DOL REVERSES POSITION ON BROKER WINDOW INVESTMENT DISCLOSURES
But "raises questions" on fiduciary issue

In direct response to an intensive lobbying effort that included PSCA, the Department of Labor on Monday reversed its position regarding the reporting of investment-related disclosures under the participant fee disclosure regulation. This relief is especially welcome because initial disclosures are due by August 30. The DOL's new position regarding the controversial FAQ 30 is included in a revised Field Assistance Bulletin 2012-02R. The DOL replaced FAQ 30 with new and improved FAQ 39 that is contained below.

FAQ 30 presented many problems. In direct contradiction of the participant fee disclosure rule, FAQ 30 required investment-related disclosures if a "significant number" of participants invested in any one broker window investment. It raised a new fiduciary duty regarding the "failure to designate a manageable number of investment alternatives." Finally, it raised significant questions about a duty to monitor brokerage window investments by participants under a prudence standard.

FAQ 39, replacing FAQ 30, clearly states that a broker window investment is not a designated investment alternative under the participant fee disclosure rule. Therefore, such investments are not subject to the investment-related disclosures under the rule. (The plan-related disclosures, however, do apply regarding the broker window arrangement.) The discussion of a manageable number of designated investment alternatives is not included. Finally, FAQ 39 specifies that the disclosure regulation does not affect the fiduciary relief provided under the section 404(c) regulation. The 404(c) regulation limits the duties to prudently select and monitor investments to designated investments as defined in the regulation. That definition does not included unspecified broker window investments.

FAQ 39 does leave the fiduciary door open a crack. It states, "Nonetheless, in the case of a 401(k) or other individual account plan covered under the regulation, a plan fiduciary's failure to designate investment alternatives, for example, to avoid investment disclosures under the regulation, raises questions under ERISA section 404(a)'s general statutory fiduciary duties of prudence and loyalty." While we prefer that the DOL not raise novel issues in a Field Assistance Bulletin, it does not state any conclusions, merely that the situation "raises questions." The Department promises to engage in discussions and to undertake rulemaking if it determines that is necessary. The last sentence of the first paragraph, relating to ERISA's general duties regarding broker windows, are viewed as applying to the brokerage window service, not investments made via the arrangement. Those duties are generally understood in the retirement plan community.

FAQ 39 of Filed Assistance Bulletin 2012-02R follows.

"Mutual Fund Platforms and Brokerage Windows

Q-39: A plan offers an investment platform that includes a brokerage window, self-directed brokerage account, or similar plan arrangement. The fiduciary did not designate any of the funds on the platform or available through the brokerage window, self-directed brokerage account, or similar plan arrangement as "designated investment alternatives" under the plan. Is the platform

or the brokerage window, self-directed brokerage account, or similar plan 23 arrangement a designated investment alternative for purposes of the regulation?

A-39. No. 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 Bulletin also does not change the 404(c) regulation or the requirements for relief from fiduciary liability under section 404(c) of ERISA or address the application of ERISA's general fiduciary requirements to SEPs or SIMPLE IRA plans. Nonetheless, in the case of a 401(k) or other individual account plan covered under the regulation, a plan fiduciary's failure to designate investment alternatives, for example, to avoid investment disclosures under the regulation, raises questions under ERISA section 404(a)'s general statutory fiduciary duties of prudence and loyalty. Also, fiduciaries of such plans with platforms or brokerage windows, self-directed brokerage accounts, or similar plan arrangements that enable participants and beneficiaries to select investments beyond those designated by the plan are still bound by ERISA section 404(a)'s statutory duties of prudence and loyalty to participants and beneficiaries who use the platform or the brokerage window, self-directed brokerage account, or similar plan arrangement, including taking into account the nature and quality of services provided in connection with the platform or the brokerage window, self-directed brokerage account, or similar plan arrangement.

The Department understands plan fiduciaries and service providers may have questions regarding the situations in which fiduciaries may have duties under ERISA's general fiduciary standards apart from those in the regulation. The Department intends to engage in discussions with interested parties to help determine how best to assure compliance with these duties in a practical and cost effective manner, including, if appropriate, through amendments of relevant regulatory provision."