
Brokerage Windows in 401(k) Plans: The Total Abdication of Fiduciary Responsibility

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This article addresses the fiduciary issues raised by the current practice of plan fiduciaries of not only disclaiming any fiduciary responsibility for brokerage window investments, but also abdicating any role (fiduciary or otherwise) in assessing even the general suitability of those investments for a retirement plan, and concludes that the practice is in plain and notorious violation of what ERISA requires of fiduciaries.

Over the last decade, fiduciaries of 401(k) plans have with increasing frequency opened their plans to investments offered through a “brokerage window,” which allows participants to invest their pre-tax assets in the numerous and varied investment options offered by a securities broker retained by the plan, but whose investment offerings are unreviewed by plan fiduciaries. Almost one-half of the largest 401(k) plans offer brokerage windows, and many major financial institutions offer participants in their plans investments through such windows, often with their affiliates serving as the broker.

The “core” investment options offered by plans subject to the Employee Retirement Income Security Act of 1974 (“ERISA”) must be initially selected by the plan fiduciaries through a prudent process and are required to be reviewed periodically for their continued prudence. That is, however, not the practice with plan investments made through brokerage windows. Indeed, fiduciaries of plans offering a brokerage window expressly disclaim any responsibility regarding the prudence

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of any investments made by participants through the brokerage window. These fiduciaries have explicitly abdicated their responsibility over brokerage window investments, as they have rejected any role in selecting or monitoring the continued prudence of such investments, leaving that to the securities brokers who are not themselves fiduciaries.¹

As this article discusses, this failure is plainly contrary to the express fiduciary requirements of ERISA. However, plan fiduciaries that offer brokerage windows in their 401(k) plans have not yet been called to account for abandoning their responsibility to offer participants only prudently selected and monitored investment options. No court has so far spoken directly to the propriety of this prevailing fiduciary practice – or more precisely, the absence of a fiduciary practice – in the brokerage window space. And the guidance that the U.S. Department of Labor (“DOL”) has provided has been widely viewed as giving license to plan sponsors and fiduciaries to ignore completely ERISA’s fiduciary standards with regard to the investments of plan assets made through brokerage windows. Under this regime, investments that would be plainly imprudent if offered as a so-called “core” investment, or, in ERISA language, a “designated investment alternative,” would not subject plan fiduciaries to any liability if offered through a brokerage window.

This article addresses the fiduciary issues raised by the current practice of plan fiduciaries of not only disclaiming any fiduciary responsibility for brokerage window investments, but also abdicating any role (fiduciary or otherwise) in assessing even the general suitability of those investments for a retirement plan, and concludes that the practice is in plain and notorious violation of what ERISA requires of fiduciaries.

BACKGROUND

What Is a Brokerage Window?

A typical 401(k) plan will offer participants a limited number (usually about 20 to 25, but sometimes up to 30) of “core” investment options into which plan participants can direct their tax-deferred retirement savings.² A brokerage window – sometimes referred to as a “self-directed account” or “self-directed brokerage account” – is an arrangement offered by a growing number of 401(k) plans that gives plan participants the ability to invest retirement assets in investments other than the plan’s so-called “core” investments.³ Through a brokerage window, participants get access to a considerably greater number of investments than those that comprise the plan’s “core” portfolio.

While some brokerage window platforms limit the type of investment available, e.g., to mutual and/or exchange-traded funds, most impose no such limit and permit participants to invest their savings in any publicly traded investment instrument – i.e., not just the sort of mutual funds and exchange-traded funds that populate the “core” investments of a typical 401(k) plan, but also individual equities, options, and other more exotic and speculative investments, such as “puts” and “calls.”⁴

For present purposes, the critical difference between the “core” investment options of a 401(k) plan and the investments available through a brokerage window is that whereas “core” investment options are – or at least, are supposed to be – carefully selected and monitored by fiduciaries tasked with overseeing the plan so that plan participants can take some comfort that their retirement savings will at least be invested in prudently selected options, no such care is exercised with respect to the investments that are available through brokerage windows. Indeed, fiduciaries of 401(k) plans that allow participants to invest through brokerage windows expressly disclaim that they have undertaken any review of such investments.⁵

Brokerage Windows Give Plan Participants Access to Inappropriate Investments

The (perhaps unsurprising) result of the lack of fiduciary oversight of brokerage-window investments is that participants in 401(k) plans are given access to investments that may well be plainly inappropriate vehicles for a retirement savings plan. That is contrary to ERISA’s stated purpose of safeguarding the assets of retirement plan participants against loss to the extent reasonably possible.⁶

401(k) plans were introduced as a substitute for traditional defined-benefit retirement plans in the Revenue Act of 1978.⁷ Since then, those plans have become the primary way in which Americans save for their retirement.⁸ Like other retirement plans, 401(k) plans are not designed to be vehicles for speculative investments. Instead, the investment options offered by 401(k) plans are intended to allow participants to make investments that, to the extent reasonably possible, will ultimately provide an adequate source of income during their retirement.⁹ To that end, plan assets are held in trust, thereby making investments of those assets subject to ERISA’s fiduciary standards.¹⁰ And persons exercising “any discretionary authority” regarding the administration or “disposition” of plan assets are ERISA fiduciaries.¹¹

Contributions to ERISA-covered plans are made on a pre-tax basis, and participants pay income taxes only when they take a withdrawal.¹² The tax deferral status provided to participant contributions to 401(k) plans operates to “facilitate[] faster growth of the account balance,”¹³

which works to meet the statutes' implied promise that the assets in a participant's account will be an adequate source of income upon retirement. And, crucially, it is with an eye towards this goal that ERISA directs plan fiduciaries to review a retirement plan's investment options for prudence.¹⁴ The protective regulatory framework of ERISA similarly works to incentivize investment in sound options curated by prudent fiduciaries who operate for the exclusive benefit of participants. Highly risky investments are generally viewed as improper vehicles for individuals saving for retirement – especially when the participants are approaching retirement age, and therefore will start taking distributions in the near future.¹⁵

While modern portfolio theory teaches that a range of investment risks facilitates a better return, ERISA requires that each investment offered by the plan must be prudent on its own.¹⁶ Many, if not most, brokerage windows, however, impose no restrictions on the type of investments that are made available to participants, and thereby permit participants to direct their retirement assets into highly risky investments. For example, some plans allow participants to invest their savings into cryptocurrencies, a notoriously speculative type of investment.¹⁷ Such investments may generate large returns when the market is up, but in a sudden downturn, such as the burst of the “tech bubble” in 2001 or the financial industry meltdown in 2008, retirement savings invested in speculative endeavors can be wiped out quickly. While younger participants may well be able to make up for those losses before they reach retirement age, older participants who are nearing retirement may not have time to recover those losses. Unfortunately, recent data shows that the rate of usage by plan participants of brokerage windows increases with age – older participants generally make more use of brokerage windows than younger participants.¹⁸ Whereas only 0.4 percent of participants in the 20-29 age range and 1.6 percent of participants in the 30-39 age range make use of a brokerage window, participants over age 40 make investments through brokerage windows at about twice that rate.¹⁹ This means that older participants, who are closer to retirement than their younger counterparts, invest more of their retirement savings in riskier investments – arguably the opposite of what prudence dictates. Yet, due to the lack of fiduciary oversight of brokerage-window investments, those tasked with managing the plan for the exclusive benefit of participants²⁰ do nothing to address this development, let alone limit its use by participants nearing retirement age.

Brokerage Windows Are Popular, and Increasingly So

Countless Americans saving for their retirement through a tax-deferred 401(k) plan have access to brokerage windows, which have

become an increasingly popular feature of 401(k) plans in recent years. As one industry commentator observed recently, “[t]he number of plan sponsors that offer brokerage windows has steadily increased over time.”²¹

According to one recent industry survey, nearly a quarter (23.2 percent) of all 401(k)-style plans currently offer a brokerage window, and nearly 40 percent of plans that have more than 5,000 participants do.²² A different study found that “[i]n 2019, 46% of plans in the market offered a brokerage window,”²³ and yet another survey commissioned by the ERISA Industry Committee found that 61 percent of member companies surveyed offered a brokerage window as part of their plan’s investment line-up.²⁴

Admittedly, both the percentage of plan participants that use their plan’s brokerage window, as well as the percentage of total plan assets invested through brokerage windows, is comparatively small – about 2.4 percent and 1.5 percent, respectively.²⁵ These small percentages, however, do not provide a basis for concluding that “any concerns based on the possible proliferation of [brokerage] window investments may not be well-founded.”²⁶ While the relative percentages may be small, the absolute amount of dollars involved is hardly negligible. In 2019, the total assets held in 401(k) plans was \$6.4 trillion, and the total assets held in brokerage windows was approximately \$96 billion – a significant amount by anyone’s financial calculus. As the late Senator Everett Dirksen once famously observed: “A billion here, a billion there, and pretty soon you’re talking real money.” Indeed, by the authors’ count, in 2019, 10 of the 25 largest 401(k) plans (as measured by total assets) allowed participants to invest plan assets through brokerage windows, with at least \$9.1 billion invested through brokerage windows wholly unsupervised by plan fiduciaries.²⁷

Many Financial Institutions Offer Brokerage Windows, and Those Windows Are Often Managed by Affiliate Security Brokers

