



November 19, 2014

By U.S. Mail and Email: e-ORI@dol.gov

Office of Regulations and Interpretations
Employee Benefit Security Administration
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Re: RIN 1210-AB59 (Brokerage Windows RFI)

Ladies and Gentlemen:

The Securities Industry and Financial Markets Association is pleased to provide comments regarding the Department of Labor’s (“Department”) request for information (“RFI”) with regard to the use of brokerage windows in participant-directed individual account retirement plans covered by the Employee Retirement Income Security Act of 1974 (“ERISA”). We appreciate the opportunity to comment and hope that our comments can be the beginning of a meaningful dialogue to best understand how brokerage windows are used today.

We hope that as the Department undertakes their review of brokerage windows that they will also review the impact of any changes on retirement plan establishment and retention. Employer-sponsored retirement plans play an important role in helping ensure Americans are prepared for retirement. As of June 2014, 401(k) plans held \$4.4 trillion in assets, up from \$2.2 trillion ten years prior.¹ Participating in an employer-sponsored retirement plan is often the easiest and most convenient way for workers to save. Many employers offer automatic enrollment, tax-deferred payroll deductions, and matching contributions which incentivize employees to set aside money for retirement.

The Employee Benefit Research Institute (“EBRI”) found that 73 percent of workers earning a moderate income from \$30,000 to \$50,000 participated in an employer-sponsored plan when a plan was available.² Furthermore, according to an Investment Company Institute (“ICI”) survey,

¹ ICI. (2014, September). Frequently Asked Questions About 401(k) Plans. Retrieved from http://www.ici.org/policy/retirement/plan/401k/faqs_401k

² Retirement Plan Participation: Survey of Income and Program Participation (SIPP) Data, 2012. (2013). Employee Benefit Research Institute Notes, 34(8), p. 6. Retrieved, from http://www.ebri.org/pdf/notespdf/EBRI_Notes_08_Aug-13_RetPart-CEHCS1.pdf

51 percent of those surveyed said they probably would not be saving for retirement if they did not have access to an employer-sponsored plan.³

We are concerned that placing any new unnecessary burdens on employers that offer brokerage windows could particularly harm plan formation in the smaller plan space. We hope the Department will review this potential negative consequence carefully.

Defining open brokerage windows (Questions 1-3)

The Department requests information with regard to how best to define the term “brokerage window,” noting that there are a variety of different plan and investment arrangements that may be included in the term. The RFI correctly notes that this could include an unlimited number of stocks, exchange-traded funds (“ETFs”) and other securities. The form of a brokerage window may include only mutual fund options, or more limited arrangements, such as one family of funds. All such arrangements, however, are distinguished clearly from specific investment funds that have been designated by the employer on a plan menu.

We believe the Department has already addressed any ambiguity surrounding what constitutes a brokerage window or similar arrangement through its clarification of what constitutes a “designated investment alternative” in Q&A 39 of Field Assistance Bulletin 2012-02R. In that Q&A answering the question of whether a brokerage window or similar arrangement – with respect to which a fiduciary did not designate any of the funds on a platform – constitutes a “designated investment alternative,” the Department answered “no”; explaining that “[w]hether an investment alternative is a ‘designated investment alternative’ (DIA) for purposes of the regulation depends on whether it is specifically identified as available under the plan.”

In the same answer, the Department also made clear that, with respect to brokerage windows and similar arrangements, fiduciaries of the plan are still bound by “ERISA section 404(a)’s statutory duties of prudence and loyalty to participants and beneficiaries . . . including taking into account the nature and quality of services provided in connection with the platform or brokerage window” It would follow that the disclosure requirements similarly apply to such arrangements.

Should the Department determine that an additional definition of “open brokerage window” is necessary, we suggest the Department consider defining it as an investment option under an individual account plan that generally permits a participant to invest in any investment option available on the brokerage window provider’s platform; provided that the investment options which participants are permitted to invest in may be limited by the plan sponsor.

Plan investment offerings (Questions 4-8)

The Department asks whether there are particular characteristics of plans that offer brokerage windows. We find there to be substantial variety in the plans that offer brokerage windows, and that such options are offered in both large and small plans.

