



November 19, 2014

Via E-mail (e-ORI@dol.gov)

Office of Regulations and Interpretations
U.S. Department of Labor
Employee Benefits Security Administration
Frances Perkins Bldg., Rm. N-5655
200 Constitution Avenue NW
Washington, DC 20210

Re: RIN 1210-AB59 (Brokerage Windows RFI)

Dear Sir or Madam:

The National Association of Plan Advisors (“NAPA”) would like to thank the Department of Labor (the “DOL” or “Department”) and its staff (“Staff”) for the time and effort it has expended studying issues surrounding brokerage windows, particularly self-directed brokerage (“SDB”) accounts. We sincerely appreciate the opportunity to comment on this important issue.

NAPA is a national organization of retirement plan advisors. It is a sister organization to the American Society of Pension Professionals & Actuaries (“ASPPA”) and together we have over 18,000 members, approximately 8,000 of whom are retirement plan financial advisors. NAPA’s mission is to be a leader in the evolution of the national retirement system to improve transparency, effectiveness and governance in an effort to improve retirement outcomes for participants. NAPA’s core purpose is to enhance retirement security in America by focusing on high quality, professional advice to retirement plans and their participants. NAPA members pledge to comply with all requirements relating to retirement plans and to maintain ethical standards in their representation of plan sponsor and participant clients.

Summary

The following is a summary of NAPA’s recommendations, which are discussed in greater detail in the Discussion section that follows:

- 1. Establish a Small Plan Exception for SDB-Only Plans** - To encourage small employers to sponsor defined contribution plans, employers with 99 or fewer employees eligible to participate in the plan should be allowed to open SDB-only plans so long as each participant positively elects his or investment choices on the SDB account application form. If a participant fails to make such an election, no contributions can be made to the plan on the participant’s behalf until the election is made.

2. **Require Large Plans to Designate Core Investments before Offering SDB Windows** – Fiduciaries of retirement plans with 100 or more eligible employees must designate a core menu of investment options before an SDB window can be offered to participants and beneficiaries.
3. **Aggregate Reporting of Brokerage Window Assets on Schedule H Should be Permitted** - The financial reporting rules for Form 5500 should continue to permit aggregate reporting of plan assets held in SDB accounts under the “other” category of Schedule H. The degree to which plan recordkeeping systems are integrated with brokerage account systems varies widely. A mandate to report SDB account investments by asset category would drive up costs with little real benefit to participants.

Discussion

1. Establish a Small Plan Exception for SDB-only Plans

a. Background. Section 404(a)(1)(C) of the Employee Retirement Income Security Act of 1974 (“ERISA”) requires a plan fiduciary to diversify “the investments of the plan so as to minimize the risk of large losses...” In turn, ERISA section 404(c) allows an individual account defined contribution plan to permit “a participant or beneficiary to exercise control over assets in his [or her] account” so long as certain requirements are satisfied. One of those requirements is that the plan must provide “a participant or beneficiary an opportunity to choose, from a broad range of investment alternatives, the manner in which all or some of the assets in his [or her] account are invested...”¹

Included in the definition of “a broad range of investment alternatives” is the requirement that the participant or beneficiary be able to “choose from at least three investment alternatives: (1) each of which is diversified; (2) each of which has materially different risk and return characteristics; (3) which in the aggregate enable the participant or beneficiary by choosing among them to achieve a portfolio with aggregate risk and return characteristics at any point within the range normally appropriate for the participant or beneficiary; and (4) each of which when combined with investments in the other alternatives tends to minimize through diversification the overall risk of a participant’s or beneficiary’s portfolio.”²

A plan fiduciary can satisfy the “broad range of investment alternatives” requirement in an individual account defined contribution plan by offering participants and beneficiaries the ability to invest in specific “designated” investment alternatives, an SDB window or account, or both.

b. Exception.

American workers are more than fifteen times more likely to save for retirement when their employers sponsor a retirement plan than when they are forced to save on their own.³ Therefore, NAPA is a strong supporter of the employer-sponsored retirement plan. However, small employers in the defined contribution plan market operate much differently than do large

¹ DOL Reg. § 2550.404c-1(b)(1)(ii).

² DOL Reg. § 2550.404c-1(b)(3).

³ Employee Benefit Research Institute (2010) estimate using 2008 SIPP (Covered by an Employer Plan) and EBRI estimate (not covered by an Employer Plan-IRA only).

employers. Plan sponsors with fewer than 100 employees are often sole proprietorships or other small business structures where employers are less likely to offer defined contribution plans for their workers.⁴

One of the reasons that small employers decide not to sponsor a plan is the cost. For example, if the plan fiduciary designates specific investment alternatives from which participants and beneficiaries may select to invest their assets, a recordkeeper must be engaged (a recordkeeper would not be required if participants and beneficiaries were offered access to investment alternatives exclusively through an SDB account).

When small employers do offer plans, they are often structured so that participants and beneficiaries are required to establish an SDB account with the broker-dealer with whom the plan sponsor is working. This structure gives the participants and beneficiaries a variety of investment options from which to choose, permits the plan fiduciary to satisfy ERISA's "broad range of investments" requirement, and reduces the cost of sponsoring the plan by not requiring the engagement of a recordkeeper (in addition to the broker-dealer).