Many major financial institutions that sponsor 401(k) plans offer participants the opportunity to direct their retirement savings into unmonitored investments through brokerage windows.²⁸ The list of financial services companies that offer brokerage windows includes State Street, Charles Schwab, Blackrock, UBS, Capitol One, and Deutsche Bank.²⁹ The total amount of 401(k) plan assets invested through brokerage windows by the plans reviewed by the authors was approximately \$3.9 billion in 2019, up from about \$3.2 billion in 2018, approximately a 20 percent increase.³⁰ One institution – UBS – alone accounted for

\$1.2 billion of brokerage-window investments in 2019, which contributed about 18 percent of that plan's total assets.³¹

While some of these financial institutions use outside brokers, others rely on an affiliate of the plan sponsor for brokerage services.³² For example, State Street, Charles Schwab, and TD Ameritrade all make use of an affiliate as the broker for the brokerage window in the 401(k) plans that they sponsor.³³ And many, if not all, of those brokers charge participants fees for transactions made through the brokerage window on the same basis as retail investors. This type of arrangement, where an affiliate of the sponsor provides (potentially highly lucrative) services to the plan, creates a significant risk of conflicts and self-dealing, and may well fall prey to ERISA's prohibited transaction provisions.³⁴

ERISA'S FIDUCIARY STANDARDS APPLY TO BROKERAGE WINDOWS

ERISA's Broad Duty of Prudence

The fiduciary duties imposed by ERISA are “the highest known to the law.”³⁵ As Justice (then Judge) Cardoza put the point almost 100 years ago, the fiduciary responsibility owed by fiduciaries to trust beneficiaries is “the punctilio of an honor the most sensitive.”³⁶ ERISA embodies that trust concept, as it “describes the scope of the duty owed by an ERISA fiduciary in broad terms”³⁷ and refers to the responsibilities that fiduciaries have with respect to “the investments of the plan”³⁸ without singling out a particular type of investment option as lying outside the scope of fiduciaries' duty of prudence.

The specific fiduciary standards set out in ERISA § 404 mandate that fiduciaries act for the “exclusive purpose” of “providing benefits to participants,” and do so “with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims,” so as to “minimize the risk of large losses” to plan participants.³⁹ Courts use this “‘prudent person’ standard” to “measure fiduciaries' investment decisions and disposition of assets.”⁴⁰

This duty of prudence, as interpreted by the Supreme Court and the lower federal courts, in the context of 401(k) plans, comprises at least two more specific obligations: First, ERISA fiduciaries must select the investment options offered to plan participants through a prudent process.⁴¹ Second, “the duty of prudence involves a continuing duty to monitor investments and remove imprudent ones.”⁴²

Enforcement of ERISA's fiduciary monitoring and oversight duties hold particular importance in the context of “defined contribution”

plans,⁴³ such as a 401(k) plan. In a “defined benefit” plan,⁴⁴ such as a traditional pension plan, participants are “entitled to a fixed periodic payment” from a pool of assets.⁴⁵ There, the plan sponsor has a built-in incentive to ensure that the pool of assets (consisting of employee contributions, employer contributions, or a mixture of both) is invested prudently, as “the [plan sponsor] typically bears the entire investment risk and . . . must cover any underfunding as the result of a shortfall that may occur from the plan’s investments.”⁴⁶

In a 401(k) plan, on the other hand, the participant is entitled only to those funds contributed to his or her individual account, and any growth over time, and therefore bears the financial risk of loss or underperformance.⁴⁷ Accordingly, there is no plan sponsor backup for losses sustained in a participant’s account, thus making fiduciary oversight of all investments even more crucial, so as to balance the twin goals of maximizing asset growth while minimizing risk.

Investments made through brokerage windows have the same essential characteristics of investments made by participants in the plan’s core investments, as they are made in an ERISA-covered plan with tax-deferred assets. The sole material difference is that the plan fiduciaries disclaim any responsibility for the selection or continued prudence of these investments. But that artifice certainly cannot put those investments outside the scope of the duties ERISA imposes on fiduciaries. Indeed, ERISA § 410(a), which provides that any “instrument that purports to relieve a fiduciary from responsibility” is “void as against public policy,”⁴⁸ underscores that fiduciaries cannot avoid their fundamental responsibilities by simply disclaiming in a plan document or elsewhere that they have no such duty. Whatever may be the case in other contexts, that imperative is all the more important where, as here, the prudent management of retirement assets is a core ERISA purpose.⁴⁹

In short, to the extent that the fiduciaries of a 401(k) plan allow participants to invest in any investment without separately vetting each one of those investments, whether made through a brokerage window or otherwise, the fiduciaries have violated ERISA’s fiduciary requirements.⁵⁰ And fiduciaries compound that fiduciary breach by failing to periodically review even the prudence of the actual investments made by participants through the brokerage window.

The Current Practice of Plan Fiduciaries to Disclaim Any Duty over Brokerage-Window Investments Is Not Defensible

Nevertheless, a faulty proposition has taken root, which has infected many plans that employ brokerage windows: That fiduciaries have no

responsibility for the selection or monitoring of investment options offered to participants through brokerage windows. This absence of fiduciary responsibility regarding brokerage window investments appears to be based upon: (1) § 404(c) of ERISA, which absolves fiduciaries of financial responsibility for losses sustained in individual account plans (like 401(k) plans) where the participants exercise control over the assets in their accounts, and (2) DOL regulations that distinguish between so-called “designated investment alternatives” – i.e., the core investment options specifically selected by plan fiduciaries – and “non-designated investment alternatives,” such as investments made through brokerage windows, and which excuse the latter from the far more robust disclosure regime required of the former.

No court has, however, directly ruled on whether brokerage windows fall outside the scope of ERISA’s fiduciary duty of prudence,⁵¹ and the DOL has provided guidance, accepted by all but one federal appellate court, that § 404(c) is inapplicable to the selection and monitoring of investments offered by 401(k) plans. Although the same should be true regarding investments made through brokerage windows, for the last decade at least, the DOL has inexplicably tolerated the widespread practice by fiduciaries of 401(k) plans of disclaiming responsibility for brokerage window investments. It appears, however, that the DOL may be reconsidering its acceptance of that practice, and for good reason.

ERISA Section 404(c) Does Not Provide a Defense for a Fiduciary Failure to Monitor Brokerage-Window Investments

Fiduciaries often cite to ERISA § 404(c), which protects them against liability for losses due to participants’ exercise of control over assets in their accounts, as implicitly relieving them of any fiduciary duties with regard to brokerage-window investments. Whatever § 404(c) may do, it does not relieve fiduciaries of their duties regarding the investment options offered to participants in a 401(k) plan, whether as core or brokerage-window investments.

ERISA § 404(c) offers a financial safe harbor for fiduciaries of plans that “provide[] for individual accounts and permit[] a participant or beneficiary to exercise control over the assets in his account.”⁵² When a plan meets the requirements for the safe harbor, “no person who is otherwise a fiduciary shall be liable . . . for any loss, or by reason of any breach, which results from such participant’s or beneficiary’s exercise of control.”⁵³ On its face, § 404(c) seemingly provides the defense that the fiduciaries maintain exists – as selecting individual investments through a brokerage window would appear to be an instance of a participant’s exercise of control over the assets in their account. That interpretation of § 404(c)’s scope would, of course, equally apply

to the so-called “designated investment alternatives” of 401(k) plans that are specifically named by plan fiduciaries, as those core investments are similarly subject to participant control.

The DOL, however, has long held the view that § 404(c) does not apply to the selection of investment options by plan fiduciaries, because “the act of limiting or designating investment options which are intended to constitute all or part of the investment universe of an ERISA 404(c) plan is a fiduciary function which . . . is not a direct or necessary result of any participant direction.”⁵⁴ With the sole exception of the U.S. Court of Appeals for the Fifth Circuit, every federal court of appeals that has so far addressed the issue has agreed that § 404(c) cannot shield fiduciaries from financial liability for imprudence in the selection of investments.⁵⁵ In that regard, the courts emphasize that “the selection of the particular funds to include and retain as investment options in a retirement plan . . . logically precedes [] and thus cannot result from[] a participant’s decision to invest in any particular option.”⁵⁶

This reasoning plainly extends to the fiduciary decision to allow plan assets to be invested in securities made available to plan participants through a brokerage window, as that decision similarly precedes any decision by a participant to make a specific investment through that window. That was DOL’s view in 1992, when it opined that relief from fiduciary liability for loss under § 404(c) did not apply both to specifically designated investment options and to all other investments offered to plan participants. The 1992 DOL guidance explained that the act of “limiting or designating investment options” that “constitute all or part of the investment universe” is a fiduciary function, and therefore triggers the fiduciary obligation to evaluate and determine whether they should be “available as participant investment options.”⁵⁷ Accordingly, fiduciaries should not be able to hide behind § 404(c) and shift the blame for any losses resulting from imprudent brokerage-window investments back to participants.⁵⁸

Moreover, even if § 404(c) applied to the decision to offer brokerage window investments, it would merely offer fiduciaries a shield against financial liability for losses resulting from imprudent investments made through the window – which is not the same thing as relieving them from all responsibility for the decision to offer imprudent investments in the first place, and to periodically monitor those investments, and remove investment options that have over time become imprudent.⁵⁹ For example: A police officer may be able to escape financially compensating for harms due to their infringement of an individual’s constitutional rights by invoking the doctrine of qualified immunity; but even where that doctrine provides the officer with a liability shield, the officer still had and has a duty to act in a manner that values those rights when making an arrest.

