ERISA FIDUCIARY CHECKUP 2015
Today’s Disclaimer

The information presented in this webinar represent our perspectives, is not necessarily all inclusive, does not constitute legal or any other advice, and should not be relied upon without first consulting with appropriate qualified professionals for your plan’s individual facts and circumstances.

Meet Your Presenters

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Auto-Enrollment and Auto-Escalation
Self-Directed Brokerage Windows
ERISA Spending Accounts
Q&As and Other Thoughts for 2015

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Auto-Enrollment

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Auto-Enrollment

What are auto-features?

- Becoming more popular
- These features have proven to be beneficial for plan participants
- Plan sponsors have a lot of flexibility in establishing these features
- Reasons against offering auto-enrollment and auto-escalation

Plan Sponsor Experience

What are plan sponsors doing?

Administrative considerations

Fiduciary considerations

What are participants doing?
QDIA Considerations

Selecting and monitoring

For some plans, the QDIA is garnering a larger percentage of new plan assets

Is additional scrutiny required?

Adding new “vintages” of target date funds

What Are the Future Trends?

More adoption by plan sponsors

Increasing initial deferral rates and caps

Including more groups of employees
Issues Related to Self-Directed Brokerage Windows

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DOL Concerns Over Brokerage Windows

- In August, 2014, DOL published a request for information (RFI) concerning brokerage windows.

  “The Department wants to make sure that participants are not exposed to under risks from brokerage windows and that plan fiduciaries properly understand the scope of their ongoing responsibilities with respect to brokerage windows.”

- Likely no guidance until 2016
Decision to offer brokerage window is a fiduciary decision

2014 RFI requests information on:

- What factors plan fiduciaries consider when deciding whether to offer a brokerage window?
- What are the most common reasons for adding a brokerage window?
- What role, if any, do concerns about fiduciary responsibilities play in deciding whether to add a brokerage window?

- No regulatory guidance on this issue and no case law finding that the offering of the brokerage window was imprudent
- Recommend that fiduciaries:
  - Consider investment knowledge of participants and benefits of brokerage window to more sophisticated investors or those who would work with an RIA
## ERISA Fiduciary Considerations

### Recommend that fiduciaries:

- Advise participants that investment made through a brokerage window are not selected and monitored by fiduciaries and that they should consider their own level of investment knowledge.
- Document carefully basis upon which decision to add brokerage window was made.

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### ERISA Fiduciary Considerations

- Fiduciaries must engage in prudent process in selecting the provider of the window.

> “fiduciaries of … plans with … brokerage windows … are still bound by ERISA section 404(a)’s statutory duties of prudence and loyalty … including taking into account the nature and quality of services provided in connection with the … the brokerage window…”

*DOL Field Assistance Bulletin 2012-02R, Q&D-39, July 30, 2012*
Prudent process involves determining:

- Is the provider qualified to offer the brokerage window services (consider experience and qualifications of brokers and whether they are approximately licensed)?
- What is the quality of the provider’s service?
- Are the fees reasonable?

ERISA Fiduciary Considerations

- 2014 RFI requests information on:
  - What role will plan fiduciaries play in selection of brokers and other service providers to brokerage windows?
  - Do plan fiduciaries monitor the investments made through their plan’s brokerage window?
ERISA Fiduciary Considerations

• 2014 RFI requests information on:
  - How do costs of investing through brokerage window compare to investing in the plan’s other investment options?
  - Are brokerage window costs subsidized by plan participants not participating in brokerage window?

Participant Disclosures Regarding Brokerage Windows

• Plan administrator must provide a general description of how the brokerage window works
  - At a minimum, must give sufficient information to enable participants to understand how the window works (how to give investment instructions, restrictions on trading, etc.) and whom to contact with questions
Participant Disclosures Regarding Brokerage Windows

Must provide an explanation of fees and expenses that may be charged against the participant’s account on an individual basis.

Must provide a statement of fees and expenses actually charged against the participant’s account during preceding quarter.

Participant Disclosures Regarding Brokerage Windows

No requirements to disclose the investment-related information required for Designated Investment Alternatives, such as market performance data.

2014 RFI indicates that DOL considering more disclosures for brokerage windows.
ERISA Spending Accounts and Related Issues

Many plan sponsors pay for recordkeeping/administration through “revenue sharing” arrangements

A plan sponsor and its record keeper may negotiate a fee for such services

If the amount of revenue sharing exceeds the negotiated amount, it may result in the creation of an ERISA budget

The ERISA budget may then be applied to plan-related expenses and/or credited back to plan participants

Conditions Giving Rise to an ERISA Spending Account
Accounting Related to DOL Advisory Opinion 2013-03A

Topic

Does an ERISA spending account constitute “a plan asset” of the clients plans under ERISA?

• Issued July 3, 2013
• Opinion requested by Principal Life Insurance Company

Background for DOL Advisory Opinion 2013-03A

Principal receives revenue sharing payments from investments including its own accounts

Payments take the form of 12b-1 fees, shareholder and administrative fees and similar payments

Principal retains payments, but may agree to maintain a bookkeeping record of payments received related to plan’s investments
More Background for DOL Advisory Opinion 2013-03A

In accordance with terms of agreement or directions from plan fiduciary, Principal:

- May apply credits to the Plan to pay certain plan expenses or
- May deposit money directly into a plan account, equal to the credits received

Principal deposits revenue sharing received in its general accounts.

No special account is set up to hold revenue sharing received

No requirement under agreement to segregate revenue sharing received for benefit of Plan

DOL Conclusion Under 2013-03A

- Asset recognition follows ordinary notion of property rights – property where the Plan has a “beneficial ownership interest”
- Nothing in Principal’s facts would cause the Plan to record an asset before the plan actually receives the benefits
- Contractual rights to receive amounts or applied to plan expenses are Plan assets
Use it or keep it arrangements
- Beneficial ownership interest has been obtained
- Reflect as a plan asset

Use it or lose it arrangements
- Beneficial ownership is contingent upon Plan performance (e.g., incurring expense subject to reimbursement)
- Follow ASC 450-30 (formerly FASB 5) for gain contingencies
- Recognize when realizable
- Typically when Plan receives the amount

Other Issues Related to ERISA Spending Accounts
- Legally permitted applications
- Timing issues for account usage
- Structuring alternatives
- Portability of accounts between vendors
- Relevance regarding participant compliance testing
Thank You for Attending

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