



GAC alert

DOL Replaces FAQ 30 in FAB 2012-02R

The Department of Labor recently revised Field Assistance Bulletin (FAB) 2012-02, which provides guidance on the participant-level fee disclosure regulations under ERISA §404(a)(5) and the service provider fee disclosure regulations under ERISA §408(b)(2). In particular, FAQ 30, which concerned the treatment of brokerage windows as designated investment alternatives (DIAs) was withdrawn and replaced with a new FAQ 39. This withdrawal is in response to efforts made by ASPPA's Government Affairs Committee to apprise the DOL of the significant problems plan sponsors would have faced in trying to comply with the original guidance.

FAQ 30 had addressed the question of whether an investment platform which consisted of a large number of mutual funds, none of which had been designated by the plan, was itself a DIA. The answer indicated that an investment platform, brokerage window or similar arrangement was not itself a DIA. However, the original answer then went on to suggest that plan fiduciaries may have a responsibility to monitor the investments being selected by participants utilizing a brokerage window. It also included a "safe harbor" which would have required investment disclosures for at least three investment alternatives offered through the window that meet the "broad range" requirement of ERISA §404(c), as well as for any investment that was selected by at least 1% of all participants and beneficiaries (or 5 people, if greater). ASPPA joined with other industry groups in a letter commenting that the answer to FAQ 30 was imposing a new regulatory requirement that should be subjected to public comment and economic analysis rather than being promulgated through a FAB. Apparently the Department agreed as FAQ 30 has now been withdrawn and replaced by FAQ 39.

FAQ 39 now simply asks whether a platform, brokerage window or similar arrangement is a DIA for purposes of the regulation. In answering no, the FAB states that whether an investment is a "designated investment alternative" will depend on whether it is specifically identified as available under the plan. The DOL indicates that the FAB does not prohibit the use of a platform, brokerage window or self-directed brokerage account nor does the regulation mandate that a plan have a particular number of DIAs. The FAB goes on to state, however, "[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."

The FAB also indicates that there may still be questions about a plan fiduciary's responsibilities with regard to brokerage windows and similar arrangements. According to the FAB, "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 provisions."

A copy of the Field Assistance Bulletin 2012-02R is available here [\[Click Here\]](#).

For more information:

DOL Releases Guidance on Fee Disclosure - FAB 2012-2 [\[Click Here\]](#)

ASPPA Comment Letter [\[Click Here\]](#)