However, NAPA understands that there is a concern that a participant may be defaulted into low- or zero-growth options (such as money market funds) if he or she does not indicate the investment alternative(s) in which he or she desires to invest on the application form when the SDB account is established. In an effort to address that concern, as well as encourage the establishment of employer-sponsored retirement plans by small employers, NAPA proposes that employers with 99 or fewer eligible employees be allowed to sponsor SDB-only plans (which would be deemed to satisfy the ERISA requirements discussed above) so long as each participant sets forth his or her investment choices on the SDB account application form. Any participant's SDB account application form that lacks investment elections would be considered incomplete, and the participant would be deemed not enrolled in the plan (and, no contributions (including salary deferrals) could be made to the plan on his or her behalf unless or until the application form is no longer incomplete).

NAPA recommends that the DOL allow employers with 99 or fewer employees eligible to participate in the plan to open SDB-only plans so long as each participant affirmatively elects his or her investment choices on the SDB account application form. If a participant fails to make such an election, no contributions can be made to the plan on the participant's behalf until the election is made.

2. Require Large Plans to Designate Core Investments before Offering SDB Windows

Once a retirement plan grows to a point where there are at least 100 employees eligible to participate, the plan's administration requirements change. One such change is the general requirement that the plan be audited by an independent auditor.⁵ The expenses related to these changes are often paid by the employer sponsoring the plan (who is typically also a plan fiduciary). Therefore, it seems logical that the fiduciary of such a "large" plan be required to

⁴ Small employers are often "sold" the plan by a broker-dealer (as opposed to the employer searching out an opportunity to "buy" the plan) because the small employer is otherwise focused on ensuring that his or her business remains viable so he or she can continue to provide employment to the company's employees.

⁵ See, DOL Reg. § 2520.104-46, which generally exempts small plans from the audit requirement.

designate the investment alternatives from which participants and beneficiary may choose in order to satisfy the ERISA section 404(c) “broad range of investments” requirement (which would entail the engagement of a recordkeeper, the cost of which may be borne by the plan sponsor).

However, many sponsors of large plans also wish to provide SDB windows for participants and beneficiaries who desire to invest in options beyond the investment alternatives specifically designated by the plan fiduciary. Therefore, NAPA proposes that an SDB window should only be offered if the large plan also has a core investment line-up that otherwise satisfies the “broad range of investments” requirement of ERISA section 404(c).

In addition, the DOL should acknowledge that plan fiduciaries of large and small plans should have no obligation to monitor or take fiduciary responsibility for any of the funds or investment choices offered through an SDB window or account. Rather, the plan fiduciaries should only have to prudently select the provider and (as provided in FAQ 39 of DOL FAB 2012.02R) be “bound by ERISA 404(a)’s statutory duties of prudence and loyalty to participants and beneficiaries ... including taking into account the nature and quality of services provided in connection” with the window or account.

NAPA recommends that the DOL require fiduciaries of retirement plans with 100 or more eligible employees to designate a core menu of investment options before an SDB window can be offered to participants and beneficiaries.

3. Aggregate Reporting of Brokerage Window Assets on Schedule H Should be Permitted

Under current financial reporting rules for Schedule H of Form 5500, assets held in SDB accounts may generally be aggregated and reported under the “other” category rather than in the respective asset categories that might otherwise apply. Certain assets held in SDB accounts, however, must always be reported in their constituent category (*i.e.*, partnership or joint venture interests, real property, employer securities, or investments that could result in a loss in excess of the account balance of the directing participant or beneficiary).

In most cases, to the extent there is a separate plan administration and recordkeeping system, it typically is not integrated with the brokerage accounting system. Similarly, if the brokerage accounting system is acting as the defacto recordkeeping system, the individual accounts are not integrated with each other. Consequently, if the special rule for SDB accounts were to be modified to require asset categorization, in most cases it would require a manual analysis of each SDB account’s holdings. This data would then need to be either entered into the plan administration system or aggregated manually to complete Schedule H. This could be expected to significantly increase the plan’s expenses with seemingly little benefit to participants.

In fact, participants and beneficiaries regularly receive individual brokerage statements which provide individual listings of the participant’s or beneficiary’s investments. This is how the benefit statement requirements are typically met by plans with SDB accounts. In plans which offer core designated investments in addition to SDB accounts, the benefit statement information on assets is typically provided through multiple documents, consistent with the “good faith” guidance in Field Assistance Bulletin 2006-03.

NAPA recommends that the financial reporting rules for Form 5500 should continue to permit aggregate reporting of plan assets held in SDB accounts under the “other” category of the Schedule H.



Again, NAPA sincerely appreciates the opportunity to provide comment on this important issue. These comments were prepared by the NAPA Government Affairs Committee, with Scott Matheson taking primary drafting responsibility. We welcome the opportunity to discuss these issues with you. If you have any questions or require additional information, please contact Ronald J. Triche, Esq., APM, General Counsel of NAPA, at (703) 516-9300. Thank you for your time and consideration.

Sincerely,

/s/

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ASPPA, CEO / Executive Director NAPA

/s/

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