

MEMO# 26305

July 16, 2012

Update on Activities in Response to FAQ-30

[26305]

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TO: PENSION COMMITTEE No. 21-12

PENSION OPERATIONS ADVISORY COMMITTEE No. 21-12 RE: UPDATE ON ACTIVITIES IN RESPONSE TO FAQ-30

We would like to give you an update on our efforts to resolve issues arising from FAQ-30 of Field Assistance Bulletin ("FAB") 2012-02. [\[1\]](#) As it was clear from discussions at the Pension Committee meeting on June 5, 2012 [\[2\]](#) and our preceding conference call devoted to the participant disclosure issues on May 22 [\[3\]](#), the guidance in FAQ-30 on brokerage windows caught the retirement community by surprise. We are concerned that the Department of Labor'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 Office of Management and Budget ("OMB") requirements. In this respect, we believe that compliance with FAQ-30 would require plan fiduciaries to continually examine the open brokerage windows [\[4\]](#) 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 subject to fiduciary review.

On July 2, the Institute (along with other trade associations) attended a meeting with senior officials from the Office of Management and Budget to discuss our concerns. Following the meeting, the Institute submitted a letter (attached) to Phyllis Borzi, Assistant Secretary of the Employee Benefits Security Administration, which stated that FAQ-30 – (a) serves to work substantive changes or major legal additions to existing rules or regulations without satisfying APA's and OMB's notice and comment requirements, (b) will have enormous costs and adverse effects with respect to the retirement plan system, and (c) should be withdrawn to allow for proper rulemaking consistent with the APA and OMB requirements. (Also attached to this memo is a June 25, 2012 letter to Ms. Borzi, signed by numerous signatories, including the Institute, expressing similar concerns.)

We are also in the process of reaching out to Congressional staff to seek their participation in the effort to encourage DOL to rescind FAQ-30.

[Attachment](#)

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] See Memorandum to Pension Committee No. 18-12, and Pension Operations Advisory Committee No. 18-12 [26188], dated May 25, 2012.

[3] See Memorandum to Pension Committee No. 15-12, and Pension Operations Advisory Committee No. 15-12 [26157], dated May 14, 2012.

[4] “Open brokerage windows” have been described by the Department as brokerage accounts available through a plan that allows “plan participants to invest in a wide range of funds, stocks, bonds and other investments offered through a designated broker for the brokerage window.” See DOL FAQs About The 2009 Form 5500 Schedule C, Question 5, available at http://www.dol.gov/ebsa/faqs/faq_scheduleC.html.