

August 6, 2012

U.S. Department of Labor Reissues Guidance on Brokerage Windows in Defined Contribution Plans

Responding to criticism that recently issued guidance regarding brokerage windows, self-directed brokerage accounts or similar plan arrangements under participant-directed accounts were unworkable and exceeded the U.S. Department of Labor's (DOL's) boundaries for interpretive guidance, the DOL reissued Field Assistance Bulletin (FAB) 2012-02 on July 30, 2012, substantially narrowing the circumstances under which such investment alternatives must be included in the participant disclosure requirements. The participant disclosure requirements are generally effective August 30, 2012 (for calendar-year plans).

FAB 2012-2 was originally issued in May 2012 to assist plan administrators with the participant disclosure regulations, which require certain plan and investment-related information be provided to participants and beneficiaries in participant-directed individual account plans, e.g., 401(k) plans. The investment-related disclosures apply only to investments that are "designated investment alternatives." Based on the regulatory language, these alternatives were understood to include the investment options selected by the plan sponsor and did not include brokerage windows or similar plan arrangements that enable participants and beneficiaries to select investments beyond those investment options designated under the plan.

The original FAB 2012-2 challenged this understanding by potentially including brokerage windows, self-directed brokerage accounts or similar plan arrangements within the definition of a designated investment alternative, e.g., if a plan only offered brokerage windows or if there were a significant number of plan participants invested in these brokerage accounts. This expansion was not well-received by plan sponsors because it was viewed as substantially increasing the cost and effort to comply with these new participant disclosure requirements.

On July 30, 2012, the DOL revised FAB 2012-2 by withdrawing its original position on brokerage windows and confirming designated investment alternatives are limited to those investment options specifically identified as being available under a plan. However, the DOL reiterated that the general ERISA fiduciary duties of prudence and loyalty to plan participants and beneficiaries apply to the selection and monitoring of plan



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investments, including brokerage windows and similar investments. The DOL also indicated its intention to engage in further discussions regarding ERISA's fiduciary duties and may, if appropriate, make amendments to applicable regulations.

What Does This Mean for Plan Administrators?

The immediate benefit of this revised FAB is that plan administrators will not need to make the investment-required disclosures for any investment not specifically identified as being available under the plan. However, plan sponsors and administrators should consult with legal counsel to review their compliance with the participant disclosure regulations and to ensure they have in place adequate administrative procedures for the selection and monitoring of plan investments.

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