



The
ERISA
Industry
Committee

November 19, 2014

Attention: Brokerage Windows RFI
Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N-5655
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

RE: RIN 1210-AB59 (Request for Information Regarding Standards for Brokerage Windows in Participant-Directed Individual Account Plans)

Ladies and Gentlemen:

The ERISA Industry Committee (“ERIC”) is pleased to respond to the request of the U.S. Department of Labor (“DOL”) for comments on the Request for Information Regarding Standards for Brokerage Windows in Participant-Directed Individual Account Plans (the “RFI”).¹

Our comments focus on these issues as they apply to large retirement plans as ERIC’s members are America’s largest companies. ERIC has found that the participant-directed individual account retirement plans (“participant-directed plans”) sponsored by our large company members understand their fiduciary obligations under the Employee Retirement Income Security Act of 1974, as amended (“ERISA”) (including offering designated investment alternatives as part of the investment offerings under the plan). Although our members do not sponsor plans that only include brokerage windows, we share the DOL’s concerns to the extent that there are participant-directed plans that include brokerage windows as the only investment option in an attempt to avoid various disclosure and regulatory requirements under ERISA. However, we urge the DOL to ensure that any guidance it issues in this area is narrowly tailored to address these concerns and does not impose additional burdens on plans that comply with the provisions the DOL has already put in place to protect plan participants.

ERIC’S INTEREST IN THE RFI

ERIC is a nonprofit association committed to the advancement of the employee retirement, health, and welfare benefit plans of America’s largest employers. ERIC’s members provide comprehensive retirement, health care coverage, incentive, and other economic security benefits directly to some 25 million active and retired workers and their families. ERIC has a strong interest in proposals that would affect its members’ ability to provide secure retirement benefits in a cost-effective manner.

¹ Dep’t of Labor, *Request for Information Regarding Standards for Brokerage Windows in Participant-Directed Individual Account Plans*, 79 Fed. Reg. 49469 (Aug. 21, 2014).

SUMMARY

The following is a summary of ERIC's comments, which are described in greater detail below:

- Large retirement plans offer a variety of investment options to meet the diverse needs of their plans' participants.
- For participants who already receive disclosures for their plans' designated investment alternatives, additional disclosures with respect to all or a limited subset of investments available through brokerage windows would be confusing, potentially misleading and an unnecessary burden on plan sponsors.
- The DOL should not impose additional fiduciary requirements on plans that include brokerage windows in addition to a sufficient number of designated investment alternatives.
- Increasing the disclosure or fiduciary obligations on plans that offer a brokerage window in addition to other designated investment alternatives could cause plans to replace the brokerage window with a larger number of "core" investment options, which might overwhelm some participants with too many choices and cause other participants to abandon the employer system in favor of individual IRAs or even non-retirement funds in which an open investment arena would remain available.
- If the DOL determines that it needs to regulate brokerage windows, it should provide a safe harbor for plans that also offer at least three designated investment alternatives that satisfy the current DOL safe harbor under Section 404(c). We detail our proposed safe harbor on page 8.
- The DOL should support the efforts of plans and their fiduciaries that strive to comply with the intent of ERISA as well as its specific requirements.

DETAILED COMMENTS

I. Large retirement plans include a variety of investment options to meet the diverse needs of their participants.²

A. Participant-directed plans sponsored by large companies include multiple designated investment options carefully chosen and monitored by the plan fiduciary.

The DOL indicated in the preamble to the RFI that some retirement plans do not include designated investment alternatives and instead only offer brokerage windows. The DOL notes in the preamble that it had observed that brokerage windows were being marketed to some fiduciaries as a device to avoid making participant disclosures. The DOL states that, as it indicated in Field Assistance Bulletin 2012-02R, "offering no menu of core investment options other than a brokerage

² The discussion in this section is designed to address the issues raised in RFI questions 4, 6, 9, 14, 18, 25, 26, and 31.

window to avoid the regulation's investment-related disclosure requirements, may raise questions under ERISA's section 404 general statutory duties of prudence and loyalty."³ As ERIC's members do not sponsor brokerage-window only plans, we cannot comment on the extent to which this approach is used.

To the extent that there are plans that offer brokerage windows as the only investment options, ERIC shares the DOL's concerns. We urge the DOL to focus on regulatory enhancements that address this concern (and avoid broad mandates that would negatively impact participants in plans that are designed to comply with both the intent of ERISA and its specific requirements by including designated investment alternatives in addition to brokerage windows).

