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Office of Regulations and Interpretations
Employee Benefits Security Administration, Room N-5655
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, DC 20210

Subject: RIN 1210-AB59 — Request for Information on Brokerage Windows in Participant-Directed Individual Account Plans

Dear Sir or Madam:

Mercer appreciates this opportunity to respond to the Department of Labor's Request for Information on standards for brokerage windows in participant-directed individual account plans (the "RFI"). We welcome the Department's call for public comment as the first step in determining the need, if any, for new regulatory standards for brokerage windows. Mercer supports efforts to strengthen the US retirement system and is glad to share our experiences dealing with retirement plans offering brokerage windows. We encourage the Department to take a measured approach that will not unduly disrupt our clients' ability to offer this valuable investment feature in the future. If, after a rigorous review of the facts, the Department identifies particular problem areas that jeopardize Americans' retirement security, we urge the Department to tackle those problems with narrowly tailored solutions, taking care not to add unnecessary burdens or costs in cases where the current compliance regime is functioning quite well. Our specific responses are provided below under the questions listed in the RFI.

Mercer is a global leader in talent, health, retirement, and investments. Mercer's more than 20,000 employees are based in 42 countries, and the firm operates in more than 130 countries. Mercer is a wholly owned subsidiary of Marsh & McLennan Companies (NYSE: MMC), a global team of professional services companies offering clients advice and solutions in the areas of risk, strategy, and human capital.

Defining "Brokerage Windows" – Scope

1. What are the various brokerage window, self-directed brokerage account, and similar arrangements that are made available in 401(k) plans, and which one (or more) is the most common? What are the benefits and drawbacks of these various arrangements?

Plan sponsors seeking to give participants access to a large number of investment alternatives — beyond those offered in a plan's core investment line-up — have many types of brokerage windows to choose from.

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After a thorough analysis of brokerage window designs, financials, and providers, Mercer decided to partner with one provider in offering our clients these two options:

- Self-directed brokerage account
- Mutual-fund-only window option

This approach — using just one provider and two window options — has proven to be an efficient and cost-effective solution for our clients who wish to offer a brokerage window as a supplement to the designated investment alternatives offered generally to the participants. Mutual-fund-only brokerage windows limit participants to investing in closed- and open-end mutual funds registered under the Investment Company Act of 1940. Self-directed brokerage accounts allow participants to invest in securities traded on a national exchange within the limits described in our response to Question 12. The mutual-fund-only window option limits this flexibility to professionally managed and regulated mutual fund investments. Both options cater to participants who want to take an active role in managing their investments, but find the plan's menu of designated investment alternatives too restrictive.

The use of a brokerage window as a supplement to the plan's designated investment alternatives should be contrasted with the situation where a brokerage window is the plan's sole investment option (that is, the plan offers no designated investment alternatives, and participants simply choose from any registered mutual fund or security traded on an exchange). This latter type of arrangement is not commonly offered by the medium and large plan sponsors that generally make up Mercer's client base.

In Mercer's experience, employers adding brokerage windows tend to do so in response to participant demand. Specifically, our clients may implement brokerage windows for one or more of these reasons:

- At the request of a vocal minority of participants looking for specialized investment vehicles
- As a way to provide investment flexibility to those who want it, while keeping the number of core designated investment alternatives at a manageable level for the vast majority of participants
- As an incentive to recruit and retain executive talent
- In the mergers and acquisitions context, as a means of retaining investments offered in an acquired retirement plan that will not be included among the surviving plan's core designated investment alternatives

2. If a more specific definition of a “brokerage window” is provided, as a regulatory or interpretive matter, how should it be defined?

The Department's current regulatory references to “brokerage window” are sufficient. The Department's existing regulations, in 29 C.F.R. §§ 2550.404a-5(h)(4) & 2550.408b-2(c)(1)(viii)(C), position brokerage

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window as any investment arrangement that allows participants to select additional investment options beyond those designated by the plan. This adequately captures the usual and understood meaning of brokerage window, as it draws a clear distinction between investments under the window and the plan administrator's designated investment alternatives.