Similarly, fiduciaries bear responsibility for the selection of investment options made available to participants in a 401(k) plan, even if they can invoke the liability shield provided by § 404(c) to escape responsibility for any financial loss. ERISA § 502(a)(3) expressly authorizes participants to bring suit “to enjoin any practice that violates any provision of the [Act]” or to “obtain appropriate equitable relief to (i) redress such violations or (ii) to enforce provisions of the [Act].”⁶⁰ Accordingly, § 502(a)(3) should suffice to provide participants with the ability to force fiduciaries to treat brokerage-window investments as other plan investments subject to fiduciary oversight.⁶¹

The Regulatory Distinction Between “Designated Investment Alternatives” and Other Investments Does Not Establish that Brokerage-Window Investments Are Not Subject to ERISA’s Fiduciary Standards

The DOL’s disclosure regulations implementing § 404(c) draw a distinction between “designated investment alternatives” (“DIA”) and non-DIA investments and exempt brokerage windows and “similar plan arrangements,” which by stipulation do not count as DIAs, from the disclosure obligations that govern a plan’s “core” (DIA) investments. Whatever its merit for general disclosure purposes, that distinction between DIA and non-DIA investments does not establish that brokerage-window investments are outside the scope of the fiduciary duty to prudently select and monitor investment options offered in a 401(k) plan.

The disclosure regulations finalized by the DOL in 2010, which are codified at 29 C.F.R. Part 2520, first introduced the term “designated investment alternative,” which refers to “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 accounts.”⁶² As there is no textual basis for the distinction, the definition of DIA arbitrarily excludes “brokerage windows,” “self-directed brokerage accounts,” or similar plan arrangements that enable participants and beneficiaries to select investments beyond those designated by the plan,⁶³ even though such investments are made with plan assets and have been determined by the plan fiduciaries to be allowable plan investments. The regulations impose stringent disclosure obligations with respect to DIAs and are considerably more forgiving disclosure duties with respect to non-DIAs.⁶⁴ Significantly, the § 404(c) disclosure regulations do not discuss (and are in fact conspicuously silent on) whether the selection process for non-DIA investments somehow falls within § 404(c)’s scope.

Some commentators, along with many plan sponsors and fiduciaries, have, however, taken the DOL’s grouping of plan investment

options into DIAs and non-DIA options for purposes of disclosure requirements as a basis for concluding that investments made through brokerage windows, being non-DIA options, are somehow not subject to ERISA's fiduciary standards regarding the investment of plan assets. For example, in a submission to the ERISA Advisory Council in 2021, one commentator stated that:

[T]he current definition of brokerage window enables plan sponsors and participants to easily distinguish between a particular investment option that is one of the plan's DIAs . . . and one that is not a DIA but is simply made available through a brokerage window. This definition works just as it should. If the plan fiduciary designates specific investment options, those designations convey to participants that the plan fiduciary is standing behind those options, and fiduciary obligations . . . should and do apply. On the other hand, if the plan fiduciary allows participants to invest in options that are not designated by the plan fiduciary, such as the options available through a brokerage window, it is clear to the participants that the plan fiduciary has not screened such options, so no fiduciary or disclosure obligations should or do apply with respect to such options.⁶⁵

This argument draws some apparent support from the fact that “[m]ultiple regulations explicitly tie the duty to monitor” to DIAs.⁶⁶ Specifically, both 29 C.F.R. § 2550.404a-5(f) and 29 C.F.R. § 2550.404c-1(d)(2)(iv) reference fiduciaries’ “duty to prudently select and monitor providers of services to the plan or designated investment alternatives offered under the plan.” The proponents of this line of argument maintain that this establishes that there is no comparable fiduciary duty to oversee a plan’s non-DIA investment options.⁶⁷

Yet, nothing in the disclosure regulations expressly limits the monitoring duty that ERISA imposes on fiduciaries to DIAs, and, in fact, there is ample reason to believe that no such limitation exists. Indeed, the regulations note that meeting the requirements for a § 404(c) plan “does not serve to relieve a fiduciary from its duty to prudently select and monitor any service provider,”⁶⁸ which would include the performance of brokers retained by the 401(k) plan, which would, in turn, include the prudence of investments allowed by the broker. As one court observed in that precise regard: “Just because these regulations apply to DIAs,” that “does not preclude them from applying also to other forms of investments, such as self-directed brokerage accounts.”⁶⁹ In the absence of an express statement that § 404(c) relieves fiduciaries of responsibility over brokerage-window investments, DOL’s 1992 advice that any decisions regarding which investment options are offered to participants are not covered by § 404(c) should control.⁷⁰

The “prudent man standard of care” imposed by § 404(a) applies “with respect to a plan,” not just to the portion of the plan investments that have been identified as DIAs.⁷¹ As the Supreme Court explained, “the [fiduciary] must systematically consider *all* the investments of the [plan] at regular intervals to ensure that they are appropriate.”⁷² Moreover, “by contrast to the rule at common law, trust documents cannot excuse trustees from their duties under ERISA.”⁷³ In other words, “the duty of prudence trumps the instructions of a plan document.”⁷⁴ That certainly extends to any attempt in a plan document to limit a fiduciary’s monitoring duties through designation of certain investment as DIAs and others as non-DIA options. Indeed, ERISA § 410(c) explicitly renders any “instrument which purports to relieve a fiduciary from responsibility or liability” for the performance of his or her duties “null and void” as “against public policy.”⁷⁵

Fiduciaries Cannot Escape Liability for Failing to Review Brokerage-Window Investments by Attempting to Transfer Fiduciary Responsibility to the Broker Servicing the Window

Nor can fiduciaries escape being called to account for failing to oversee brokerage-window investments by seeking to transfer fiduciary responsibility for such investments to the broker who services the brokerage window. As noted, ERISA § 410(a) nullifies any such contractual or other arrangement.

Furthermore, seeking to transfer fiduciary responsibility for monitoring brokerage-window investments onto a broker presumes that plan fiduciaries had the responsibility for monitoring these investments in the first place, for they cannot transfer a responsibility they do not have themselves.⁷⁶ Accordingly, an attempt to abdicate the duty of prudence in this manner presupposes what many fiduciaries seek to deny, i.e., that they bear a fiduciary responsibility for the prudence of brokerage-window investments.

Some commentators argue that even if plan officials retain some fiduciary responsibility regarding brokerage-window investments, that duty is fully discharged if the fiduciaries prudently select the broker for the window.⁷⁷ But even the prudent selection of a provider to the plan does not relieve the fiduciary of the duty to oversee the performance of the provider.⁷⁸ In the brokerage-window context, that would require reviewing the investment options offered to plan participants and vetoing those that would be imprudent if offered directly in the plan as a core investment.

Undertaking such a responsibility is, some commentators observe, an impossible task to impose on plan fiduciaries, as brokerage windows offers thousands of investment options to plan participants.⁷⁹ But rather than operating as an excuse for relieving fiduciaries of

responsibility for brokerage-window investments, the practical inability of fiduciaries to vet such investments serves as a powerful reason to find such brokerage-window arrangements to be altogether inappropriate for retirement plans. If an investment platform by its very structure makes it impossible for a fiduciary to discharge the duties prescribed by ERISA, the answer is not to relieve the fiduciary from those duties, but rather to hold that platform unavailable for investments by participants in an ERISA-covered retirement plan.

The DOL's Inconsistent Guidance on Whether Fiduciaries Have Oversight Responsibility with Respect to Brokerage Window Investments Is at Best a Rickety Three-Legged Stool on Which Fiduciaries Should Rely Upon to Abdicate Monitoring Duties at Their Peril

While DOL's 1992 guidance on the scope of § 404(c) held that the section was inapplicable to the selection and monitoring of all investments offered by an ERISA-covered retirement plan, the disclosure rules the agency issued in 2010 have caused many in the ERISA fiduciary community to hold fast to the belief that the liability shield of § 404(c) applies to non-DIAs, like brokerage-window investments. The DOL has only added more confusion to the matter by its 2012 flip-flop as to whether there might be fiduciary responsibility regarding brokerage-window investments in certain circumstances.

Some 401(k) plan fiduciaries expressly rely on the DOL's withdrawal in July 2012 of an earlier Field Assistance Bulletin suggesting that ERISA's fiduciary duties apply to brokerage-window investments. Indeed, some commentators have pointed to the DOL's 2012 about-face in its guidance on whether brokerage-window investments fall within the scope of ERISA's fiduciary duty standards as providing a sound basis for concluding that brokerage windows fall outside that scope. That reliance on DOL's flip-flopping should, however, provide fiduciaries with little comfort in the totality of circumstances.

