# Anon.

August 25, 2014

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

Attention: **Brokerage Windows RFI**

RE: *Agency Name:* **Employee Benefits Security Administration, Department of Labor**
*Regulation Identifier Number:* **RIN 1210-AB59**

Ladies and Gentlemen:

I am writing these comments in response to your request to give you my observations as an individual, and not on behalf of a financial institution or any other organization. Please excuse any obvious typographical errors.

By way of background, I participated in a 401(k) plan for about 30 years (and before that for about eight years in its predecessor qualified profit-sharing plan). My employer never maintained a defined benefit pension plan. My own personal goal was always to use the benefits under the 401(k) plan as a source of retirement income, in part, along with personal investments and Social Security. When I retired about five years ago I rolled my entire 401(k) plan account into several IRAs, where they remained invested until I reached age 70-1/2, at which point I began withdrawing the required minimum distribution from the IRAs each year. So far, so good.

Although I cannot recall the exact date, about 20 years ago my employer added a "brokerage window" to the plan's investment options. However, I never use the window. I consider myself a smart investor, but certainly not a "sophisticated" one. The designated investment options under the plan (mutual funds in our case) were quite sufficient for investment diversification and asset allocation purposes, and their costs were reasonable. I never used an "advisor" to help me "manage" my plan account, although I was aware that some of my co-workers did.

During my employment I was involved with the administration of my employer's 401(k) plan. I am sure that you would classify some of the decisions I was involved with as fiduciary decisions, while others were simply ministerial. As a result of this work and other things, I had substantial experience with the 401(k) plan business, but only on a limited basis and from the employer side. My employer was not a 401(k) plan "provider," for example. Thus, my comments are limited by personal experience, and are necessarily anecdotal. I cannot offer any hard data to back up my

comments. Also, since I retired about five years ago, I am not up to date on any subsequent developments in the 401(k) plan business.

## General Comments

Before I address your specific questions at the bottom of page 5 below, I want to make a number of general observations or comments.

The Business

Your "Supplementary Information" and the questions you ask in this request make clear that you recognize that there is a "401(k) plan business." Good. My advice is to keep in mind that the financial industry and plan providers are the drivers – not employers, not employees. The entire 401(k) plan phenomenon has been developed to where it is today by the industry. Thus, it is the industry, directly or indirectly, that is going to be most resistant to regulation. I'm sure you already, know this, but I want to make sure that you understand it is obvious to most of us out here in the general public.

Role of the Department of Labor

My personal view is that the Department of Labor (DOL) has always been a day late and a dollar short in regulating 401(k) plans. Although not dictated or even hinted at in Section 401(k) of the Internal Revenue Code (IRC) or mandated by the Employee Retirement Income Security Act of 1974 (ERISA), the 401(k) plan business (see preceding paragraph) model is built around participant investment direction. Section 404(c) of ERISA nodded to participant investment direction issues, but I doubt the drafters had any idea of the monster that participant investment direction has become forty years later.

In any case, ERSIA's call for regulations to implement Section 404(c) was a start. Yet it took the DOL about 20 years to put any regulations in place, and even today the import of 404(c) remains murky. Below I mention a personal difficulty I had on behalf of my employer in getting information from the DOL on the use of 12b-1 fees to cover plan costs. But you know the history far better than I do.

What's a 401(k) Plan, Anyway?

I suggest you back up and take a look at the nature of a typical "401(k) plan." As you know, the term "401(k) plan" is found neither in the IRC nor in the parts of ERISA administered by the DOL. Under the IRC what is commonly called a 401(k) plan (with inconsequential exceptions) is "qualified" as an individual account profit-sharing plan that includes a cash-or-deferred contribution arrangement complying with Section 401(k) of the IRC. Neither the IRC nor any regulations under the IRC require that a "401(k) plan" be operated as a retirement plan.

Similarly, there is no requirement under ERISA that a 401(k) plan be designed and operated as a retirement plan. Although 401(k) plans fall within the definition of "pension plan" under

ERISA, that definition does not limit the term "pension plan" only to plans providing for the retirement income.