3. Should the fiduciary, disclosure, or other standards that apply to brokerage windows (and which are raised in more detail below) vary depending on the type of arrangement, or perhaps the ultimate number of investment options available to participants (e.g., a mutual fund window that offers access to fifty mutual funds vs. an open brokerage structure that offers access to many thousands of stocks, mutual funds, and other securities) and, if so, how?

Plan administrators should adhere to the fiduciary standards in ERISA Section 404(a) in prudently evaluating whether any type of brokerage window option is reasonably designed to further the plan's purposes, taking into account service quality, access fees, and other appropriate considerations. We see no reason why the standards should differ for mutual-fund-only window options or self-directed brokerage accounts. Mercer believes the principles of ERISA Section 404(c) set the appropriate standard: If a plan permits participants to exercise independent control over the investment of their retirement assets, plan fiduciaries should not be liable for any loss resulting from that exercise of control.

That said, DOL could consider narrow and targeted guidance to address extreme situations, such as when the number of designated investment alternatives available to participants is very limited (or nonexistent). For example, if in addition to the brokerage window, a plan fails to offer participants at least a reasonable minimum number of (e.g., three) designated investment alternatives with different risk and return characteristics meeting the requirements of ERISA Section 404(c), the brokerage window itself could be treated as a designated investment alternative, subject to all laws and regulations governing such investment alternatives.

As long as the window merely supplements a plan's menu of diversified designated investment alternatives, any disclosures related to particular investments purchased through the window would not, in our opinion, be justified by any perceived participant benefit.

Plan Investment Offerings – Brokerage Windows and Designated Investment Alternatives

4. What are the characteristics of plans that offer brokerage windows?

Survey data indicates that larger plans (ranked by participant headcount or total assets) are generally more likely than smaller plans to offer a self-directed brokerage or mutual-fund-only window. For example, the table below reflects survey dataⁱ through November 2013:

	Plans with \$5-49 million in assets	Plans with > \$1 billion in assets
Self-directed brokerage	14%	42.6%
Mutual-fund-only window	13.5%	22.3%

Another surveyⁱⁱ reflecting 2012 plan year experience indicates:

	Plans with 50-199 participants	Plans with 5,000+ participants
Self-directed brokerage	11.8	22.2%
Mutual-fund-only window	4.7%	8.9%

5. Is the number of plans offering brokerage windows increasing, decreasing, or remaining relatively constant? If the number is changing, why?

Survey dataⁱⁱⁱ indicates that the number of plans offering windows has remained fairly constant in recent years. For example, the percentage of plans offering self-directed brokerage windows increased modestly from 2004 (approximately 15.6% of plans) to 2012 (approximately 17.1% of plans). However, the percentage of plans offering mutual fund windows declined modestly from 2004 (approximately 7.3% of plans) to 2012 (approximately 5.6% of plans).

6. What is a typical number of “designated investment alternatives” offered by a 401(k) plan? Are plans increasing, decreasing, or holding constant the number of designated investment alternatives that they offer? If the number is changing, why?

Survey data^{iv} indicates that the average number of investment options offered by 401(k) plans is 19. Reviewing data from 2004 to 2012, this number appears to be holding constant.

7. Is there any correlation between the trends observed in the preceding two questions, and if so, what is the correlation?

If the Department is concerned that the number of designated investment alternatives is shrinking as brokerage windows become more prevalent, we see no evidence to support that concern.

8. At what point might the number of investment options available to plan participants warrant treating the options as a “brokerage window” of some variety, rather than as a menu of “designated investment alternatives?” Does the detailed investment-related information required by the

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Department's participant-level disclosure regulation for designated investment alternatives (vs. brokerage windows) affect the answer to this question and, if so, how?

Mercer infers from this question that the Department might have concerns about how to treat plans offering an exorbitant number of designated investment alternatives. We see no basis for that concern. As indicated in our response to Question 6, survey data shows that on average, plans offer 19 designated investment alternatives.

