Ball of Confusion

'FAQ 30' creates concern about brokerage windows

When the Department of Labor (DOL) published Field Assistance Bulletin 2012-02, including a set of 38 frequently asked questions and answers about the participant fee disclosure regulation, the agency believed the bulletin would help resolve issues surrounding the regulation. In many respects, the publication did just that—but not in the case of Q30. Here, the DOL addressed the application of the participant disclosure rules to self-directed brokerage accounts and to investment platforms and windows made available to plan participants; however, in the process, it announced some unexpected and controversial guidance regarding the responsibilities of fiduciaries to plans that make investments available through these types of arrangements.

Q30 describes a hypothetical plan in which a fiduciary has selected the provider of a platform consisting of a large number of registered mutual funds from several fund families but has not indicated that any of the platform's funds are designated investment alternatives—a term defined under the regulation. Using this scenario, the question becomes: Is this platform itself a designated investment alternative for purposes of this regulation? In its answer to Q30, the DOL quickly dispatches the question, referencing the regulation's definition of designated investment alternative—which specifically excludes brokerage windows and similar arrangements—stating that the platform itself is not one. However, the department goes on to make three additional pronouncements:

1) The regulation does not specifically require a plan to have a particular number of designated investment alternatives. However, in most cases, the failure of a plan fiduciary to designate a "manageable number of investment alternatives" could raise questions as to whether the fiduciary has satisfied its obligations under Section 404 of the Employee Retirement Income Security Act (ERISA).

2) A plan fiduciary has an affirmative duty to consider whether an investment alternative that has been selected by "significant numbers of participants and beneficiaries" through the plan's brokerage window or similar arrangement should be "treated as designated for purposes of the regulation."

3) If a plan offers a platform holding more than 25 investment alternatives, the DOL will not, as an enforcement policy, require the plan administrator to treat every investment alternative offered as designated for purposes of the regulation as long as the plan administrator makes the required disclosures for "at least three" of the alternatives that, collectively, would meet the "broad range" requirements of the 404(c) regulation and for every investment alternative in which at least 1% of all participants and beneficiaries are invested. If the plan has fewer than 500 participants and beneficiaries, then the triggering threshold is only five participants or beneficiaries.

Although Q30 specifically addresses a situation in which a plan fiduciary has not designated any investment alternatives, the department has informally stated that Q30 applies to all plans with brokerage windows or similar arrangements—even plans with a core set of designated investment alternatives in addition to the brokerage window. Fortunately, the department has also indicated informally that certain transition relief (discussed in Q37) does apply to Q30. Therefore, "enforcement action generally would be unnecessary" if the plan fiduciary has acted in good faith based on a reasonable interpretation of the regulation and establishes a plan for complying with the guidance in the bulletin. Nevertheless, we understand that, in the department's opinion, plans with brokerage windows should be preparing for future compliance with Q30. The transition relief ignores the possibility of potential actions or remedies open to participants and beneficiaries.

Many in the retirement community have questioned whether this guidance actually amounts to a new rule-making that should have been subject to the normal notice and comment procedures, and have asked the DOL to rescind the guidance. Although the dialog is ongoing, no speedy resolution to the problem appears forthcoming. In the meantime, the confusion surrounding the application of the fiduciary duties to brokerage windows will continue to leave plan sponsors and providers in an unsettled position.

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