



Financial Security...for Life.

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

**RE: RIN 1210-AB59 Request for Information Regarding Standards for Brokerage Windows in Participant-Directed Individual Account Plans**

Dear Sir or Madam:

On behalf of the American Council of Life Insurers (“ACLI”), we are writing in response to the Department of Labor’s (“Department’s”) request for information (“RFI”) published on August 21, 2014 (79 FR 49469). The RFI posits 39 questions regarding brokerage windows in participant-directed individual account plans. The questions are focused on investments that have not been “designated” and are available to plan participants without endorsement by the plan sponsor. The Department plans to determine whether there should be standards or other guidance regarding these investments to protect participants’ retirement savings.

The ACLI represents more than 300 legal reserve life insurer and fraternal benefit society member companies operating in the United States. These member companies represent over 90% of the assets and premiums of the U.S. life insurance and annuity industry. ACLI member companies offer insurance contracts and other investment products and services to qualified retirement plans, including both defined benefit pension and 401(k) arrangements, and to individuals through individual retirement arrangements (IRAs) or on a non-qualified basis. ACLI member companies also are employer sponsors of retirement plans for their own employees.

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ERISA was enacted to protect plan participants and beneficiaries from the actions of persons with authority over the plan and its assets. ERISA Section 404(a) requires plan fiduciaries to “diversify the investments of the plan so as to minimize the risk of large losses...” ERISA Section 404(c) provides that a plan fiduciary is not liable for any loss, or by reason of any breach, which results from a participant exercise of control. In general, these provisions operate to place responsibility for investment diversification and the minimization of the risk of large losses on the individual with control over the investment of plan assets.

On October 10, 2010, the Department issued a final rule under ERISA §404(a)<sup>1</sup> (“Final Rule”) to ensure that plan participants had sufficient information to make an informed investment decision with respect to the investments designated by the plan sponsor. The rule requires plans to provide specific investment related disclosures. This requirement does not apply to investments held in a brokerage window or similar arrangement. However, the final rule does require the plan to clearly inform participants of individual, non-investment related expenses which include “fees for brokerage windows.”

## **Brokerage Windows and Similar Arrangements**

### Services to Plans With Designated Investment Alternatives

Among the services provided by ACLI member companies to defined contribution plans is access to brokerage windows. It is common for an ongoing service fee for brokerage windows to be charged to the participant’s individual account on an annual or quarterly basis. When these windows are provided as an accommodation at the request of the plan sponsor in plans that also have designated investment options, it is not uncommon for plans to limit investment transfers to brokerage windows to a percentage of a participant’s individual account. While ACLI does not have industry survey data, members do report that the utilization of these arrangements is low, usually by participants with account balances above the median, and that assets held in these arrangements typically represent a small percentage of the plan’s total assets.

### Services to Plans Without Designated Investment Alternatives

ACLI members also provide annuity contracts used to fund retirement plans for sole proprietorships through “solo 401(k) plans” and businesses with very few employees. In such cases, the business owner is plan sponsor, trustee and a participant. These plans may take different forms. Arrangements may provide for a third party registered investment adviser (RIA) solution that is facilitated by a brokerage account. Plans may also be set up with individual contracts through which individuals select from a large universe of investment funds without the services of an investment adviser; these may be facilitated by a brokerage account. The third party solution or brokerage account provider typically is selected by the sponsor, acting as an ERISA fiduciary. In these instances it would be rare, given the costs, to also offer a selection of designated investments. For these plans, it is important to note that without the brokerage account or similar arrangement, there would generally be no plan.

When determining whether to sponsor a retirement plan, a significant issue facing small employers is whether the plan has or will have sufficient scale to bear the expense of hiring a plan recordkeeper and setting up a trust. While a \$1,500 flat startup recordkeeping cost may be insignificant for a \$10 million plan, it is clearly an inhibitor for a plan with only a few employees. As these arrangements must balance the value of administrative ease with attendant costs, it is common for very small plans to use one or more broker-dealers or insurance companies without hiring a recordkeeper and creating a core line-up. This is similar to arrangements for Simplified Employee Pension

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<sup>1</sup> §2550.404a-5 Fiduciary requirements for disclosure in participant-directed individual account plans.

arrangements and SIMPLE IRAs, arrangements which do not involve the designation of investment alternatives. Further, the use of insurance contracts avoids the need to establish a separate trust.