Participation in Brokerage Windows

9. How many participants, or what proportion of participants, typically use their plan's brokerage window? What proportion of a plan's total assets typically is invested through the brokerage window?

Mercer's experience indicates that brokerage window utilization is very low. Approximately 13% of our client plans offer brokerage windows.

Looking solely at plans offering brokerage windows,

- Approximately 2.23% of participants invest through the window
- Investments in the brokerage windows account for about 1.5% of plan assets
- Approximately 95% of the windows offered are mutual-fund-only (with the remaining 5% allowing self-directed brokerage investments in individual stocks, etc.).

10. Do respondents have demographic data on these participants, either for a particular plan or more broadly?

As to demographic databases, it's important to distinguish among (i) plan sponsors, (ii) plan record keepers (like Mercer) and (iii) brokerage window providers. As explained below, record keepers generally can track the number of participants using a brokerage window, but not specific investments made by a participant through the window.

Plan sponsors. Most plan sponsors in Mercer's client base compile limited data on participant demographics to assist in the administration of the plan's features. Clients share this information with record keepers (such as Mercer), who use it in administering the plan's eligibility, vesting, in-service withdrawal, and distribution rights and features. Plan sponsors rely on their record keepers to maintain participant investment records, including which participants are utilizing brokerage windows.

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Plan record keepers. As a record keeper, Mercer has developed the capability to track and report participant utilization of various plan features, including investment selections. These detailed reports enable our clients to evaluate plan performance features such as participant contribution levels, loan and withdrawal utilization, and investment elections among designated investment alternatives. Clients may use these reports to target areas of improvement in plan design, investment options, or participant communications. Clients receiving these reports would know how many participants are utilizing brokerage windows in the aggregate and at a macro-level, the investments held by the qualified trust for the benefit of all participants utilizing the brokerage window. However, they would not know the specific investments held by each participant in the brokerage window.

Brokerage window providers. Participant-level investment information is generally housed on the brokerage window provider's systems, which are separate and apart from the plan record keeper's systems. The brokerage window provider shares plan-level information (for example, total account value for all participants and an aggregate listing of all investments purchased by all participants through the window) with the record keeper as necessary to allow for proper plan administration and disclosure, but not broken down by individual participant account. For example, the record keeper would know that the plan's qualified trust owns a total of 100 shares of stock, but not that participant A holds 10 shares and participant B holds 20 shares. The brokerage window provider shares individual account information directly with the affected participant. In fact, many brokerage providers' contracts specify that specific trades in the brokerage window will be kept confidential and not shared with the plan sponsor or record keeper.

The industry has not yet developed the infrastructure that would allow plan sponsors, record keepers, and brokerage window providers to exchange information on the investment behavior of individuals investing through a brokerage window. To reduce costs, avoid duplication of effort, and avoid participant confusion, plan administrators generally rely on brokerage window providers — who have existing systems for communicating with individual account holders — to complement the quarterly disclosures provided by the plan administrator. The transfer of data between record keepers and brokerage window providers is limited to plan-level information designed to assist plan administrators in meeting their plan-level disclosure and reporting requirements, such as the information necessary to complete the plan's Form 5500 schedules. Requiring plan administrators to monitor individual participant investments within the brokerage window would require development of secure electronic data-sharing capabilities, at significant time, effort, and expense.

11. Of the participants that use their plan's brokerage window, do these participants typically invest all of the assets in their plan account through the window, or some proportion of their assets?

Mercer does not have data that reveals whether any participants are investing nearly all of their plan account through the window. Plan sponsors have the option of limiting the percentage of the account

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balance eligible to be transferred to the brokerage account. Plans utilizing this restriction commonly cap the eligible amount at 50%.

12. What types of restrictions, if any, are typically made on brokerage window participation (e.g., minimum account balances, minimum dollar amounts that may be transferred to a brokerage window, maximum percentage of account balance that may be invested through a brokerage window, etc.)?

