses are allocated among the available investment choices.

INTRODUCTION

The Employee Retirement Income Security Act of 1974 (“ERISA”) does not specify how expenses should be allocated to participants in a defined contribution plan. Yet allocating these expenses constitutes a fiduciary responsibility subject to the law’s fiduciary duties and prohibited transaction rules.

In recent years, the retirement plan community has focused increased attention on the fees and expenses associated with 401(k) plans. The Department of Labor (the “DOL”) recently issued a regulation requiring service providers to disclose to plan sponsors the fees the service providers receive.¹⁶ The DOL is expected to issue additional regulations requiring disclosure of plan expense detail to participants. Additionally, more than two dozen lawsuits have been filed in recent years alleging fiduciary breaches associated with excessive fees and the lack of disclosure to participants.¹⁷ One mid-western law firm alone has brought more than a dozen of such lawsuits against plan sponsors.¹⁸

Fiduciaries need to be sure they are satisfying their ERISA fiduciary duties when allocating plan expenses among participant accounts. While the allocation of fees – as opposed to the amount of fees – has not received a great amount of attention, the increased litigation and attention regarding fees in general suggests that it is only a matter of time before it does.

Allocating plan expenses when revenue sharing is involved can be complicated. Generally, many of the mutual funds offered in participant-directed individual account plans provide revenue sharing payments to the plans’ recordkeeper to offset the recordkeeper’s fees. However, different mutual funds often pay revenue sharing in different amounts, and different share classes of the same fund family often pay varying amounts – or no – revenue sharing. In our experience, fiduciaries have not focused on the proper allocation of the plan costs or of such revenue sharing payments. We believe that is a mistake.

The allocation of costs and revenue sharing is a fiduciary responsibility, and fiduciaries must engage in a prudent process to determine the allocation. In the past, recordkeeping systems generally could not track revenue sharing on a participant account-by-participant account basis. Today, increasingly sophisticated systems exist that can perform this function. As a consequence, the change in

technology has brought about a change in the fiduciaries' responsibility to address how revenue sharing is accounted for and allocated within a participant-directed plan. This White Paper addresses two fiduciary issues: (1) the methodology used to allocate plan expenses when a participant-directed plan receives revenue sharing, and (2) the obligation to disclose such allocation to participants. Before analyzing the fiduciary duties associated with expense allocations, we start with a description of how revenue sharing generally works.

FACTUAL DESCRIPTION

Many participant-directed plans pay all or a significant portion of the administrative and recordkeeping fees through revenue sharing. It is common for a plan's investment funds to pay revenue sharing to the plan's third party administrator or recordkeeper (referred to collectively as the recordkeeper). The recordkeeper then applies the revenue sharing payments it receives against the fees it otherwise charges the plan. (In some cases, the recordkeeper deposits the revenue sharing into an expense recapture account in the plan, and then the plan sponsor authorizes payment of various plan-related expenses, including the recordkeeper's fee, from that account.) To the extent that revenue sharing payments do not offset the recordkeeper's full fee, the remaining fee is charged to the plan. If there are excess revenue sharing payments and if the fiduciaries negotiate for the recovery of the excess amounts, they are allocated to an ERISA fee recapture account to be used for other eligible plan expenses or to be allocated to the accounts of the participants.

There is nothing inherently improper with a plan receiving revenue sharing under ERISA.¹⁹ However, the application of revenue sharing can result in certain inequities. Investment funds offered under a plan often have different expense ratios and different amounts appropriated for revenue sharing. Some investment funds pay more than others; and, as a result, the participants who have invested in such funds create more revenue sharing than others. Consider the following scenario:

A 401(k) plan has a recordkeeping fee for the year of \$267,600. The plan offers the following mutual funds with expense ratios and revenue sharing payments:

Table 1 Investment Fund Line-up						
INVESTMENT OPTION	ASSETS	% OF PLAN	EXPENSE RATIO		REVENUE SHARING	
Stable Value	\$9,500,000	9.50%	0.40%	\$38,000	0.25%	\$23,750
Intermediate-Term Bond	\$20,500,000	20.50%	0.65%	\$133,250	0.35%	\$71,750
Inflation-Protected Bond	\$7,000,000	7.00%	0.85%	\$59,500	0.40%	\$28,000
Large Value	\$14,500,000	14.50%	0.95%	\$137,750	0.40%	\$58,000
Large Blend (Index)	\$10,500,000	10.50%	0.09%	\$9,450	0.02%	\$2,100
Large Growth	\$13,500,000	13.50%	0.96%	\$129,600	0.40%	\$54,000
Mid-cap Value	\$3,000,000	3.00%	0.85%	\$25,500	0.15%	\$4,500
Mid-cap Growth	\$2,500,000	2.50%	0.75%	\$18,250	0.08%	\$2,000
Small Value	\$3,500,000	3.50%	1.30%	\$45,500	0.00%	—
Small Growth	\$4,500,000	4.50%	1.44%	\$64,800	0.40%	\$18,000
Foreign Large Blend	\$5,500,000	5.50%	0.75%	\$41,250	0.10%	\$5,500
Diversified Emerging Mkts	\$5,500,000	5.50%	0.62%	\$34,100	0.00%	—
Total Assets	\$100,000,000	100.00%	0.737%	\$736,950	0.268%	\$267,600

In this example, the recordkeeping fee is exactly offset by the revenue sharing payments. However, the participants in the Inflation-Protected Bond, Large Value, Large Growth and Small Growth funds are paying a larger percentage of the recordkeeping costs than participants in other funds because the expense ratios and the amount of revenue sharing available are higher in those funds. Participant investments in the Small Value and Diversified Emerging Market Funds do not bear any portion of the recordkeeper fee.

