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Brokerage Windows

The DOL may have more regulatory guidance coming

In May 2012, the Department of Labor (DOL) stated in a Q-and-A that an administrator of a participant-directed individual account plan may need to treat an investment alternative through a brokerage window as a "designated investment alternative" and therefore provide certain disclosures regarding the investment alternative—if a "significant number of participants and beneficiaries" invested in it. Also stated in DOL Field Assistance Bulletin (FAB) 2012-02 Q-and-A 30: "Unless participants and beneficiaries are financially sophisticated, many of them may need guidance when choosing their own investments from among a large number of alternatives" and the suggestion that plan fiduciaries may have a duty to "designate a manageable number of investment alternatives."

In response to mostly negative reactions, the department replaced the Q-and-A in July 2012—FAB 2012-02R—with Q-and-A 39, which states that a plan fiduciary's attempt to avoid making disclosures required under the participant disclosure regulation by not designating any investment alternative—and offering only a brokerage window—may be inconsistent with the plan fiduciary's statutory duties of prudence and loyalty.

The DOL's regulatory agenda currently indicates that it plans to "explore whether, and to what extent, regulatory guidance on fiduciary requirements and regulatory safeguards … are appropriate for the [use of brokerage windows in] … plans that allow participants to direct investments." The department will begin this study by issuing a request for information (RFI) in April.

It appears likely that the Labor Department will address whether it is permissible for plan fiduciaries to offer only a brokerage window to plan participants and beneficiaries. The department might also address whether offering more than a "manageable number" of investment alternatives, perhaps through a brokerage window, is inconsistent with a fiduciary's duties. If it decides to address this issue, it will be revisiting a concern that it had previously raised in connection with the well-known 7th Circuit decision in *Hecker v. Deere & Co.*, known as *Hecker I*.

How Many Investment Choices?

The DOL may hold the view that offering a large number of investment choices to participants, including investments through brokerage windows, may serve as an effective means of blocking potential liability to any poorly performing or high-fee investment choices. In *Hecker I*, the 7th Circuit concluded that plan participants could not complain about certain investment options with allegedly high fees when the plan offered participants 26 investment options and more than 2,500 funds through a brokerage window. Because some of these alternatives had low fees, the court found that the plans had offered "a sufficient mix of investments for their participants."

The DOL supported the plaintiffs' request for a rehearing because it was concerned that *Hecker I* could be read as suggesting that plan fiduciaries could avoid liability by simply offering a large number of options. The 7th Circuit, in an opinion denying rehearing, addressed the department's concern by noting that *Hecker I* was "tethered closely to the facts before the court," including the fact that the plaintiff did not allege that the inclusion of any of the investment options, such as a brokerage window, was "unsound or reckless" (*Hecker v. Deere & Co.*—*Hecker II*). But this clarification did not change the fact that the plan fiduciaries in *Hecker I* prevailed because a large number of investment options were made available to plan participants. This clarification also did not dissuade the 3rd Circuit from largely following *Hecker I* to rule in favor of plan fiduciaries that offered 73 investment options in *Renfro v. Unisys Corp.*

It will be interesting to see whether the DOL reiterates its position that plan fiduciaries may have a duty to limit participant investment choices to a "manageable number." In this regard, it cited *Hecker II* as supporting its position in the May 2012 Q-and-A, although, as noted, it is doubtful whether *Hecker II* truly supports the DOL's position, given that *Hecker I* was left intact by *Hecker II* and the 3rd Circuit in *Renfro* went so far as to explain that a distinguishing fact of the 8th Circuit's decision in favor of participant plaintiffs in *Braden v. Wal-Mart Stores Inc.* was that the Wal-Mart plan did not offer as many investment alternatives as the plan in *Hecker I*.

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