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DOL Revises Guidance on Open Brokerage Windows

Modified Field Assistance Bulletin eliminates rule calling for fund disclosures of investments available through brokerage windows and other similar arrangements.

In early May, the U.S. Department of Labor (DOL) issued guidance, in the form of "frequently asked questions" (FAQs), on the plan participant disclosure rules under DOL Regulation 404a-5 that come into effect at the end of August. The guidance, contained in Field Assistance Bulletin (FAB) 2012-02, raised a number of issues for open brokerage window arrangements. Specifically, Q&A 30 discussed how the disclosure requirements apply to investments that are made available through an investment platform but are not specifically designated as investment options under the plan, such as an open brokerage window or similar arrangement. In response to concerns raised by the plan sponsor and investment communities, DOL has now revised the FAB to withdraw the more open-ended and controversial aspects of its guidance.

Background

Q&A 30 addressed an arrangement in which a plan offers to its participants an investment platform of registered mutual funds, but where the plan fiduciary who selected the platform does not specifically designate any of the funds as "designated investment alternatives" (DIAs) under the plan. The question was whether the platform itself is a DIA for which specific disclosures are required under the new rules. DOL concluded that a platform consisting of multiple investment alternatives would not itself be a DIA, but left open the issue of whether the investment funds on the platform (or those available through the brokerage window) should be treated as DIAs for purposes of the disclosure rules. DOL also announced a safe-harbor rule for determining whether the DIA disclosure rules would apply to investment funds on a platform or brokerage window with more than 25 funds; the rule required such disclosures for at least three funds on the platform. This appeared to undermine the general rule of the DOL regulation that the disclosure rules did not apply to investments available through a brokerage window or similar arrangement.

In addition, Q&A 30 suggested a broader fiduciary diligence and monitoring obligation over brokerage window investments than had been indicated in any prior guidance. DOL said that if a "significant number" of plan participants and beneficiaries select non-designated investments that are available through the brokerage window, "an affirmative obligation arises on the part of the plan fiduciary to examine these alternatives and determine whether one or more such alternatives should be treated as designated for purposes of the [disclosure] regulation."

Several industry groups requested additional guidance from DOL on the meaning of the standards described in Q&A 30 through letters and meetings. They urged the withdrawal of Q&A 30 and reconsideration through an established rulemaking process, such as a proposed regulation, if necessary.

Revised Field Assistance Bulletin

In response, on July 30, DOL issued a revised version of FAB 2012-02—now FAB 2012-02R—that replaces Q&A 30 with Q&A 39. In Q&A 39, DOL included its view that a plan fiduciary's failure to designate DIAs to avoid the disclosure requirements of the regulation would raise questions under ERISA's general statutory fiduciary duties of prudence and loyalty, and that, in connection with brokerage window arrangements generally, fiduciaries are bound by ERISA's fiduciary duties to "take into account the nature and quality of services provided in connection

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with" the brokerage window. However, there is no mention of a specific obligation to monitor the investment funds available through the window or to treat any of those funds as DIAs subject to new disclosure requirements.

DOL added that plan fiduciaries and service providers may have questions about their general ERISA fiduciary duties apart from the disclosure regulation, and that it intends to engage in discussions with interested parties to determine how best to assure compliance with those duties, including possibly through amendments of its regulations. In an announcement, DOL said that its goal is to give interested parties more time to engage in discussions with DOL on "practical and cost effective ways" to ensure that plan participants are protected by the ERISA fiduciary rules when using brokerage windows.

While DOL has left open the possibility of further guidance on how the ERISA fiduciary responsibility rules apply to brokerage window arrangements, it has alleviated the immediate concerns as to whether investment funds available through brokerage windows must be covered in participant disclosure statements.

Contacts

If you have any questions or would like more information on the issues discussed in this LawFlash, please contact any of the following Morgan Lewis attorneys:

Chicago

Louis L. Joseph	Employee Benefits	312.324.1726	louis.joseph@morganlewis.com
Marla J. Kreindler	Employee Benefits	312.324.1114	mkreindler@morganlewis.com
Julie K. Stapel	Employee Benefits	312.324.1113	jstapel@morganlewis.com

New York

Craig A. Bitman	Employee Benefits	212.309.7190	cbitman@morganlewis.com
P. Georgia Bullitt	Investment Management	212.309.6683	gbullitt@morganlewis.com
Jennifer L. Klass	Investment Management	212.309.7105	jklass@morganlewis.com

Philadelphia

I. Lee Falk	Employee Benefits	215.963.5616	ilfalk@morganlewis.com
Vivian S. McCardell	Employee Benefits	215.963.5810	vmccardell@morganlewis.com
Steven D. Spencer	Employee Benefits	215.963.5714	sspencer@morganlewis.com
David B. Zelikoff	Employee Benefits	215.963.5360	dzelikoff@morganlewis.com

Pittsburgh

Lisa H. Barton	Employee Benefits	412.560.3375	lbarton@morganlewis.com
John G. Ferreira	Employee Benefits	412.560.3350	jferreira@morganlewis.com
Lauren B. Licastro	Employee Benefits	412.560.3383	llicastro@morganlewis.com
R. Randall Tracht	Employee Benefits	412.560.3352	rtracht@morganlewis.com

Washington, D.C.

Lindsay B. Jackson	Employee Benefits	202.739.5120	ljackson@morganlewis.com
Stuart P. Kasiske	Employee Benefits	202.739.6368	skasiske@morganlewis.com
Daniel R. Kleinman	Investment Management	202.739.5143	dkleinman@morganlewis.com
Donald J. Myers	Employee Benefits	202.739.5666	dmyers@morganlewis.com
Michael B. Richman	Employee Benefits	202.739.5036	mrichman@morganlewis.com
Steven W. Stone	Investment Management	202.739.5453	sstone@morganlewis.com

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