June 14, 2012

AMERICAN BENEFITS
COUNCIL

The Honorable Phyllis C. Borzi
Assistant Secretary
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Dear Ms. Borzi:

The American Benefits Council (the "Council") would like to thank the Department for issuing Field Assistance Bulletin 2012-02 (the "FAB"), which generally provides helpful interpretive guidance regarding the Department's final regulations on disclosure of fee and other information to participants. However, Q&A-30 of the FAB raises critical and urgent problems for a very large number of plan sponsors, especially small businesses. As explained below, Q&A-30 was issued in a manner that conflicts with procedures established by the Office of Management and Budget ("OMB") and therefore should be withdrawn.

The Council is a public policy organization representing principally Fortune 500 companies and other organizations that assist employers of all sizes in providing benefits to employees. Collectively, the Council's members either sponsor directly or provide services to retirement and health plans that cover more than 100 million Americans.

REQUESTED ACTION

We would also like to thank you for meeting with us and other concerned industry groups on May 31 regarding Q&A-30. ***As discussed at our meeting, we respectfully request that the Department withdraw Q&A-30, because it was issued in a manner that did not comply with the requirements set forth by OMB in its Final Bulletin for Agency Good Guidance Practices (the "OMB Bulletin"). Under the OMB Bulletin, the Department was required to provide advance public notice and an opportunity to comment prior to issuing Q&A-30, which was not done. Moreover, withdrawal would avoid the severe disruption and harm to plan sponsors otherwise caused by Q&A-30, as discussed later in this letter.***

The position set forth in Q&A-30 is immediately effective, since the transitional relief provided in Q&A-37 does not apply to participant claims. ***Accordingly, as explained further below, because of the imminent deadlines with respect to compliance with the new position set forth in Q&A-30, there is a great need for withdrawal as soon as possible.***

Just to be clear, the Council is a long-time 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, for the reasons described below, 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 normal regulatory process to propose the new rule for public comment.

BACKGROUND

Unlike other parts of the FAB, Q&A-30 of the FAB sets forth a new position regarding current law. 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; arrangements involving such brokerage windows are expressly contemplated by the regulations. 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.

Q&A-30 of the FAB would, for the first time, require plan fiduciaries to examine all brokerage window investments in which a significant number of participants and beneficiaries have invested and determine whether plan disclosures should be provided with respect to one or more of such investments. This position is in effect a new rule because there is no basis for Q&A-30 in the participant disclosure regulations or in any other legal authority. The Department has had numerous formal and informal opportunities over many years to articulate the Q&A-30 position, but has not done so; in fact, the new position is contrary to existing authorities.

The new disclosures required by Q&A-30 must be provided to participants generally by August 30, 2012. Moreover, under separate regulations applicable to plan service providers, service providers must provide plan fiduciaries with the participant disclosure information, effective July 1, 2012.

ADVERSE EFFECTS AND COSTS

As discussed below, a key element with respect to the OMB Bulletin is whether a new rule could have an effect on the economy of $100 million or more. This is clearly true with respect to Q&A-30.

- **Prevalence of brokerage windows.** We are working on assembling data on the precise prevalence of brokerage windows. It is clear, however, that, within the multi-trillion dollar defined contribution plan market, such windows are relatively common, especially among small employers. Small business owners often insist on a mix of core investment options and the investment and cost flexibility of a brokerage window.
- **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.** Manual determinations would require a long time, causing widespread noncompliance as of the effective dates of the applicable disclosure rules and resulting transaction costs.
- **Examples of problems raised by Q&A-30.**
    - **Fiduciary issues.** If a plan determines that disclosure is needed because of the number of participants invested in a brokerage window investment, such disclosure may cause the investment to be treated as "designated" by the plan fiduciary. This in turn could result in designation of investments that are not suitable to be included in the fiduciary-reviewed investment offerings or that are inappropriate for the plan sponsor, such as stock of a competitor. Accordingly, there may be a need to immediately liquidate the newly designated investments or to close access to a particular investment once it is possible that the "significant" participation threshold will be exceeded.
    - **Disclosure confusion.** Even with respect to disclosure of suitable brokerage window investments, participants not in the brokerage window will be very confused by receipt of disclosures regarding brokerage window investments that they may not have been aware of.
    - **Cash funds.** It is common for brokerage windows to maintain cash funds to hold assets that are moving to or from the brokerage window. At any given time, more than 1% of participants can have money in these cash funds, even though the length of time that assets are in this fund could be very short. Could these investments become designated? If so, how would such investments be evaluated for prudence?

