



# AMERICAN BENEFITS COUNCIL

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## BROKERAGE WINDOW RULE ISSUED BY DEPARTMENT OF LABOR IMMEDIATELY AND EFFECTIVELY ESTABLISHES NEW LAW IN VIOLATION OF LEGALLY REQUIRED NOTICE AND COMMENT RULES: WITHDRAWAL OF THE RULE IS NEEDED AS SOON AS POSSIBLE

[Field Assistance Bulletin 2012-02](#) (the "FAB") generally provides helpful interpretive guidance regarding the Department of Labor's final regulations on disclosure of fee and other information to participants. However, Q&A-30 of the FAB raises urgent problems for a large number of plan sponsors.

As explained below, Q&A-30 creates new rules without notice and the opportunity for public comment, and thus violates requirements contained in the Administrative Procedure Act, OMB's Final Bulletin for Agency Good Guidance Practices, and Executive Order 12866. Because of the procedural violations and the harm that would be caused by Q&A-30, Q&A-30 needs to be withdrawn as soon as possible. In fact, the noted procedural rules were established for situations exactly like this, where new problematic rules are issued because there was not an opportunity for public notice and comment that would have identified the problems before the rules could take effect.

### **BACKGROUND**

Under the current participant disclosure regulations, there is no obligation to disclose information with respect to investments that have not been "designated" as plan investments by the plan fiduciary. For example, many plans offer a core group of designated plan investments and an option for participants to invest separately in almost any investment through a brokerage window. Under the regulations, disclosure is required with respect to the core group of designated plan investments; disclosure is not required with respect to the tens of thousands of investments available through the brokerage window. This rule makes sense for two reasons: (1) it is impractical for employers to make disclosures with respect to tens of thousands of different public and private investments, and (2) any applicable disclosure should be governed by the securities laws, since the employer has not endorsed investments available only through the brokerage window.

## NEW LAW

Q&A-30 establishes new law in two respects. First, Q&A-30 would, for the first time, require plan fiduciaries to (1) examine all brokerage window investments in which a significant number of participants and beneficiaries have invested and (2) determine whether plan disclosures should be provided with respect to one or more of such investments by no later than August 30. There is no basis for this requirement in the participant disclosure regulations or in any other legal authority; in fact, the new position is contrary to existing authorities.

Second, Q&A-30 states that the “failure to designate a manageable number of investment alternatives raises questions as to whether the plan fiduciary has satisfied its [fiduciary] obligations under ... ERISA.” There is no guidance as to what this means and how a plan sponsor can comply with it. Even more importantly, this rule had never shown up in any other guidance issued by the Department.

## IMMEDIATELY EFFECTIVE NEW LAW

The FAB contains transition relief applicable to Q&A-30, but the transition relief provided does not apply to participant claims. Because of the clear applicability of Q&A-30 to participant claims, there is thus in effect no transition period. The brokerage window rule is effective at the latest on August 30th, but since it is too late now for national compliance with the new brokerage window rule by August 30, there is an immediate problem. The “manageable number of investment alternatives” rule is in all respects immediately effective. *Accordingly, as explained further below, especially because of the looming August 30 deadline, there is a great need for withdrawal of Q&A-30 as soon as possible.*

## ADVERSE EFFECTS AND COSTS OF Q&A-30

As discussed above, Q&A-30 is a new law that is immediately effective. Moreover, this new law will cause very significant and unnecessary costs to the system, further underscoring the need for the Department to withdraw the Q&A and follow the legally required notice and comment process.

- **Prevalence of brokerage windows.** Within the multi-trillion dollar defined contribution plan market, such windows are relatively common, among both large and small employers.
- **Manual monitoring required.** Very few plan service providers, including brokerage window providers, have a system that can determine the number of plan participants who are invested in any particular brokerage window investment. Thus, generally, the determinations required for the first time by

Q&A-30 would need to be done manually, triggering enormous costs. Modifying disclosure processes to include brokerage window investments would further increase costs and complexity in plan administration.

- **Widespread noncompliance.** As noted, the massive amount of work needed to comply with the August 30 deadline regarding participant disclosure had to be completed well before now, so there will be no way to avoid widespread noncompliance with Q&A-30 as of August 30.
- **Plan sponsor dilemma.** Many plan sponsors are faced with no way to avoid potential liability even if they can comply with Q&A-30 as of August 30. If the plan sponsor makes disclosures regarding popular brokerage window investments, that implies plan sponsor approval of those investments as appropriate for all participants. The law has been extremely clear that plan sponsors have had no obligation to review the appropriateness of the tens of thousands of investments available through a brokerage window, so this implication of approval could easily give rise to potential liability if the investment is not appropriate for all participants. The only safe way to avoid this implicit approval is to force liquidation of that investment, a move that would give rise to potential liability with respect to those forced to liquidate their investments.
- **Small business plan terminations.** Small business experts have observed that Q&A-30 will likely cause many small businesses to terminate their plans. For many small businesses, brokerage windows, which are hardly viable after Q&A-30, were a key selling point in a small business owner's decision to establish a plan. For other small businesses, the prospect of facing potential liabilities whatever is done will likely be enough to cause the owner to cancel the plan.

## NEXT STEPS

The American Benefits Council is a longtime supporter of transparency with respect to fee and other plan information. We are not opposed in any way to a public policy discussion regarding disclosure issues. However, if the Department believes that brokerage windows merit review and the possible adoption of a new rule, it is critical that the Department use the required regulatory process to propose the new rule for public comment.

Modifying Q&A-30 would not solve the problem, because that would be more rulemaking in violation of the procedural requirements noted above. Moreover, in light of the August 30 deadline, preparation for which has already passed for the most part, modified rules would in many ways only exacerbate the problem. Q&A-30 needs to be withdrawn immediately. If the Department would like to pursue these issues, it needs to follow the legally required procedures in doing so.