In 2012, the DOL initially issued guidance suggesting that brokerage window investments might in certain circumstances be subject to ERISA's fiduciary standards. In Field Assistance Bulletin ("FAB") 2012-02, issued on May 7, 2012, the DOL explained that:

If, through a brokerage window or similar arrangement, non-designated investment alternatives available under a plan are selected by significant numbers of participants and beneficiaries, an affirmative obligation arises on the part of the plan fiduciary to examine these alternatives and determine whether one or more such alternatives should be treated as designated for purposes of the regulation.⁸⁰

At that time, it was the DOL's position that a non-DIA investment available through a brokerage window could merit DIA treatment under the disclosure regulations, if a large number of participants chose to invest in it.

The DOL failed, however, to explain why a brokerage-window investment would become subject to ERISA's fiduciary standards simply because a significant number of participants selected that investment. That failure is easily explainable as there is no logical basis to find that a non-DIA became a DIA merely because many participants found some non-DIA investment particularly attractive. One more likely, but unstated reason may have been that the DOL realized that investments in a non-fiduciary curated investment were increasing and could result in substantial losses to participants, especially for those participants who opt to invest in highly speculative securities. And while fiduciary responsibility operates to protect plan assets as a whole, it also operates as a safeguard against losses in an individual account as a result of fiduciary negligence.⁸¹

Two months later, however, the DOL flip-flopped. On July 30, 2012, in response to a strong pushback from plan sponsors, brokers, and fiduciaries, the DOL abandoned the approach to the issue set out in its May 2012 Field Assistance Bulletin. In its revised guidance, FAB 2012-02R, the DOL, returning to its original position on the matter, said that "[w]hether an investment alternative is a [DIA] for purposes of the regulation depends on whether it is specifically identified as available under the plan."⁸² Apparently no longer concerned that investments in highly speculative brokerage-window offerings could well result in substantial losses to participants, the agency added that "nothing in this Bulletin prohibits the use of a platform or a brokerage window, self-directed brokerage account, or similar plan arrangement in an individual account plan."⁸³

An exemplar of consistency on this issue the DOL plainly has not been. While withdrawing from its earlier guidance, DOL's July 30, 2012 guidance nevertheless kept at least one foot on the fiduciary duty side of the line, observing that:

[F]iduciaries of such 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 still 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.⁸⁴

This shifting of the DOL's view of whether brokerage windows should be treated under ERISA's fiduciary standards provides at most weak, if any, support for the current practice of many fiduciaries that treat brokerage window investments as outside the purview of the fiduciary duty of prudence mandated by ERISA. Certainly, the language quoted in the preceding paragraph from DOL's July 2012 guidance that the duties of prudence set out in ERISA § 404(a) apply to plans with brokerage window arrangements undercuts substantially any contrary implications in previous DOL guidance.

The DOL's next act on the brokerage window issue was its 2014 Request for Information, which suggested that the agency was restless as to where it had left the matter. The information sought indicated that the DOL was engaged in a comprehensive review of the entire brokerage window issue. Specifically, the DOL sought information on:

- (1) The characteristics of brokerage-window arrangements offered;
- (2) The participation rate in plans that offered them;
- (3) The process for selecting and monitoring service providers for these arrangements;
- (4) Their associated costs;
- (5) The disclosures made regarding them; and
- (6) The use of advisors in connection with brokerage-window usage by plan participants.⁸⁵

The information sought, the DOL explained, was to assist “the Department in determining 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 – a core ERISA purpose.”⁸⁶

In any event, whatever limited comfort the brokerage-window community should take from DOL's inconsistent and sometimes incoherent actions (or inactions) on the subject may not long endure. The DOL seemingly has had second, if not third, thoughts regarding its apparent past tolerance for brokerage-window investments wholly unsupervised by plan fiduciaries. In the spring of 2021, the ERISA Advisory Council of the DOL's Employee Benefits Security Administration held a

meeting on brokerage windows in 401(k)-type plans. In its announcement of the meeting, the Council stated that it “will examine brokerage windows in participant-directed individual account retirement plans that are covered by ERISA to gain a better understanding of their design, prevalence, and usage.”⁸⁷ The announcement further referenced the 2014 Request for Information, and noted that in 2014, “[t]he Department was interested in whether guidance would be appropriate and necessary to ensure that plan participants and beneficiaries with access to a brokerage window are adequately informed and protected under ERISA,” adding that “[t]he work of the Council is intended to assist in this effort.”⁸⁸

The protection of the assets of participants in any ERISA-covered retirement plan is, of course, a key purpose of the statute, which it seeks to accomplish by subjecting the investments of those assets to fiduciary oversight. Consistent with that understanding, the DOL in 1992 found that § 404(c) was inapplicable to all investments of plan assets, whether specifically designated or otherwise. It would appear that the DOL is reconsidering its later misadventures on the subject.

RELIEF

In the authors’ view, the foregoing discussion demonstrates that ERISA mandates fiduciary oversight of brokerage-window investments on the same plane as other plan investment options. Given that the fiduciaries of numerous 401(k) plans freely admit that they do not oversee such investments, establishing a breach of the duty of prudence should follow for any plan participant seeking to address this failure through litigation.

Of course, to succeed in litigation, a participant seeking to bring suit will also need to establish an “injury-in-fact” in order to have Article III-standing.⁸⁹ One way to do so would be for the participant to allege and then demonstrate that he or she has suffered a loss in their personal account due to an investment in an imprudent investment option that was offered through the plan’s brokerage window.⁹⁰ While even in an “up market” an individual participant may have suffered a financial loss as a result of imprudent investments made through the plan’s brokerage window, the plan as a whole may not have, and it may therefore be difficult to proceed as a class action, because there may not be a sufficient number of participants who have suffered losses to justify class treatment.⁹¹ It is often the case that, where class treatment is not available, the recovery of losses sustained by an individual participant may not make litigation financially viable. That circumstance should not, however, necessarily prevent fiduciaries from being called to account for their failure to discharge their duties.

As noted previously, ERISA § 502(a)(3) authorizes suit by a participant to “enjoin” any act or practice that violates the statute, and to “obtain other equitable relief,” to “redress such violations,” and to “enforce any provisions” of the Act.⁹² ERISA by its very terms creates a right for participants to have all investments of plan assets be subject to fiduciary oversight, and § 502(a)(3) specifically authorizes courts to enjoin a failure by fiduciaries to provide such oversight.

Abdicating the duty of prudence with respect to brokerage-window investments is not just a “bare procedural violation” that is “divorced from any concrete harm,” rather, it creates a “risk of real harm,” which should provide the requisite standing.⁹³ Indeed, courts have taken action to enjoin imprudent fiduciary practices even where there had been as yet no monetary loss, recognizing that “[t]he likelihood that a fund’s assets will be unnecessarily diminished is greatly increased when its trustees show a propensity to engage in imprudent conduct.”⁹⁴

A downturn in the stock market is bound to happen at some point, and participants who have directed their retirement savings towards high-risk investments through brokerage windows may well see those savings wiped out. As one federal court of appeals trenchantly explained:

Requiring a showing of loss in such a case would be to say that the fiduciaries are free to ignore their duties so long as they do no tangible harm, and that the beneficiaries are powerless to rein in the fiduciaries’ imprudent behavior until some actual damage has been done. This result is not supported by the language of ERISA, the common law, or common sense.⁹⁵

Waiting for the monetary loss to occur, another appeals court similarly observed, would “undermine the purpose of ERISA which is to insure that the assets of a fund will be there when the [participants] need them.”⁹⁶

In any event, standing considerations applicable to actions by participants provide no impediment to action by the DOL – be it in the form of regulations or guidance, or enforcement actions against the fiduciaries that have abdicated their responsibilities with respect to brokerage-window investments.⁹⁷

CONCLUSION

Despite the current widespread belief to the contrary in the plan sponsor and fiduciary community, ERISA requires that fiduciaries oversee investments offered through brokerage windows, as part of their

duty of prudence under ERISA § 404(a), in the same way that they oversee so-called “core” or “DIA” investment options. The DOL has so far effectively failed to curb this practice, and in fact, the limited and inconsistent guidance it has issued on the point has for the most part served to bolster the confidence of plan fiduciaries that they may safely abandon their responsibility for overseeing brokerage-window investments. The agency is now undertaking a comprehensive review of brokerage windows in 401(k) plans, which may well result in the DOL stepping away from any endorsement of the current regime of non-fiduciary oversight of investments of plan assets through brokerage windows.

In any event, the widespread practice of permitting brokerage-window investments uncurated by fiduciary oversight is a ripe target for litigation to correct this practice fundamentally at odds with ERISA’s purpose to protect the assets of retirement plan participants by making fiduciaries responsible for offering participants only prudently selected investment options and by requiring fiduciaries to periodically monitor those investments and replace those that over time have become imprudent.