Now, consider Table 2, which allocates the recordkeeping costs to all participants on a pro rata basis and then applies the revenue sharing calculations from Table 1:

Table 2
Allocate Fees to Each Investment Fund and Then Apply Revenue Sharing Offsets

INVESTMENT OPTION	ASSETS	% OF PLAN	RECORDKEEPING COSTS		EXPENSE RATIO		REVENUE SHARING		ADDITIONAL CHARGE (CREDIT) TO FUND	
				ASSIGNED TO FUND						
Stable Fund	\$9,500,000	9.50%	0.268%	\$25,422.00	0.40%	\$38,000	0.25%	\$23,750	0.02%	\$1,572
Intermediate-Term Bond	\$20,500,000	20.50%	0.268%	\$54,858.00	0.65%	\$133,250	0.35%	\$71,750	-0.08%	\$(16,892)
Inflation- Protected Bond	\$7,000,000	7.00%	0.268%	\$18,732.00	0.85%	\$59,500	0.40%	\$28,000	-0.13%	\$(9,268)
Large Value	\$14,500,000	14.50%	0.268%	\$38,802.00	0.95%	\$137,750	0.40%	\$58,000	-0.13%	\$(19,198)
Large Blend (Index)	\$10,500,000	10.50%	0.268%	\$28,098.00	0.09%	\$9,450	0.02%	\$2,100	0.25%	\$25,998
Large Growth	\$13,500,000	15.50%	0.268%	\$36,126.00	0.96%	\$129,600	0.40%	\$54,000	-0.13%	\$(17,874)
Mid-cap Value	\$3,000,000	3.00%	0.268%	\$8,028.00	0.85%	\$22,500	0.15%	\$4,500	0.12%	\$3,528
Mid-cap Growth	\$2,500,000	2.50%	0.268%	\$6,690.00	0.73%	\$18,250	0.08%	\$2,000	0.19%	\$4,690
Small Value	\$3,500,000	3.50%	0.268%	\$9,366.00	1.30%	\$45,500	0.00%	—	0.27%	\$9,366
Small Growth	\$4,500,000	4.50%	0.268%	\$12,042.00	1.44%	\$64,800	0.40%	\$18,000	-0.13%	\$(5,958)
Foreign Large Blend	\$5,500,000	5.50%	0.268%	\$14,718.00	0.75%	\$41,250	0.10%	\$5,500	0.17%	\$9,218
Diversified Emerging Mkts	\$5,500,000	5.50%	0.268%	\$14,718.00	0.62%	\$34,100	0.00%	—	0.27%	\$14,718
Total Assets	\$100,000,000	100.00%	0.268%	\$267,600.00	0.737%	\$736,950	0.268%	\$267,600		

The foregoing approach spreads the plan’s recordkeeping cost among plan participants on a pro rata basis. Note that each investment fund pays the same percentage - .268% - for the recordkeeping services.

Table 3 illustrates this point even more dramatically. In this example, the plan offers a company stock fund that represents half of the assets of the plan. But in contrast to the mutual funds offered under the plan, there is no charge to the participants who invest in the company stock fund. This means that all of the plan costs are effectively borne by one-half of the plan’s assets.

INVESTMENT OPTION	ASSETS	% OF PLAN	EXPENSE RATIO		REVENUE SHARING	
Stable Value	\$9,500,000	4.75%	0.40%	\$38,000	0.25%	\$23,750
Intermediate- Term Bond	\$20,500,000	10.25%	0.65%	\$133,250	0.35%	\$71,750
Inflation- Protected Bond	\$7,000,000	3.50%	0.85%	\$59,500	0.40%	\$28,000
Large Value	\$14,500,000	7.25%	0.95%	\$137,750	0.40%	\$58,000
Large Blend (Index)	\$10,500,000	5.25%	0.09%	\$9,450	0.02%	\$2,100
Large Growth	\$13,500,000	6.75%	0.96%	\$129,600	0.40%	\$54,000
Mid-cap Value	\$3,000,000	1.50%	0.85%	\$25,500	0.15%	\$4,500
Mid-cap Growth	\$2,500,000	1.25%	0.73%	\$18,250	0.08%	\$2,000
Small Value	\$3,500,000	1.75%	1.30%	\$45,500	0.00%	--
Small Growth	\$4,500,000	2.25%	1.44%	\$64,800	0.40%	\$18,000
Foreign Large Blend	\$5,500,000	2.75%	0.75%	\$41,250	0.10%	\$5,500
Diversified Emerging Mkts	\$5,500,000	2.75%	0.62%	\$34,100	0.00%	--
Employer Stock	\$100,000,000	50.00%	0.00%	--	0.00%	--
Total Assets	\$200,000,000	100.00%	0.368%	\$736,950	0.134%	\$267,600

This same scenario exists for those plans with a design feature that includes access to a self-directed brokerage account. There is an equal or greater probability that highly-compensated employees utilize this feature with more frequency, which increases the potential for non-highly compensated employees subsidizing a larger cost of the plan.

