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DISCUSSION OF PARTICIPANT FEE DISCLOSURE FAQs IN DEPARTMENT OF LABOR FIELD ASSISTANCE BULLETIN 2012-02

May 25, 2012

To a large extent, the Department of Labor's 38 Q&As on the pending participant fee disclosures, contained in Field Assistance Bulletin (FAB) 2012-02, provide exactly what the retirement community is seeking – clarification and explanation of the new rules for participant fee disclosures that must be provided by August 30. However, the now-notorious FAQ-30 appears to require new disclosures not to be found in the final rule.

The final rule for fee disclosure to participants explicitly states that "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 not considered a designated investment alternative under the rule. Therefore, they are not subject to the investment-related disclosures (including the comparative chart, fee disclosure, benchmarking, web site, etc). However, broker window arrangements are subject to the disclosure rules for plan-related information. Click here for a PSCA summary of the rule.

The FAB, in FAQ-13, clarifies this treatment. It states that the disclosures should describe how the window operates, how to access it, any restrictions that apply, how it differs from the plan's designated investment alternatives, and who to contact with questions. Any fees for accessing or exiting the window must be disclosed. Commissions or fees incurred for purchasing or selling a security in the window have to be disclosed; but not fees or expenses of the specific investment, such as those included in the investment's total operating expense. If transaction fees vary, a general statement of the existence of such fees, and instructions how to gain specific general fee information about a particular investment alternative will suffice. Any fees actually charged during a preceding quarter against an individual account in connection with a window are subject to the rule's quarterly reporting requirement (but not investment management fees included in an alternative's total operating expense). FAQ-14 clarifies that the broker window disclosures must be furnished to all eligible participants and beneficiaries, not just those currently investing via the window. FAQ-29 confirms that disclosures for broker window arrangements are "limited to the disclosure requirements in paragraph (c) of the regulation (relating to plan information)."

So far, so good. The FAB's discussion of broker windows is consistent with the final rule, the preamble, and the retirement community's general understanding.

But wait - there's more!

FAQ-30 suddenly explores new ground. It discusses a situation in which a plan offers a platform consisting of a large number of investment alternatives, none of which are designated by the plan fiduciary as designated investment alternatives – i.e. a window arrangement. Positively, the FAQ finds that the platform itself is not a designated investment alternative, subject to the investment-related disclosure requirements. However, the DOL then states,

> *"Whether the individual investment alternatives are designated investment alternatives depends on whether they are specifically identified as available under the plan. As the Department explained in the preamble to the final regulation (75 FR 64910), when a plan assigns investment responsibilities to the plan's participants and beneficiaries, it is the view of the Department that plan fiduciaries must take steps to ensure that participants and beneficiaries are made aware of their rights and responsibilities with respect to managing their individual plan accounts and are provided sufficient information regarding the plan, including its fees and expenses and designated investment alternatives, to make informed decisions about the management of their individual accounts. Although the regulation does not specifically require that a plan have a particular number of designated investment alternatives, 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.*
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> *"…If, through a brokerage window or similar arrangement, non-designated investment alternatives available under a plan are selected by significant numbers of participants and beneficiaries, 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 regulation."*

We understand that the DOL's interpretation applies to plans that offer a selected line-up of investment options (designated investment alternatives) in addition to a broker window. Suddenly, the Department is adding new disclosure requirements for broker window investments beyond the well-understood language in the final rule.

The FAQ continues to find, pending further guidance, as a matter of enforcement policy, that when a window or platform holds more than 25 investment alternatives, **not all** of the alternatives must be treated as a designated investment alternative if disclosure applicable to designated investment alternative are made for:

- at least three investment alternatives that meet the "broad range" requirements of section 404(c), **and**
- all other investments alternatives on the platform in which at least five participants and beneficiaries, or, in a plan with 500 participants and beneficiaries, at least one percent of all participants and beneficiaries are invested on a date that is not more than 90 days preceding each annual disclosure.

Needless to say, this last-minute curve ball is quite a surprise. Rather than clarifying the rule, the DOL is amending it to totally uproot the treatment of broker windows under the fee disclosure rules. In addition to the participant fee disclosures, this change will affect the service provider disclosure rules that are due on July 1 because the service provider disclosures must be adequate for the plan administrator to provide participant disclosures.

