THE ERISA INDUSTRY COMMITTEE
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ALIYA ROBINSON
Senior Vice President, Retirement and Compensation Policy

Understanding Brokerage Windows in Self-Directed Retirement Plans

Testimony before the U.S. Department of Labor Advisory Council on Employee Welfare and Pension Benefit Plans
U.S. Department of Labor
Washington, D.C.

June 25, 2021

Thank you for the opportunity to appear before you today. I am Aliya Robinson, Senior Vice President for Retirement and Compensation Policy at The ERISA Industry Committee ("ERIC"). ERIC is the only national trade association that advocates exclusively for large employers on health, retirement, and compensation public policies on the federal, state, and local levels. ERIC member companies operate in every industry sector and most have employees or retirees in every state. Unlike other trade groups that have testified before you, ERIC represents solely the perspective of large employers that sponsor benefit plans for their workforce. We do not represent those that provide services to plan sponsors.

At ERIC, we support the ability of our large employer member companies to tailor retirement, health, and compensation benefits for millions of workers, retirees, and their families. One of the important fiduciary obligations of a plan sponsor pertains to the investment options provided within a 401(k) plan. As such, we appreciate being invited by the ERISA Advisory Council ("Council") to discuss the implementation and usage of brokerage windows in 401(k) plans and, particularly, how large plan sponsors treat these investment options.

Introduction

ERIC represents America's largest companies. They each sponsor retirement plans for their workforce. Our member companies take pride in the generous benefits they provide and work hard to ensure that plan options, including investment options, in retirement plans assist plan participants. They do this out of concern for their workers and understand their fiduciary obligations under the Employee Retirement Income Security Act of 1974, as amended ("ERISA"). For some of our member companies, the inclusion of a brokerage window in the retirement plan is an important option for the reasons detailed below. These member companies are confident in their abilities to include the brokerage window as an option under the current guidance that is provided under ERISA.

In 2014, the DOL issued a RFI to determine if further guidance was needed pertaining to brokerage windows in 401(k) plans. This action was driven by concerns about participantdirected plans that include brokerage windows as the only investment option in an attempt to avoid various disclosure and regulatory requirements under ERISA. These plans were specifically targeted at small employers. Plan sponsors that offer designated investment alternatives in addition to a brokerage window are not trying to evade fiduciary liability. Therefore, ERIC does not see a need for further guidance in this area – particularly for large plan sponsors.[1]

ERIC Survey on Usage of Brokerage Windows in 401(K) plans

ERIC recently conducted a survey of our membership. Approximately half of our membership responded to the survey – which corresponds to the coverage of over 2.5 million American workers.

- 61% of member companies provide a brokerage window as part of the investment line-up
- Of those that do not offer a brokerage window, the following reasons were given:
  - No need (26%)
  - Not suitable for participants (17%)
  - Fiduciary concerns (30%)
  - While higher expense fees was given as an option for this question, no members chose this option.
- Reasons for implementing a brokerage window:
  - Expand available investment options under the plan (75%)
  - Decrease investment options in the core line-up (9%)
  - Other (16%)
- Participants that have access to a brokerage window:
  - All Participants (88%)
  - Participants with a minimum account balance (12%)
  - Other (6%)
- Restrictions placed on the brokerage window:
  - No employer stock (61%)
  - No options (58%)
  - No investment that could generate Unrelated Business Income Tax (58%)

[1] To the extent that this remains a concern, we recommend that any guidance issued in this area be 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.

- Maximum % of total account balance (18%)

- Percentage of participants that use the brokerage window:
    - 0-2% (24%)
    - 3-5% (28%)
    - 6-10% (21%)
    - 11-15% (3%)
    - 16% and more (10%)
    - Unknown (14%)

In addition to the survey, we met individually with about 10 respondents who offer brokerage windows to get additional perspectives. While this is a much smaller sampling, there were several similarities among the responses and perspectives of these plan sponsors. Highly compensated employees were not the majority of the participants in the brokerage window their companies offered. At the same time, many respondents acknowledged that they have a significant number of retirees and inactive participants in the plans. Also, several respondents shared that their companies have a more experienced workforce, with many participants who are late-career or second-career workers. As such, these participants tend to have higher account balances and are more sophisticated investors. For most respondents, participants use the brokerage window as a supplement to the options in the core line-up. One respondent did mention that a small percentage of participants use the brokerage window for 100% of their retirement investment, but that seems to be rare. All of the respondents emphasized that they make clear disclosures that the brokerage window is not subject to the fiduciary protections of the other in-plan investment options and that investments within the brokerage window are the complete liability of the participant. About half of the respondents allow personal financial advisors access to the brokerage window to provide advice to those participants.

Overall, our strong sense from the survey and the additional discussions with respondents is that the large plan sponsors who include a brokerage window as an investment option consider it an important part of the investment line up and make concerted efforts to ensure that participants who invest in the brokerage window are aware of the risks.

Current Guidance on Brokerage Windows is Sufficient for Plan Sponsors

ERIC believes that participants in large retirement plans that include brokerage windows in addition to designated investment alternatives are already protected under statutory and regulatory guidance. To receive protection for participants' investment decisions, ERISA section 404(c) and the regulations thereunder, plan sponsors must meet the following requirements:

- offer a broad range of investment alternatives, including at least three options, with differing potential for investment risk and return;
- give participants the right to timely direct the investment of their account; and

- provide disclosures about the plan, its investment options, and its operations as well as additional information about each investment option to participants upon request.[2]

In addition, the DOL mandates additional disclosures to provide participants with the information they need to make informed decisions regarding brokerage windows. Under current guidance, plan sponsors must provide participants with sufficient information to understand how the brokerage window works, explain any fees and expenses that may be charged against the participant's account, and a statement of the dollar amount of fees charged.[3]

Large plans include investment options designed to address the diverse needs of their participants and include alternatives for a wide range of investor preferences, including very sophisticated investors who 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 to mitigate the loss of a brokerage window option.

The DOL Should Not Impose Additional Fiduciary Requirements on Plans with Brokerage Windows

Fiduciaries of large plans already prudently select and monitor their plans' designated investment alternatives. These fiduciaries spend significant time and resources to determine appropriate investment options for participants. The DOL should support the efforts of these plans and their fiduciaries who strive to comply with the intent of ERISA and its specific requirements. ERIC does not believe further fiduciary obligations would be useful or necessary regarding 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 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 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. 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 who want to rely on

[2] DOL Reg. §§ 2550.404a-5; 2550.404c-1.
[3] Dep't of Labor, *Field Assistance Bulletin 2012-02R* (Jul. 30, 2012).

the plan fiduciary's selection and monitoring process. 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.

Conclusion

As the representative of the largest and most sophisticated retirement plans in the private retirement system, we appreciate the opportunity to discuss the implementation and usage of brokerage windows in 401(k) plans. Large plan sponsors who decide to offer brokerage windows understand their disclosure and fiduciary obligations and their plan participants are protected. As such, we strongly advise against additional guidance from the DOL.

Members of the Council, thank you again for the opportunity to participate today, and for your interest in this issue. I look forward to your questions and addressing any further concerns you may have regarding this subject.