To minimize negative participant outcomes and promote efficient plan administration, plan administrators impose a variety of restrictions on the use brokerage windows, including:

- Limiting the percentage of a participant's account balance that can be invested in the brokerage window
- Limiting the percentage of a participant's regular contributions that can be invested in the brokerage window
- Requiring minimum non-brokerage account balances
- Restricting the types of investments and trading venues available to participants under the brokerage window, such as prohibiting:
 - "Qualifying employer securities" trading within the brokerage window
 - Sell short trading
 - Using margins
 - Option trading
 - Trading on foreign exchanges
 - Currency trading
 - Trading private limited partnership shares
 - Bulletin board stock trading
 - Trading on the pink sheets
 - Futures or commodities trading
 - Promissory note trading
 - Real estate property trading
 - Collectibles, metals, and other personal property trading
 - Municipal bond trading
 - Other alternative investment trading
- Trading in any other investments or classes of investments specifically excluded by the plan administrator.

Many plan administrators also provide general investment education, including warnings about the dangers of inadequate investment diversification.

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13. Is there evidence of good or poor decision-making and outcomes by those participants using brokerage windows? What types of evidence are available?

Answering this question would require an analysis of the personal rate of return of each participant using a brokerage window. Unless and until the industry develops the necessary infrastructure, plan administrators generally lack the capability of monitoring participant trading activity within a brokerage window.

14. What benefits accrue to participants that invest through brokerage windows? Do participants who do not invest through the brokerage window benefit from having a brokerage window option in their plan, and if so, how?

Typically, participants taking advantage of brokerage windows do so to more closely tailor their retirement plan investments to their overall investment strategy. These participants are able to access specialized investment vehicles that are not necessarily appropriate as a plan's designated investment alternative. Also, in the context of a merger or acquisition, the window feature allows participants to retain investments offered in an acquired retirement plan that will not be included among the surviving plan's core designated investment alternatives.

Other than facilitating the plan administrator's efforts to maintain a manageable number of designated investment alternatives offered to the general plan population — and thereby minimizing the risk of "paralysis" from having too many investment options — Mercer is not aware of any substantial benefit to participants who choose not to invest in the brokerage window.

Selecting and Monitoring Brokerage Windows and Service Providers

15. How many vendors does a plan fiduciary research or contact, on average, when deciding whether to include a brokerage window feature? How do vendors typically market brokerage windows to their existing or potential plan clients?

In its record keeping capacity, Mercer offers brokerage windows through a vendor selected by Mercer after a thorough analysis of available options. Any plan administrators that engage Mercer for benefits administration services have access to this vendor if they want to offer participants this type of investment vehicle. It is our understanding that most record keepers offer access to no more than two or three brokerage vendors.

16. Do plan record keepers typically require the use of their own or affiliated brokerage services, or are plan fiduciaries able to shop for brokerage windows provided by multiple vendors? Are there

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ways in which brokerage window providers favor or encourage investment in proprietary funds or products through brokerage windows?

To minimize the cost associated with creating and maintaining the necessary interfaces between the record keeper and brokerage window providers, Mercer offers brokerage windows through a single non-affiliated provider. Building the infrastructure to accommodate multiple vendors could increase costs to the plan or plan sponsor beyond reasonable levels.

Mercer has no insight into the operation of proprietary brokerage window products and has chosen a brokerage window provider that does not sell proprietary products.

17. What factors do plan fiduciaries consider and what challenges, if any, do they face when deciding whether to include a brokerage window and who should provide the window?

As with any other plan investment feature, fiduciaries should act prudently and in participants' best interest in evaluating the merits of any brokerage window. Fiduciaries should consider whether a brokerage window is reasonably designed to further the plan's purposes, taking into account the plan's objectives and the participants' needs. Factors to be considered include:

- The reason for, and purpose of, offering the brokerage window
- Participant demographics
- The reputation and qualifications of the brokerage window service provider
- The reasonableness of the fees to be borne by the plan and participants
- The risk of loss and opportunity for gain
- Opportunities for diversification
- Liquidity needs

Fiduciaries that decide to offer a brokerage window should have a prudent and reasonable process for periodically monitoring brokerage window services (but not specific trades).