The DOL offers enforcement relief in FAQ 37. For enforcement purposes only, it will take into account if covered service providers and plan administrators have acted in a good faith interpretation of the final rule. However, the covered entity must also establish a plan for complying with the FAB in future disclosures. Note that this non-enforcement policy will not preclude legal challenges from participants and beneficiaries.

Next Steps
PSCA's Washington Office is in conversation with the Department of Labor to obtain clarification of FAQ 30. In addition to substantive issues, significant concerns exist regarding the complexity of implementing a monitoring and reporting system to identify investments that may have to be reported under this FAQ. Finally, the possibility that the normal rulemaking process, which provides for orderly public comment, is being circumvented is a serious matter. We will keep you informed of future developments

The Rest o the FAB
As noted, with the exception of the broker window issue, the FAB is generally quite helpful. Here are some highlights:

- Enforcement relief is discussed at the end of the preceding article.

- The DOL will not take enforcement action against a plan administrator of a 403(b) plan that is subject to ERISA who "reasonably determines it would be impracticable, or impossible," to obtain the information needed to make investment-related disclosures with regard to a designated investment alternative contract or account that was issued before January 1, 2009; the employer ceased to have any obligation to make contributions (including deferrals) before the same date; the rights and benefits are enforceable by the individual owner without any employer involvement; and the owner is fully invested in the contract or account. Plans should look to relief provided in DOL Field Assistance Bulletins 2010-01 and 2009-02, as guidelines for eligibility for this exemption.

- Disclosures of plan administrative fees must be specific and individually identified when fees are known at the time of disclosure. However, if a fee is not known, and may or may not be assessed, such as legal fees, a general statement of the possibility of such fee, how it will be paid, and an estimate based on prior years' experiences will suffice.

- Fees that are usually offset by revenue sharing still need to be disclosed. However, fees that are fully paid from forfeited accounts and/or the plan sponsor do not need to be disclosed. Additionally, disclosure is not required when a plan provides that fees are paid from forfeitures, the plan sponsor, or from individual accounts and those fees have always been paid by the first two sources; there is no intent to change that arrangement in the foreseeable future; and the plan has a written commitment to pay fees not covered by forfeitures.

- In the case of a plan where all administrative costs are paid from total operating expenses of investment alternatives, resulting in no direct quarterly charges to individual accounts, the requirement to quarterly disclose that some (or all) administrative expenses are paid from total operating expenses still applies.

- Disclosure is required for designated investment alternatives that are closed to new contributions.

- A website landing page does not have to include all the required disclosures as long as it is "sufficiently specific to provide participants and beneficiaries access to the information without difficulty. Whether an address is "sufficiently specific" will depend upon the facts and circumstances. A plan administrator should consider, for example, the user-friendliness of the Web site, the number and complexity of the plan's designated investment alternatives, and the computer literacy of the average plan participant." Generally, unlike the fee comparison chart, a website must reflect a change in an investment's fees "as soon as reasonably possible following a change." The site should include the date of its last update.

- The DOL does not plan to issue a sample glossary.

- Multiple comparative charts supplied from various service providers are permitted if they are furnished at the same time in a single delivery. The charts must "facilitate a comparison among designated investment alternatives available under the plan." A chart may provide annual total return more recently than the end of the last calendar year if the new date is used for all designated investment alternatives and it is utilized for the benchmarking requirement.

- The examples in the regulation for combining disclosures with other documents are not exclusive. For example, the disclosures can be included in a new employee enrollment package.

- A "designated investment manager" under the rule is a section 3(38) investment manager that is designated by the plan and made available to participants to direct some or all of the assets in an individual account. This service does not constitute a designated investment alternative. Therefore, it is not subject to the investment-related disclosure rules. Plan-related disclosures apply. For example, the service must be described, the investment manager must be identified and the fees for the service must be disclosed.

- Model portfolios (i.e., conservative, moderate, and growth labels) are not designated investment alternatives. However, a portfolio in which a participant acquires an equity security, unit participation, or similar interest in an entity that invests in a combination of designated investment alternatives is itself a designated investment alternative.

- "Funds of funds" must consider the underlying funds in reporting total operating expenses.

- The cost of an insurance component in a stable value fund, if paid from fund assets, must be included in the operating expenses of the stable value fund.