



November 18, 2014

Submitted Electronically

The Honorable Phyllis C. Borzi
Assistant Secretary
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Re: RIN 1210—AB59 (Brokerage Windows RFI)

To Whom It May Concern:

On behalf of the U.S. Chamber of Commerce, we are writing this letter in response to the request for comments on the Request for Information Regarding Standards for Brokerage Windows in Participant-Directed Individual Account Plans issued by the Department of Labor (“DOL”) on August 21, 2014.

The Chamber is the world's largest business federation, representing more than three million businesses and organizations of every size, sector, and region. More than 96 percent of the Chamber's members are small businesses with 100 or fewer employees, 70 percent of which have 10 or fewer employees. Yet, virtually all of the nation's largest companies are also active members. The Chamber is particularly cognizant of the problems of smaller businesses, as well as issues facing the business community at large. Besides representing a cross-section of the American business community in terms of number of employees, the Chamber represents a wide management spectrum by type of business and location. Each major classification of American business—manufacturing, retailing, services, construction, wholesaling, and finance—is represented. Also, the Chamber has substantial membership in all 50 states. Positions on national issues are developed by a cross-section of Chamber members serving on committees, subcommittees, and task forces. More than 1,000 business people participate in this process.

Introduction

On May 7, 2012, the Department of Labor (“DOL”) issued Field Assistance Bulletin 2012-02, providing Frequently Asked Question (FAQ) guidance on the participant disclosure regulations and, to a limited extent, the 408(b)-2 regulations. Q&A-30 of the Field Assistance Bulletin generated a great deal of concern.

After concerns were raised by interested parties, the Department of Labor subsequently issued a revised FAQ, as Field Assistance Bulletin 2012-02R, clarifying its position on the treatment of open broker windows in 401(k) plans. The clarification removes several of our concerns including the requirements 1) to monitor investments inside the brokerage window; 2) to consider whether certain investments inside the brokerage window should be designated investment alternatives and 3) to determine whether there are a “manageable number” of investment options. The revised FAQ clarifies that plan sponsors must provide fee information concerning the brokerage window itself but limits the plan sponsors’ obligations with respect to investments inside the window. This position is much more in line with the previous regulatory guidance from the DOL.

In August of this year, the DOL issued a Request For Information (“RFI”) to determine whether and to what extent regulatory standards or other guidance concerning the use of brokerage windows by plans are necessary to protect participants’ retirement savings. The RFI asks a number of detailed questions. The Chamber does not collect this type of information; however, we would like to share our concerns about changing any guidance surrounding open brokerage windows in retirement plans. As stated above, the Chamber believes that the clarification issued in the revised FAQ (FAB 2012-02R) is consistent with previous DOL guidance and does not need further amendment. Moreover, any change to the current guidance could discourage the use of brokerage windows and take away the flexibility they currently provide to plan sponsors.

Comments

Current Guidance Surrounding Open Brokerage Windows is Consistent with Previous Guidance and Should Remain in Place. Since 1992, when the DOL adopted its regulation under ERISA Section 404(c), plan fiduciaries have understood that they have certain duties regarding the prudent selection and monitoring of “designated investment alternatives.” The Section 404(c) regulation defined the term “designated investment alternative” to mean “a specific investment identified by a plan fiduciary as an available investment under the plan,”¹ which would not include investments selected and made by individual participants through a brokerage window. The Section 404a-5 regulation similarly applies to “designated investment alternatives,” which are defined in a manner that is similar to the Section 404(c) regulation as: any investment alternative designated by the plan into which participants and beneficiaries may direct the investment of assets held in, or contributed to, their individual account. The term ‘designated investment alternative’ shall not include ‘brokerage windows,’ ‘self-directed brokerage accounts,’ or similar plan arrangements that enable participants and beneficiaries to select investments beyond those designated by the plan.²

Even the recently adopted amendment to the Section 404(c) regulation to provide that Section 404(c) “does not serve to relieve a fiduciary from its duty to prudently select and monitor any service provider or designated investment alternative offered under the plan” is clear on its face

¹ 29 C.F.R. § 2550.404c-1(e)(4).

² 29 C.F.R. § 2550.404a-5(h)(4).

that it does not apply to brokerage windows. Further, aside from the original FAB 2012-02, at no time following the adoption of the Section 404(c) regulation in 1992 did the DOL ever express, or even suggest, that plan fiduciaries may have a duty to monitor investments selected by participants through a brokerage window.³ Brokerage windows have long been understood as mechanisms by which plan participants may invest in a wide range of stocks, mutual funds and other investments not otherwise specifically designated by the plan as available for investment. To change this understanding now would upset decades of previous guidance and negatively impact the ability of employers to provide certain investment options to their employees.

Open Brokerage Windows Provide Needed Flexibility. Plan sponsors take seriously their obligation to provide prudent investment options for their participants. At the same time, plan sponsors want to accommodate the investment wishes of their participants to encourage them to participate in the plan. Including an open brokerage window allows plan sponsors to fulfill both of these needs. For example, a participant may desire exposure to additional market segments, have an interest in a different investment manager, or have some other interest in greater diversification than that available through the plan's core investment line up. Particularly with narrow sector funds, plan sponsors do not want to expand the core fund line up to include a laundry list of sector funds, but some participants seek exposure to a particular segment of the market and appreciate the chance to do so through a brokerage window. Consequently, a brokerage window allows the plan sponsor to satisfy the participant's investment desire for a broader array of investment options without unduly expanding the core investment platform.

Conclusion

We reiterate our belief that no change to current guidance surrounding brokerage windows is needed. If, however, the DOL intends to pursue changes, we will work with you to ensure that any such changes address the agency's concerns without unduly burdening plan sponsors or participants. Thank you for your consideration of these comments.

Sincerely,



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U.S. Chamber of Commerce



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³ Indeed, the Department's own Section 404(c) regulation is entirely to the contrary. It provides as follows: A participant, P, independently exercises control over assets in his individual account plan by directing a plan fiduciary, F, to invest 100% of his account balance in a single stock. P is not a fiduciary with respect to the plan by reason of his exercise of control and F will not be liable for any losses that necessarily result from P's investment instruction. See 29 C.F.R. 2550.404c-1(f)(5). It is noteworthy that the Department did not condition its conclusion by saying "if F prudently monitors P's investment decisions."