In contrast, Table 4 shows the allocation of recordkeeping costs to all participants on a pro rata basis and then applies the revenue sharing calculations from Table 2:

Table 4**Allocate Fees to Each Investment Fund (including Employer Stock) and then Apply Revenue Sharing Offsets**

INVESTMENT OPTION	ASSETS	% OF PLAN	EXPENSE RATIO		REVENUE SHARING		ADDITIONAL CHARGE (CREDIT) TO FUND		ADMINISTRATIVE/RECORDKEEPING COSTS ASSIGNED TO FUND	
Stable Value	\$9,500,000	4.75%	0.40%	\$38,000	0.25%	\$23,750	-0.12%	\$(11,039)	0.134%	\$12,711
Intermediate-Term Bond	\$20,500,000	10.25%	0.65%	\$133,250	0.35%	\$71,750	-0.22%	\$(44,321)	0.134%	\$27,429
Inflation- Protected Bond	\$7,000,000	3.50%	0.85%	\$59,500	0.40%	\$28,000	-0.27%	\$(18,634)	0.134%	\$9,366
Large Value	\$14,500,000	7.25%	0.95%	\$137,750	0.40%	\$58,000	-0.27%	\$(38,599)	0.134%	\$19,401
Large Blend (Index)	\$10,500,000	5.25%	0.09%	\$9,450	0.02%	\$2,100	0.11%	\$11,949	0.134%	\$14,049
Large Growth	\$13,500,000	6.75%	0.96%	\$129,600	0.40%	\$54,000	-0.27%	\$(35,937)	0.134%	\$18,063
Mid-cap Value	\$3,000,000	1.50%	0.85%	\$25,500	0.15%	\$4,500	-0.02%	\$(486)	0.134%	\$4,014
Mid-cap Growth	\$2,500,000	1.25%	0.73%	\$18,250	0.08%	\$2,000	0.05%	\$1,345	0.134%	\$3,345
Small Value	\$3,500,000	1.75%	1.30%	\$45,500	0.00%	\$--	0.13%	\$4,683	0.134%	\$4,683
Small Growth	\$4,500,000	2.25%	1.44%	\$64,800	0.40%	\$18,000	-0.27%	\$(11,979)	0.134%	\$6,021
Foreign Large Blend	\$5,500,000	2.75%	0.75%	\$41,250	0.10%	\$5,500	0.03%	\$1,859	0.134%	\$7,359
Diversified Emerging Mkts	\$5,500,000	2.75%	0.62%	\$34,100	0.00%	\$--	0.13%	\$7,359	0.134%	\$7,359
Employer Stock	\$100,000,000	50.00%	0.00%	\$--	0.00%	\$--	0.13%	\$133,800	0.134%	\$133,800
Total Assets	\$200,000,000	100.00%	0.368%	\$736,950	0.134%	\$267,600			0.134%	\$267,600

This approach spreads the plan's recordkeeping cost among plan participants on a pro rata basis.

Note that each investment fund pays the same percentage - .134% - for the recordkeeping services.

ANALYSIS AND DISCUSSION

Fiduciary Duties

ERISA imposes certain obligations and duties on the fiduciaries of an employee benefit plan. The most fundamental of these duties are the duty of loyalty and the exclusive purpose requirement. These duties are described in ERISA as follows:

A fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and:

- (A) for the exclusive purpose of:
 - (i) providing benefits to participants and their beneficiaries; and
 - (ii) **defraying reasonable expenses of administering the plan.**²⁰
[Emphasis added.]

Such duties must be exercised in accordance with the “prudent man rule.”²¹ Specifically, ERISA requires that such duties be exercised

with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.²²

Fiduciaries of participant-directed plans – generally 401(k) plans and 403(b) plans subject to ERISA – must act for the exclusive purpose of providing retirement benefits by prudently selecting and monitoring the plan’s investment alternatives and service providers, approving and monitoring plan expenses and always acting in the best interest of the participants. Fiduciary conduct is measured by the prudent man rule. The duty to act prudently has generally been described as requiring procedural diligence or a *prudent process*, but is also referred to as the “prudent expert” rule due to the requirement that fiduciaries carry out their duties as would a prudent man who is “*familiar with such matters.*”²³

The main focus of this requirement is that fiduciaries engage in a process for making their decisions that will generally lead to informed and reasoned decisions.²⁴ This means that fiduciaries must gather and analyze the facts and circumstances that are relevant to the decision and then make an informed, reasoned decision.²⁵

The prudent man rule also requires fiduciaries to consider “the circumstances then prevailing” in making decisions. This means that as the facts affecting a decision change – for example, the performance of investment alternatives selected for the plan or the costs of services offered by the plan – the fiduciaries are required to re-consider their earlier decision. It also means that as new products or services become available in the marketplace, the fiduciaries may need to consider their impact on how a plan is being administered or the assets invested.

In addition to the exclusive purpose and prudent man requirements, fiduciaries are also subject to prohibited transaction rules under ERISA.²⁶ Such rules prohibit fiduciaries from dealing with the assets of the plan for their own benefit or their own account.²⁷ The prohibited transaction rules also provide that, absent an exemption, fiduciaries cannot allow a plan to engage in any transaction that involves a furnishing of goods or services between a plan and a party in interest (*e.g.*, a plan service provider such as a recordkeeper) unless an exemption is available.²⁸ In order to allow plans to engage service providers and pay for their services, ERISA provides an exception to this rule, allowing fiduciaries to enter into “reasonable arrangements” with parties in interest for services necessary to operate the plan, so long as no more than *reasonable compensation* is paid for those services.²⁹ Fiduciaries must consider both the compensation paid to plan service providers as well as the costs to the plan (and hence, in most participant-directed plans, the plan participants).

Allocation Methodology

ERISA requires fiduciaries to consider the reasonableness of expenses paid by a plan, but the law does not contain specific directions to fiduciaries on how those expenses should be allocated among the accounts of the participants.³⁰ This is, in part, a result of the environment that existed when ERISA was adopted in the mid-1970s, when most participants who were provided an employer-sponsored retirement plan were covered by a pension plan, in which the assets and expenses are pooled and the employer bears the ultimate risk of both investment losses and high expenses. With the growth of defined contribution plans, in which each participant has his or her own account and in which the participant bears the investment risk and, in most plans, the expense burden, the issue of plan expenses – and the allocation of costs – has taken on a greater significance.

