SUTHERLAND

LEGAL ALERT

July 31, 2012

DOL Withdraws FAQ 30 for its ERISA Participant Disclosure Regulation

Among the 38 FAQs included in Field Assistance Bulletin 2012-02, released by the Department of Labor (DOL) on May 7, 2012, to provide additional guidance on the final participant-level disclosure regulations under ERISA, the most controversial to date has proven to be FAQ 30. That FAQ was read by many to take positions on the obligation of a fiduciary to a participant-directed plan:

- To designate "a manageable number" of specific investment options among which participants might elect,
- To monitor for investments selected by "significant" numbers of participants through self-directed brokerage windows, and
- In some cases to treat, pursuant to a new safe harbor test, those "significant" investments selected through a brokerage window as "designated investment options" (DIA) for which investment-level disclosure was required under the new regulation

that were inconsistent with the statute and with the regulation itself. That guidance also clouded the practical feasibility of including brokerage windows in ERISA plans.

On July 30, DOL issued a revised FAB 2012-02R, replacing FAQ 30 with a new FAQ 39 and making correlative changes in FAQs 13 and 29. Among other things:

- The "manageable number of investment alternatives" requirement was deleted, as was the requirement to monitor for significant investments through brokerage windows and the safe harbor test. FAQ 39 specifically states that the participant disclosure regulation "does not require that a plan have a particular number of DIAs, and nothing in this Bulletin prohibits the use of a platform or a brokerage window, self-directed brokerage account, or similar plan arrangement in an individual account plan." FAQ 29 adds that disclosure under the regulation about brokerage windows is limited to plan-level disclosure, and investment-level disclosure is not required for "any investment selected by a participant or beneficiary that is not designated by the plan (*i.e.*, any investments made through the window…)."
- Also, the DIA definition was clarified in FAQ 39 to depend on "whether [an investment alternative] is specifically identified as available under the plan."
- DOL continued to take the position, however, that plan fiduciaries "are still bound by ERISA Section 404(a)'s statutory duties of prudence and loyalty to participants and beneficiaries who use the platform or the brokerage window, self-directed brokerage account, or similar plan arrangement, including taking into account the nature and quality of services provided in connection with the platform or the brokerage window, self-directed brokerage account, or similar plan arrangement …" and that the failure to designate investment alternatives to avoid disclosure "raises questions under ERISA Section 404(a)'s general statutory fiduciary duties of prudence and loyalty." That is, DOL repositioned some of its concerns expressed in FAQ 30 as arising under the ERISA fiduciary standards generally, rather than having consequences under the

© 2012 Sutherland Asbill & Brennan LLP. All Rights Reserved.
This communication is for general informational purposes only and is not intended to constitute legal advice or a recommended course of action in any given situation. This communication is not intended to be, and should not be, relied upon by the recipient in making decisions of a legal nature with respect to the issues discussed herein. The recipient is encouraged to consult independent counsel before making any decisions or taking any action concerning the matters in this communication. This communication does not create an attorney-client relationship between Sutherland and the recipient.

participant disclosure regulation specifically. DOL also reserved the right to continue its consideration of those concerns, potentially through rule making.

■ ■ ■

If you have any questions about this Legal Alert, please feel free to contact any of the attorneys listed below or the Sutherland attorney with whom you regularly work.

Margaret C. Barker	404.853.8054	margaret.barker@sutherland.com
Adam B. Cohen	202.383.0167	adam.cohen@sutherland.com
Jamey A. Medlin	404.853.8198	jamey.medlin@sutherland.com
Alice Murtos	404.853.8410	alice.murtos@sutherland.com
Joanna G. Myers	202.383.0237	joanna.myers@sutherland.com
Vanessa A. Scott	202.383.0215	vanessa.scott@sutherland.com
W. Mark Smith	202.383.0221	mark.smith@sutherland.com
William J. Walderman	202.383.0243	william.walderman@sutherland.com
Carol A. Weiser	202.383.0728	carol.weiser@sutherland.com

© 2012 Sutherland Asbill & Brennan LLP. All Rights Reserved.
This article is for informational purposes and is not intended to constitute legal advice.