> . . . "employee pension benefit plan" and "pension plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program—
> **(i)** provides retirement income to employees, or
> **(ii)** results in a deferral of income by employees for periods extending to the termination of covered employment or beyond . . . ." [Cite: you know it by heart.]

A typical 401(k) plan is a pension plan only under clause **(ii)** unless by its express terms it "provides retirement income to employees." I'm uncertain what such "express terms" might be, but I would not challenge reliance on even such a simple statement in the plan as "the purpose of this plan is to provide retirement income to the Company's eligible employees." On the other hand if, you look at the "surrounding circumstances," for which I would look first to the terms of plan, then clearly the typical 401(k) plan, as designed, is not set up to provide retirement income.[1] It does, however, result in deferral of income, etc., under clause **(ii)** and is therefore a "pension plan" under ERISA. I suppose you could argue that **(i)** applies in any case because just about every 401(k) plan will in fact provide some retirement income for some employees, but I would reject that interpretation because the ultimate use of 401(k) plan funds is wholly beyond the control of the employer (plan sponsor) and the terms of the plan.

I bring this up because your premise seems to be that participants' accounts in a self-directed 401(k) plan necessarily represent "retirement" money, and that ERISA fiduciary issues regarding the investment of such accounts are to be resolved in light of such retirement purpose.

From the summary and supplementary information sections of your request for information:

> The Employee Benefits Security Administration of the U.S. Department of Labor (the Department) is publishing this Notice as part of its review of the use of brokerage windows (including self-directed brokerage accounts or similar arrangements) in participant-directed individual account retirement plans . . . .
>
> The use of brokerage windows and similar arrangements by participant directed individual account retirement plans (such as 401(k) plans) raises important issues concerning ERISA's reporting and disclosure requirements, as well as ERISA's fiduciary standards.
>
> The Request for Information contained in this Notice will assist the Department in determining whether, and to what extent, regulatory standards or other guidance

[1] One might reasonably argue, with a wink to the wording of ERISA's pension plan definition, that the typical 401(k) plan, if you look at the surrounding circumstances, is not really a retirement plan, even if it expressly purports to be. One might also reasonably argue, and those who had any sense would agree, that a 401(k) plan that allows participants to direct the investment of their own accounts could not possibly be a retirement plan, given (among other things) that the vast majority of 401(k) plan participants who direct the investment of their accounts have absolutely no idea what they are doing and as result don't invest for a good retirement income outcome. In short, the 401(k) plan as it is today is not a rational retirement plan vehicle.

> concerning the use of brokerage windows by plans are necessary to protect participants' retirement savings.
>
> Retirement plans that allow participants to choose investments for their individual accounts typically offer a limited set of specific investment options, which are selected and monitored by a plan fiduciary.
>
> This regulation was intended to ensure that all participants and beneficiaries in such plans have the information they need to make informed decisions about the management of their individual accounts and the investment of their retirement savings.

On the other hand, neither the title of your request for information, "Request for Information Regarding Standards for Brokerage Windows in Participant-Directed Individual Account Plans," nor your statement of the request's purpose, "The purpose of this RFI generally is to increase the Department's understanding of the prevalence and role of brokerage windows in participant-directed individual account plans covered by ERISA" includes the limiting word "retirement."

The distinction is important. Both retirement and non-retirement 401(k) plans are subject to ERISA and its fiduciary standards, of course, but the answers to many of your questions would (should) vary depending on the type of plan it is, that is, a retirement plan, or something else, and what else.

To make it easy, let's say you have a 401(k) plan with all the bells and whistles – you know what I mean – that expressly provides it is designed as a tax-deferred compensation plan, that it is not designed as or intended to be a retirement plan and that participants can choose individually how their accounts are invested based on their own intended use of the funds. An individual just out of high school goes to work for the company and participates in the 401(k) plan. Her idea is work for about five years, saving money both inside and outside the 401(k) plan, to put to her college education (notwithstanding tax issues she may face). Since her investment is only short-term, she should put her 401(k) money in a "safe" fund, which would not be the prudent thing for her to do if she was beginning at such a young age to build a retirement fund.

