

November 18, 2014

Mr. Joe Canary, Director
Office of Regulations and Interpretations
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Ave., NW, Room N-5655
Washington, D.C. 20210

Re: Request for Information Regarding Standards for Brokerage Windows in Participant-Directed Individual Account Plans – RIN 1210-AB59 (Brokerage Windows RFI)

Dear Mr. Canary:

The American Bankers Association¹ (ABA) appreciates the opportunity to provide comments on the Request for Information (RFI) regarding standards for brokerage windows in participant-directed individual account plans (participant-directed plans). A “brokerage window” is a defined contribution plan, or an investment option within an existing participant-directed plan, which allows a plan participant to select from a much larger number of investments than would ordinarily be available through a typical defined contribution plan. The Employee Benefits Security Administration (EBSA) of the U.S. Department of Labor (DOL) has issued the RFI to assist DOL staff in determining whether, and the extent to which, regulatory standards or other guidance concerning the use of brokerage windows by plans are necessary to protect participants’ retirement savings.² DOL’s purpose in issuing the RFI is to increase the agency’s understanding of the prevalence and role of brokerage windows in participant-directed plans.³ DOL’s announced objective is to ensure “that participants are not exposed to undue risks from brokerage windows and that plan fiduciaries properly understand the scope of their ongoing responsibilities with respect to brokerage windows.”⁴

ABA commends DOL for employing the RFI process as the starting point for determining whether further regulation of brokerage windows is necessary. This will allow DOL to collect information from industry sources and interested parties, which information then can be

¹ The American Bankers Association is the voice of the nation’s \$15 trillion banking industry, which is composed of small, regional, and large banks that together employ more than 2 million people, safeguard \$11 trillion in deposits, and extend more than \$8 trillion in loans. Many of these banks are plan service providers, providing trust, custody, and other services for institutional clients, including employee benefit plans covered by the Employee Retirement Income Security Act (ERISA). Learn more at www.aba.com.

² See EBSA, Request for Information Regarding Standards for Brokerage Windows in Participant-Directed Individual Account Plans, 79 Fed. Reg. 49,469, 49,471 (Aug. 21, 2014) (RFI).

³ See *id.* at 49,471.

⁴ *Id.*

reviewed to evaluate how plans offer and maintain brokerage windows as an investment option and which fiduciary or other legal or regulatory issues their use might raise. Because brokerage windows provide many benefits to participants, and because there have been few if any reported mishaps or abuses involving brokerage windows, we would encourage DOL to proceed with a proposed rulemaking only if the evidence gathered from the RFI process and the focus groups clearly shows that (i) participants are experiencing direct, tangible harm from the inclusion of a brokerage window as a plan investment option; and (ii) any demonstrated harm to participants, or other agency concerns can be corrected only through rulemaking and/or regulatory guidance, as opposed to alternative, less intrusive regulatory tools, such as the supervisory and examination process.

I. Overview of the RFI.

The RFI contains 39 questions that are intended to inform DOL on the retirement plan industry's use and experience with brokerage windows. The questions include: (i) how a brokerage window should be defined (Questions 2); (ii) how a plan fiduciary selects and monitors brokerage windows and service providers (Question 21); (iii) what the costs are for participation in a brokerage window (Question 25); and (iv) what disclosures are provided to participants who elect to participate in a brokerage window (Question 30).⁵ We are responding to Question 37, which states:

37. *Do these questions [contained in the RFI] 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 [a] brokerage window itself, as a plan feature, and with respect to the investments through the window? If guidance is needed, please try to identify the precise circumstances in need of guidance. If no guidance is needed, please explain why not.*⁶

Responses to the questions posed in the RFI should greatly assist DOL in determining the need for regulatory guidance. The questions themselves, however, do not infer a need for agency action. As described below, we believe that existing fiduciary obligations under section 404(a) of ERISA are sufficiently clear to regulate and to hold plan fiduciaries responsible for their decision to include a brokerage window among their plan investment options. Therefore, in the absence of clear evidence to the contrary – as revealed in responses to the RFI – we do not believe that an agency rule, interpretation, or guidance concerning the establishment and maintenance of a brokerage window in a participant-directed plan is necessary or appropriate.

II. Plan Fiduciary Requirements in Establishing and Maintaining a Brokerage Window Investment in Participant-Directed Plans.

Plan fiduciaries are generally bound by ERISA section 404(a)'s statutory duties of prudence and loyalty, including taking into account the nature and quality of services that are provided in

⁵ *Id.* at 49,471-49,472.