Large retirement plans are typically designed and operated to satisfy the needs of participants who have varying levels of knowledge about investing. While some workers prefer to choose from a pre-defined set of investment options for retirement savings, others have significantly greater knowledge about and experience with investing and want to have a greater array of choice with respect to investment options within the plan.

Large plan participants typically fall into three categories: (1) participants who want an "auto pilot" investment solution, (2) participants who want some freedom to choose from among a pre-selected lineup of investment offerings, and (3) a smaller group of participants who want a higher degree of choice.

Today, plans have numerous options to offer the first group – that is, participants who prefer investment options that are more "auto pilot" in nature and require minimal investment knowledge and/or regular oversight by the participant. These participants are typically most interested in using managed accounts or investments such as target date funds and other qualified default investment alternatives ("QDIAs") that are authorized under DOL guidance.

The second group includes those participants who prefer to have a somewhat greater level of choice, but who are not necessarily experienced or sophisticated investors. For these participants, large plans typically include a core lineup of designated investment alternatives that are carefully selected to provide participants with choices that can be combined to create a diversified portfolio. Large plans typically include between 9 and 25 investment options, often offering both active and passive management covering both fixed income and equities, which are designed to enable participants to create a portfolio with aggregate risk and return characteristics at any point within the range normally appropriate for the participant. A recent survey of ERIC members indicated that all of the responding companies offered more than three investment options,⁴ and the vast majority (75%) of respondents offered between 9 and 25 investment options.

The final group of participants includes those participants who are sophisticated investors with significant investment expertise. This knowledge may come from formal education, professional experience, and/or managing their personal finances. Additionally, many participants in this category use the services of a financial professional. These sophisticated investors seek to use their knowledge and expertise with respect to their retirement plan contributions (including any employer

³ 79 Fed. Reg. at 49470.

⁴ The survey found that no respondents offer fewer than four investment options (excluding the brokerage window option and counting target date funds and similar offerings as one option).

contributions) to create a portfolio that they believe is more appropriate for their needs than any portfolio that they could create using the core lineup. These investors usually prefer to construct their own portfolio of individual equities, bonds or mutual funds. Large plans often accommodate the needs of these investors by including additional investment options or brokerage windows rather than adding additional investment options to the core lineup (which could confuse other plan participants or overwhelm them with too much choice). ERIC's survey of its members who sponsor large retirement plans found that slightly more than half of the responding companies include brokerage windows in their 401(k) plans to accommodate these more sophisticated plan participants.

Large participant-directed plans strive to achieve an appropriate balance with respect to the number of investment alternatives offered in the plan. They must consider the needs of participants who want a reasonable number of diverse investment alternatives within the plan as well as the needs of participants who want a larger and broader array of investment alternatives. These plans have to strike the right balance between offering "enough" investment alternatives to participants and not too many, thereby overwhelming participants. As the DOL noted in the preamble to the RFI, some plans have a very large number of designated investment alternatives, which may confuse less knowledgeable participants.⁵ Research suggests that participants benefit from fewer investment choices. A recent research paper found that the more investments offered, the lower the participation rate.⁶ Another study indicated that "larger menus are objectively worse than smaller menus" in 401(k) plans.⁷ Research has also found that "the presence of more funds in an individual's 401(k) plan is associated with a greater allocation to money market and bond funds at the expense of equity funds."⁸

Some of ERIC's members include brokerage windows in their plans as an alternative to offering a greater number of investment options. ERIC's survey of its members who sponsor large retirement plans found that 58% of responding companies include brokerage windows as options in their 401(k) plans. The survey also found that the brokerage window option is used by a relatively small number of participants; with 77% of these responding companies indicating that the brokerage window is used by 5% or fewer participants. Additionally, the investments in the brokerage window represented less than 20% of plan assets for 100% of the respondents; with the vast majority (77%) of plans having 5% or less assets in the brokerage window.

B. The inclusion of brokerage windows in large retirement plans can provide plans with the flexibility to satisfy the needs of diverse groups of participants.

Plans can satisfy the needs of diverse groups of participants by including brokerage windows as an option along with their core group of designated investment options. Other plans provide a greater number of designated investment options for participants. ERIC members have indicated that under both types of arrangements, the fiduciaries of their plans prudently select and monitor a limited number of designated investment alternatives.

Some plans include brokerage windows in response to participant demand for investments that are not included in the core group of designated investment options. For example, unions

⁵ 79 Fed. Reg. at 49471.

