Plan Sponsor Council of America
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November 19, 2014

VIA EMAIL (e-ORI@dol.gov)

Office of Regulations and Interpretations
Employee Benefits Security Administration
Attn: RIN 1210-AB59; Brokerage Windows RFI
U.S. Department of Labor
200 Constitution Avenue NW
Washington, DC 20210

Re: Brokerage Windows RFI

Dear Sir or Madam:

The Plan Sponsor Council of America ("PSCA") appreciates the opportunity to comment on the U.S. Department of Labor's ("DOL") Request for Information Regarding Standards for Brokerage Windows in Participant-Directed Individual Account Plans ("RFI").[1]

PSCA is a national, non-profit association that advocates on behalf of 1,200 companies and their six million employees for increased retirement security through profit sharing, 401(k), and related savings and incentive programs. PSCA was established in 1947 and its member companies include both large and small employers ranging in size from Fortune 100 firms to small, entrepreneurial businesses. Our members include both plan fiduciaries ***and*** plan service providers, working together to improve the defined contribution landscape. It is from this perspective that PSCA is providing its response to the RFI.

As discussed in more detail below, our members believe that the guidance provided in Field Assistance Bulletin ("FAB") 2012-02R is sufficient and are concerned that any proposed rulemaking resulting from the RFI will likely reintroduce several of the unsettling positions set forth in Q&A-30 of FAB 2012-02. Accordingly, this comment restates our concerns with the positions set forth in Q&A-30. We have also surveyed our members on several of the RFI questions and have summarized those responses below.

[1] 79 Fed. Reg. 49,469 (Aug. 21, 2014).

Background

In October 2010, DOL issued a final rule requiring plan administrators to disclose certain plan and investment-related information to participants and beneficiaries in participant-directed individual account plans.[2] This regulation was intended to ensure that participants and beneficiaries in such plans have the information needed to make informed decisions about the management and investment of their retirement savings.[3]

Under the regulation, investment options that are designated investment alternatives are subject to detailed performance, fee, and other investment-related disclosure requirements. Importantly, the regulation provides that brokerage windows are not designated investment alternatives.[4] Accordingly, brokerage windows are not subject to the regulation's investment-related disclosure requirements.

In May 2012, DOL issued a series of frequently asked questions under the regulation.[5] Among those frequently asked questions was Q&A-30, under which DOL attempted to impose the regulation's investment-related disclosure requirements and ERISA fiduciary duties on certain investment alternatives purchased through brokerage windows. Specifically, Q&A-30 provided that plan fiduciaries may have liability in two situations: (1) if it failed to select a "manageable" number of designated investment alternatives and (2) if it failed to provide the regulation's investment-related disclosures with respect to investments selected through brokerage windows by significant numbers of participants and beneficiaries.[6]

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[2] 75 Fed. Reg. 64,910 (Oct. 20, 2010), codified at 29 C.F.R. §2550.404a-5.

[3] 79 Fed. Reg. at 49,470.

[4] 29 C.F.R. §2550.404A-5(h)(4). Designated investment alternatives are defined in the regulation as "any investment alternative designated by the plan into which participants and beneficiaries may direct the investment of assets held in, or contributed to, their individual accounts. The term 'designated investment alternative' ***shall not include*** 'brokerage windows,' 'self-directed brokerage accounts,' or similar plan arrangements that enable participants and beneficiaries to select investments beyond those designated by the plan." *Id.* (emphasis added).

[5] Field Assistance Bulletin No. 2012-02 (May 7, 2012).

[6] *See* Q&A-30, Field Assistance Bulletin No. 2012-02 (May 7, 2012) ("Although the regulation does not specifically require that a plan have a particular number of designated investment alternatives, the failure to designate a manageable number of investment alternatives raises questions as to whether the plan fiduciary has satisfied its obligations under section 404 of ERISA."); *see also id.* ("If, through a brokerage window or similar arrangement, non-designated investment alternatives available under a plan are selected by significant numbers of participants and beneficiaries, an affirmative obligation arises on the part of the plan fiduciary to examine these alternatives and determine whether one or more such alternatives should be treated as designated for purposes of the regulation.").

The Q&A-30 requirements were made without proper notice or opportunity for comment and after substantial negative feedback from the public, DOL subsequently published FAB 2012-02R, which modified and replaced Q&A-30 with Q&A-39.[7] Q&A-39 confirms that, absent additional guidance, investment alternatives purchased through brokerage windows are not designated investment alternatives.

<u>Concerns with Positions set forth in Q&A-30</u>

PSCA members are concerned that any forthcoming guidance resulting from the RFI will likely reintroduce some of the unsettling positions set forth in Q&A-30. Accordingly, PSCA wishes to restate those concerns.