APPENDIX 1 - 25 LARGEST 401(k) PLANS (BY TOTAL ASSETS, PY 2019)

1. Boeing: \$67.2 billion – no brokerage window

- a. Participants: 205,460
- b. Total Assets: \$67,171,473,83
- c. Assets Invested Through Brokerage Window: N/A

2. IBM: \$58.2 billion – no brokerage window

- a. Participants: 183,694
- b. Total Assets: \$58,165,700,712
- c. Assets Invested Through Brokerage Window: N/A

3. AT&T: \$49.3 billion - \$2.4 billion (4.8%) invested through brokerage window

- a. Participants: 259,872

- b. Total Assets: \$49,280,973,000
- c. Assets Invested Through Brokerage Window: \$2,381,817,000

4. Wells Fargo: \$48.2 billion – no brokerage window

- a. Participants: 349,262
- b. Total Assets: \$48,176,866,174
- c. Assets Invested Through Brokerage Window: N/A

5. Bank of America: \$44.4 billion – no brokerage window

- a. Participants: 279,148
- b. Total Assets: \$44,446,556,471
- c. Assets Invested Through Brokerage Window: N/A

6. Lockheed: \$40.6 billion - \$1.5 billion (2.8%) invested through brokerage window

- a. Participants: 128,863
- b. Total Assets: \$40,636,001,161
- c. Assets Invested Through Brokerage Window: \$1,146,860,000

7. JPMorgan Chase: \$33.8 billion – no brokerage window

- a. Participants: 271,937
- b. Total Assets: \$33,816,336,275
- c. Assets Invested Through Brokerage Window: N/A

8. Walmart: \$32.7 billion – no brokerage window

- a. Participants: 1,664,901
- b. Total Assets: \$32,663,824,722
- c. Assets Invested Through Brokerage Window: N/A

9. Northrop Grumman: \$30.1 billion – \$2.1 billion (7%) invested through brokerage window

- a. Participants: 107,795
- b. Total Assets: \$30,096,862,012
- c. Assets Invested Through Brokerage Window: \$2,102,790,000

10. UTC: \$28.6 billion – unknown amount invested through brokerage window

- a. Participants: 102,954
- b. Total Assets: \$28,559,621,000
- c. Assets Invested Through Brokerage Window: Unknown – While UTC offered a mutual fund brokerage window, its Form 5500 does not specify the assets

11. Microsoft: \$27.5 billion - \$1.1 billion (4.2%) invested through brokerage window

- a. Participants: 109,109
- b. Total Assets: \$27,542,813,107
- c. Assets Invested Through Brokerage Window Assets: 1,149,314,671

12. GE: \$27.0 billion – no brokerage window

- a. Participants: 205,186
- b. Total Assets: \$27,036,598,168
- c. Assets Invested Through Brokerage Window: N/A

13. Verizon: \$26.5 billion – no brokerage window

- a. Participants: 159,874
- b. Total Assets: \$26,539,227,066
- c. Assets Invested Through Brokerage Window: N/A

14. Raytheon: \$20.9 billion - \$713 million (3.4%) invested through brokerage window

- a. Participants: 88,044
- b. Total Assets: \$20,870,028,587
- c. Assets Invested Through Brokerage Window: \$713,347,371

15. FedEx: \$20.8 billion – no brokerage window

- a. Participants: 253,208
- b. Total Assets: \$20,819,143,999
- c. Assets Invested Through Brokerage Window: N/A

16. Costco: \$20.5 billion – no brokerage window

- a. Participants: 184,587
- b. Total Assets: \$20,528,057,831
- c. Assets Invested Through Brokerage Window: N/A

17. Fidelity: \$20.3 billion – unknown amount invested through brokerage window

- a. Participants: 59,689
- b. Total Assets: \$20,317,547,857
- c. Assets Invested Through Brokerage Window: Unknown

18. ExxonMobil: \$19.4 billion – no brokerage window

- a. Participants: 41,892
- b. Total Assets: \$19,432,000,000
- c. Assets Invested Through Brokerage Window: N/A

19. Johnson & Johnson: \$19.1 billion – no brokerage window

- a. Participants: 70,206

- b. Total Assets: \$19,140,430,064
- c. Assets Invested Through Brokerage Window: N/A

20. Chevron: \$18.8 billion – no brokerage window

- a. Participants: 35,611
- b. Total Assets: \$18,779,626,876
- c. Assets Invested Through Brokerage Window: N/A

21. HCA: \$18.0 billion – no brokerage window

- a. Participants: 387,421
- b. Total Assets: \$18,025,909,149
- c. Assets Invested Through Brokerage Window: N/A

22. Oracle: \$17.5 billion – \$1.1 billion (6.1%) invested through brokerage window

- a. Participants: 79,632
- b. Total Assets: \$ 17,474,825,000
- c. Assets Invested Through Brokerage Window: \$1,057,843,000

23. Google: \$17.3 billion – \$287 million (1.7%) invested through brokerage window

- a. Participants: 83,353
- b. Total Assets: \$17,290,544,625
- c. Assets Invested Through Brokerage Window: \$286,642,365

24. GM: \$16.9 billion – no brokerage window

- a. Participants: 63,352
- b. Total Assets: \$16,888,445,272
- c. Assets Invested Through Brokerage Window: N/A

25. Pfizer: \$16.2 billion - \$236 million (1.5%) invested through brokerage window

- a. Participants: 53,828
- b. Total Assets: \$16,191,259,990
- c. Assets Invested Through Brokerage Window: \$235,728,000

APPENDIX 2 - FINANCIAL INSTITUTIONS WITH BROKERAGE WINDOWS

1. Alight

- a. In sum:
 - 2019: \$20.7 million of \$1.6 billion (1.1%) invested through brokerage window
 - 2018: \$16.3 million of \$1.5 billion (1.1%) invested through brokerage window
- b. Total Net Assets:
 - 2019: \$1,800,564,000
 - 2018: \$1,448,218,000
- c. Assets Invested Through Brokerage Window:
 - 2019: \$20,703,000 (26.8% increase from 2018)
 - 2018: \$16,333,000
- d. Broker: Pershing LLC

2. American Express

- a. In sum:
 - 2019: \$138.4 million of \$6.2 billion (2.2%) invested through brokerage window
 - 2018: \$123.7 million of \$5.1 billion (2.4%) invested through brokerage window

- b. Total Net Assets:
 - 2019: \$6,226,352,000
 - 2018: \$5,110,920,000
- c. Assets Invested Through Brokerage Window:
 - 2019: \$138,364,000 (11.9% increase from 2018)
 - 2018: \$123,618,000
- d. Broker: Unknown

3. Ameriprise

- a. In sum:
 - 2019: \$392.4 million of \$2.3 billion (16.9%) invested through brokerage window
 - 2018: \$321.4 million of \$1.9 billion (17.2%) invested through brokerage window
- b. Total Net Assets:
 - 2019: \$ 2,326,483,934
 - 2018: \$ 1,868,207,461
- c. Assets Invested Through Brokerage Window:
 - 2019: \$ 392,378,983 (22.1% increase from 2018)
 - 2018: \$ 321,412,498
- d. Broker: Pershing LLC

4. Blackrock

- a. In sum:
 - 2019: \$29.1 million of \$2.7 billion (1.1%) invested through brokerage window

- 2018: \$21.2 million of \$2.1 billion (1.0%) invested through brokerage window
- b. Total Net Assets:
 - 2019: \$ 2,706,218,463
 - 2018: \$ 2,143,834,799
- c. Assets Invested Through Brokerage Window:
 - 2019: \$ 29,079,769 (37.4% increase from 2018)
 - 2018: \$ 21,164,511
- d. Broker: Merrill Lynch

5. BNY Mellon

- a. In sum:
 - 2019: \$136.0 million of \$13.7 billion (1.0%) invested through brokerage window
 - 2018: \$123.0 million of \$11.8 billion (1.0%) invested through brokerage window
- b. Total Net Assets:
 - 2019: \$13,685,787,944
 - 2018: \$11,795,133,938
- c. Assets Invested Through Brokerage Window:
 - 2019: \$136,012,706 (10.5% increase from 2018)
 - 2018: \$123,033,856
- d. Broker: Unknown

6. Capital One

- a. In sum

- 2019: \$62.5 million of \$6.7 billion (0.9%) invested through brokerage window
 - 2018: \$47.2 million of \$5.2 billion (0.9%) invested through brokerage window
- b. Total Net Assets:
- 2019: \$6,686,740,461
 - 2018: \$5,224,676,025
- c. Assets Invested Through Brokerage Window:
- 2019: \$62,511,080 (32.5% increase from 2018)
 - 2018: \$47,176,859
- d. Broker: Fidelity

7. Charles Schwab

- a. In sum:
- 2019: \$976.8 million of \$4.4 billion (22.3%) invested through brokerage window
 - 2018: \$767.9 million of \$3.6 billion (21.4%) invested through brokerage window
- b. Total Net Assets:
- 2019: \$4,374,545,752
 - 2018: \$3,586,057,520
- c. Assets Invested Through Brokerage Window:
- 2019: \$976,840,742 (27.2% increase from 2018)
 - 2018: \$767,854,353
- d. Broker: Charles Schwab

8. Citizens Financial Group

- a. In sum:
 - 2019: \$59.7 million of \$2.2 billion (2.8%) invested through brokerage window
 - 2018: \$44.5 million of \$1.7 billion (2.6%) invested through brokerage window
- b. Total Net Assets:
 - 2019: \$2,166,920,000
 - 2018: \$1,733,287,000
- c. Assets Invested Through Brokerage Window:
 - 2019: \$59,721,000 (34.3% increase from 2018)
 - 2018: \$44,464,000
- d. Brokers: Unknown

