

GROOM LAW GROUP

Stephen M. Saxon
(202) 861-6609
sms@groom.com

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Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N-5669
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Re: Revision of Form 5500 (RIN1210-AB06)

Ladies and Gentlemen:

The Groom Law Group, Chtd., on behalf of a group of financial institutions (the "Groom Comment Group" or "Group"), has previously commented on the Proposed Revision of Annual Information Return/Reports (the "Form 5500 Proposal" or "Proposal") published by the Department of Labor, the Internal Revenue Service, and the Pension Benefit Guaranty Corporation on July 21, 2006. *See* 71 Fed. Reg. 41616 (Jul. 21, 2006). The purpose of this submission is to request that the Department clarify the Proposal as it relates to the treatment of certain types of service provider payments. Specifically, we ask that the Department confirm in the Instructions to the Form 5500 that the "revenue sharing" payments received by plan service providers are not to be treated as "plan assets" for purposes of Form 5500 reporting.

The Department's Proposal requires a large plan to report on Schedule C amounts "received from a source other than the plan or the plan sponsor by a person who is a service provider *in connection with* that person's position with the plan or services rendered to the plan." *See* Preamble to Proposal, 71 Fed. Reg. at 41649. The Proposal's examples of this type of compensation include sub-transfer agency fees, shareholder servicing fees, and 12b-1 fees. *Id.* These types of fees are commonly referred to as "revenue sharing" because they fall into a category of payments made by an investment vehicle or the vehicle's adviser to a plan service provider.¹

¹ Some revenue sharing payments to plan service providers are calculated based on the amount of assets a plan or group of plans (*i.e.*, all of a service provider's plan customers) have invested in a particular investment vehicle or family of vehicles at a given time. Other revenue sharing payments are not asset-based, but may involve a flat fee. Further, we note that many of these arrangements, however the payment is calculated, are in fact arrangement for services to the investment fund or its adviser, separate from those the service provider performs for its plan customers.

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As the Department prepares to publish final rules regarding the reporting of service provider compensation, we ask you to clarify that to the extent the final rules require that plans report sub-transfer agency fees, shareholder servicing fees, and 12b-1 fees and other "revenue sharing" payments received by the plan's service providers from third parties, such reporting will not also require the plan to treat these amounts as "plan assets" for purposes of other Form 5500 reporting. For example, if revenue sharing payments were viewed as "plan assets," a plan administrator could arguably be required to –

- Report an amount equal to the revenue sharing payments as "income" to the plan on Line 2(c) of Schedule H (or Line 2(c) of Schedule I) and, to the extent that the provider retained the payment, a corresponding amount as an administrative expense on Line 2(i) of Schedule H (or Line 2(i) of Schedule I).
- Potentially report the provider's receipt of the revenue sharing payments as a non-exempt prohibited transaction on Line 4(d) of Schedule H (or Line 4(d) of Schedule I) and on Schedule G and the plan's financial statements. In this regard, if revenue sharing payments were plan assets, service providers could be plan fiduciaries solely as a result of receiving such payments; and absent a dollar-for-dollar offset of such revenue sharing payments against the fees owed by the plan to the service providers, the arrangement could result in non-exempt party-in-interest transactions reportable on Schedules H (or I), G, and the plan's financial statements.

Specifically, we ask for clarification that, consistent with previous DOL guidance and positions, revenue sharing payments are not "plan assets" that must be accounted for as income to the plan and whose receipt could result in a non-exempt prohibited transaction to be reported on the Form 5500.

In general, in situations beyond the context of the "plan assets" regulation (29 C.F.R. 2510.3-101) the Department has determined that the assets of an employee benefit plan are identified on the basis of "ordinary notions of property rights," and that anyone with control over such plan assets is a fiduciary subject to the requirements of ERISA sections 404 and 406. See, e.g., DOL Adv. Op. 99-08A (May 20, 1999); DOL Adv. Op. 2005-08A (May 11, 2005); DOL Adv. Op. 2005-22A (Dec. 7, 2005). We note that revenue sharing payments are typically made by (and from the assets of) mutual fund advisors or advisors to other investment vehicles (e.g., collective trust funds). In the context of a plan's investment in a mutual fund or other investment vehicle, the plan's beneficial interest is limited to its ownership of shares, units, or an undivided interest in the underlying assets of the vehicle, as the case may be (see 29 C.F.R. 2510.3-101) and does not encompass any payment that the vehicle's advisor might make. The governing documents typically suggest no intent on the part of the parties to grant a beneficial ownership interest to the plan in anything but the fund shares or units. If this were not the case, a plan's investment would entitle it to an "ownership interest" in the fees charged by the investment manager, merely because such fees are calculated based on the amount invested by the plan.

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We note also that, while the Department has addressed revenue sharing arrangements in the past, it has never taken the position that the payments themselves are "plan assets." In several advisory opinions, the Department found that where a mutual fund pays a service provider fees based on the percentage of the service provider's plan clients' assets invested in the mutual fund, that payment may raise prohibited transaction issues. See DOL Adv. Op. 97-15A (May 22, 1997); DOL Adv. Op. 97-16A (May 22, 1997). In our view, the Department correctly analyzed the arrangement, not by characterizing these payments as "plan assets," but by recognizing that the receipt of the payments by a plan fiduciary could be a prohibited "kickback" under section 406(b)(3). A "kickback" under section 406(b)(3) is, by definition, a payment made not from plan assets but from third party assets. See Adv. Op. 88-02A (Feb. 2, 1988) (no 406(b)(3) violation where payment is from plan assets). It also seems to us unlikely that the Department would have issued Advisory Opinion 97-16A, had it concluded that the revenue sharing payments were "plan assets" because the exercise of control over those payments by the recordkeeper would have rendered it a fiduciary and simultaneously resulted in a violation of ERISA section 406(b)(1).² Thus, our request is consistent with the Department's published views on this matter.

In the Proposal, the Department took the position that revenue sharing payments, though not paid or received directly by plans, must be reported on the Form 5500 as service provider compensation. Because the Department did not also propose to require reporting of revenue sharing payments as income to plans and as prohibited transactions, it appears to us that the Department, consistent with its previous interpretations, does not view revenue sharing payments as "plan assets." However, it is imperative that the Department clarify the precise scope and basis of plans' reporting obligations with respect to revenue sharing. We request that the Department do this by confirming that the Schedule C reporting requirement does not presume revenue sharing payments are "plan assets," merely because the Department may require the reporting on the Form 5500 of such payments in connection with the reporting of a plan's service providers' compensation.

* * * *

² See also PTE 84-24, which addressed the potential prohibited transaction issues in the payment of insurance commissions to fiduciary agents or brokers. Like the revenue sharing arrangements, these commissions have not been analyzed as "plan assets" but instead are viewed as potential kickbacks. PTE 84-24 was intended to provide relief for any potential section 406(b)(3) violations.

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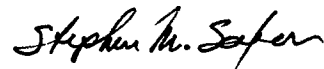
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The Group appreciates the opportunity to provide comments to the Department. Please feel free to contact me if you have questions or would like to discuss these issues further.

Sincerely,



Stephen M. Saxon

cc: Mr. Robert J. Doyle
Mr. J. Joseph Canary

GROOM LAW GROUP, CHARTERED

1701 Pennsylvania Ave., N.W. • Washington, D.C. 20006-5811

202-857-0620 • Fax: 202-659-4503 • www.groom.com