- <u>New Fiduciary Requirement to Monitor and Evaluate Non-Designated Investment Alternatives</u>: Q&A-30's suggestion that plan sponsors may need to look through brokerage windows to determine whether any particular investment is popular enough with participants and beneficiaries to be considered a designated investment alternative remains concerning. Brokerage windows have long been understood as mechanisms by which plan participants may invest in a wide range of stocks, mutual funds, and other investments not otherwise specifically designated by the plan as available for investment. As discussed above, FAB 2012-02R specifically states that brokerage windows are not designated investment alternatives. This is consistent with prior DOL guidance. And as such, FAB 2012-02R is sufficient and does not need any modification.

- <u>Impact on Retirement Plan Establishment and Retention</u>: The extent to which employers may rethink establishing or maintaining a plan in the absence of being able to offer brokerage windows remains an important consideration. We note that brokerage windows tend to be very common and attractive features for small employers. Additionally, many employers offer brokerage windows to accommodate participant requests for a broader array of investment options. Any new requirements and the substantive uncertainty noted throughout this letter would create significant additional risk that many employers and plan sponsors will be unwilling to accept.

- <u>Impact of Potential Brokerage Window Elimination and Liquidation of Current Holdings</u>: The extent to which participants and beneficiaries will be adversely impacted by the elimination of brokerage windows due to employer concerns about fiduciary liability remains an important consideration. As noted above, any new requirements and the substantive uncertainty noted throughout this letter will create significant additional risk that many employers and plan sponsors will be unwilling to accept. For employers that offer a brokerage window, even deciding to eliminate the window subjects them to significant risk because of the potential reactions from participants and beneficiaries who would be forced to liquidate their investments. Plan sponsors would be put in the untenable position of having to choose between two unacceptable alternatives: maintain brokerage account investments and accept the risk of participant claims about improper

[7] Field Assistance Bulletin No. 2012-02R (July 30, 2012).

fiduciary oversight, or eliminate the accounts and bear the risk of claims from participants and beneficiaries who did not want their investments liquidated.

- Financial Impact and Potential Compliance Costs: The financial impact of any new requirements and costs associated with setting up mechanisms to monitor participant investments in brokerage windows will be significant and have not been quantified or evaluated. We remain unaware of any service provider whose recordkeeping system can gather and disclose the required information for brokerage window investments. Unlike plan sponsor-selected designated investment alternatives, brokerage window investments are maintained on separate systems that are not linked to those that have been built for making the participant disclosures. Thus, any new disclosure requirements for brokerage windows would involve significant and costly manual processes pending development of the needed systems and linkages. These costs are likely to be borne by plan participants and beneficiaries. Neither the costs to develop, build, and maintain systems, nor the costs to comply with any new disclosure requirements on a manual basis, have been quantified or evaluated.

Survey Results and Accompanying Comments

In developing this comment, PSCA conducted a membership survey and received responses from 22 plan fiduciaries representing both large and small employers. Respondents were polled on several questions from the RFI, including questions 15, 17, 18, 21, and 25.

The survey results found that 38.1% of respondents researched or contacted only one vendor when deciding to include a brokerage window feature in their plan, while 38.1% of respondents also researched or contacted two to three different vendors. The responses for the factors and challenges that were considered when deciding whether to include a brokerage window included "administrative feasibility," "employees' knowledge level regarding investments," "annual account costs and general transaction fees," "participant request," and "risks to participants."

When asked why a brokerage window was added, responses included flexibility and increased investment options for participants (90.48%), to facilitate the ability of participants to work with an adviser or a managed account provider (14.29%), and participant demand (33.33%).

The survey results found that the most common costs associated with participation in a brokerage window were account fees (66.67%) and brokerage commissions (80.95%). Additionally, 85.71% of respondents indicated that individual participants bear the costs of the brokerage window, while a smaller percentage indicated that the plan sponsor bears the cost (9.52%) or that it is shared (4.76%).

When asked whether there are any other comments about brokerage windows that the survey respondents would like to have considered, responses included "it is a good option if the employee base is knowledgeable about investments and realize the importance of the concept 'you win by not losing,'" "we offer this as a service to our participants who have greater needs and are advanced investors," "plan sponsors and recordkeepers advertise the brokerage account as suitable only for sophisticated investors willing and able to accept additional responsibility

regarding their plan investments," and "most newly eligible participants do not utilize these options, again, made available to satisfy a small group of vocal highly compensated employees."

Conclusion

PSCA continues to believe that the consequences and costs described above represent only a few of those that should be considered in assessing the merits of the positions set forth in Q&A-30. To the extent that any proposed rulemaking results from the RFI, we urge DOL to fully consider and appreciate all of the implications flowing therefrom.

We appreciate the opportunity to comment and look forward to productive discussions with DOL in the future.

Respectfully submitted,

Plan Sponsor Council of America