9. Deutsche Bank

- a. In sum:
 - 2019: \$56.4 million of \$3.7 billion (1.5%) invested through brokerage window
 - 2018: \$46.4 million of \$3.1 billion (1.5%) invested through brokerage window
- b. Total Net Assets:
 - 2019: \$3,688,492,114
 - 2018: \$3,148,724,268
- c. Assets Invested Through Brokerage Window:
 - 2019: \$56,422,144 (21.6% increase from 2018)
 - 2018: \$46,382,823

d. Broker: Unknown

10. First American

a. In sum:

- 2019: \$17.9 million of \$1.5 billion (1.2%) invested through brokerage window
- 2018: \$7.4 million of \$1.5 billion (0.5%) invested through brokerage window

b. Total Net Assets:

- 2019: \$1,467,500,582
- 2018: \$1,521,651,127

c. Assets Invested Through Brokerage Window:

- 2019: \$17,929,306 (140.8% increase from 2018)
- 2018: \$7,445,203

d. Broker: Unknown

11. HSBC

a. In sum:

- 2019: \$18.1 million of \$4.1 billion (0.4%) invested through brokerage window
- 2018: \$15.6 million of \$3.4 billion (0.5%) invested through brokerage window

b. Total Net Assets:

- 2019: \$4,067,090,000
- 2018: \$3,433,628,000

c. Assets Invested Through Brokerage Window:

- 2019: \$18,158,000 (16.5% increase from 2018)

- 2018: \$15,589,000
- d. Broker: TD Ameritrade

12. Principal Financial Group

- a. In sum:
 - 2019: \$2.9 million of \$3 billion (0.1%) invested through brokerage window
 - 2018: \$2 million of \$2.4 billion (0.1%) invested through brokerage window
- b. Total Net Assets:
 - 2019: \$2,962,300,399
 - 2018: \$2,449,415,053
- c. Assets Invested Through Brokerage Window:
 - 2019: \$2,910,426 (45.9% increase from 2018)
 - 2018: \$1,994,147
- d. Broker: Unknown

13. RBC

- a. In sum:
 - 2019: \$97.3 million of \$2.9 billion (3.4%) invested through brokerage window
 - 2018: \$82.1 million of \$2.4 billion (3.5%) invested through brokerage window
- b. Total Net Assets:
 - 2019: \$2,901,999,327
 - 2018: \$2,365,985,714
- c. Assets Invested Through Brokerage Window

- 2019: \$97,437,671 (18.7% increase from 2018)
- 2018: \$82,113,138

d. Broker: Unknown

14. State Street

a. In sum:

- 2019: \$244 million of \$4.5 billion (5.4%) invested through brokerage window
- 2018: \$183 million of \$3.6 billion (5.1%) invested through brokerage window

b. Total Net Assets:

- 2019: \$4,493,798,125
- 2018: \$3,566,808,485

c. Assets Invested Through Brokerage Window:

- 2019: \$244,308,611 (33.5% increase from 2018)
- 2018: \$182,957,224

d. Broker: State Street

15. TD Ameritrade

a. In sum:

- 2019: \$201.3 million of \$1.7 billion (11.9%) invested through brokerage window
- 2018: \$146.3 million of \$1.4 billion (10.6%) invested through brokerage window

b. Total Net Assets:

- 2019: \$1,699,131,721
- 2018: \$1,383,424,096

- c. Assets Invested Through Brokerage Window:
 - 2019: \$201,369,858 (37.7% increase from 2018)
 - 2018: \$146,277,471
- d. Broker: TD Ameritrade

16. Truist

- a. In sum:
 - 2019: \$217.8 million of \$5.2 billion (4.2%) invested through brokerage window
 - 2018: \$171.2 million of \$4.3 billion (4.0%) invested through brokerage window
- b. Total Net Assets:
 - 2019: \$5,245,412,829
 - 2018: \$4,318,765,050
- c. Assets Invested Through Brokerage Window:
 - 2019: \$217,782,101 (27.2% increase from 2018)
 - 2018: \$171,159,234
- d. Broker: TD Ameritrade

17. UBS

- a. In sum:
 - 2019: \$1.2 billion of \$6.8 billion (17.8%) invested through brokerage window
 - 2018: \$1 billion of \$5.4 billion (18.6%) invested through brokerage window
- b. Total Net Assets:
 - 2019: \$6,791,221,949

- 2018: \$5,542,941,743
- c. Assets Invested Through Brokerage Window:
 - 2019: \$1,208,231,257 (17.1% increase from 2018)
 - 2018: \$1,031,899,452
- d. Broker: Unknown

18. Union Bank

- a. In sum:
 - 2019: \$22.7 million of \$2.9 billion (0.8%) invested through brokerage window
 - 2018: \$16.5 million of \$2.3 billion (0.7%) invested through brokerage window
- b. Total Net Assets:
 - 2019: \$2,882,768,705
 - 2018: \$2,342,721,842
- c. Assets Invested Through Brokerage Window:
 - 2019: \$22,648,488 (37.4% increase from 2018)
 - 2018: \$16,480,849
- d. Broker: Unknown

19. Visa

- a. In sum:
 - 2019: \$176.5 million of \$2.6 billion (6.8%) invested through brokerage window
 - 2018: \$128.4 million of \$2.0 billion (6.5%) invested through brokerage window

b. Total Net Assets:

- 2019: \$2,603,718,403
- 2018: \$1,981,297,100

c. Assets Invested Through Brokerage Window:

- 2019: \$176,477,163 (37.4% increase from 2018)
- 2018: \$128,428,193

d. Broker: Fidelity

NOTES

1. Some states (namely, Massachusetts, Nevada, New Jersey, and New York) impose fiduciary duties on broker-dealers, and thus brokers have “fiduciary” duties owed to their customers under state law. *See* Bailey McCann, Brokers and Investors Face a Crazy Quilt of State Regulations, *WALL ST. J.* (Mar. 7, 2018), <https://www.wsj.com/articles/financial-advisers-and-investors-face-a-crazy-quilt-of-state-regulations-11615122000>. However, as investments made through brokerage windows in ERISA-covered plans are subject to the Act’s preemption of state law, 29 U.S.C. § 1144, whether brokers handling brokerage-window investments are fiduciaries will be determined by federal law. Brokers are not considered fiduciaries under the Investment Company Act of 1940, 15 U.S.C. §§ 80a-1-80a-64, and § 514 (d) of ERISA specifically respects status determinations made by other federal statutes. *See* 29 U.S.C. § 1144(d) (explaining that nothing in ERISA is to be “construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States”).

2. *See* Christine Benz, 100 Must-Know Statistics About 401(k) Plans, *MORNINGSTAR* (Sept. 4, 2020), <https://www.morningstar.com/articles/1000743/100-must-know-statistics-about-401k-plans> (noting that the average number of options offered is 21 when target date funds are considered a single fund, 28 when target date funds with different target retirement dates are treated as separate investment options); Testimony of Alison Borland before the ERISA Advisory Council (June 24, 2021), at 3 (“In 2019, an average of 25 investment options were offered in defined contributions plans, which has been relatively consistent for the last several years.”).

3. Adam Heyes, Brokerage Window, *INVESTOPEDIA* (Jul. 8, 2021), https://www.investopedia.com/terms/b/brokerage_window.asp; *Moitoso v. FMR LLC*, 451 F. Supp. 3d 189, 208 (D. Mass. 2020) (citing Investopedia); Testimony of Chantel Sheaks before the ERISA Advisory Council (June 24, 2021) (same). Disclosure regulations define a “brokerage window” as a “plan arrangement[] that enable[s] participants and beneficiaries to select investments beyond those designated by the plan.” 29 C.F.R. §§ 2550.404a-5(c)(1)(i)(F), 2550.404a-5(h)(4); 29 C.F.R. § 2550.408b-2(c)(1)(viii)(C). The import of this definition (and the distinction between “designated investment alternatives” and brokerage window investments) is further discussed below.

