

LEGAL UPDATE

DOL Amicus Brief Preserves Sinking Float Guidance

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The DOL staked out its position on float income more than 20 years ago in Advisory Opinion 93-24 and subsequently elaborated on its views in Field Advisory Bulletin 2002-3. Float is income earned when, at the request of a plan participant, a plan trustee or custodian redeems or sells assets in the participant's investment account (usually consisting of mutual fund shares) and temporarily transfers the proceeds into interest-bearing accounts before distributing them to the participant. Float can also be earned on deposits of cash contributions before they are invested in specific assets.

Duties of Plan Fiduciaries. In an amicus brief recently filed with the U.S. Court of Appeals for the First Circuit, the DOL neatly summarized the duties of plan fiduciaries with respect to float in three points. Specifically, a fiduciary is required to review (1) comparable providers of trustee services to determine for whom float is credited, (2) the circumstances under which float is earned, such as the time limits for earning float, and (3) information to evaluate float as a part of the total compensation to be paid for services rendered under the trust agreement.

Correspondingly, the three primary duties of the service provider were stated to be: (1) disclosure of the specific circumstances under which float is earned, (2) establishment and adherence to time frames with respect to depositary and redemptive float, and (3) disclosure of the rate and manner by which float is earned.

Court Rulings Upend Longstanding Guidance. The Eighth Circuit's ruling in *Tussey v. ABB* unexpectedly held that, in the circumstances of that case, no fiduciary duties were owed with respect to float, because it was not a plan asset. Instead, the Court ruled that the float earned under Fidelity's distribution procedure was owned by the underlying mutual funds as a matter of property rights and that Fidelity, the trustee of the ABB 401(k) plan, could retain the float to pay taxes owed by Fidelity or pay the float to third

parties, such as the mutual funds. The Eighth Circuit also held that Fidelity was not an ERISA fiduciary when it came to its float practices.

In the case of *In Re Fidelity ERISA Float Litigation*, a Massachusetts District Court relied on the Eighth Circuit's analysis in arriving at the same result. The DOL's amicus brief contesting dismissal of claims against Fidelity was filed in the Massachusetts case, because, as stated in the brief, "the regulatory float regime that has governed the financial industry for over two decades risks being upended."

DOL Sidesteps Characterization of Float as a Plan Asset. The DOL brief argues that the float rulings of the Eighth Circuit and the Massachusetts District Court miss the point by focusing on whether float constitutes a plan asset. The DOL's view is that Fidelity possessed discretionary administrative authority to cause the plans to transfer the cash proceeds from the disposition of the mutual funds shares, which did constitute plan assets, into interest-bearing accounts that generated float income and then used this float for its own purposes. The DOL argued that Fidelity's discretionary authority over the redemption process (not its control over plan assets) made it a plan fiduciary and that it violated its fiduciary duty by acting disloyally and not in the sole interest of the plan, as required by ERISA. The duty of loyalty is not restricted to plan assets.

Moreover, the DOL argued that Fidelity committed prohibited transactions by causing the plan to transfer plan assets to and for the benefit of Fidelity, that is, by self-dealing. Generally, self-dealing is contingent on misuse of plan assets, but the DOL pointed out that the statute broadly prohibits any direct, as well as indirect, use of plan assets to benefit a fiduciary. By receiving or benefitting from cash proceeds of the mutual fund shares, Fidelity had indirectly used plan assets (*i.e.*, the fund shares) for its own benefit, even if the float retained or used by Fidelity was not itself a plan asset.

Duty to Disclose and Negotiate. Longstanding DOL policy and guidance has sought to ensure that float programs are disclosed and openly negotiated. Fidelity's trust agreements arguably gave it discretion to process and approve withdrawals in whatever way it chose, but apparently did not specifically mention float. Because of this failure, the DOL was able to distinguish First Circuit precedent relied on by the Massachusetts District Court dealing with life insurance benefits. In the life insurance cases, plan participants were informed at the outset in the plan documents that the life insurance benefits could be paid using unfunded non-interest bearing retained asset accounts set up by an insurance company with a third party from which the beneficiaries could withdraw insurance proceeds. This process has been approved by the First Circuit and other appellate courts. The DOL insists that its guidance reflects the position that a plan trustee cannot retain float where the governing plan documents do not expressly authorize the float program and, therefore, applies to a different fact pattern than the retained asset cases.

In the DOL's view, if the Eighth Circuit and Massachusetts cases stand, the onus will be on plan

sponsors to negotiate for a different float arrangement even if the float's existence was never disclosed. The DOL's position appears to be that the duty to disclose float rests with the plan trustee and only after this duty has been met does the obligation to negotiate float terms shift back to the sponsor.

Continued Struggle Over Float Likely. The DOL is likely to continue strongly resisting the idea that float is not beneficially owned by a 401(k) plan, regardless of whether the plan has legal title to the float, and the amicus brief in the Massachusetts case is a manifestation of that stance. Given that it is an element of a trustee's compensation, 401(k) plan fiduciaries should be aware of how float is being disposed of under their plans and seek to limit a trustee's float retention so that the trustee's overall compensation is no more than reasonable.

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