⁶ Sheena Iyengar, Wei Jiang and Gur Huberman, *How Much Choice Is Too Much?* (2004).

⁷ David Goldreich and Hanna Halaburda, *When Smaller Menus Are Better: Variability in Menu-Setting Ability* (2011).

⁸ Sheena S. Iyengar and Emir Kamenica, *Choice proliferation, simplicity seeking, and asset allocation*, *Journal of Public Economics* (2010).

sometimes collectively bargain with plan sponsors for this benefit to be included in their plans for participants.

Plans may also add a brokerage window feature as an alternative to increasing the amount of designated investment alternatives. Some individuals who are hired by the company will have many years of experience participating in retirement plans, while this may be the first time some workers will participate in a retirement plan. This approach can satisfy the needs of the sophisticated investors, while providing well diversified options for less sophisticated investors (as well as managed accounts, target date funds and similar options for less engaged participants). (The Internal Revenue Code requires plans to make these types of features available to plan participants in a nondiscriminatory manner.⁹)

Plans with brokerage windows (in addition to designated investment alternatives) are sensitive to ensuring that they balance all of the participants' needs, such as by addressing any costs associated with the brokerage window. For example, ERIC members have indicated that their plans' recordkeeping fees are often lower if their plans include brokerage windows. Thus, in these cases, brokerage windows are not subsidized by plan participants who do not use the brokerage windows in these plans. In fact, ERIC members have indicated that the presence of a brokerage window in a plan can often result in lower administrative and other fees for those NOT participating in the brokerage window.

We have found that large participant-directed plans also typically inform participants that the investments available through the brokerage window are not selected and monitored by the plan fiduciaries and remind them about the availability of the designated investment alternatives. Some large plan sponsors have found that offering a brokerage window as part of a line-up of investment options can help facilitate meeting the diverse needs of participants, regardless of their investing expertise. In the large plan marketplace, this is often accomplished by either offering plan participants a greater variety of designated investment alternatives or designated investment alternatives and a brokerage window option. Under either approach, the designated investment alternatives are chosen and monitored regularly by the plan fiduciary.

C. Participants in large retirement plans that include brokerage windows in addition to designated investment alternatives are already protected under guidance issued by the DOL.

Additional protections for participants in plans that include brokerage windows as well as designated investment alternatives are not needed as the interests of participants in these plans are already protected by comprehensive guidance issued by the DOL. ERISA and the guidance issued thereunder already require mandatory disclosures and impose additional requirements to rely on ERISA section 404(c).¹⁰

The mandatory disclosure rules provide participants with the information they need to make informed decisions regarding brokerage windows. For example, a Field Assistance Bulletin issued by

⁹ Treasury Regulations provide that in order for a plan to be considered a qualified plan, all benefits, rights and features provided under the plan must be made available under the plan in a nondiscriminatory manner. Treas. Reg. § 1.401(a)(4)-1(b)(3); § 1.401(a)(4)-4.

¹⁰ DOL Reg. §§ 2550.404a-5; 2550.404c-1.

the DOL requires plans to provide participants with sufficient information to understand how the brokerage window works, an explanation of any fees and expenses that may be charged against the participant's account, and a statement of the dollar amount of fees that were charged.¹¹

Additionally, to receive protection for participants' investment decisions, the regulations under ERISA section 404(c) require plans to provide participants with a reasonable opportunity to choose from at least three investment alternatives, each of which is diversified and has materially different risk and return characteristics. Additionally, the investments must enable participants to achieve a portfolio with aggregate risk and return characteristics at any point within the range normally appropriate for the participant or beneficiary.

In accordance with these requirements, large retirement plans allow participants to choose among a diverse group of designated investment alternatives and provide participants with information about their options. Furthermore, many large plans that include brokerage windows (in addition to designated investment alternatives) highlight the differences between the designated investment alternatives and the brokerage window by imposing a separate fee for the brokerage window and notifying participants that the funds available through the brokerage window are not selected and monitored by the fiduciaries. Some plans do not even allow participants to invest directly in brokerage window investments, but instead require participants to move new contributions from a plan "holding" account into a brokerage account in order to select any investments that are available through the brokerage window.

As discussed above, large plans include investment options that are designed to address the diverse needs of their participants and include alternatives for a wide range of investor preferences, including very sophisticated investors that prefer a very diverse array of investment options. Any guidance that might restrict or inhibit the use of brokerage windows as part of a plan's design could have the unintended consequence of limiting investment opportunities for the very sophisticated participant investor while significantly expanding the number of investment choices for all others in an effort to mitigate the loss of a brokerage window option.