4. See, e.g., Testimony of Alison Borland before the ERISA Advisory Council (June 24, 2021), at 3 (“The investment options made available through brokerage windows are usually much more numerous than in the plan menu, thus giving participants access to a broader array of stocks, bonds, mutual funds and exchange traded funds (ETFs).”).
5. See Testimony of Kent A. Mason before the ERISA Advisory Council (June 24, 2021), § 2 (“The investments available through a brokerage window are not presented to participants as having been screened by the plan fiduciary; such investments are presented as market investments that may be used outside the oversight of the fiduciary”); *Troudt v. Oracle Corp.*, No. 16-cv-00175, 2019 WL 1006019, at *11 n.18 (D. Colo. Mar. 1, 2019) (noting that investments available through brokerage window were not monitored by plan).
6. See ERISA § 2(b), 29 U.S.C. § 1001(b) (explaining that the statute’s policy is, inter alia, “to protect . . . the interests of participants in employee benefit plans . . . by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans”); and § 404(a), 29 U.S.C. § 1104(a) (requiring fiduciaries to minimize the risk of loss by diversifying plan investments).
7. See Employee Benefit Research Institute, Fast Facts: History of 401(k) Plans: An Update (Nov. 5, 2018), <https://www.ebri.org/docs/default-source/fast-facts/ff-318-k-40year-5nov18.pdf>.
8. *LaRue v. DeWolff, Boberg & Assocs., Inc.*, 552 U.S. 248, 255 (2008) (“Defined contribution plans dominate the retirement plan scene today.”).
9. John Sullivan, What Is the ‘Core Purpose’ of a 401(k) Plan?, 401k SPECIALIST (Sept. 7, 2016), <https://401kspecialistmag.com/core-purpose-401k-plan/> (“A large majority of plan sponsors (85 percent) think the core purpose of a 401(k) plan is to provide income sources during retirement, rather than savings”).
10. See 29 U.S.C. §§ 1103, 1104.
11. ERISA Section 3(21)(A), 29 U.S.C. § 1002(21)(A).
12. See Mark Kronson, Bureau of Labor Statistics, Employee Costs and Risks in 401(k) Plans, COMPENSATION AND WORKING CONDITIONS 12 (Summer 2000), <https://www.bls.gov/opub/mlr/cwc/employee-costs-and-risks-in-401k-plans.pdf>.
13. *Id.*
14. See *infra*.
15. Indeed, this is the animating thought of target-date funds, which gradually reduce investment risk in investment portfolios as participants get closer to retirement. See Troy Segal, Target-Date Fund, INVESTOPEDIA (May 30, 2021), https://www.investopedia.com/terms/t/target-date_fund.asp. Of course, nothing prevents an employee from investing their non-ERISA governed funds in any high-risk endeavors of their choosing but without the governmental incentivization that comes with using tax-deferred dollars.
16. *DiFelice v. U.S. Airways*, 497 F.3d 410, 423 (4th Cir. 2007) (“[A] fiduciary must initially determine, and continue to monitor, the prudence of *each* investment option available to plan participants.”) (emphasis added).
17. Nevin Adams, “Playing” With Fire?, NAT’L ASSOC. OF PLAN ADVISORS (June 15, 2021), <https://www.napa-net.org/news-info/daily-news/playing-fire>.

18. Testimony of Alison Borland before the ERISA Advisory Council (June 24, 2021), at 5 (citing data from ALIGHT SOLUTIONS, TRENDS & EXPERIENCE IN DEFINED CONTRIBUTION PLANS (2019)).
19. *See id.*
20. *See infra.*
21. Testimony of Alison Borland before the ERISA Advisory Council (June 24, 2021), at 8; *see also* Amanda Umpierrez, What to Know Before Adding an SDBA to Your Plan, PLAN SPONSOR (Apr. 8, 2021), <https://www.plansponsor.com/in-depth/know-adding-sdba-plan/>. (“[S]ources say self-directed brokerage accounts (SDBAs) are becoming increasingly popular”).
22. Testimony of Kevin Mahoney before the ERISA Advisory Council (June 24, 2021) (citing data from the Plan Sponsor Council of America’s (“PSCA”) 63rd Annual Survey of Profit Sharing and 401(k) Plans, which is the most recent version of PSCA’s survey, and reports on 2019 data; *see* https://www.psc.org/PR_2020_63rdReport).
23. Testimony of Alison Borland before the ERISA Advisory Council (June 24, 2021), at 8 (citing data from ALIGHT SOLUTIONS, TRENDS & EXPERIENCE IN DEFINED CONTRIBUTION PLANS (2019)).
24. Testimony of Aliya Robinson before the ERISA Advisory Council (June 24, 2021), at 2 (citing results of an ERISA Industry Committee (“ERIC”) member survey).
25. The first figure is drawn from Testimony of Alison Borland before the ERISA Advisory Council (June 24, 2021), at 8; the second from Testimony of Kevin Mahoney before the ERISA Advisory Council (June 24, 2021) (citing data from the PSCA’s 63rd Annual Survey of Profit Sharing and 401(k) Plans).
26. Testimony of Kent A. Mason before the ERISA Advisory Council (June 24, 2021), § 1.
27. *See* Appendix 1.
28. While Some of the country’s largest providers of financial services – including Wells Fargo, Bank of America, and JP Morgan Chase – have prudently shied away from providing brokerage windows, the authors’ review of Form 5500s of financial institutions has identified 19 financial service companies that have brokerage windows in their 401(k) plans. *See* Appendix 2.
29. *See* Appendix 2.
30. *See* Appendix 2.
31. *See* Appendix 2.
32. *See* Appendix 2.
33. *See* Appendix 2.
34. *See* ERISA Section 406, 29 U.S.C. § 1106. This article does not address the complicated prohibited transactions issues that may arise from the use of affiliated brokers. But, it should be noted that violation of ERISA’s prohibited transaction rules may subject plans to serious adverse tax consequences. The Internal Revenue Code penalizes a fiduciary who fails to remedy a prohibited transaction. A first-level tax of 15 percent is imposed upon a fiduciary who allowed the transaction to occur in the first place. I.R.C. § 4975(a). A second-level tax of 100 percent is imposed for each subsequent

- “taxable period” in which the prohibited transaction is not corrected. *Id.* at Section 4975(b). The potential tax liability to the U.S. Treasury is in addition to the liability that may be owed to the participant. *See Nieto v. Ecker*, 845 F.2d 868, 874 n.6 (9th Cir. 1988) (“Moreover, section 4975 clearly contemplates that the tax does not foreclose remedial action by the Secretary of Labor and, implicitly, participants or beneficiaries as well.”).
35. *Donovan v. Bierwirth*, 680 F.2d 263, 272 (2d Cir. 1982).
36. *Meinhard v. Salmon*, 164 N.E. 545, 546 (1928).
37. *Neil v. Zell*, 677 F. Supp. 2d 1010, 1019 (N.D. Ill. 2009), as amended (Mar. 11, 2010).
38. 29 U.S.C. § 1104(a)(1)(C).
39. 29 U.S.C. §§ 1104(a)(1)(A), (B), and (C).
40. *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 419 (2014) (citation omitted).
41. *See, e.g., Sweda v. Univ. of Pennsylvania*, 923 F.3d 320, 328 (3d Cir. 2019), cert. denied, 140 S. Ct. 2565 (2020) (explaining that “[a] fiduciary must prudently select investments”).
42. *Tibble v. Edison Int’l*, 575 U.S. 523, 530 (2015) (“*Tibble I*”).
43. *See* ERISA § 204(b)(2); 29 U.S.C. § 1054(b)(2).
44. *See* ERISA § 204(b)(1); 29 U.S.C. § 1054(b)(1).
45. *See Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 439-40 (U.S. 1999) (explaining the inherent differences between defined contribution and defined benefit plans).
46. *Id.*
47. *See* ERISA § 204(c)(2)(A) (entitling participants in plans other than “defined benefit” plans to only those “contributions and the income, expenses, gains, and losses attributable thereto” of the participant’s individual account).
48. 29 U.S.C. § 1110.
49. For further discussion of how ERISA § 410 limits fiduciaries’ ability to disclaim duties, *see infra*.
50. *DiFelice*, 497 F.3d 410 at 423.
51. The most comprehensive discussion of the issue that the authors are familiar with can be found in *Moitoso*, 451 F. Supp. 3d at 205-8. However, even there the court ultimately concludes that it “need not decide this thorny issue [i.e., what duties a fiduciary owes with regard to the funds within a brokerage window], . . . because [the defendant] was not offering [the funds challenged in the action] through a brokerage window or its equivalent.” *Id.* at 208. Other cases that touch upon the issue are *Ramos v. Banner Health*, 461 F. Supp. 3d 1067, 1126-27 (D. Colo. 2020), *aff’d*, 1 F.4th 769 (10th Cir. 2021) (granting summary judgment on plaintiffs’ breach of duty claim based on defendant fiduciaries’ failure to monitor brokerage-window investments because plaintiffs had failed to establish “a reasonably precise amount of damages” resulting from the failure to monitor brokerage-window investments. and that “any breach of the duty of prudence allegedly resulting by [sic] the failure to monitor . . . actually caused any economic losses,” but the court seemingly accepted that the fiduciaries could face liability for its failure to monitor those investments, had plaintiffs been able to establish damages and a causal connection between the breach and those losses); and *Larson v. Allina Health Sys.*, 350 F. Supp. 3d 780, 800-2 (D. Minn. 2018) (granting motion to dismiss breach of fiduciary duty claim based on fact that, through

brokerage windows, participants had access to “too many” investment options, without addressing whether those options were subject to duty to monitor).

52. 29 U.S.C. § 1104(c)(1)(A).

53. *Id.*

54. 57 Fed. Reg. 46,922, 46,924 n. 27 (Oct. 13, 1992).

55. Compare *Tibble v. Edison Int'l*, 729 F.3d 1110, 1123-25 (9th Cir. 2013) (“*Tibble I*”), vacated on other grounds, 575 U.S. 523 (2015) (holding that Section 404(c), even when a plan meets all regulatory requirements, does not bar a suit by participants for breach of the duty of prudence in selecting investments); *Pfeil v. State St. Bank & Tr. Co.*, 671 F.3d 585, 597 (6th Cir. 2012) (“We hold that as a fiduciary, [the defendant] was obligated to exercise prudence when designating and monitoring the menu of different investment options that would be offered to plan participants.”); *Howell v. Motorola, Inc.*, 633 F.3d 552, 567 (7th Cir. 2011) (“The selection of plan investment options and the decision to continue offering a particular investment vehicle are acts to which fiduciary duties attach, and that the safe harbor [of § 404(c)] is not available for such acts.”) *DiFelice v. U.S. Airways, Inc.*, 497 F.3d 410, 418 (4th Cir. 2007) (“A . . . fiduciary of a defined contribution, participant-driven, 401(k) plan created to provide retirement income for employees who is given discretion to select and maintain specific investment options for participants [] must exercise prudence in selecting and retaining available investment options.”); with *Langbecker v. Elec. Data Sys. Corp.*, 476 F.3d 299, 311-13 (5th Cir. 2007) (holding that § 404(c) can insulate plan fiduciaries against liability despite having “violated the duties of selection and monitoring of a plan investment,” because “[Section] 404(c) recognizes that participants are not helpless victims of every error”).