Sophisticated Investors

In the "Supplementary Information" section of your request you make several references to "sophisticated investors" and "sophisticated participants"[2], with your text in *italics* and my comments in **bold face**, below.

> *Some articles make the case that brokerage windows can be highly attractive and suitable plan features for sophisticated investors.*
>
> **Agreed. Articles sure do that.**
>
> *Sophisticated investors may be less likely to be overwhelmed by a large number of investment options and may benefit from the flexibility that brokerage windows offer.*

[2] By the term "sophisticated participant" I assume you mean sophisticated "as an investor," rather than someone who may read *The New Yorker*, attend opera, wear the latest high fashion, and whatever.

**Agreed. No question about it.**

*These individuals assert that many plans over time have increased the number of designated investment alternatives they offer in response to demands from company owner-employees, senior executives, and other potentially sophisticated employee-investors for access to more diverse investment opportunities.*

**This is absolutely true. However, the word "potentially" is the kicker. The vast majority of such employees, who make a disproportionate impact on their employers' plan designs, think they're sophisticated investors, but they are not, really. They may be bright, talented business people, but sophisticated investors they are not.**

**In fact, the true sophisticated investors among the "owner-employees, senior executives" would prefer to invest (and I do mean invest, not "play the market," not "time," not "trade," not "gamble") though a prudent selection of designated investment options (*e.g.*, low cost mutual funds) than through a brokerage window.**

*Brokerage window opponents maintain that plans have no bona fide method to restrict brokerage window access only to sophisticated participants, and that the use of dollar thresholds or gateways, for example, may discriminate in favor of highly compensated employees.*

**Agreed. There is no reasonable, practical way, to restrict access only to so-called sophisticated investors. Moreover, if only truly sophisticated investors could have access to a brokerage window, you'd be talking about Warren Buffett and his ilk (for starters), a very small subset of the larger group of so-called "investment professionals," and a number of random other people too small to be of significance.**

Legal Issues vs. Policy Issues

"Supplementary Information, B. Request for Information," you say:

> *In particular, the RFI will focus on why, under what circumstances, and how often these brokerage windows are offered and used in ERISA plans, and the legal and policy issues that relate to such usage.*

As a lay person, I'd like to have a more detailed explanation of what you mean by "legal" issues and "policy" issues. The "legal" issues seem fairly clear. Looking to the making of regulations, you wish to adopt regulations that are consistent with the legislative mandate. Policy, on the other hand, suggests political decision-making, which is generally the responsibility of Congress. Beyond that, you could simply be pointing to legislative regulations. I don't regard this as major point, but I'd appreciate some fleshing out of your distinction between legal issues and policy (political) issues and how you intend to use the information you glean for both legal and policy purposes.

## Your Specific Questions

Again, I use italics for your questions and boldface for my answers. When I say "No answer," that means although I believe I could give you a useful answer, I am choosing not to.

Defining "Brokerage Windows" – Scope. *The Department understands that a variety of different plan and investment arrangements may be encompassed by the terms "brokerage window," "self-directed brokerage account," and similar arrangements. For example, open mutual fund windows may permit participants to invest in hundreds or thousands of mutual funds. More limited mutual fund windows or "supermarkets" may permit participants to invest in any mutual fund on one or more of a particular vendor's platforms, but not necessarily every mutual fund on the market. Other brokerage accounts also offer participants access to a virtually unlimited number of individual stocks, exchange-traded funds, and other securities.*

*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?*

**I have no idea which ones are the most common. The ones I'm familiar with offer whatever the broker offers to retail customers, which is quite large number of securities. Of course, the offerings need to be limited in certain respects. For example, the offerings should not involve anything whose purchase would or could result in a prohibited transaction, or to any investment that might result in UBTI to the plan. In my experience, while such limitations are easy to put on paper, in practice they are easy for broker or other service provider to overlook. This is a risk.**