Whether a small plan operates with or without an investment adviser, plan participants are afforded broad discretion as to the investments, without the implicit or explicit endorsement of any investment by the sponsor. In this context, the investor protections and standards in state and federal law today are sufficient to protect these plan participants. These plans play an important role in securing resources for retirement; additional regulatory burdens may have a chilling effect on small business owners and their willingness to establish, maintain or retain qualified retirement plans for their employees.

We caution the Department against adopting rules that would impose new administrative burdens, costs or fiduciary responsibilities on brokerage windows. Such burdens, costs and responsibilities may only serve to drive very small employers away from offering their employees the opportunity to save for retirement in the workplace. We need expanded opportunities for retirement savings in the small plan space (such as multiple employer plans), not fewer. We understand that very small employers that begin offering a retirement plan with only a brokerage only investment platform often migrate to more traditional 401(k) plan offerings as they grow. We need to be careful not to remove such starter plan frameworks from the options currently available to smaller employers.

### **Current Department Guidance of Brokerage Windows**

The Department has already provided useful guidance regarding brokerage windows. On July 30, 2013, the Department issued Field Assistance Bulletin No. 2012-02R (the "Bulletin"). The Bulletin offers plan fiduciaries and service providers very useful guidance regarding mutual fund platforms and brokerage windows. Q&A 39 includes a fact pattern in which a plan offers an investment platform that includes a brokerage window, self-directed brokerage account, or similar plan arrangement. The fiduciary did not designate any of the funds on the platform or available through the brokerage window, self-directed brokerage account, or similar plan arrangement as "designated investment alternatives" under the plan. In response to whether the platform or the brokerage window, self-directed brokerage account, or similar plan arrangement is a designated investment alternative for purposes of the regulation, the Department makes clear that it is not.

In the Answer, the Department notes that whether 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*. The Department notes that the Final Rule does not require that a plan have a particular number of DIAs. The Department makes clear that nothing in the Bulletin prohibits the use of a platform or a brokerage window, self-directed brokerage account, or similar plan arrangement in an individual account plan and that the Bulletin does not change the 404(c) regulation or the requirements for relief from fiduciary liability under section 404(c) of ERISA or address the application of ERISA's general fiduciary requirements to SEPs or SIMPLE IRA plans.

The Department notes that fiduciaries of plans with platforms or brokerage windows, self-directed brokerage accounts, or similar plan arrangements that enable participants and beneficiaries to select investments beyond those designated by the plan are bound by ERISA section 404(a)'s statutory duties of prudence and loyalty to participants and beneficiaries who use the platform or the brokerage window, self-directed brokerage account, or similar plan arrangement, including taking into account the nature and quality of services provided in connection with the platform or the brokerage window, self-directed brokerage account, or similar plan arrangement.

This guidance is useful and sufficient. Participants receive the protections afforded to the general investing public under securities law, state insurance law, etc., and receive the same disclosures

provided to individuals investing on their own. The focus of the Final Rule was disclosure of investment selected and endorsed by the plan fiduciary. These funds are typically institutional funds in which the plan fiduciary is provided with the relevant disclosures and makes an informed decision about whether to designate/endorse the investment.

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We hope that our comments will prove helpful to the Department in better understanding the broad range of plans and markets that are operating within the retirement plans industry, and the ways in which disclosure requirements serve plans ranging from the very small to the very largest.

Plans with sufficient resources adopt designs with designated investment alternatives. Some plans have added brokerage window to satisfy participants who are not fully satisfied with the plan's limited fund offering. For these situations, the most important disclosure element is the distinction between the plan menu investment options, which have been selected by and are monitored by the plan sponsor, and those available through a brokerage window, whose main distinction is that they have not. We would like to emphasize that we believe that the current regulatory regime is effective in this regard and does not need to be changed.

For small plans, of necessity, the brokerage window or similar arrangement may represent the entire plan. ACLI expects that it is a challenge to operate a micro business. As is clear from the BLS data, these businesses have the lowest levels of workplace coverage. More should be done to encourage plan sponsorship. Even for plans without designated investments, there are costs to businesses that offer a retirement plan. We urge the Department to recognize the important role that such firms have in facilitating retirement savings and security through workplace payroll deduction, and not to impose new burdens on these plans and the business owners that make them possible.

Sincerely,



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