

MEMO# 26356

July 31, 2012

DOL Withdraws Controversial FAQ-30

[26356]

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TO: PENSION COMMITTEE No. 25-12
PENSION OPERATIONS ADVISORY COMMITTEE No. 23-12 RE: DOL WITHDRAWS
CONTROVERSIAL FAQ-30

We are pleased to report that the Department of Labor (“DOL”) rescinded FAQ-30 of Field Assistance Bulletin (“FAB”) 2012-02 [\[1\]](#) and re-published guidance as FAB 2012-02R by removing FAQ-30 and adding new FAQ-39 that does not contain the controversial pronouncements of FAQ-30. [\[2\]](#)

As we reported previously, [\[3\]](#) since the FAB’s issuance in May, we engaged actively with DOL, Office of Management and Budget (“OMB”) and Congressional staff to communicate our concerns that the DOL’s position in FAQ-30 created new law, rights, or obligations without proper notice and comment in violation of the Administrative Procedure Act (“APA”) and OMB requirements. In our meetings and our letter to DOL, [\[4\]](#) we argued that compliance with FAQ-30 would require plan fiduciaries to continually examine the open brokerage windows of participants and beneficiaries to determine if a “significant” number of participants and beneficiaries has independently invested in a particular investment and treat such investment as a “designated” investment option subject to fiduciary review.

New FAQ-39, “Mutual Fund Platforms and Brokerage Windows,” confirms that a platform or a brokerage window, self-directed brokerage account, or similar plan arrangement in which the fiduciary did not designate any of the funds as a designated investment alternative (“DIA”) is not a DIA. Additionally, FAQ-39 states that the participant disclosure regulation “does not require that a plan have a particular number of DIAs, and nothing in this [FAB] prohibits the use of a platform or a brokerage window, self-directed brokerage account, or similar plan arrangement in an individual account plan.” However, FAQ-39 cautions that “a plan fiduciary’s failure to designate investment alternatives, for example, to avoid investment disclosures under the [participant disclosure] regulation, raises questions under ERISA section 404(a)’s general statutory fiduciary duties of prudence and loyalty.”

FAQ-39 also reminds fiduciaries of their statutory duties of prudence and loyalty to participants and beneficiaries who use the platform or the brokerage window, self-directed brokerage account, or similar plan arrangement, which would include “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 plan arrangement.”

Accordingly, the DOL's clarified position regarding brokerage accounts or similar plan arrangements is much more in line with prior statements and previous regulatory guidance. Significantly, FAQ-39 concludes by noting that DOL "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." We will keep you informed of any additional efforts by DOL to pursue regulatory action impacting the use of brokerage accounts or similar plan arrangements.

Anna Driggs
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endnotes

[1] See [Memorandum](#) to Pension Members No. 21-12, and Bank, Trust and Retirement Advisory Committee No. 22-12 [26153], dated May 11, 2012; [Memorandum](#) to Pension Members No. 21-12 [26161], dated May 18, 2012.

[2] FAB 2012-02R is available at <http://www.dol.gov/ebsa/regs/fab2012-2R.html>. The revised FAB also makes corresponding adjustments to the cross-references in FAQ-13 and FAQ-29.

[3] See [Memorandum](#) to Pension Committee No. 21-12, and Pension Operations Advisory Committee No. 21-12 [26305], dated July 16, 2012 (update on activities in response to FAQ-30, including a copy of the Institute letter to DOL dated July 3, 2012).

[4] See n. 3.