³ Holden, S. and Bass, S. (2013). America’s Commitment to Retirement Security: Investor Attitudes and Actions, 2013. (p. 12,fig 6). Washington, DC: Investment Company Institute. Retrieved from http://www.ici.org/pdf/ppr_13_retir_sec_update.pdf

In the large plan market, brokerage windows tend to be offered in addition to a core investment menu. In these instances, windows are added to accommodate participants who desire to customize their portfolio through a broader array of investment options without adding dozens of extra funds to the base plan line-up. Plan sponsors consider factors such as how savvy their participants are as investors, corporate culture, participant demographics, regulations and fiduciary responsibility, product development and new trends and innovations when deciding whether to offer a brokerage window.

In the small plan market, some plans utilize an open brokerage window to offer participants a broad range of investment alternatives where it would not be economically feasible to offer a diverse menu of core investment options under the plan due to the costs and administrative burdens of the recordkeeping that would be required. Such a plan design can be offered with very little administrative costs and burdens and, therefore, serves as an important option for employers who would not otherwise offer their employees the opportunity to save for retirement in the workplace. We understand that, as account balances grow, smaller employers often migrate from a brokerage window only structure to a more traditional plan with designated investment alternatives. We believe that it is critical that the Department consider any unintended consequences attendant to a rulemaking that may serve to limit or discourage the ability of smaller employers to offer plans to their employees even if, in the early years, the plan design is limited.

We note one additional point relating to the Department's question as to whether there is a "perfect" number of investment options to offer. Since there is so much variety in plan participants' knowledge and education and risk tolerance, there is no perfect number. We believe such determinations are best left to plan sponsors who are most familiar with the interests and needs of their employees.

Selecting and monitoring brokerage windows and service providers (Questions 15-21)

As noted earlier, it has long been recognized that the selection of a service provider is subject to ERISA's fiduciary standards of prudence and loyalty. Again, we believe the guidance provided by the Department to date is sufficient to ensure a fully informed prudent process for making determinations associated with implementing and offering a brokerage window as part of a retirement plan.

The Department asks for information about the usage of affiliated brokerage services and/or usage of proprietary funds. We find that there are a variety of arrangements. For some arrangements, the brokerage services are affiliated. For many others, the offerings are unaffiliated. In most cases, the options are limited to one or two brokerage window providers because the plan service providers need to be able to manage the offerings from an operational standpoint.

The provider's use of affiliated brokerage services or use of proprietary funds is among the factors that a fiduciary considers when selecting their provider. The fiduciary would be aware of the brokerage window offerings, whether affiliated or not.

The Department inquires about the contractual relationships between parties and who is typically the party to the contract when a plan fiduciary selects a brokerage window feature for a plan. When there is an open brokerage window offered under a plan, there is usually a plan brokerage agreement, or recordkeeping agreement, in place with the plan (e.g. trustee, plan sponsor, employer). Once that contract is in place, then the brokerage window provider often enters into agreements with the individual plan participants who would be utilizing the brokerage window.

The Department asks about the role, if any, that plan fiduciaries play in the selection of brokers, advisers or other service provider to a brokerage window. In addition, the Department asks how plan fiduciaries monitor the performance of these service providers, if at all. Historically, the Department has held that the plan fiduciaries must prudently select and monitor a brokerage window provider and furnish participants with key information about the brokerage window option. A plan fiduciary has a responsibility to assess the nature and quality of the services to be provided when selecting an appropriate brokerage window provider and to monitor that provider to ensure it is meeting the requirements of its contract. It would be extremely difficult, if not impossible, for a plan sponsor to look through the window to monitor the performance of the brokers, advisers or other service providers to a brokerage window. Imposing such a requirement could lead to the elimination of brokerage window options under many plans.

Fiduciary access to information about brokerage window investments (Questions 22-24)

The Department asks about the technological or other challenges that exist which may reduce the feasibility or increase the cost of compiling information to plan fiduciaries with regard to the investments within the brokerage window. Today, the plan (e.g. trustee, plan sponsor, employer) can request the statements for all of the plan participants who elect to use self-directed brokerage accounts and see a snapshot of the participant's investments within the brokerage window.

However, plan sponsors generally do not undertake to regularly monitor participants' investment selections within their brokerage windows because such monitoring would be cost and resource prohibitive and is not required in the context of a participant-directed plan. These costs would be dependent on a variety of factors based on how many relationships there might be with various other vendors. For example, if the plan uses one provider for the brokerage window, and it already shares the same platform, it could possibly be accomplished within a reasonable amount of time for a reasonable amount of money. However, if there are multiple different advisors and multiple different brokerage relationships and if they are on multiple different platforms, then each of those conditions increases the costs exponentially.