Despite – or perhaps because of – the absence of a specific provision in ERISA, the allocation of expenses among participant accounts is a fiduciary act, which requires fiduciaries to act prudently and in the best interests of plan participants. The DOL addressed the prudence process in this context in Field Assistance Bulletin 2003-03. As a starting point, the DOL said that fiduciaries need to consider what the plan document says about plan expenses. If the plan document does not specify a method (or is ambiguous), the fiduciaries must select the proper method to apply.³¹ The DOL then described the next steps as follows:

A plan fiduciary must be prudent in the selection of the method of allocation. Prudence in such instances would, at a minimum, require a process by which the fiduciary weighs the competing interests of various classes of the plan’s participants and the effects of various allocation methods on those interests. In addition to a deliberative process, a fiduciary’s decision must satisfy the “solely in the interest of participants” standard. . . . if a method of allocation has no reasonable relationship to the services furnished or available to an individual account, a case might be made that the fiduciary breached his fiduciary duties to act prudently and “solely in the interest of participants” in selecting the allocation method. Further, in the case where the fiduciary is also a plan participant, the selection of the method of allocation may raise issues under the prohibited transaction provisions of section 406 of ERISA where the benefit to the fiduciary is more than merely incidental.³² [Emphasis added.]

The FAB lays out the following principles:

- The fiduciaries must engage in a deliberative, prudent process;

- They must weigh the interests of different classes of participants and the effect the method of allocation they chose has on those participants;
- The method of allocation must have a reasonable relationship to the services being provided to the participants;
- The fiduciaries must avoid conflicts of interest.

These principles suggest a number of problems in the way many plans treat revenue sharing. First, in our experience, in most cases, there is no process, deliberative or otherwise, in which the fiduciaries engage to make a decision about how expenses and revenue sharing should be allocated. The failure to actively make a decision is, in essence, a decision; and in these cases, it is a decision made without analysis and by default. Second, in failing to engage in a decision-making process, the fiduciaries fail to weigh the interests of the participants who invest in higher-expense funds (with higher revenue sharing) versus those who invest in lower expense, lower or non-revenue sharing funds. Third, and perhaps most important, the method of allocation bears no relationship to the services being performed for the participants.

So, how should the costs be allocated? There is no direct guidance on this issue, but in Field Assistance Bulletin 2006-01, the DOL addressed the allocation of settlement proceeds from securities class actions regarding late trading and market timing. Similar to allocating expenses, a plan fiduciary must be prudent in the selection of a method of allocating settlement proceeds among plan participants.³³ The DOL stated:

Prudence in such instances, at a minimum, would require a process by which the fiduciary chooses a methodology where the proceeds of the settlement would be allocated, where possible, to the affected participants in relation to the impact the market timing and late trading activities may have had on the particular account. However, prudence would also require a process by which the fiduciary weighs the costs to the plan or the participant accounts and ultimate benefit to the plan or the participants associated with achieving that goal.

In other words, the allocation of items of revenue or expense should take into account the impact on affected participants (which, in the case of recordkeeping services, is all of the participants); but at the same time a fiduciary should undertake a cost-benefit analysis to ensure that the cost to the plan does not outweigh the benefit sought to be achieved. That analysis may also dictate other decisions

about plan services and service providers. If, for example, a fiduciary determines that a pro rata allocation of revenue sharing is proper but the plan's recordkeeper is unable to process such an allocation (or is unable to do so except at significant additional cost), the fiduciary has two choices: it can select another allocation methodology that the recordkeeper's system can accommodate; or it can seek a different recordkeeper that is able to perform the pro rata allocation for little or no cost.

Absent revenue sharing, fiduciaries would merely determine the recordkeeper's fee and then decide how to allocate it among plan participants, such as pro rata to account balances or on a per participant basis. This would require the fiduciaries to consider the services provided for the fee and go through a reasonable process to determine a fair and equitable approach. The DOL recognized that in most cases a pro rata method would appear to be equitable.³⁴ For example, if the plan's recordkeeping fee were 25 basis points, the fiduciaries could allocate the fee pro rata among participants so that each participant's account would be charged 25 basis points. (Arguments for and against this and other approaches can be made; it is beyond the scope of this White Paper to address those issues.)

The allocation method gets more complicated when revenue sharing is involved because different levels of revenue sharing are paid by the various investment funds. Consider the situation in which the revenue sharing payments exceed the service provider's fee. At first blush, it would appear that there is no service provider fee to allocate among plan participants because it is covered by the revenue sharing payments. However, the amount of revenue sharing payments differs among different funds. Since the revenue sharing payments cover the service provider's fee, how the revenue sharing payments are spread over the participant accounts is essentially the allocation of the recordkeeper's fee.

(In this situation, it would also be prudent for the fiduciaries to negotiate to have the excess recordkeeping fees paid to the plan to be used to pay other plan expenses or be allocated among the participants. The allocation of any excess to the participant accounts is a fiduciary decision, which should be undertaken under the same principles that apply to the allocation of the revenue sharing itself.)

