Update on DOL Guidance Regarding Disclosure Rules

By Marcia S. Wagner, Esq.

On May 7, 2012, the Department of Labor (DOL) released 38 frequently asked questions (FAQs) concerning the impending plan-level and participant-level disclosure rules. The FAQs are contained in Field Assistance Bulletin 2012-02 and focus primarily on the disclosures that must be made to plan participants, resolving lingering questions as well as raising new issues. The FAQs also have implications for service providers and advisors. Furthermore, the DOL has indicated that a second set of FAQs will be issued dealing with the service provider disclosure rules.

Effective Date Confirmed. The FAQs confirmed that the July 1, 2012, effective date for disclosures by service providers to plan sponsors will not be further extended and that the requirement of initial annual disclosures to participants by calendar-year plans no later than August 30, 2012, also remains unchanged. In addition, for most plans, including calendar year plans, the quarterly statement of fees and expenses actually deducted from a participant's account during the preceding quarter would have to be provided no later than November 14, 2012, which is the 45th day after the end of the third quarter ending on September 30, 2012.

DOL Enforcement Policy. The DOL refused to allow a further delay of the disclosure rules, even though it recognized that some of the positions in the FAQs represent new guidance not previously available to plan administrators and service providers already in the process of changing their systems. However, the DOL indicated that for enforcement purposes it would take into account "whether covered service providers and plan administrators have acted in good faith based on a reasonable interpretation of the new regulations" and established a plan for complying with the FAQs in future disclosures. Noncompliance with the disclosure rules by service providers, even with respect to a new DOL position, would constitute a failure to meet a condition for avoiding the prohibited transaction rules and the DOL's relaxation of its enforcement policy might not be sufficient to prevent the mischief that this could cause, such as participant lawsuits. Therefore, further transition relief is expected.

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Section 404(c) Protection. The FAQs already provide transition relief on another issue, specifically, whether plans have forfeited Section 404(c) protection after November 1, 2011, if they were not already in compliance with the participant-level disclosure rules as of that date. A condition for satisfying Section 404(c) is that a plan fiduciary must disclose the information required by the new participant-level disclosure rules that have technically been in effect for many plans since last November. The FAQs clarified that participant disclosures do not have to be furnished before they must be furnished under the participant disclosure rules in order to maintain a plan's 404(c) status.

Brokerage Windows. The FAQs add to the specificity of the participant disclosures that are required when a plan makes a brokerage window available. The FAQs confirm that plan administrators must provide information on how the brokerage window works (e.g., by furnishing details regarding investment instructions, as well as any account balance requirements, restrictions, or limitations on trading, how the window differs from the plan's designated investment alternatives, and whom to contact with questions).

A plan administrator must also provide all participants (not just those who utilize it) with a general explanation of the fees and expenses that may be charged against a participant's account with a brokerage window. The explanation must include a description of fees and expenses necessary to open or access the window, as well as fees to close the window or terminate access. In addition, the explanation is required to cover any ongoing fees or expenses necessary to maintain access to the window, including inactivity fees and minimum balance fees. The explanation is also required to cover commissions and other per trade fees charged in connection with the purchase or sale of a security, including front- or back-end sales loads. However, the expenses of an investment chosen by a participant, such as 12b-1 fees or other fees reflected in the investment's total annual operating expenses, do not need to be included in the explanation of the window's fees.

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Since the fees and expenses of purchasing securities through a brokerage window may vary across investments or may not be known in advance, the general statement described above, along with directions as to how more information can be obtained, is sufficient for purposes of the annual

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disclosure of plan-related information without referring to actual amounts. However, a plan administrator must also provide participants with a quarterly statement of the dollar amount of fees and expenses actually charged during the preceding quarter against their accounts in connection with a brokerage window, as well as a description of the services to which the charges relate. Accordingly, a participant's quarterly statement may include specific dollar amounts allocated to brokerage trades, brokerage account minimum balance fees, brokerage account wire transfer fees, and sales loads.

Designated Investment Platform. The FAQs also consider the required disclosures where a plan sponsor selects an investment platform consisting of a large number of mutual funds into which participants may direct their individual accounts, but does not designate any of the funds on the platform as designated investment alternatives under the plan. The FAQs indicate that the platform itself, like a brokerage window, would not be a designated investment alternative. Whether the individual funds are treated as designated investment alternatives, however, depends on whether they are specifically identified by the sponsor or other plan fiduciary as available under the plan. Nevertheless, the FAQs indicate that "the failure to designate a manageable number of investment alternatives raises questions as to whether the plan fiduciary has satisfied its obligations under section 404 of ERISA." The DOL sees the designation of specific investment alternatives as enabling participants to compare the cost and return information of the designated investment alternatives when they are evaluating and selecting investments for their accounts.

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Pending further guidance, the DOL indicated that its enforcement policy where a platform holds more that 25 investment alternatives will not require that all of the investment alternatives be treated as designated investment alternatives for disclosure purposes if certain conditions are met. To meet these conditions, a plan administrator must:

- Make the required disclosures to participants for at least three of the investment alternatives on the platform that collectively meet the "broad range" requirements under Section 404(c) of ERISA; and
- Make the required disclosures to participants with respect to all other investments on the platform in which at least five participants or beneficiaries are invested on a date that is not more than 90 days before each annual disclosure. In the case of a plan with more than 500 participants and beneficiaries, this threshold would be 1 percent of all participants and beneficiaries.

These rules are a manifestation of the DOL's concern that certain plan sponsors may be trying to avoid responsibility for a plan's investment funds by abstaining from the designation of specific funds on an investment platform. ❖

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