Brokerage window costs (Questions 25-28)

The Department asks about the most common costs associated with participation in a brokerage window, and whether these costs are borne by the plan sponsor or the plan, as opposed to the individual plan participants. In the small plan market, these costs are typically borne by the individual participants. Each participant generally pays the fees related to their own plan investments. In the large plan market, individual participants who choose to utilize a brokerage window typically pay additional fees related to that investment option that participants who only

invest in the plan's core investment options do not pay. In both situations, this is determined by the plan fiduciary who determines how to allocate the overall costs of the plan.

We note that, pursuant to guidance issued by the Department (Field Assistance Bulletin 2003-03), plan sponsors, in their capacity as settlors, have considerable flexibility in allocating costs among plan participants and plan fiduciaries, unless contrary to ERISA, and are obliged to follow such terms. We further note that, in the absence of specific plan language, plan fiduciaries also appear to have considerable flexibility with regard to allocating such costs. We believe this guidance has served both plan sponsors and plan fiduciaries very well over the years and, accordingly, we encourage the Department to refrain from proposing piecemeal changes to these well-established principles.

Disclosure concerning brokerage windows and underlying investments (Questions 29-32)

The Department asks whether the information required to be disclosed about brokerage windows by the Department's participant-level disclosure regulations provides an appropriate level of protection. We appreciate the effort the Department undertook to implement that disclosure regulation, and understand that plan sponsors are pleased with the results. Our members spent a significant amount of money and time creating the disclosure, with participation of business staff, supervisory staff, compliance staff, internal and external legal counsel, computer programmers and others. We believe that this disclosure, which became effective in 2012, provides plan participants with the information they need to make informed decisions.

Individuals who elect to participate in a brokerage window typically receive general information about the brokerage window options from the plan through the plan's normal communications channels (e.g. website, mail). In addition, they receive more detailed information directly from the provider of the open brokerage window. Many brokerage window providers require individuals to complete additional forms or agreements that include additional disclosures. Sometimes there are additional disclosures under Securities and Exchange Commission ("SEC") and Financial Industry Regulatory Authority ("FINRA") rules due to an individual choosing a particular investment.

Fiduciary duties (Question 37)

The Department asks whether they should be considering additional guidance in relation to brokerage windows and ERISA's fiduciary provisions. We believe the Department adequately addressed most issues in its issuance of FAB 2012-02R. We do not feel there is a need for additional guidance in this space. Open brokerage windows seem to be working well for the participants and plan sponsors who choose to utilize them. We have seen no data that indicates there is a problem with these investment options being used by participants as a means to prepare for retirement. Further, we are concerned that any additional responsibilities, beyond those that a plan fiduciary currently has, would discourage plan sponsors from offering brokerage windows and, in some cases, any 401(k) plan option to their participants in the small plan market. As noted earlier, studies show great benefits to individuals who have an opportunity to participate in a workplace retirement plan. We are further concerned that additional disclosure or required fiduciary oversight will, in those instances where a brokerage window is retained, only result in

increased plan costs; costs that are passed on to participants and serve to reduce retirement savings.

Annual reporting and periodic pension benefit statements (Questions 38-39)

The Department asks whether they should consider changing the reporting on Schedule H which currently 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, to a requirement to provide more detail and transparency regarding these investments. We believe that such a requirement would increase costs and burdens for plan sponsors with no benefit. We are unclear as to the purpose of having this additional data on the Schedule H.

The Department also asks about the benefit statements that are required to be furnished to plan participants. In the large plan market, information about the investments in the brokerage window is on both the plan statement and on a separate statement from the provider of the brokerage window to the individual plan participant. In the small plan market, information about the investments in the brokerage window is provided directly to the individual participant. We should note that any requirement that this information be aggregated into a single disclosure could involve significant costs for many plans and their participants, again, without any definable or supportable benefit. As indicated earlier, we are unaware of any participant disclosure problems directly resulting from the offering of a brokerage window.

Conclusion

We appreciate this opportunity to provide our insights with regard to the Department’s review of open brokerage windows. We would welcome any follow-up questions.

Sincerely,

A handwritten signature in black ink that reads "Lisa J. Bleier". The signature is written in a cursive, flowing style.

Lisa J. Bleier
Managing Director and Associate General Counsel