

## DOL Revises Participant Disclosure Guidance On Brokerage Windows

On July 30, 2012, the U.S. Department of Labor (DOL) revised its most recent Field Assistance Bulletin providing guidance on the final Participant Disclosure Regulation. Field Assistance Bulletin No. 2012-02 (FAB 2012-02), which we discussed [here](#), contained explanations in the form of 38 questions and answers that covered several categories of disclosures, including disclosures for plans offering brokerage windows. In Question 30 of FAB 2012-02, DOL considered the situation in which a plan offered an investment platform consisting of a large number of mutual funds, none of which were designated as "designated investment alternatives" under the plan. DOL recognized that the regulation does not require a plan to have a specific number of investment alternatives, but cautioned that a plan's failure to designate a "manageable number" would "raise questions" about whether the plan fiduciaries satisfied their fiduciary obligations under ERISA. DOL also acknowledged that neither brokerage windows nor platforms that offer multiple investment alternatives, themselves, are "designated investment alternatives." DOL added, however, that if "significant" numbers of participants or beneficiaries selected one or more of the investment alternatives offered through a brokerage window, an affirmative obligation arises on the part of a plan fiduciary to determine if the investment alternative "should" be treated as a designated investment alternative for purposes of the Participant Disclosure regulation. Question 30 then provided a safe-harbor for plans that provide a platform holding more than 25 investment alternatives under which DOL would not, as a matter of enforcement policy, require that all of the investment alternatives be "treated" as designated investment alternatives for purposes of the regulation.

Question 30 generated substantial concern and criticism over DOL's apparent suggestion that plan fiduciaries were now required to designate a "manageable" number investment alternatives and would have to track and monitor non-designated investments chosen by participants and beneficiaries through brokerage windows.

Seemingly in response, DOL issued Field Assistance Bulletin No. 2012-02R (FAB 2012-02R), in which it withdrew Question 30 and replaced it with Question 39, which is now limited to the issue of whether a brokerage window, self-directed brokerage account, or similar plan arrangement is a designated investment alternative under the regulation. Unlike Question 30, Question 39 does not contemplate that the number of participants who invest in a non-designated alternative offered through a brokerage window will trigger its treatment as a "designated investment alternative" under the regulation. As it did in Question 30, DOL acknowledges that the regulation does not require a plan to have a required number of designated investment alternatives. DOL now cautions that a failure to designate "any" investment alternatives (including, for example to avoid investment disclosures under the regulation) raises questions about whether ERISA's fiduciary duties of prudence and loyalty have been met. DOL also reiterates that plan administrators are still bound by fiduciary obligations of prudence and loyalty with regard to the platform, brokerage window, or similar 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 arrangement." Question 39 concludes with DOL's acknowledgment that plan fiduciaries and service providers may have questions regarding the situations in which ERISA's fiduciary duties apply apart from duties under the regulation. Consequently, DOL ends Question 39 by stating its intention to engage in discussions with interested parties over "how best to assure compliance with these duties in a practical and cost effective manner, including, if appropriate, through amendment of relevant regulatory provisions."

You can read FAB 2012-02R in its entirety [here](#). If you have any questions on FAB 2012-02R or the Participant Disclosure regulation, please feel free to contact the attorney listed below.

### Contact

Mark A. Amadeo, Esq.  
Principal  
Direct: (301) 703-9287  
[mamadeo@amadeolaw.com](mailto:mamadeo@amadeolaw.com)  
[www.amadeolaw.com](http://www.amadeolaw.com)

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