

Labor Department Modifies Disclosure Regarding Brokerage Windows in Participant-Directed Plans

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August 1, 2012 -- Yesterday, the Department of Labor issued Field Assistance Bulletin ("FAB") No. 2012-02R supplementing the disclosure required to be given to participants in participant-directed individual account plans (e.g. 401(k) plans) by the recently issued participant disclosure regulation (29 CFR 2550.404a-5). Service providers who are required to furnish certain specified information to plan administrators so that they can comply with the participant disclosure regulation can also rely on the guidance provided by FAB No. 2012-02R. The recently issued guidance supersedes the guidance previously issued in FAB No. 2012-02 by specifically modifying and replacing the question dealing with plans that provide a "brokerage window" or similar arrangements as an investment alternative. Specifically, the new guidance replaces old Frequently Asked Question ("FAQ") 30 with new FAQ 39 and makes correlative changes to FAQ 13 and 29. FAQ 30 stated that "the failure to designate a manageable number of investment alternatives raises questions as to whether the plan fiduciary has satisfied its obligations under section 404 of ERISA." Many practitioners thought that this requirement exceeded the regulatory requirements the FAQ was implementing. FAQ 30 also imposed an affirmative obligation on plan fiduciaries to examine non-designated investment alternatives available under the plan that are selected by a significant number of participants and determine whether one or more of such alternatives should be treated as a designated investment alternative. Finally, FAQ 30 contained a safe harbor for plans that offered more than 25 investment alternatives, if certain requirements were met. All three of these requirements were eliminated in FAQ 39. Specifically, FAQ 39 states: Whether an investment alternative is a "designated investment alternative" (DIA) for purposes of the regulation depends on whether it is specifically identified as available under the plan. The regulation does not require that a plan have a particular number of DIAs, and nothing in this Bulletin prohibits the use of a platform or a brokerage window, self-directed brokerage account, or similar plan arrangement in an individual account plan. The Labor Department

does caution, however, that fiduciaries of plans with brokerage windows, self-directed brokerage accounts or similar arrangements are still bound by ERISA's general fiduciary responsibilities under ERISA Section 404(a). The Labor Department also warns that a fiduciary's failure to designate investment alternatives to avoid investment disclosures under the participant disclosure regulation will raise questions under ERISA's general fiduciary responsibility provisions.

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