In order to satisfy the fiduciary obligations associated with allocating plan expenses, the fiduciaries must prudently consider how such revenue sharing payments are to be spread. While there may be no one correct answer, consistent with the DOL’s guidance in Field Assistance Bulletin 2003-03, a pro rata method based on account balances would generally be considered an equitable approach. Under this methodology, the recordkeeping/administration expenses, would be allocated on a pro rata basis among all participants. Then, for funds with revenue sharing, the revenue sharing amounts could offset the fees otherwise owed by the participants in those funds, whereas the accounts of the other participants would be subject to a direct charge. On the assumption that those participants are paying smaller (or no) expense ratios, however, the cost to each participant should balance out to be the same exact percentage of assets.

As noted in the Factual Background section earlier, Table 2 shows an allocation of the recordkeeping costs to all participants pro rata and then applies the revenue sharing calculations from Table 1:

INVESTMENT OPTION	ASSETS	% OF PLAN	RECORDKEEPING COSTS ASSIGNED TO FUND		EXPENSE RATIO		REVENUE SHARING		ADDITIONAL CHARGE (CREDIT) TO FUND	
Stable Fund	\$9,500,000	9.50%	0.268%	\$25,422.00	0.40%	\$38,000	0.25%	\$23,750	0.02%	\$1,572
Intermediate-Term Bond	\$20,500,000	20.50%	0.268%	\$54,858.00	0.65%	\$133,250	0.35%	\$71,750	-0.08%	\$(16,892)
Inflation- Protected Bond	\$7,000,000	7.00%	0.268%	\$18,732.00	0.85%	\$59,500	0.40%	\$28,000	-0.13%	\$(9,268)
Large Value	\$14,500,000	14.50%	0.268%	\$38,802.00	0.95%	\$137,750	0.40%	\$58,000	-0.13%	\$(19,198)
Large Blend (Index)	\$10,500,000	10.50%	0.268%	\$28,098.00	0.09%	\$9,450	0.02%	\$2,100	0.25%	\$25,998
Large Growth	\$13,500,000	15.50%	0.268%	\$36,126.00	0.96%	\$129,600	0.40%	\$54,000	-0.13%	\$(17,874)
Mid-cap Value	\$3,000,000	3.00%	0.268%	\$8,028.00	0.85%	\$22,500	0.15%	\$4,500	0.12%	\$3,528
Mid-cap Growth	\$2,500,000	2.50%	0.268%	\$6,690.00	0.73%	\$18,250	0.08%	\$2,000	0.19%	\$4,690
Small Value	\$3,500,000	3.50%	0.268%	\$9,366.00	1.30%	\$45,500	0.00%	—	0.27%	\$9,366
Small Growth	\$4,500,000	4.50%	0.268%	\$12,042.00	1.44%	\$64,800	0.40%	\$18,000	-0.13%	\$(5,958)
Foreign Large Blend	\$5,500,000	5.50%	0.268%	\$14,718.00	0.75%	\$41,250	0.10%	\$5,500	0.17%	\$9,218
Diversified Emerging Mkts	\$5,500,000	5.50%	0.268%	\$14,718.00	0.62%	\$34,100	0.00%	—	0.27%	\$14,718
Total Assets	\$100,000,000	100.00%	0.268%	\$267,600.00	0.737%	\$736,950	0.268%	\$267,600		

The table shows that the plan’s recordkeeping cost - \$267,600 - is spread among plan participants on a pro rata basis, which, according to the DOL, “would appear in most cases to be an equitable method.”³⁵ (Note, however, a pro rata allocation may not be the only prudent method for allocating

plan expenses.) The most important point is that the fiduciaries consider the expenses and revenue sharing payments and decide on a reasonable method that makes sense based on the plan's particular circumstances, is not arbitrary and does not favor the fiduciaries themselves. Note the fact that the pro rata method may be difficult or costly for the recordkeeper. This does not excuse the fiduciaries from making an equitable allocation. (Table 3, showing the allocation in the case of a plan with an employer stock fund is discussed in the following section of this White Paper.)

The topic of revenue sharing was discussed in detail by the 2007 ERISA Advisory Council's Working Group on Fiduciary Responsibilities and Revenue Sharing Practices (the "Working Group").³⁶ In discussing and analyzing revenue sharing issues, the Working Group heard testimony from individuals representing the federal government, multiemployer plan representatives, investment consultants, plan administrators and consultants, recordkeepers, and others in the retirement plan industry.³⁷ The Working Group's general consensus was that revenue sharing is an acceptable practice and can help reduce overall plan costs. That being said, the Working Group also recognized the need for transparency with respect to revenue sharing payments and stated "that the DOL should consider issuing guidance with respect to the obligations of plan sponsors and trustees and other fiduciaries regarding allocation of revenue sharing payments."³⁸

[T]he Working Group understands that ERISA does not specifically speak to methods by which revenue sharing proceeds might be allocated among the plan's participants and beneficiaries. The DOL suggests that [sic] in its testimony that in the absence of statutory guidance, allocation decisions must be made taking into account the terms of the plan and the obligations of plan and the obligations of plan fiduciaries to have prudently acted in the interests of the plan's participants and beneficiaries. It offers Field Assistance Bulletin 2003-3 pertaining to the allocation of expenses in a defined contribution plan and Field Assistance Bulletin 2006-1 pertaining to the distribution of settlement proceeds relating to late trading and market time as having applicability in the allocation of revenue sharing proceeds among plan participants.

The Working Group notes testimony that plan sponsors have considerable discretion to determine how revenue sharing proceeds will be allocated to and among the plan participants and beneficiaries. It also understands DOL's suggestion that the documents and instruments governing a plan therefore might specifically provide that revenue sharing could be used to reduce plan expenses generally or that such proceeds would be allocated to particular participants and beneficiaries whose accounts are responsible for generating the proceeds. **The suggestion that prudence would require a process by which the fiduciary weighs the competing interests of the**

various classes of the plan’s participants and the effects of various allocations on these interests supports a position of DOL intervention in this area. On this point, broad and strong testimony has been presented that suggests the need for such further guidance as to this issue of allocation of proceeds.³⁹ [Emphasis added.]