- **Lack of guidance.** The Department has not addressed any of the above issues. These and other uncertainties -- e.g., the effect of disclosure on whether an investment is "designated", how disclosure works with respect to brokerage window investments, and how to properly liquidate brokerage window investments -- could have been addressed if there had been a notice and comment process. This lack of guidance will trigger large legal and compliance costs.
- **Additional lack of guidance.** There is no guidance regarding how many participants must be invested in a brokerage window investment before the number is treated as "significant" under Q&A-30. (We understand from our May 31 meeting that the "1% of participants" safe harbor is not intended to be reflective of the meaning of "significant", a point that needs to be clarified.) Nor is there any guidance regarding how often the determination of significance must be applied. Again, this lack of guidance will result in very material legal and compliance costs.
- **Forced liquidation of brokerage window investments.** Most affected plan sponsors have recognized, or will quickly recognize, that they cannot as a practical matter comply with Q&A-30 by August 30, 2012. Many others are likely to conclude that they cannot attain reasonable comfort on the unclear issues by August 30. These employers may conclude that they will be effectively forced to terminate their brokerage window arrangements and liquidate all participants' brokerage window investments, and possibly identify alternative investment options, at great expense in terms of legal costs, transaction costs, employee relations, adverse effects on participants, and potential fiduciary liability attributable to liquidation. For participants who do not make affirmative elections of alternative investments, mandatory movement of the assets to other plan investments may be needed. Such forced liquidation of brokerage window investments would also place the participants in the brokerage window at potentially significant market risk as a result of such a sudden change. It is not at all clear that a plan fiduciary that is effectively forced to liquidate brokerage window investments by Q&A-30 would be protected from fiduciary liability. While the decision to eliminate of the brokerage window could perhaps be considered a settlor function, the implementation of that decision could very well be a fiduciary event that is subject to ERISA's fiduciary rules (and may not be protected by ERISA section 404(c)).
- **National reports of adverse actions.** A forced liquidation of brokerage window investments will, as noted, raise severe employee relations issues. For prominent plan sponsors whose actions frequently are reported nationally, this is extremely troubling.
- **Plan terminations.** Many commentators have observed informally that the anticipated unavailability of brokerage windows will have a very adverse effect on the maintenance and adoption of retirement plans by small employers. Before issuing the new rule set forth in Q&A-30, the Department needed to closely examine the effect of the new rule on the future adoption and maintenance of

plans by small businesses, and on how many small businesses might terminate their plans because of this position. This negative experience could even affect the willingness of mid-sized companies to maintain plans that are becoming sources of substantial potential liabilities and costs.

- **Effect on SEPs and SIMPLE IRAs.** Commentators have also noted informally that the Department's position could call into question the viability of all SEPs and SIMPLE IRAs, two of the most popular forms of small business plans. While the participant disclosure regulations do not apply to SEPs and SIMPLE IRAs, the Q&A-30 position seems to operate independently of (and in contradiction to) the applicable regulations. Many SEPs and SIMPLE IRAs offer all participants the right to invest through a brokerage account, so if the Q&A-30 rule does apply to them, application raises enormous problems for these arrangements. We do not believe that this result could have been intended. Again, with notice and comment, this can be cleared up. Due to the lack of notice and comment, Q&A-30 raises a host of very serious problems similar to this one.
- **Issues not reviewed by the Department.** To our knowledge, the Department has not reviewed any of the above issues either (1) in connection with the cost/benefit analysis or the regulatory flexibility analysis of the participant disclosure regulations, or (2) in connection with similar analyses regarding the FAB. In light of the very material cost implications and the potentially very serious effect on businesses and especially on small businesses, such analyses are needed before the Q&A-30 issue can be addressed.

A thorough cost/benefit analysis would also provide guidance to the public on DOL's objectives with respect to this new rule. This in turn would facilitate a public policy dialogue regarding the extent of any problem identified by the Department and whether there is a more cost-effective and less disruptive way to address it.

OTHER Q&A-30 ISSUES

The uncertainties and issues triggered by Q&A-30 go beyond the brokerage window issues and the questions raised above. For example, 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", citing inconclusive dicta in Hecker v. Deere, 569 F. 3d 708, 711 (7th Cir. 2009). There is no guidance as to what this means and how a plan sponsor can comply with the law in this respect.

Q&A-30 also establishes a safe harbor applicable to brokerage windows and other platforms that have raised numerous questions and uncertainties. For example, the safe harbor applies different rules to investment platforms, depending on whether they have 25 or more investment alternatives. Questions have been raised as to whether this sheds a negative light on platforms with fewer alternatives, or on platforms with more alternatives. (Both situations are extremely common.)

The FAB can also be read to suggest a need by plan sponsors in some circumstances to evaluate the "financial sophistication" of their employees, which plan sponsors cannot do.

All of the above is (1) unsupported by legal authority, and (2) unclear as to its precise meaning and application, raising serious potential liabilities without guidance as to how to avoid such liabilities. These points further demonstrate the need for advance public notice and the opportunity for public comment with respect to Q&A-30.

PROCEDURAL RULES

The costs described above are almost certainly far in excess of $100 million nationally. In addition, Q&A-30 clearly raises "novel legal or policy issues", especially since there is no legal authority for the positions taken in Q&A-30; in fact, court opinions involving brokerage windows do not in any way reflect the position in Q&A-30. Under the OMB Bulletin, either of the conclusions in the prior two sentences would make Q&A-30 an "economically significant guidance document." As such, the OMB Bulletin requires advance public notice and the opportunity for public comment with respect to Q&A-30. Since the Department did not follow this procedure, Q&A-30 should be withdrawn.

Moreover, it would be appropriate for the Department and OMB to explore whether any guidance addressing the Q&A-30 issue is actually subject to notice and comment under the Administrative Procedure Act ("APA"). See, e.g., *American Mining Congress v. Mine Safety & Health Administration*, 995 F.2d 1106 (D.C. Cir. 1993). There are real questions as to whether, in addition to failing to comply with the OMB Bulletin, the issuance of Q&A-30 without notice and comment also failed to comply with the APA.

This Administration has shown sensitivity to the need to comply with sound regulatory processes. Critical retirement security issues, like those discussed above, deserve that same sensitivity and adherence to the Administration's own carefully constructed regulatory process. Q&A-30 should be withdrawn. Any proposal relating to the issues raised in Q&A-30 needs to comply with the OMB Bulletin.

American Benefits Council

cc: The Honorable Cass R. Sunstein