

MEMO# 28347

August 27, 2014

DOL Issues Request for Information on Brokerage Windows; Conference Call Scheduled for September 11

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TO: PENSION COMMITTEE No. 19-14

PENSION OPERATIONS ADVISORY COMMITTEE No. 18-14 RE: DOL ISSUES REQUEST FOR INFORMATION ON BROKERAGE WINDOWS; CONFERENCE CALL SCHEDULED FOR SEPTEMBER 11

The Department of Labor (DOL) has published a Request for Information (RFI) regarding standards for brokerage windows in participant-directed individual account plans. [\[1\]](#) Responses to the RFI are due November 19, 2014. As we previously reported, in its most recently updated Regulatory Agenda, DOL indicated that it expected to issue the RFI regarding brokerage windows in May 2014. [\[2\]](#)

The Institute will hold a conference call for the Pension Committee and Pension Operations Advisory Committee on Thursday, September 11, 2014 at 3pm ET to discuss the Institute's potential response to the RFI. If you would like to participate in the call, please respond to Brenda Turner (bturner@ici.org or by phone at 202-326-5820) by close of business on Wednesday, September 10, 2014. To participate, please dial 1-888-603-7098 and enter passcode 51029. For purposes of this call, please consider in advance any information or data relevant to the RFI that your company may want to share and any questions raised in the RFI that you believe the Institute should address.

As you may recall, in Field Assistance Bulletin 2012-02R (which provided answers to frequently asked questions regarding the participant-level disclosure regulation), DOL added Q&A 39 in which it confirmed that a platform or a brokerage window, self-directed brokerage account, or similar plan arrangement in which the fiduciary did not designate any of the funds available through the platform or window as designated investment alternatives ("DIA") is not itself a DIA. [\[3\]](#) In the same answer, DOL reminded fiduciaries of their statutory duties of prudence and loyalty to participants who use brokerage windows and stated that it intended to engage in discussions with interested parties to determine how best to assure compliance with these duties in a practical and cost effective manner, including, if appropriate, through amendments of relevant regulatory provisions.

The RFI states that its purpose is to increase the DOL's understanding of the prevalence and role of brokerage windows in participant-directed individual account plans covered by ERISA. According to DOL, the RFI focuses 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. In the RFI, DOL states that it wants to make sure 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. DOL states that the information received in response to the RFI will assist it in determining whether, and to what extent, regulatory standards or safeguards, or other guidance, are necessary to protect participants' retirement savings.

The RFI asks questions in each of the following categories:

- **Defining "Brokerage Windows" – Scope.** In this category, DOL specifically asks about mutual fund windows (including mutual fund windows limited to a subset of registered mutual funds) and the different types of arrangements that may be encompassed by the terms "brokerage window" or "self-directed brokerage account," and whether any standards should vary depending on the type of arrangement.
- **Plan Investment Offerings – Brokerage Windows and Designated Investment Alternatives.** This category of questions asks about what types of plans offer brokerage windows, trends in the number of plans offering brokerage windows and the number of DIAs typically offered by plans, and any implications of these trends.
- **Participation in Brokerage Windows.** DOL is interested in demographic data on participants who use brokerage windows, information on how and how many participants use them, including whether there is any evidence of "good or poor decision-making and outcomes" by participants in brokerage windows, and information on the benefits of having a brokerage window in a plan.
- **Selecting and Monitoring Brokerage Windows and Service Providers.** DOL asks about the factors to be considered when determining whether to add a brokerage window and selecting a brokerage window provider, how contracts for brokerage window services work, and whether recordkeepers typically require the use of their own or affiliated brokerage services (and whether providers favor or encourage investment in proprietary funds through brokerage windows).
- **Fiduciary Access to Information about Brokerage Window Investments.** This section asks whether plan fiduciaries monitor (and whether it is possible to monitor) investments made through a brokerage window and what costs and considerations would be involved in doing so.
- **Brokerage Window Costs.** DOL asks for information about common fees and expenses associated with investing through a brokerage window, how these costs are borne, how they compare to other plan investment fees or retail fees, and how the costs factor into the decision to add a brokerage window. This section also asks whether brokerage windows are effectively subsidized by plan participants other than those participating in the brokerage window.
- **Disclosure Concerning Brokerage Windows and Underlying Investments.** This category of questions asks about the information on brokerage windows required to be disclosed to participants under the participant-level disclosure rule, whether any additional information should be disclosed, and specifically whether these disclosures include descriptions of the different risks and costs of investing through a brokerage window compared to investing in a DIA or descriptions of differences in fiduciary duties owed to participants investing through a brokerage window compared to investing in a DIA. DOL also asks here about managed account services and whether

it is feasible and advisable to provide participants with aggregated managed account performance and benchmark information (whether the managed account service is accessed with or without a brokerage window), consistent with recent recommendations made by the Government Accountability Office. [4]

- The Role of Advisers. This section asks about the use of advisers by plan fiduciaries and participants in the context of brokerage windows.
- Fiduciary Duties. DOL asks whether there is a need to clarify the extent of a fiduciary's duties of prudence, loyalty, and diversification under section 404(a) of ERISA with respect to a brokerage window feature and with respect to investments made through a brokerage window.
- Annual Reporting and Periodic Pension Benefit Statements. The RFI asks about Form 5500 reporting requirements for plans with brokerage windows and participant benefit statements for participants investing through brokerage windows.

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endnotes

[1] The RFI is available at
<http://www.gpo.gov/fdsys/pkg/FR-2014-08-21/pdf/2014-19832.pdf>.

[2] See [Memorandum](#) to Pension Members No. 24-14, Bank, Trust and Retirement Advisory Committee No. 25-14, Broker/Dealer Advisory Committee No. 32-14, Operations Members No. 4-14, Transfer Agent Advisory Committee No. 34-14 [28180], dated June 11, 2014.

[3] See [Memorandum](#) to Pension Members No. 27-12 [26357], dated July 31, 2012.

[4] See [Memorandum](#) to Pension Members No. 33-14 [28317], dated August 18, 2014.