Notwithstanding the Working Group’s recommendation that further guidance be provided, using an allocation method under which the plan expenses are spread pro rata among participants and the revenue sharing is offset within the accounts holding the investments would appear to be reasonable under virtually any circumstance.

Conflicts of Interest

When allocating plan expenses, fiduciaries must act prudently. They must also be sure to avoid conflicts of interest.⁴⁰ Even if a conflict of interest does not create a prohibited transaction (*e.g.*, when an exemption applies), the fiduciaries must properly manage the conflict in order to comply with the general fiduciary duties under Section 404 of ERISA.⁴¹ When a plan offers employer stock as an investment option in a defined contribution plan, often there is no charge to the participants who invest in the employer stock fund. In the revenue sharing context, this means that the participants who invest in the funds that pay revenue sharing are paying a disproportionate share of the administration expenses relative to the participants who invest in employer stock. (The same issue often arises in the context of self-directed brokerage accounts. We focus here on employer stock funds but the same points similarly apply with respect to brokerage accounts.) The participants who are invested in the funds that make revenue sharing payments are essentially subsidizing the recordkeeping fee for those who are invested in funds that do not pay revenue sharing, such as the employer stock fund.

It is worth reviewing Table 3 (set out earlier in the Factual Background section). As noted, this table illustrates in a \$200,000,000 plan in which half the assets are invested in the employer stock fund, 100% of the plan’s recordkeeping expenses are borne out of 50% of the assets, thus making the plan “free” to participants whose accounts are invested entirely in the stock fund.

INVESTMENT OPTION	ASSETS	% OF PLAN	EXPENSE RATIO		REVENUE SHARING	
Stable Value	\$9,500,000	4.75%	0.40%	\$38,000	0.25%	\$23,750
Intermediate- Term Bond	\$20,500,000	10.25%	0.65%	\$133,250	0.35%	\$71,750
Inflation- Protected Bond	\$7,000,000	3.50%	0.85%	\$59,500	0.40%	\$28,000
Large Value	\$14,500,000	7.25%	0.95%	\$137,750	0.40%	\$58,000
Large Blend (Index)	\$10,500,000	5.25%	0.09%	\$9,450	0.02%	\$2,100
Large Growth	\$13,500,000	6.75%	0.96%	\$129,600	0.40%	\$54,000
Mid-cap Value	\$3,000,000	1.50%	0.85%	\$25,500	0.15%	\$4,500
Mid-cap Growth	\$2,500,000	1.25%	0.73%	\$18,250	0.08%	\$2,000
Small Value	\$3,500,000	1.75%	1.30%	\$45,500	0.00%	--
Small Growth	\$4,500,000	2.25%	1.44%	\$64,800	0.40%	\$18,000
Foreign Large Blend	\$5,500,000	2.75%	0.75%	\$41,250	0.10%	\$5,500
Diversified Emerging Mkts	\$5,500,000	2.75%	0.62%	\$34,100	0.00%	--
Employer Stock	\$100,000,000	50.00%	0.00%	--	0.00%	--
Total Assets	\$200,000,000	100.00%	0.368%	\$736,950	0.134%	\$267,600

While not always the case, as a general rule, the participants who invest in employer stock funds tend to be senior managers and above and are often the members of the plan committee serving as fiduciaries. (This is based on the assumption that the employer stock fund is an investment option available in the plan and is selected by the participants rather than a fund created to hold a company match over which the participants have no control.) In Table 3, if committee members are heavily invested in the employer stock fund, they arguably have a conflict of interest in allowing the recordkeeping fee to be offset by revenue sharing payments from other funds when the employer stock fund has a zero expense ratio and makes no such payment. To the extent a fiduciary benefits by allowing the plan's recordkeeping fees to be paid by funds other than the fund(s) in which he or she is invested, the fiduciary may have engaged in a prohibited transaction by acting in his or her own interest rather than for the benefit of the plan participants.⁴²

This concern was raised by the DOL in discussing fee allocation in Field Assistance Bulletin 2003-03. Specifically, the DOL stated that "in the case where the fiduciary is also a plan participant, the

selection of the method of allocation may raise issues under the prohibited transaction provisions of Section 406 of ERISA where the benefit to the fiduciary is more than merely incidental.”⁴³

Plan sponsors also need to consider whether having a fund that pays no part of the plan’s recordkeeping fee and that consists primarily of highly compensated employees (“HCEs”) creates a discrimination issue under the Internal Revenue Code (the “Code”). Section 401(a)(4) of the Code provides that the benefits provided under a qualified plan cannot discriminate in favor of HCEs. In fact, the effective availability of “benefits, rights, and features” provided under the plan cannot discriminate in favor of HCEs.⁴⁴ The rights and features of a plan include, without limitation, the right to a particular form of investment “taking into account, in determining whether different form of investment exist, any differences in conversion, dividend, voting, liquidation, preference, or **other rights conferred under the security.**”⁴⁵ [Emphasis added.] Based on this broad language, the right to invest in a fund that does not pay recordkeeping fees could be treated as an “other right or feature” for purposes of the 401(a)(4) nondiscrimination requirements. As employer stock funds are often held primarily by HCEs, the fact that more HCEs than non-HCEs are avoiding paying recordkeeping fees could present a qualification issue for the plan.