18. What are the most common reasons for adding a brokerage window feature (e.g., flexibility and increased investment options for participants, to facilitate the ability of participants to work with an adviser or a managed account provider, etc.)? What role, if any, do concerns about fiduciary responsibility or disclosure obligations play in deciding whether to add a brokerage window?

Based on Mercer's experience with medium and large plan sponsors, the most common reason cited for adding a brokerage window feature to a plan is to accommodate some participants' desire to access a broad array of investment options beyond the plan's designated investment alternatives.

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From a fiduciary's perspective, adding a brokerage window increases fiduciary responsibilities because of the need to prudently select and monitor a brokerage window provider and disclose related fees. (If the Department is concerned that a brokerage window could be used to evade fiduciary responsibility for managing and disclosing designated investment alternatives, we have seen no evidence among our client base to support that concern.) The decision to add a brokerage window is taken seriously from a fiduciary and disclosure perspective by most medium and large plan sponsors, with significant attention to the reasonableness of fees incurred for the services provided.

19. When a plan fiduciary selects a brokerage window feature for a plan, does the plan fiduciary typically enter into a contract for this service, on behalf of the plan? If so, who are the parties to the contract? If not, why not?

Generally, the brokerage window provider enters into a brokerage window administrative services contract with the plan sponsor or plan administrator. Participants electing to utilize the brokerage window also enter directly into individual contracts with the brokerage window provider.

20. Do plan participants themselves commonly contract with the vendor when they choose to participate in the brokerage window (either in lieu of, or in addition to, a contract with a plan official) and, if so, what role, if any, does a plan fiduciary play in this process?

Within Mercer's service model, after the plan fiduciary has decided to offer a brokerage window and entered into a contract with a brokerage window provider, plan participants directly contract the provider when they choose to participate in the brokerage window. Other than disclosing the availability of the brokerage window (including the information required by the Department's fee disclosure regulations), the plan fiduciary does not play a role in the participant's individual investment decision.

21. What role, if any, do plan fiduciaries play in the selection of brokers, advisers, or other service providers to a brokerage window? How do plan fiduciaries monitor the performance of these service providers if at all?

Plan fiduciaries generally do not play a role in the selection of brokerage window providers. However, when selecting a record keeper, plan fiduciaries interested in offering a brokerage window will review the record keeper's brokerage window product and vendor. This review normally includes a review of the types of brokerage windows offered, along with their costs and services.

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Fiduciary Access to Information about Brokerage Window Investments

22. How do plan fiduciaries monitor investments made through their plan's brokerage window, if at all? For example, do plan fiduciaries have access to information about specific investments that are selected or asset class or allocation information?

In Mercer's experience, most plan fiduciaries cannot monitor specific investments made within the brokerage window, with the exception of receiving regular compliance reporting from the vendor for restricted securities within the account. Plan fiduciaries have access to an aggregate listing of investments purchased through the brokerage window, but they do not have access to individual plan participant asset allocation data. As noted above, current industry infrastructure does not support that sort of monitoring.

23. Do fiduciaries view this information as important to effectively monitoring the inclusion of a brokerage window feature in their plan? If applicable, how often do plan fiduciaries request and review such information?

See response to question 22.

24. What, if any, technological or other challenges exist that may reduce the feasibility, or increase the cost, of compiling this type of information for plan fiduciaries? Can respondents quantify such costs?

The industry has not built the infrastructure to allow efficient transmission of:

- Participant-level investment selections
- Breakdowns between principal investment, earnings, and capital gains
- Participant investment outcomes.

Mercer utilizes a common vendor-provided recordkeeping technology that limits the number of investments which can be added to the core lineup. To track a participant's investment detail, it would be necessary to add all investment options available to the participant via the brokerage window. At this time, the technology cannot support this number of investments.

We anticipate that building the systems and processes needed for this type of monitoring would be substantial, time consuming, and most likely borne by plan participants. However, we have not attempted to quantify the costs or scope out the necessary steps or challenges.

