

MEMO# 13069

January 22, 2001

DOL ISSUES GUIDANCE ON PLAN EXPENSES

[13069] January 22, 2001 TO: PENSION MEMBERS No. 3-01 PENSION OPERATIONS ADVISORY COMMITTEE No. 6-01 RE: DOL ISSUES GUIDANCE ON PLAN EXPENSES The Department of Labor recently issued guidance on the question of whether plan expenses may be paid from plan assets or must be paid by the employer. The guidance takes the form of an advisory opinion and a release that sets forth six hypothetical fact patterns intended to address the most frequently raised questions regarding the payment of plan expenses. Advisory Opinion 2001-01A. In Advisory Opinion 2001-01A (January 18, 2001), the Department addresses the extent to which an employee benefit plan may pay the costs of maintaining the plan's tax-qualified status. In the advisory opinion, the Department states that "the formation of a plan as a tax-qualified plan is a settlor activity for which a plan may not pay. Where a plan is intended to be a tax-qualified plan, however, implementation of this settlor decision may require plan fiduciaries to undertake activities relating to maintaining the plan's tax-qualified status for which a plan may pay reasonable expenses." Notably, such costs need not be apportioned between the plan and plan sponsor. The Department previously expressed the view in Advisory Opinion 97-03A (January 23, 1997) that the tax-qualified status of a plan confers benefits on both the plan sponsor and the plan and, therefore, a portion of the expenses relating to tax-qualification activities may be reasonable plan expenses. In Advisory Opinion 2001-01A, the Department clarifies that this prior guidance should not be construed to require an apportionment of all tax-qualification related expenses between the plan and plan sponsor. Rather, in the context of tax-qualification activities, fiduciaries must consider whether the activities are settlor in nature for purposes of determining whether related expenses may be paid by the plan. In making this determination, according to the advisory opinion, a fiduciary need not take into account the benefit a plan's tax-qualified status confers on the employer, because any such benefit should be viewed as an "incidental benefit" that flows to plan sponsors by virtue of offering a plan. Hypothetical Examples of Settlor v. Plan Expenses. The Department sets forth in a separate companion document six examples clarifying the distinction between settlor and plan expenses. 2Example 1. The first example deals with costs associated with a plan spin-off and the transfer of employees from the prior employer's defined benefit plan to an acquiring employer's plan. In this context, the Department clarifies that plan design study costs, amendments related to the plan spin-off and related union negotiation costs are treated as settlor expenses not chargeable to the plan. However, expenses incurred to determine the amount of assets to be transferred would be a permissible plan expense if the expense related to implementing a decision to spin-off certain participants, rather than to the formulation of the spin-off. Example 2. Example 2 addresses the actuarial costs of implementing an early retirement window in a defined benefit plan. In this case, plan design expenses, including cost projections

determining the financial impact of the plan change on the plan sponsor, are not payable from plan expenses. However, the expense of calculating benefits for participants with respect to the retirement window and the cost of communicating plan information about the plan change may be reasonable expenses of the plan, even though the activities might be viewed as furthering the objectives of the company. Example 3. Example 3 deals with the implementation of a participant loan program and an early retirement window for management employees, and the continued maintenance of the plan's tax-qualified status. In this example, the Department states that the expense of amending the plan to comply with tax law changes and performing routine nondiscrimination testing may constitute reasonable plan expenses. By contrast, the cost of amending the plan to establish a loan program would be a plan design/settlor expense "inasmuch as the plan fiduciaries have no implementation obligations until the time the plan is amended." Subsequent to the amendment, however, expenses attendant to operating the loan program may be paid from plan assets. With respect to amending a plan to establish an early retirement window and obtaining a subsequent determination letter, the amendment would be a plan design/settlor expense, but the cost of obtaining the determination letter may be allocated between plan and plan sponsor. In this case, the Department indicates the plan fiduciaries should obtain from the service provider a determination of the specific expenses attributable to the fiduciaries' "implementation responsibilities." Example 4. Example 4 also clarifies that the expense to amend a plan and obtain a determination letter in light of tax law changes may be paid from plan assets. Similarly, nondiscrimination testing performed as a result of a plan amendment that increases benefits may also be paid from plan assets. In contrast, however, consulting fees incurred analyzing a company's options for complying with tax law changes or costs incurred negotiating a plan change with a union are plan design/settlor expenses and may not be paid by the plan. Example 5. Example 5 involves costs associated with an employer's provision to employees of a booklet incorporating summary information about all of the employer's benefit plans and other benefits. The Department states that plans may pay the cost of complying with ERISA's disclosure requirements. Furthermore, nothing in Title I of ERISA would preclude a plan fiduciary from providing more information than is required by statute. Therefore, the cost of producing and distributing individual benefit statements or benefit booklets may be treated as plan expenses. The Department notes, however, that each of the plans should pay their proportionate share of the expenses of the booklet and the plan sponsor should pay that portion of the costs of the booklet that relate to non-plan matters. Example 6. Example 6 addresses a plan fiduciary's decision to out-source plan administration. To the extent that services provided by the firm to which the plan is outsourced are necessary for the administration of the plan, including both start-up and ongoing administrative fees, they may be treated as plan expenses. Russell G. Galer Senior Counsel Attachment Note: Not all recipients receive the attachment. To obtain a copy of the attachment to which this memo refers, please call the ICI Library at (202) 326-8304 and request the attachment for memo 13069. ICI Members may retrieve this memo and its attachment from ICINet (<http://members.ici.org>). Attachment (in .pdf format)