Participant Disclosures

In addition to deciding how to allocate plan expenses, fiduciaries have an obligation to accurately communicate plan expenses to participants.⁴⁶ As one federal appeals court stated:

“[W]e have made clear that fiduciaries must communicate material facts affecting the interests of plan participants or beneficiaries and that this duty to communicate exists when a participant or beneficiary ‘asks fiduciaries for information, and even when he or she does not.’”⁴⁷

In other words, fiduciaries need to determine the information that is material to the participants and must disclose it to them, regardless of whether the participants ask for the information or are even aware of its existence. Whether this includes information regarding revenue sharing payments and the allocation of such payments is somewhat unclear, though a case can be made that such information is material. While many of the complaints in the ERISA fee lawsuits have alleged that failure to disclose revenue sharing is a fiduciary breach, at least one circuit has held that there is no such duty.⁴⁸ In *Hecker v. Deere*, the Court of Appeals for the Seventh Circuit found that the participants only needed to know the expense that would be charged for an investment fund and not if

or how some part of that charge would be used to make revenue sharing payments to the recordkeeper.⁴⁹ That being said, that holding applies only in the Seventh Circuit, and there are still multiple fee cases pending across the country. For example, in reversing the dismissal of a fiduciary breach case brought against the fiduciaries of Wal-Mart's profit sharing and 401(k) plan, the Eighth Circuit stated that failure to disclose fund expense and revenue sharing information may mislead participants in making their investment decisions.⁵⁰ According to the Eighth Circuit, "materiality turns on the effect information would have on a reasonable participant's decisions about how to allocate his or her investment among the options in the Plan."⁵¹

The argument that the allocation of revenue sharing is material to participants and, therefore, must be disclosed, is reasonably clear. As participants consider which funds to select, the fees associated with the investment are relevant. Most participants are told what the expense ratio or cost to invest in a particular fund is. For example, this information is included in the investment fund's prospectus. Thus, in considering our examples from above, a participant may know (or at least presumably has access to information that will tell him) that the Large Value fund's expense ratio is .95%. What the participant may not know, however, is that the Large Value fund's revenue sharing percentage is .40%. The participant is not told that a portion of his investment fund expense is being used to pay a portion of the plan's recordkeeping expense while participants in the Small Value fund pay no portion of the plan's recordkeeping expense.

Thus, while participants know what the investment actually costs, they do not know that, by bearing a higher investment expense, they also bear a disproportionately large share of the plan expenses and that their fellow participants may not be bearing any of that expense. Why is this relevant to a participant? Why is it material? As the DOL explained in the preamble to its original proposed regulation under ERISA Section 408(b)(2), information that would be viewed as "significantly affecting a reasonable [person's] decision..." is material.⁵² Information regarding the way in which plan expenses are allocated among a plan's participants, if known and understood by participants, could affect how they decide to invest. Information about how that revenue sharing is allocated among the participants in the plan, if known and understood by participants, could affect how they decide to invest. On this basis, the information could be viewed as material under the DOL definition, and failure to communicate such information could be considered a fiduciary breach.

On July 16, 2010, the DOL finalized a regulation addressing what constitutes a reasonable contract for purposes of the service provider exemption in ERISA section 408(b)(2).⁵³ This regulation requires that service providers disclose fee information to plan fiduciaries, including revenue sharing amounts.⁵⁴ This required disclosure indicates that the DOL wants to make sure fiduciaries are aware of and take into consideration revenue sharing payments.

The DOL recently issued a regulation requiring fee disclosures to plan participants.⁵⁵ The participant disclosure regulation specifically requires plan administrators to explain that some of the plan's administrative expenses were paid from the total annual operating expenses of one or more of the plan's investment options.⁵⁶

Even if failure to disclose how revenue sharing is allocated is not considered a fiduciary breach, it could still present an issue for fiduciaries. Not disclosing information regarding the allocation of revenue sharing may cause a plan to fail to satisfy the requirements of ERISA Section 404(c).⁵⁷ While plans are not required to comply with Section 404(c), for those that do, the fiduciaries are not liable for the investment decisions made by plan participants.⁵⁸ However, under the 404(c) regulation, if a plan fiduciary has concealed "material non-public facts regarding the investment from the participant," the participant's exercise of control is not independent and the fiduciaries may be held liable for the participant's investments.⁵⁹ Arguably, how fees are allocated between different investment options could influence a participant's investment decisions and thus raise an issue as to whether such information should be disclosed for 404(c) purposes. In refusing to grant a sponsor's motion to dismiss on the grounds of a 404(c) defense, the court in *Tussey v. ABB, Inc.* noted that "[t]he participant's choice might change if he or she knew that the additional expense was going to the Plan's fiduciary in exchange for choosing that investment company to become one of the limited companies permitted to sell their products to Plan participants, or **as an undisclosed way to subsidize the administrative costs of the Plan.**"⁶⁰ [Emphasis added.] If a participant knows that due to revenue sharing allocations, one fund pays a higher share of the plan recordkeeping expenses than another fund, the participant may change how he or she invests. Fiduciaries who want 404(c) protection would be well served to disclose revenue sharing allocation information to plan participants.

CONCLUSION

When allocating plan expenses and revenue sharing payments fiduciaries must act prudently, in the best interests of participants and without conflicts of interests when considering allocation methods. Given the current concerns and litigation surrounding 401(k) plan fees and revenue sharing, it is especially important that fiduciaries engage in careful deliberation of how to allocate plan costs. When participants invested in certain funds essentially subsidize a plan's recordkeeping fees because participants in other funds, company stock or brokerage accounts pay little or no part of the recordkeeping fees, fiduciaries should be cautious. They should give serious consideration to whether that is an appropriate allocation or if some other approach may be more appropriate. As indicated by the DOL, the most equitable approach may be to allocate the recordkeeping expense on a pro rata basis among all plan participants, and then apply revenue sharing to offset fees for the applicable funds.