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Brokerage Window Costs

25. What are the most common costs associated with participation in a brokerage window (e.g., account fees, brokerage commissions, etc.), and what dollar amounts are typically charged? Are there costs to including a brokerage window that usually are borne by the plan sponsor or by the plan, rather than by individual participants who use the brokerage window?

The brokerage window product offered by Mercer's vendor imposes a fixed annual administration fee, traditional brokerage, commission, transaction and trading fees, plus individual charges for such items as additional copies of statements and confirmations and research fees. These fees are normally paid by the participant investing in the brokerage window and are disclosed to participants in the annual fee disclosure notice.

26. To what extent are brokerage windows effectively subsidized by plan participants other than those participating in the brokerage window?

In Mercer's experience with medium and large plan sponsors, brokerage fees are not paid or subsidized by plan participants other than those participating in the brokerage window. Normally there are no explicit implementation costs in establishing a brokerage window. If an implementation cost exists, it is typically amortized in the ongoing administrative fee, which may be paid by the plan sponsor or charged to the plan participants utilizing the brokerage window option.

27. How do the costs of investing through a brokerage window typically compare to investing in a plan's designated investment alternatives? How do the costs compare to investing outside of the plan, e.g., in an IRA?

Relative to investing in a plan's designated investment alternatives, investing through the brokerage window can increase costs to participants (for example, they may incur annual administration fees and additional trading and brokerage fees). Mercer has no ready data needed to benchmark IRA fees against fees incurred under an employer-sponsored plan.

28. How significant of a factor to plan fiduciaries are these costs when deciding to add a brokerage window to their plan? How do plan fiduciaries monitor or oversee the fees and costs of a brokerage window, available investments, and related services? How much discretion does a plan fiduciary have in negotiating brokerage commissions and other costs that presumably cannot be controlled by participants?

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When deciding to offer a brokerage window, fiduciaries will review the brokerage option(s) available from their record keeper, focusing on the nature and quality of services as well as associated fees. Often this entails benchmarking brokerage window fees against other providers in the market to determine and document reasonableness of fees for services provided. Most plan fiduciaries will conduct a regular review of fees associated with the brokerage window from a plan perspective. To the best of our knowledge, plan fiduciaries do not monitor or review the fees actually charged to individual participants. Individual-level charges are incurred based on the participant's investment behavior and are reported quarterly to the participant so that the participant may evaluate whether a change in his or her investment behavior is warranted.

Disclosure Concerning Brokerage Windows and Underlying Investments

29. Is the information required to be disclosed about brokerage windows by the Department's participant-level disclosure regulation sufficient to protect plan participants? Is this required information more or less than plans disclosed prior to the effective date of the regulation? Does this information usually come from plan administrators or from a third party, such as plan service or investment providers? What additional information, if any, is or should be disclosed to participants?

In Mercer's view, the standards set by the Department's participant-level disclosure regulations are sufficient to describe how the window works, explain fees in general terms (enrollment and access fees, brokerage commissions, etc.), and indicate how the participant may obtain more information if interested in taking advantage of this option. The brokerage window provider gives additional, more detailed, information about using the brokerage account to interested participants, including the following:

- Instructions on how to access the account online or by phone
- Funding the account and making trades
- Accessing account information
- General investment education including the benefits of a diversified portfolio.

These disclosures are over and above the Department's regulatory requirements for brokerage windows and do not appear to have been substantially changed as a result of the issuance of 29 C.F.R. § 2550.404a-5.

30. Is different or additional information disclosed to participants after they elect to participate in a brokerage window and, if so, what information?

See response to Question 29.

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31. The Department has said that disclosures regarding brokerage windows or similar arrangements under the participant-level fee disclosure regulation must, at a minimum, provide sufficient information to enable participants and beneficiaries to understand how the brokerage window works (e.g., how and to whom to give investment instructions; account balance requirements, if any; restrictions or limitations on trading, if any; how the brokerage window differs from the plan's designated investment alternatives) and who to contact with questions. See FAB 2012-02R at Q&A 13. Do these disclosures regarding how the brokerage window differs from the plan's designated investment alternatives typically include a description of the different risks and costs of investing through a brokerage window compared to investing in a designated investment alternative? Also, do the disclosures typically include a description of differences in fiduciary duties owed to participants investing through a brokerage window compared to investing in a designated investment alternative?

