American Benefits Council

Testimony Of

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For the ERISA Advisory Council

Understanding Brokerage Windows in Self-Directed Retirement Plans

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Thank you for the opportunity to appear before you today. I am Diann Howland, vice president, legislative affairs at the American Benefits Council ("the Council"). I am here today to review the results of an informal survey that the Council conducted on the use of brokerage windows among some of our member companies.

The Council is a Washington D.C.-based employee benefits public policy organization. The Council advocates for employers dedicated to the achievement of best-in-class solutions that protect and encourage the health and financial well-being of their workers, retirees and their families. Council members include over 220 of the world's largest corporations as well as organizations serving employers of all sizes. Collectively our members directly sponsor or administer health and retirement benefits for virtually all Americans covered by employer-sponsored plans.

INTRODUCTION

The Council's member companies have sponsored broad-based retirement programs for their rank-and-file workers for many decades. Our member companies are intent on both understanding the law and complying with it. They each spend a large amount of time and money in retirement and health benefit plan design, communication, and compliance. Hence, companies that include a brokerage window among the investment offerings of their retirement plan do so after careful consideration of employee demand, plan investment policy, plan operations and demographics, and the rules applicable to such investment offerings.

Plan sponsors with designated investment alternatives (DIAs) in addition to a brokerage window may also recall the U.S. Department of Labor's Request for Information (RFI) Regarding Standards for Brokerage Windows in Participant-Directed Individual Account Plans that was issued in 2014. The RFI was issued based on a concern that some plans offered only a brokerage window investment option to ensure compliance with ERISA with respect to a wide array of choices. In its 2014 comment letter to the DOL, the Council concluded that "…the Department has already provided sufficient guidance on brokerage windows to serve the need of plan sponsors and to protect participants." We continue to believe this to be the case.

AMERICAN BENEFITS COUNCIL'S BROKERAGE WINDOW SURVEY RESULTS

From July 13 to August 6, 2021, the Council fielded a survey of plan sponsor companies on the topic of brokerage windows in 401(k) plans. The Council received 71 total unique company responses (including partial responses, meaning that not all questions were answered by all respondents), representing all major sectors of the economy. Around 62% of respondents offer a brokerage window while 38% do not. The rationales and practices of these companies are discussed in greater detail below.

- **Sponsors of plans with brokerage windows:** Among respondents that do sponsor a brokerage window in their 401(k) plan, the most frequently cited reasons (respondents could choose more than one reason) for doing so were:

    - to expand the investment options in their plan (98%)
    - to decrease the number of options in the core investment line-up (26%)
    - in lieu of adding other investments (29%)
    - because there had been a brokerage window in place and they did not want to take away the investment option (22%)

- **Plan sponsors without brokerage windows:** Among those that do not sponsor a brokerage window in their plan, the most frequently selected reasons chosen (again, they could choose more than one) were:

    - no requests or few requests to offer a brokerage window (58%)
    - ERISA liability concerns (54%)
    - brokerage windows were not suitable for their employees (38.5%)
    - higher expense share class fees expected (31%) and no reason to offer a brokerage window (31%)

- **Share classes:** Plan sponsors included a variety of share classes in their brokerage windows, with:

    - retail share classes being the most prevalent (74%)
    - institutional share classes the second most prevalent (33%)
    - retirement class shares (26%)

- **Allowed Investments:** Allowed investments included:

    - mutual funds (97%)
    - exchange traded funds (ETFs) (65%)
    - stocks and bonds (55%)

- **Restrictions placed on brokerage windows:**

    - employer stock was not included in 55% of plan sponsor brokerage windows

  - stock options were excluded from 48% of brokerage windows

  - a cap on the total account balance that could be invested in the brokerage window and a prohibition on investments that could generate unrelated business income tax (UBIT) tied as the third-most commonly cited restriction on brokerage windows (35%)

- **Usage:** Overall, the use of brokerage windows by participants is low by most plan sponsor respondents who were able to make an estimate. Among those that responded:

  - more than two-thirds (68%) estimated a usage rate of less than 5%

  - one-quarter (25%) estimated a usage rate of less than 2%

- **Ability to Monitor Investments:** Slightly more than half of responding plan sponsors (54%) indicated that their recordkeeping systems can monitor investments made through the brokerage window. Almost half (46%) must do this manually.

RECOMMENDATIONS

The American Benefits Council respectfully recommends that DOL maintain its current definition of brokerage window. The current definition allows plan sponsors and participants to differentiate between the investment options that are on the plan's menu of investments and a larger number of investments that can be accessed only through the brokerage window.

Brokerage windows serve specific investment needs of a relatively small group of participants who seek access to a much broader set of investments, including different types of investments, and many plan sponsors believe it is important to respond to those interests of participants because it helps to keep them engaged in the plan. Furthermore, this allows plan sponsors to maintain a small more manageable fund menu for the vast majority of the plan participants.

If DOL were to impose additional fiduciary duties and burdens on sponsors that include brokerage windows in their plan, it could discourage the use of brokerage windows altogether, which would unnecessarily limit opportunity and choice, and could lead to larger and, for some sponsors and participants, less manageable core investment menus

If that were to occur, some of the brokerage window accounts could be liquidated, which would be undesirable because it would affect the investment outcome of individuals and force them from investments they had selected.

For the record, we note that the Federal Employees' Thrift Savings Plan (TSP) has recently approved a mutual fund brokerage window that will provide more investment choices to federal employee participants, including making ESG funds available to them. These actions are also relevant to private sector plans. The mutual fund brokerage window for the TSP is responsive to the desires of TSP participants and will allow them access to a wide array of investments while maintaining a smaller set of core investments and life cycle funds.

Thank you. That concludes my prepared remarks. I will be happy to answer any questions you may have.