The Department of Labor issued additional guidance regarding fiduciary relief for Qualified Default Investment Alternatives on April 29. The guidance is contained in correcting amendments to the final regulation issued on October 24, 2007, and new Field Assistance Bulletin 2008-03 (FAB), presented in a Q&A format.

The Correcting Amendments to the Final Rule make three changes:

- The preamble to the Final Rule is amended to remove a "round-trip" restriction as an example of a restriction that is not permitted under paragraph (c)(5)(ii) of the Final Rule. Paragraph (c)(5)(ii) provides that a transfer or withdrawal from a QDIA during the 90-day period following the first QDIA elective contribution cannot be subject to any fees, expenses, or restrictions; other than ongoing fees not incurred as the result of the transfer or withdrawal. We believe that a "round-trip" consists of an investment in a QDIA, divestment of a QDIA asset, and a subsequent investment in the QDIA. The restriction on redemption fees assessed as the result of divestment from a QDIA still applies.
- Paragraph (e)(3)(i)(C) of the final rule specifies that a plan sponsor who is a named fiduciary may manage a QDIA. The correction adds "or a committee comprised primarily of employees of the plan sponsor, which is a named fiduciary..." to the paragraph.
- The definition of a "grandfathered stable value" QDIA in paragraph (e)(4)(v)(B) is amended to address concerns that the prior definition is too restrictive. Under the old definition, the fund was "designed to guarantee principal." It now applies to investments "designed to preserve principal." The condition that principal and rates of return by guaranteed by State or federally regulated financial institution now reads, "Such investment product or fund invests primarily in investment products that are backed by State or federally regulated financial institutions."

The Field Assistance Bulletin incorporates the correcting amendments and contains the following assertions:

- The Final Rule does not relieve a plan sponsor of liability for the management, selection, and monitoring of a QDIA.
- The relief provided under the Final Rule, which became effective on December 24, 2007, is available for default investments prior to the effective date if all the conditions of the Final Rule are met with respect to such assets. The relief is available for all the assets once the QDIA requirements are met. However, the FAB cautions that no relief is provided for fiduciary decisions made prior to the effective date of the Final Rule. (For example, no relief is provided regarding the monitoring of the appropriateness of the previous investment alternative.)
- Prospective relief under the Final Rule is available "without regard to whether the participant or beneficiary made an earlier affirmative election to invest in the default investment." This situation may arise when certain records regarding the current default investment are not

available.

- Relief under the Final Rule is available for non-elective contributions or proceeds from litigation or settlements if a participant or beneficiary has the opportunity to direct the investment of the contributions.
- The Final Rule applies to 403(b) plans if they are subject to ERISA.
- Information about fees and expenses may be provided in separate, but simultaneous, documents.
- Notices can be combined with notices required for permissible withdrawals (IRC 414(w)), the automatic enrollment safe harbor (IRC 401(k)(13)), and "normal" safe harbors (IRC 401(k)(12)). However, the notices may also be distributed separately.
- The timing requirements for notices under the Final Rule, the automatic enrollment safe harbor design, and permissible withdrawals are "not inconsistent" and can easily be satisfied for a plan year.
- A payment of a fee or expense by a plan sponsor would not violate the rule limiting such fees in the 90-day period following the first QDIA elective contribution.
- The 90-day period restricting fees or expenses as the result of a transfer or withdrawal from a QDIA does not apply to existing assets invested in a QDIA following the effective date of the Final Rule.
- All three QDIA alternatives must contain "some fixed income exposure" in addition to equity exposure. The Department continues to decline to set any parameters.
- The rules under section 404(c) regarding which information must be provided and which information is required to provided only upon request apply to QDIAs.
- A plan sponsor may use more than one QDIA.
- The 120-day capital preservation QDIA is available only for plans that are Eligible Automatic Contribution Arrangements (EACA) and also provide for permissible withdrawals.
- Plan sponsors generally cannot manage a 120-day capital preservation QDIA because it must be offered by a State or federally regulated financial institution.
- A plan sponsor is not required to deliver a notice 30 days before the effective date of the Final Rule in order to obtain relief for prior contributions to a stable value investment, but the relief provided under the Final Rule is not available until thirty days after providing such notice.

Open Issues

Several questions submitted by PSCA and, presumably, other organizations were not addressed in this guidance. Of particular note is the failure to provide guidance regarding the requirement that a balanced fund QDIA be "appropriate for participants of the plan as a whole." PSCA is already in contact with the DOL regarding these open issues.