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

**This is probably a fool's errand. I can't trouble myself to come up with a definition, but take off on a well-know Supreme Court justice's remark about pornography, "I can't define it, I know a brokerage window when I see one."**

*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?*

**Yes, if you wish to include the mutual fund window as a brokerage window. I would not put a mutual fund window offering, say, fifty different mutual funds in the same category as your "open brokerage structure." The former is just a large number of designated investment options, to my way of thinking, and each such fund should be subject to full disclosure and fiduciary evaluation for appropriateness as such. I don't know how to define the difference (see answer to question 2 above), but simply basing the distinction on the "ultimate number of investment options" isn't going to work.**

Plan Investment Offerings – Brokerage Windows and Designated Investment Alternatives.

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

**In my experience they are largely the plans of small companies, privately-owned, in which prominent people in the company have large accounts. That's about it (again, just my experience).**

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

**I have no idea.**

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?

**Again, I really don't have a good idea. If I had to guess I'd say that the typical number is about ten (10), and staying relatively constant. The big players (*e.g.*, Fidelity, Vanguard) ought to have pretty good data. There are also organizations that do surveys of plans to gather such information, but given the nature of most of these surveys (poorly designed questions answered by lots of people who don't know what they are doing) I've never had much confidence in them.**

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

**Cannot answer.**

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

**See answers to questions 2 and 3 above.**

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?*

**Wild guess. About 5 percent of participants and 25 percent of assets. Good data ought to be available from the biggies.**

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

**No such data here, but in my anecdotal experience most, but certainly not all, of the users are more highly educated, make more compensation and are wealthier than those who don't.**

*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?*

**I'd say it's a fair mix of both – some go all the way, while others do not.**

*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.)?*

**In my experience there are no such limits at all.**

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

**Again, only anecdotally, the decision-making and outcomes tend to be on the poor side. However, <u>the same can be said</u> of participant decision-making and outcomes with respect to their choices and allocations among designated investment options.**

*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?*

**No benefits that I see to participants who do not use available brokerage windows. To those who do, the benefits are largely psychic, which can be quite important in the employer-employee relationship.**

<u>Selecting and Monitoring Brokerage Windows and Service Providers.</u>

*15. How many vendors does a plan fiduciary research or contact, on average, when deciding whether to include a brokerage window feature*

**Cannot begin to answer.**

*How do vendors typically market brokerage windows to their existing or potential plan clients?*

**My sense is that vendors do not market brokerage widows. Most would rather not have to offer them. In my experience, which is somewhat dated, the push comes from the employer side, to which the vendors must then respond, and vendors don't make the process easy.**

*16. Do plan recordkeepers 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?*

**The former.**

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

**Not that I know of. I'd guess that any such encouragement would be way below the level that the broker's retail customers are pushed toward 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?*

**No answer.**

*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.)?*

**Flexibility and increased investment options for participants and to facilitating the ability of participants to work with an adviser or a managed account provider are the two most common reasons.**

*What role, if any, do concerns about fiduciary responsibility or disclosure obligations play in deciding whether to add a brokerage window?*

**Little, if any, so far. What comes out of this project may change that.**

*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?*

**In my experience, "yes." A very detailed contract, or series of contracts, the principal purpose of which is/are to try to limit the exposure of the brokerage window provider and other players in the game from any legal liability resulting from a participant's investment choice(s) gone wrong. The contract(s) are between the plan sponsor, the person providing the brokerage window service, any other third-party administrator, and the plan's directed trustee.**

*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?*

**In my experience, "yes," in addition to the contract(s) referred to in my answer to the question in 19 above. When the plan fiduciary makes the contract(s) referred to in the answer to question 19 above, the fiduciary is aware of the contract the participants must sign as part of brokerage window "deal" the fiduciary has agreed to, and so implicitly approves the form and substance of the participant contract.**

*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?*

**No answer.**

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 my experience the fiduciary has complete access to information about specific investments. The fiduciary should have such access. However, monitoring is limited to trying to make certain that investments not permitted under the window do not slip through a crack and find their way into the plan – believe me, it happens.**