When a brokerage window is available, the annual participant disclosure notice explains that participants have options outside of plan's designated investment alternatives. Participants typically are cautioned that a brokerage window may be unsuitable unless they have the time and skill to monitor, review, and manage their plan investments on an ongoing basis. Considerable emphasis is placed on the participant's responsibility for investment management (as contrasted with a mutual fund managed by a professional fund manager). Mercer is not aware of plan sponsors attempting to explain how fiduciary duties may differ for investments made through a brokerage window.

32. In a recent report entitled, 401(k) PLANS: Improvements Can Be Made to Better Protect Participants in Managed Accounts, GAO-14-310 (June 2014), the United States Government Accountability Office (GAO) recognized that managed account or similar services could be available to participants through brokerage windows. GAO recommended that the Department, among other things, amend regulations under title I of ERISA to require plan sponsors who offer managed account services to provide participants with standardized performance and benchmarking information on managed accounts. For example, one GAO suggestion is that plan officials could be required to periodically furnish each managed account participant with the aggregate performance of participants' managed account portfolios and returns for broad-based securities market indices and applicable customized benchmarks. To what extent is the GAO recommendation feasible and advisable for participants who access managed account services with or without a brokerage window?

The GAO's recommendation may be feasible for participants who access managed account services.

However, as a general rule, managed account services and brokerage windows are mutually exclusive. Generally, participants using a managed account service elect to have 100% of their accounts invested

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through that service. Participants wishing to control the investment of their retirement assets using a brokerage window would not be interested in a managed account service. Most plans do not offer, nor has Mercer been asked to include, a brokerage window in the managed account services contracted by our clients. Most managed account services allocate assets solely among the plan's designated investment alternatives (disregarding any investment opportunities available via the brokerage window).

The Role of Advisers

33. How often do plan fiduciaries engage advisers to assist with decisions about whether, and what type of brokerage window to include in their plan?

We have no insights to offer on this question.

34. How often do plan participants use an adviser or a provider of managed account services to help them make investments through a plan brokerage window?

We have no insights to offer on this question.

35. Do plans generally make advisers or managed account providers available to participants for this purpose and, if so, do the advisers or managed account providers typically contract with the plan or with the participant?

We have no insights to offer on this question.

36. How often do plan participants independently select advisers or other providers to assist with their investments through the brokerage window? Are plan fiduciaries, record-keepers, or other service providers generally aware of these arrangements?

We have no insights to offer on this question.

Fiduciary Duties

In connection with the issuance of FAB 2012-02 and FAB 2012-02R, the Department became aware of the possibility that plan fiduciaries and service providers have questions regarding the nature and extent of ERISA's fiduciary of duties under section 404(a) of ERISA in connection with brokerage windows in plans intended to be "ERISA 404(c) plans."

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37. Do these questions indicate a need for guidance, regulatory or otherwise, on brokerage windows under ERISA's fiduciary provisions? For instance, is there a need to clarify the extent of a fiduciary's duties of prudence, loyalty, and diversification under section 404(a) of ERISA, both with respect to brokerage window itself, as a plan feature, and with respect to the investments through the window? If guidance is needed, please try to identify the precise circumstances in need of guidance. If no guidance is needed, please explain why not.

Just as qualified default investment alternatives play a vital role for participants who don't want to make investment decisions, brokerage windows fill a need for participants at the opposite end of the spectrum — namely those who desire to take an active role in managing their investments but find the plan's menu of designated investment alternatives too restrictive. Mercer believes the following principles should guide the Department's regulatory efforts in this area:

- Plan administrators should adhere to the fiduciary standards in ERISA Section 404(a) in evaluating whether a brokerage window option is reasonably designed to further the plan's purposes, taking into account service quality, access fees, and other appropriate considerations
- Fiduciary standards should be uniform, cost-effective, and flexible enough to accommodate a wide range of brokerage window designs, including future innovations.
- If the Department finds evidence of brokerage windows being used to avoid fiduciary responsibilities, efforts to curb this abuse should reflect the Department's existing regulatory framework by limiting brokerage windows to plans that offer a minimum number of diversified designated investment alternatives, offer a qualified default investment alternative, or meet similar threshold requirements designed to offer prudent, balanced investment choices for participants who do not wish to utilize a brokerage window option.
- Fiduciaries should not be liable for any loss resulting from participants' independent exercise of control over their brokerage window investments.
- Fiduciaries should have no duty to monitor (or send disclosures about) individual investments within the window, as this would involve technological complications and costs far outweighing any perceived participant benefit.
- Fiduciaries should have discretion to impose trading restrictions of the type described in Question 12.
- If the Department finds solid evidence that brokerage windows have had a material adverse effect on certain vulnerable segments of the general population, any efforts to limit window access — for example, to participants with large accounts and/or demonstrated financial acumen — should be administratively workable, cost-effective, and consistent with the Treasury Department's rules prohibiting discrimination in favor of highly compensated employees.

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- Fiduciaries should have discretion to remove a brokerage window (or any investment option within the window), although the Department may be able to offer helpful guidance on how to do so prudently.

Annual Reporting and Periodic Pension Benefit Statements

38. The annual reporting requirements contain a special provision for plans with brokerage windows. Specifically, subject to certain exceptions, the Schedule H allows plans to report certain classes of investments made through a brokerage window as an aggregate amount under a catch-all “other” category rather than by type of asset on the appropriate line item from the asset category, e.g., common stocks, mutual funds, employer securities, etc. Should this special provision be changed to require more detail and transparency regarding these investments? If so, what level of transparency is appropriate, taking into account current technology and the administrative burdens and costs of increased transparency?

We urge the Department to consider this important question within the context of a broader review of Form 5500 reporting requirements. Mercer supports efforts to strengthen the Form 5500 reporting regime by making best use of current technologies, while taking care not to increase the burdens and costs borne by retirement plan trusts and participants.

39. ERISA section 105 requires plans to furnish benefit statements at least quarterly in the case of participant-directed individual account plans. How do these benefit statements typically reflect investments made through brokerage windows?

Generally, the plan administrator sends a quarterly benefit statement containing the overall value of the portion of the account invested in a brokerage window. Separately, the brokerage window provider supplies a detailed quarterly statement with specific information about the individual’s brokerage window account, including the brokerage account investments, values, and rates of return. This information is also available online through the brokerage window provider’s secure website. We believe these disclosure practices are working effectively to put the relevant information into the hands of affected participants. Combining these disclosures into one quarterly benefit statement would substantially increase the length and complexity of the plan’s overall quarterly benefit statements without providing any benefit to the vast majority of participants who do not utilize brokerage windows. For example, the amount of time necessary to consolidate the information received from the brokerage provider would, at a minimum, delay the release of quarterly statements.



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We look forward to working further with the Department as it moves ahead on this initiative. If you have any questions or would like to discuss, please contact:

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Sincerely,

A handwritten signature in black ink that reads "Sandy McCarthy". The signature is written in a cursive, flowing style.

Sandy McCarthy
U.S. Benefits Administration Leader
Mercer

ⁱ PlanSponsor Defined Contribution Survey, 2014 (reflects responses of 5,342 plan sponsors from a broad variety of industries)

ⁱⁱ PSCA 56th Annual Survey of Profit Sharing and 401(k) Plans (reflecting 2012 plan year experience of 686 respondents)

ⁱⁱⁱ PSCA Annual Survey of Profit Sharing and 401(k) Plans, 48th – 56th editions (reflecting 2004 – 2012 plan year experience, number of respondents varies by year, ranging from 686 (2012) to 1011 (2007))

^{iv} PSCA Annual Survey of Profit Sharing and 401(k) Plans, 48th – 56th editions (reflecting 2004 – 2012 plan year experience, number of respondents varies by year, ranging from 686 (2012) to 1011 (2007))