56. *Tibble II*, 729 F.3d at 1123.

57. 57 Fed. Reg. at 46,924 n.27.

58. See *Langbecker*, 476 F.3d at 321 (Reavley, J., dissenting) (concluding that “§ 404(c) does not shift liability for a plan fiduciary’s duty to ensure that each investment option is and continues to be a prudent one” onto plan participants).

59. *Tibble I*, 575 U.S. at 530.

60. 29 U.S.C. § 1132(a)(3).

61. See *infra*.

62. 29 C.F.R. §§ 2550.404a-5(c)(1)(i)(F), 2550.404a-5(h)(4), 2550.408b-2(c)(1)(viii)(C).

63. 29 C.F.R. §§ 2550.404a-5(h)(4), 2550.408b-2(c)(1)(viii)(C).

64. Plan administrators must provide participants with “[a] description of any ‘brokerage windows,’ ‘self-directed brokerage accounts,’ or similar plan arrangements” under 29 C.F.R. §§ 2550.404a-5(c)(1)(i)(F) but do not have to provide participants with the detailed information on performance, benchmarks, fees, and expenses that is required with respect to DIAs under 29 C.F.R. §§ 2550.404a-5(d).

65. Testimony of Kent A. Mason before the ERISA Advisory Council (June 24, 2021), § 5.

66. *Moitoso*, 451 F. Supp. 3d at 206.

67. See Defendants’ Memorandum of Law in Opposition to Plaintiffs’ Motion for Summary Judgment at 6, *Moitoso v. FMR LLC*, No. 1:18-cv-12122 (D. Mass. Oct. 4, 2019), ECF No. 165 (arguing that the exclusion of brokerage windows from the

disclosure regulations “establish that fiduciaries need not monitor investments in brokerage windows and similar arrangements” because “it is a fiduciary’s duty to “monitor . . . designated investment alternatives offered under the plan” (citing 29 C.F.R. § 2550.404a-5(f)), and concluding that therefore, “a fiduciary does not have a duty to monitor non-DIA investment options”).

68. 29 C.F.R. § 2550.404c-1(d)(2)(iv).

69. *Moitoso*, 451 F. Supp. 3d at 206.

70. 57 Fed. Reg. at 46,924 n.27; *see also, e.g., RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012) (“A well established canon of statutory interpretation succinctly captures the problem: ‘It is a commonplace of statutory construction that the specific governs the general.’ . . . The general/specific canon is perhaps most frequently applied to statutes in which a general permission or prohibition is contradicted by a specific prohibition or permission. To eliminate the contradiction, the specific provision is construed as an exception to the general one.”) (quoting *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992)).

71. 29 U.S.C. § 1104(a)(1). Though the focus of this article is on ERISA’s fiduciary duty of prudence in the selection and monitoring of investment options, it is worth noting that the same reasoning applies to the application of ERISA’s twin duty of fiduciary loyalty under § 404(a). Indeed, this very issue arose in a recent case where the plan fiduciary allowed participants to invest in a self-directed brokerage account offered through Charles Schwab, and then was alleged to have structured the offerings available through the brokerage window to include only exchange traded funds (“ETFs”) affiliated with the fiduciary plan sponsor, while excluding investment options offered by competitors. *See Cervantes v. Invesco Holding Co. (US), Inc.*, No. 1:18-cv-02551, 2019 WL 5067202, at *2 (N.D. Ga. Sept. 25, 2019).

72. *Tibble I*, 575 U.S. at 529 (cleaned up) (emphasis added) (citation omitted); *see also* Plaintiffs’ Reply Memorandum of Law in Support of Their Motion for Partial Summary Judgment at 9, *Moitoso v. FMR LLC*, No. 1:18-cv-12122 (D. Mass. Oct. 11, 2019), ECF No. 176.

73. *Dudenboefffer*, 573 U.S. at 422 (internal marks and citation omitted).

74. *Id.* (internal marks and citation omitted). Indeed, the very provision that sets forth the fiduciary duty to act in accordance with plan documents explicitly states that fiduciaries must act “in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with other provisions of this subchapter.” 29 U.S.C. § 1104(a)(1)(D).

75. 29 U.S.C. § 1110(a). This means that the following argument, often offered to support the absence of fiduciary responsibility over brokerage-window investments, is circular, as it incorrectly assumes that fiduciaries may do exactly what ERISA § 410(a) says they may not:

The investments available through a brokerage window are not presented to participants as having been screened by the plan fiduciary; such investments are presented as market investments that may be used outside the oversight of the fiduciary. Thus, there is no duty to monitor those investments.

Testimony of Kent A. Mason before the ERISA Advisory Council (June 24, 2021), § 2.

76. *Moitoso*, 451 F. Supp. 3d at 208.

77. Testimony of Chantel Sheaks before the ERISA Advisory Council (June 24, 2021).

78. See, e.g., *Moitoso*, 451 F. Supp. 3d at 207 (“[A] plan sponsor can incur liability when it fails to carefully select or monitor the service provider. . . .”).
79. Testimony of Chantel Sheaks before the ERISA Advisory Council (June 24, 2021).
80. DOL FAB 2012-02 (May 7, 2012), FAQ 30, available at <https://www.dol.gov/sites/dolgov/files/EBSA/employers-and-advisers/guidance/field-assistance-bulletins/2019-02.pdf>.
81. See *LaRue*, 552 U.S. at 255-56.
82. DOL FAB 2012-02R (July 30, 2012), FAQ 39, available at <https://www.dol.gov/sites/dolgov/files/ebsa/employers-and-advisers/guidance/field-assistance-bulletins/2012-02r.pdf>.
83. *Id.*
84. *Id.*
85. 79 Fed. Reg. 49,469, 49,471-473 (Aug. 21, 2014).
86. 79 Fed. Reg. 49,469 (emphasis added). The DOL, unfortunately, neither issued a report on the information it received in response to its 2014 Request, nor did it at that time provide any further guidance, or act in any other way based on the information provided. This inaction may have encouraged fiduciaries who allow brokerage-window investments in their 401(k) plans to believe that they remained free to ignore their fiduciary duties regarding those investments.
87. 2021 Advisory Council on Employee Welfare and Pension Benefit Plans, Understanding Brokerage Windows in Self-Directed Retirement Plans (May 26, 2021), <https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/about-us/erisa-advisory-council/2021-advisory-council-issue-statement-brokerage-windows.pdf>.
88. *Id.*
89. See, e.g., *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992); *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 591-92 (8th Cir. 2009).
90. 29 U.S.C. § 1132(a)(1), (2); *LaRue*, 552 U.S. at 261-63; but see *Cervantes*, 2019 WL 5067202 at *8-9 (indicating that a plaintiff may have standing to challenge fiduciary conduct regarding a brokerage window without having personally invested through it, so long as the allegation “arises from the same misconduct that injured his retirement savings and the retirement savings of all participants.”).
91. See Fed. R. Civ. P. 23(a)(1) (requiring that “the class is so numerous that joinder of all members is impracticable”). As a general rule of thumb, a minimum of 40 class members is necessary to satisfy the Rule 23 numerosity requirement. See, e.g., 5 William B. Rubenstein, *Newberg on Class Actions* § 3:12 (“As a general guideline . . . a class of 40 or more members raises a presumption of impracticability of joinder based on numbers alone.”).
92. 29 U.S.C. § 1132(a)(3).
93. *Spokeo, Inc. v. Robins*, 578 U.S. 856, 136 S. Ct. 1540, 1549 (2016), as revised (May 24, 2016) (explaining that whereas “a bare procedural violation, divorced from any concrete harm” does not “satisfy the injury-in-fact requirement of Article III,” the “violation of a procedural right granted by statute can be sufficient . . . to constitute injury in fact” if there is a “risk of real harm”).
94. *Brock v. Robbins*, 830 F.2d 640, 647-48 (7th Cir. 1987) (further recognizing that where “certain trustees have acted imprudently, even if there is no monetary loss as a

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result of the imprudence, then the interests of ERISA are furthered by entering appropriate injunctive relief.); *see also Moitoso*, 451 F. Supp. 3d at 218 (“Equitable relief is an available remedy for individuals even when the Plan as a whole has not suffered losses, if such relief is ‘appropriate.’”).

95. *Shaver v. Operating Engineers Loc. 428 Pension Tr. Fund*, 332 F.3d 1198, 1203 (9th Cir. 2003).

96. *Brock*, 830 F.2d at 647-48.

97. *See* 29 U.S.C. § 1132(a)(5) (empowering the DOL bring suit “to enjoin any act or practice” that violates ERISA, to “redress” violations, and “enforce any provision” of ERISA).