II. For participants who already receive disclosures for their plans' designated investment alternatives, additional disclosures with respect to investments available through brokerage windows would be confusing and potentially misleading.¹²

Participants in plans with designated investment alternatives already receive lengthy disclosures under the participant fee disclosure regulation. Participants in these plans have become accustomed to receiving these disclosures, which primarily describe the investments that are prudently selected and monitored by the plan fiduciaries.

ERIC is concerned that any changes and/or additions to the participant fee disclosure regulation for plans with designated investment alternatives will make the disclosure longer and more difficult to comprehend. It will also, by default, further discourage participants from reading other important plan disclosures (unrelated to fee disclosure). Given the length of the current participant fee disclosures, participants are unlikely to be willing to read additional information about their plans.

¹¹ Dep't of Labor, *Field Assistance Bulletin 2012-02R* (Jul. 30, 2012).

¹² The discussion in this section is designed to address the issues raised in RFI question 29.

The current participant fee disclosure requirements should not be revised to include any investments that are not designated investment alternatives. For example, the DOL would have required plans, which had a platform that offered more than 25 investment alternatives, to make disclosures for any investment alternative in which at least five participants (or at least one percent of all participants in plans with more than 500 participants) were invested.¹³ This requirement was later removed.¹⁴

This approach would have completely undercut the concept of designated investment alternatives (which are prudently selected and monitored by fiduciaries). Under this approach, the DOL would have elevated a particular investment that was not selected by plan fiduciaries, which is only available in the brokerage window, based on a minimal investment take-up rate by a handful of participants. This is an unprecedented approach that would elevate individuals' particular investments and treat them as if they were investments chosen by and monitored by plan fiduciaries. This would have exposed plan fiduciaries to risks and obligations based not on their actions and decisions, but on the actions and decisions of plan participants over which they had no control. Additionally, a mutual fund may be available as an institutional share class as a designated investment alternative. The mutual fund may also be available through the brokerage window at a higher price as a retail share class. Participants may be confused if the disclosure statement needed to include both the institutional share class version as well as the retail version. To date, the DOL has not taken this approach and we would agree that it would not be helpful or useful disclosure.

Under the current rules, participants consistently receive information about their plans' designated investment alternatives. If information on investments that are available through a brokerage window were included, participants may become confused and interpret the inclusion of funds as an endorsement by the plan. Additionally, it may encourage more participants to invest through the brokerage window (instead of in the designated investment alternatives) in the mistaken belief that the investment included in the disclosure is somehow selected or sanctioned by the plan fiduciaries. It may also prompt them to invest in any highlighted funds that were selected by their peers (who are likely perceived by others as more sophisticated investors). In addition, a requirement to disclose any particular investment based on the number of participants investing in the option is by its nature contrary and undermining to the fiduciary responsibilities inherent in ERISA. Such disclosures would likely change on a regular basis, resulting in confusion and distrust of the participant fee disclosure regime.

III. The DOL should also not impose additional fiduciary requirements on plans with designated investment alternatives that also include brokerage windows.¹⁵

Fiduciaries of large plans already prudently select and monitor their plans' designated investment alternatives. These fiduciaries use significant time and resources to select appropriate investment options for participants.

The DOL should support the efforts of these plans and their fiduciaries that strive to comply with the intent of ERISA as well as its specific requirements. ERIC does not believe further guidance

¹³ Dep't of Labor, *Field Assistance Bulletin 2012-02* (May 7, 2012).

¹⁴ Dep't of Labor, *Field Assistance Bulletin 2012-02R* (Jul. 30, 2012).

¹⁵ The discussion in this section is designed to address the issues raised in RFI question 37.

would be useful or is necessary with regard to brokerage windows offered in plans with at least three designated investment alternatives.

Any guidance from the DOL that would seek to impose fiduciary responsibilities over specific brokerage window investments would be unwieldy, if not impossible, to satisfy; potentially putting plan fiduciaries in the position of having to evaluate the thousands of investments and their appropriateness with respect to the investing plan participant and the plan. In this regard, we note there is no standard benchmarking mechanism for monitoring such investments. The benchmarks that are available for the designated investment alternatives are not appropriate and cannot be applied to the evaluation of individual stocks and many of the other investments that are available through brokerage windows. Placing these burdens and risks on plan fiduciaries could have the result of plans dropping brokerage windows which could very well cause those participants who rely upon these windows to abandon the employer retirement system in favor of IRAs or even non-retirement funds in which an open investment arena would remain available.