*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?*

**Yes. Periodically – such as monthly – certainly not daily.**

*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?*

**This sort of information should be demanded by the fiduciaries, and it certainly should cost very little, if anything, to provide. After all, the broker and/or recordkeeper must keep this information for the participants, and making it also available to the fiduciaries should be a simple matter.**

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?*

**Account maintenance fee, e.g., $50 - $100 annually & retail brokerage commissions (vary by broker), with both fees charged against the participant's account. Back door, the vendor may receive rebates from 12b-1 fees, etc., on mutual funds purchased through the window.**

*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?*

**Not in my experience.**

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

**Given the wide variety and chaotic nature of fee arrangements for plans, that is very difficult to say. Most of the income to the plan service providers is asset based – money directed to the providers from 12b-1 fees or other mutual fund sources. My sense is that providers look at plan revenues as a whole. The more money they can make from the plan, the more services they'll be willing to include in the package. The provider is not concerned whether individual participants share their fair burden of the costs.**

**I am unaware of any general asset based fees being imposed directly on broker accounts on top of commission costs and the nominal account maintenance fee, so in that sense an argument could be made that brokerage windows are at least partially subsidized by other participants. On the other hand, where mutual funds selected in the window provide 12b-1 rebates, etc., or there are extra charges when no 12b-1 rebate, etc., is provided, the subsidy is reduced.**

**Of course, the question of subsidization begs the question of, "what is subsidization." Remember that a 401(k) plan is not simply an aggregation of the individual (investment) accounts that comprise the plan, but as a whole an arrangement that involves complex systems of recordkeeping, reporting, testing (plan qualification rules), and other administrative tasks shared by the provider/recordkeeper and the employer.**

**As a "footnote," I'll add that 20 to 25 years ago I tried to have a discussion with the Department of Labor on behalf of my employer concerning fiduciary issues in the use of mutual fund 12b-1 rebates and the like to cover plan costs. I was rudely blown off by the man I spoke with. I am sure that you have more interest in this subject today.**

*27. How do the costs of investing through a brokerage window typically compare to investing in a plan's designated investment alternatives?*

**Hard to say. Sometimes the DIAs are going to cost more, and sometimes less.**

*How do the costs compare to investing outside of the plan, e.g., in an IRA?*

**Again, it depends on the individual case. For example, investing in a Vanguard mutual fund through a Vanguard IRA is going to be more economical than through a qualified plan not administered by Vanguard, whether through a brokerage window or otherwise. However, there may be other situations where a mutual fund investment through a plan could be less costly than through an IRA, depending on the size of the plan (including consideration of asset to account ratios). One thing you have to keep in mind is that the financial institutions that are 401(k) plan providers offer plans lots of services whose costs have to be covered somehow. Not so much with the IRA.**

*28. How significant of a factor to plan fiduciaries are these costs when deciding to add a brokerage window to their plan?*

**Somewhat significant. On the one hand, the employer is not going to offer a brokerage window where the costs are not reasonable. Once costs are in the reasonable range, then it's up to the participant to decide whether they are "reasonable enough."**

*How do plan fiduciaries monitor or oversee the fees and costs of a brokerage window, available investments, and related services?*

**Obtain complete fee and cost information from the vendor (which can be like pulling teeth at times), and do independent research.**

*How much discretion does a plan fiduciary have in negotiating brokerage commissions and other costs that presumably cannot be controlled by participants?*

**The fiduciary has all the discretion in the world to <u>negotiate</u>, but in most cases that won't get the fiduciary very far. Of course, the more profitable the plan for the provider <u>as a whole</u>, the easier it's going to be to get a break on window charges. But, it's still not going to be easy.**

<u>Disclosure Concerning Brokerage Windows and Underlying Investments.</u>

*29. Is the information required to be disclosed about brokerage windows by the Department's participant-level disclosure regulation sufficient to protect plan participants?*