Fiduciaries must also consider the consequences of failing to disclose how revenue sharing is allocated. Given the current concerns with the costs associated with plan investments, participants who feel they were not properly informed when making their investment decisions may bring fiduciary breach claims. Even if courts find that fiduciaries are not required to disclose such information, fiduciaries run the risk of losing the fiduciary protections of ERISA Section 404(c) if participants are not given such information.

The law and our analysis contained in this White Paper are current as of October 2010. Changes may have occurred in the law since this paper was drafted. As a result, readers may want to consult with their legal advisers to determine if there have been any relevant developments since then.

IRS CIRCULAR 230 DISCLOSURE: To ensure compliance with Internal Revenue Service Circular 230, recipients of this White Paper are hereby notified that: (1) any tax advice contained herein is not intended or written to be used, and cannot be used, by any taxpayer for the purpose of avoiding penalties that may be imposed under the U.S. Internal Revenue Code; (2) any such advice is written to support the promotion or marketing of the matters described herein; and (3) they should seek advice based on their particular circumstances from an independent tax advisor.

ENDNOTES

¹ Field Assistance Bulletin 2003-03.

² *Id.*

³ *Id.*

⁴ See ERISA § 406(b)(1).

⁵ ERISA § 406(b)(1).

⁶ *Id.*

⁷ Internal Revenue Code § 401(a)(4); Treas. Reg. § 1.401(a)(4)-4.

⁸ See Treas. Reg. § 1.401(a)(4)-4(e)(3).

⁹ *Bowerman v. Wal-Mart Stores, Inc.*, 226 F.3d 574 (7th Cir. 2000).

¹⁰ *Hecker v. Deere*, 556 4.3d 575 (7th Cir. 2009).

¹¹ Report of The Working Group in Fiduciary Responsibilities and Revenue Sharing Practices.

¹² ERISA Reg. § 2550.408b-2.

¹³ ERISA Reg. § 2550.404a-5, 75 Fed. Reg. 64910 (October 20, 2010).

¹⁴ See *Tussey v. ABB, Inc.*, Case No. 06-04306-CV-NKL (W.D. Mo. 2008).

¹⁵ *Id.* This was a preliminary decision, and there has not been a final decision in the case. It is not clear whether the court will ultimately rule that the failure to disclose the revenue sharing causes a loss of 404(c) protection.

¹⁶ ERISA Regulation § 2550.408b-2, 75 FR 41600 (July 16, 2010).

¹⁷ *Employee allegation of excessive 401(k) fees gain ground*, LA. Times (July 29, 2010).

¹⁸ See *Caterpillar Settler 401(k) Fee Lawsuit*, Treasury & Risk (Nov. 17, 2009).

¹⁹ Report of The Working Group on Fiduciary Responsibilities and Revenue Sharing Practices.

²⁰ ERISA §404(a)(1).

²¹ ERISA §404(a)(1)(B).

²² ERISA §404(a)(1)(B).

²³ ERISA § 404(a)(1)(B).

²⁴ See *In re Unisys Savings Plan Litigation*, 74 F.3d 420, 434 (3rd Cir. 1996).

²⁵ See e.g. ERISA Regulation § 2550.404a-1(b)(1).

²⁶ ERISA §406(5).

²⁷ ERISA §406(5).

²⁸ ERISA §406(a)(1)(C).

²⁹ ERISA §408(b)(2).

³⁰ Field Assistance Bulletin 2003-03.

³¹ See Field Assistance Bulletin 2003-03.

³² Field Assistance Bulletin 2003-03.

³³ Field Assistance Bulletin 2006-01.

³⁴ Field Assistance Bulletin 2003-03.

³⁵ *Id.*

³⁶ Report of The Working Group on Fiduciary Responsibilities and Revenue Sharing Practices.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ See *Mertens v. Hewitt Assoc.* 508 U.S. 248 (1993)

⁴¹ See *McMahon v. McDowell* 794 F.2d 100 (3rd Cir. 1986) cert. denied 479 U.S. 971 (1986).

⁴² ERISA §406(b).

⁴³ Field Assistance Bulletin 2003-03.

⁴⁴ Treas. Reg. § 1.401(a)(4)-4.

⁴⁵ Treas. Reg. § 1.401(a)(4)-4(e)(3)(iii).

⁴⁶ See *Bowerman v. Wal-Mart Stores, Inc.*, 226 F.3d 574 (7th Cir. 2000).

⁴⁷ *Id.*

⁴⁸ *Hecker v. Deere*, 556 4.3d 575 (7th Cir. 2009).

⁴⁹ *Id.*

⁵⁰ See *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585 (8th Cir. 2009).

⁵¹ *Id.*

⁵² Preamble to Proposed Regulation under ERISA Section 408(b)(2), 72 FR 70987, at 70992 (December 13, 2007).

⁵³ ERISA Reg. § 2550.408b-2.

⁵⁴ *Id.*

⁵⁵ *See* 75 Fed. Reg. 64910 (October 20, 2010).

⁵⁶ *See* ERISA Reg. § 2550.404a-5(c)(2)(ii)(C).

⁵⁷ *See* ERISA Reg. § 2550.404c-1(c)(2).

⁵⁸ ERISA § 404(c).

⁵⁹ *See* ERISA Reg. § 2550.404c-1(c)(2)(ii).

⁶⁰ *Tussey v. ABB, Inc.*, Case No. 06-04306-CV-NKL (W.D. Mo. 2008).