

## DOL does turnaround, backs off controversial brokerage window provisions

Changes soothe fiduciary fears of plan sponsors, service providers; previous FAB not so fab, advisers said

By Darla Mercado

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The Labor Department on Monday released new language clarifying plan fiduciaries' responsibilities with respect to brokerage windows in 401(k)s — an issue that was causing great concern in the retirement industry.

Major retirement plan service providers and plan sponsors have been worrying over a May field assistance bulletin from the department that they contend gives employers more fiduciary responsibility for investments an employee chooses via a brokerage account.

Mutual funds offered in retirement plans are subject to review for their suitability as investments for participants and must meet fee disclosure requirements. Brokerage accounts — generally intended for savvier investors and offering a wide array of investments — typically are not considered a “designated investment alternative.” But the DOL's May bulletin raised the possibility that investments in a brokerage window could be designated investment alternatives if enough participants invest in them.

That raised the ire of service providers and made advisers consider backing away from recommending that plan sponsors add the brokerage accounts.

On Monday, however, the Labor Department released a follow-up to its field assistance bulletin. In this latest memo, the agency dropped language that would denote brokerage windows as designated investment alternatives if a certain number of people elected to use them.

The DOL clarifies that brokerage windows are not considered designated investment alternatives and that the regulation doesn't prohibit the use of these brokerage accounts. The agency said that plan fiduciaries, however, still have a duty of prudence and loyalty to participants who use the brokerage window — including taking into account the nature and quality of services provided.

“This is excellent and helpful,” said Marcia Wagner, managing director at The Wagner Law Group PC. “It looks like the DOL is backing down from its strict requirements promulgated in the prior FAB.”

“It still correctly maintains that the offering of the window should be held to the fiduciary standards of

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general prudence, which is reasonable," she added. "But it clears up that the window in and of itself is not a designated investment alternative."

"We're grateful to the department for this clarification," said Bob Holcomb, head of legislative and regulatory affairs at J.P. Morgan Retirement Plan Services. "It alleviates some of the concerns sponsors and service providers had,"

Still, just because the most stringent requirements are off the bulletin doesn't mean that service providers and employers should rest easy.

Mr. Holcomb added that there is always the "possibility" that the department could revisit the brokerage window issue more formally through the rule-making process. "The important thing is that we follow the standard process where there is a notice of rule making and an opportunity to comment," Mr. Holcomb said. "We're still absorbing this, but we're very grateful to the DOL."

Jason C. Roberts, chief executive of the Pension Resource Institute LLC, agreed that the brokerage account provision could resurface down the road.

"I have a sneaking suspicion we'll see something proposed more formally that goes to the issues that the Labor Department thinks are problematic — someone had to have this on their radar screen," he said.

Mr. Roberts added: "If I were a [service provider], I wouldn't stop the coders or pull the information technology teams off of this yet. I think we'll see some preparation that will continue in case this provision comes back."

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