Fiduciaries of large plans address these issues by providing prudently selected and monitored designated investment alternatives for the average participant. As discussed above, some plans include brokerage windows for their more sophisticated investors who have the resources available to them to evaluate the investments that are available through the brokerage window. In these plans, the designated investment alternatives are targeted toward plan participants that want to rely on the plan fiduciary's selection and monitoring process. As noted above, large plan sponsors typically have both types of participants and may balance their co-existing needs and expectations by including brokerage windows as an option.

IV. There is no need for additional guidance regarding brokerage windows. However, if the DOL regulates brokerage windows, it should provide a safe harbor for plans with at least three designated investment alternatives.¹⁶

As discussed above, brokerage windows play an important role in addressing participant needs in retirement plans. ERIC believes whether or to what extent a brokerage window or similar arrangement is to be made available to plan participants is best left to the plan sponsor who is in the best position to assess what is in the best interest of its employees and participants. The DOL specifically addressed any ambiguity surrounding what constitutes a brokerage window or similar arrangement through its clarification of what constitutes a "designated investment alternative" in Q&A 39 of Field Assistance Bulletin 2012-2R. In Q&A 39 – answering the question of whether a brokerage window or similar arrangement – with respect to which a fiduciary did not designate any of the funds on a platform – constitutes a "designated investment alternative," the DOL answered "no"; explaining that "[w]hether an investment alternative is a 'designated investment alternative' (DIA) for purposes of the regulation depends on whether it is specifically identified as available under the plan.

As discussed above, many well-designed plans include brokerage windows in addition to designated investment alternatives to address the diverse needs of their participants. These plans comply with the protections that already exist under ERISA and corresponding guidance.

¹⁶ The discussion in this section is designed to address the issues raised in RFI question 37.

If the DOL is inclined to regulate brokerage windows, it should focus its efforts on any plans that include brokerage windows as the only investment option in order to avoid various disclosure and regulatory requirements under ERISA. Even in these situations, ERIC urges the DOL to narrowly tailor the guidance to address the DOL's specific concerns. The guidance should not impose additional burdens on plans that are complying with the current fiduciary standards, disclosure regulations and participant protections that are already in place. To be clear, the DOL should tailor a regulatory solution for the identified problem and not impose additional regulatory requirements on plans that are operating as intended and required under ERISA.

If the DOL determines that additional guidance is needed with respect to brokerage windows, it should provide a safe harbor for those plans that include at least three designated investment alternatives. The safe harbor could ensure that participants in plans with designated investment alternatives and brokerage windows would include language in the summary plan description or participant fee disclosures that would notify participants that the investments available through the brokerage window are not selected and monitored by the plan fiduciaries (for those plans that do not already disclose this information).

V. The DOL should support and encourage plans that are designed to comply with the intent of ERISA as well as its specific requirements.¹⁷

ERIC's members (who sponsor large retirement plans) devote significant time and resources to provide participants with the opportunity to achieve adequate retirement savings. These plans include prudently selected and monitored designated investment alternatives. In the plans that include brokerage windows as an option, participants are given the disclosures required by the participant fee disclosure regulation and the ERISA section 404(c) regulation, are frequently notified that the investments in the brokerage windows are not selected and monitored by the fiduciaries, and are usually charge an extra fee to use the brokerage window.


Any regulations issued by the DOL should support the efforts of plan sponsors who "do the right thing" by offering well-designed plans that meet the needs of a diverse participant population and comply with the spirit and letter of ERISA. We recommend that the DOL refrain from imposing additional regulatory burdens on well-functioning and ERISA-compliant plans who offer brokerage windows as part of a diversified investment alternative lineup. We caution the DOL that additional regulatory burdens and/or disclosure requirements (for ERISA-compliant plans) can have unintended consequences that include participant reluctance to read and consider additional and lengthy disclosures.

ERIC urges the DOL to narrowly focus any regulatory activity on areas of potential abuse related to brokerage window offerings in plans that do not include designated investment alternatives. We believe the current ERISA-related compliance requirements, including the disclosure regime, works well for participant-directed plans and fiduciaries who are striving to meet the needs of their participants by including at least three designated investment alternatives in addition to a brokerage window.

¹⁷ The discussion in this section is designed to address the issues raised in RFI question 37.

ERIC appreciates the opportunity to provide comments on the RFI. If the DOL has any questions concerning our comments, or if we can be of further assistance, please contact us at (202) 789-1400.

Sincerely,


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