**I haven't looked at the detail in the disclosure regulations (they're after my time), but regardless of the regulations, as a matter of general prudence, the fiduciary should make absolutely certain that participants are adequately informed of all of the "rules" of the window, including costs. This is not to say that the fiduciary is responsible for making certain that participants pay attention to and understand such information. Of course, the typical participant won't do either. Moreover, the fiduciary should not be required to provide detail about the individual investments available through the window.**

*Is this required information more or less than plans disclosed prior to the effective date of the regulation?*

**I would hope it is less, if anything, but I have no way of knowing.**

*Does this information usually come from plan administrators or from a third party, such as plan service or investment providers*

**The plan administrator.**

*What additional information, if any, is or should be disclosed to participants?*

**Cannot answer.**

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

**Cannot answer.**

*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?*

**Costs but not risks.**

*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?*

**Not in so many words.**

*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?*

**It's silly for an employer to offer managed account services through a 401(k) plan. The minefields far outweigh any potential benefits in the context of a 401(k) plan. However, if the employer does offer managed account services, then some employer related fiduciary should provide participants (or see that they are provided) with a broad range of information and disclosures. I'm not interested in commenting on what that might entail. On the other hand, if an employee wants to hire someone to manage his account through a brokerage window, then that's the employee's business and the employer should have no responsibility to get involved.**

The Role of Advisers.

**At the outset, the term "adviser" can mean many different thing. The most important thing to understand is the only truly worthwhile adviser (unbiased, unconflicted) is a totally independent one, and those birds are very, very difficult to find – in fact, it's practically impossible. (Ten years ago or so a plan provider who "advised" on investments and *purported* to act as a plan fiduciary who was trying to sell it services to my employer said, in my presence, "You don't have to worry about plan costs – the employees will be paying for them through the 12b-1 rebates we get." This was quite a prominent company. Needless to say we did not bite.)**

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?

**Cannot say.**

*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?*

**Cannot say how often, but it definitely happens. One model is for the "adviser" to have direct access to the participant's account to make investments. Another model is for the participant to do the mechanics of investing, with the "adviser" telling him or her what to do (i.e., what and when to buy and sell). Those are the only two models I am aware of.**

*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?*

**Again, a plan sponsor (employer) would be silly to do this. I suppose there must be such arrangements or you would not mention them, but if so I'm not familiar with the details.**

*36. How often do plan participants independently select advisers or other providers to assist with their investments through the brokerage window?*

**See answer to question 34 above.**

*Are plan fiduciaries, recordkeepers, or other service providers generally aware of these arrangements?*

**Yes, one or more of such persons would have to be if the advisor is directly managing the account, but not necessarily if the participant was working directly with the advisor, and then taking buy/sell action himself or herself, or the participant simply supplies the advisor with his or her personal information so the advisor can act as the participant.**

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."*

*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,*

**Yes, as to its selection and operation**

*as a plan feature,*

**No, that should be plan design issue, an employer decision, and with no fiduciary responsibility**

*with respect to the investments through the window.*

**No, except to make certain that no prohibited transaction investments (and maybe some other otherwise legally off-limit investments) and no investments that could generate UBTI are permitted.**

**But this is one place where the nature of the 401(k) plan comes into play. If the employer styles the plan as a retirement plan, then it may be that the employer/fiduciary should have responsibility to make certain that only "retirement quality" investments are permitted. However, the preferred 401(k) plan would not be styled as a retirement plan, but rather simply as a deferred compensation plan, and that out to take the "retirement quality" (and the like) issues out of the picture.**

*If guidance is needed, please try to identify the precise circumstances in need of guidance. If no guidance is needed, please explain why not.*

**No answer.**

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?*

**No.**

*If so, what level of transparency is appropriate, taking into account current technology and the administrative burdens and costs of increased transparency?*

**Not applicable, given my "no" answer to the prior question.**

*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?*

**The benefit statement provides, though normally through a separate document comprising part of the statement, a complete, detailed listing of the investments and other relevant financial information in the brokerage window part of the account.**

Respectfully submitted.

Anon.