⁶ *Id.* at 49,473.

connection with offering and maintaining a brokerage window.⁷ ERISA appears to permit a plan, in its discretion, to offer a brokerage window as an investment option under a participant-directed plan, provided that the duties of prudence and loyalty under section 404(a) have been met, including consideration of the provider's qualifications, the quality of services to be provided, and the provider's fees, which must be reasonable.⁸ The plan fiduciary also must ensure that the brokerage window is made available to all participants.⁹

Once the brokerage window is established, the plan fiduciary must comply with the section 404a-5 disclosure requirements to participants. These disclosures, which include an explanation of fees and expenses charged to the participant's account, are detailed in Question 13 of the DOL's FAB 2012-02R on disclosure guidance under section 404a-5.¹⁰ At a minimum, the disclosures must include "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 window . . . differs from the plan's designated investment alternatives and whom to contact with questions)."¹¹ The participant also must receive the quarterly dollar amount disclosures related to the individual expenses that are charged against the participant's account.¹² A plan fiduciary providing these disclosures, together with satisfying the prudence and loyalty requirements as described above, should be able to rely on the protections afforded to ERISA fiduciaries under section 404(c).

III. Proposed Rules Must Have Compelling Need.

In the RFI, DOL states that information collected from the RFI process, among other things, "will assist the Department in preparing any analyses that it may need to perform pursuant to Executive Order 12866."¹³ Executive Order 12866 provides that, in the absence of a legal requirement for a regulation or a necessity to interpret the law, agencies should publish *only* such regulations that "are made necessary by a compelling public need."¹⁴ Consequently, before DOL considers any proposed regulation, the information gathered from the RFI process should clearly indicate that there are significant and widespread problems being reported on the offering or operation of brokerage windows.¹⁵

Consistent with Executive Order 12866, therefore, we believe DOL should not proceed with a proposed rule, or a regulatory release, interpretation, or other form of agency guidance (*e.g.*, Field Assistance Bulletin) unless it is clear from the information reviewed from the RFI process

⁷ See DOL Field Assistance Bulletin (FAB) 2012-02R (July 30, 2012).

⁸ See DOL Field Assistance Bulletin (FAB) 2007-01 (Feb. 2, 2007), discussing the selection of an investment advisor for participants.

⁹ See Treas. Reg. § 1.401(a)(4) – 4(c).

¹⁰ See DOL FAB 2012-02R, Q-13.

¹¹ *Id.*

¹² *Id.*

¹³ RFI, 79 Fed. Reg. at 49,469.

¹⁴ Executive Order 12866 (Oct. 4, 1993).

¹⁵ The RFI does not cite any actual problems or issues that have arisen with brokerage windows, nor does it refer to any instances of reported harm caused to participants who have a brokerage window investment option in their plans.

that participants are being harmed from the presence of brokerage windows in plans' investment line-ups. Moreover, should there be adequate evidence to substantiate the existence of harm, DOL should further conclude that such harm cannot be addressed by the supervisory or examination process before proceeding with proposed regulatory rulemaking or guidance.

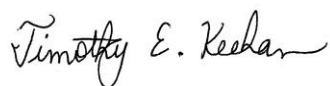
For instance, where there may be isolated instances of harm or damage to participants' retirement savings through a brokerage window, DOL should first determine whether these occur due to a particular plan fiduciary's insufficient oversight of the brokerage window provider, or a plan's inadequate disclosures made to participants under Rule 404a-5. If so, this is readily and effectively remedied at the supervisory level, where corrective action (and if necessary, regulatory sanctions) may be ordered. On the other hand, imposing unnecessary regulatory requirements on the entire retirement services industry to address a small or isolated problem would be both costly and unnecessarily burdensome, and may lead plans to forego including a brokerage window option, thus reducing and limiting investment choices for participants. We therefore urge DOL to employ these other regulatory tools before considering regulatory action.

IV. Conclusion.

For the reasons stated above, we believe that DOL, at the conclusion of the RFI process, should move forward with a proposed rule, interpretation, or guidance on the establishment and use of brokerage windows in participant-directed plans only if: (i) the information collected from the RFI clearly show that plan participants are being harmed from the inclusion of a brokerage window as a plan investment option, and (ii) the harm cannot effectively be addressed or mitigated by DOL's supervisory and examination process.

Thank you for your consideration of these views. If you have any questions or require any additional information, please do not hesitate to contact me at 202-663-5479.

Sincerely,

A handwritten signature in cursive script that reads "Timothy E. Keehan".

Timothy E. Keehan
Vice President & Senior Counsel