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Item 10

DATE June 15, 2023

TO: Deferred Compensation Management Council

FROM: Brent Petty, NWCM, Inc.

SUBJECT: Plan Sponsor Consideration for Offering a Self-Directed Brokerage Window

The purpose of this memo is to summarize the factors a plan sponsor should take into consideration when deciding whether to offer a self-directed brokerage window (brokerage window) as part of their defined contribution retirement plan.

Plan Sponsor Considerations

Fiduciary Roles and Responsibilities

Offering a brokerage window is a fiduciary decision.[1] Plan sponsors (acting as plan fiduciaries) are exercising their discretion concerning how to implement the plan provisions giving participants the right to direct their accounts. That said, plan sponsors must use a prudent process in determining if a brokerage window is appropriate. Questions for consideration to determine if the plan should offer a brokerage window include but are not limited to:

- What is the investment sophistication of the overall participant population?
- Would the participants benefit from offering an expanded number of investments in the brokerage window?
- Does the plan sponsor have the ability to communicate to participants that the investments in the brokerage window are not selected or monitored by the DCMC or its advisor and that participants should consider their unique risk tolerance and sophistication level?

Fiduciary Process for Selection and Monitoring:

There is limited guidance on the fiduciary duty related to brokerage windows. That said, the decision is not fundamentally different from any other decision made by fiduciaries in that they must engage in a prudent process. Fiduciaries have a responsibility to prudently select and monitor the provider of the brokerage window. Once the provider of the brokerage window has

[1] It may also be the case that the decision to offer a brokerage window itself is a plan design decision, which is a settlor function. While unsettled, that is outside the scope of this memo and the most conservative approach would be to assume the decision to offer a brokerage window is a fiduciary decision by which a fiduciary process should be followed.

been selected, there is no responsibility to prudently select and monitor each underlying investment option in the brokerage window.

Selection of the Provider

Once a decision has been made to offer a brokerage window, the fiduciaries have a second decision to make: selecting the provider. This review process should include the following:

- Is the provider qualified to offer a brokerage window service?
- What is the quality of the service provider's services?
- Do they have a track record of providing prompt, efficient and accurate responses?
- Are confirmations provided promptly?
- Are the fees reasonable relative to other window providers?

Monitoring of the Provider

Plan sponsors should periodically review that the service provider originally selected continue to offer services and pricing competitive with the marketplace.

Other considerations:

Does offering a brokerage window continue to afford plan sponsors protection under ERISA 404(c)– protection against losses incurred by plan participants? The answer is yes, as long as the plan's "core" options meet the criteria and all disclosure obligations are met. Additionally, the following disclosures explaining any fee and expense that may be charged against the individual account may need to be made as required under 404(a)(5):

- Any fee or expense necessary for the participant to open or close the window.
- Any ongoing fee or expenses to maintain the window.
- Commissions or fees per trade.
- A reconciliation with a statement of the dollar amount of fees and expenses that were charged during the preceding quarter.

Regarding disclosures, in Field Assistant Bulletin 2012-02R, the DOL explained that the plan sponsor or plan committee must provide a general description that gives "sufficient information to enable participants and beneficiaries to understand how the window, account, or arrangement works."

Conclusion

Offering a brokerage window can provide participants with additional investment options beyond those offered in the plan's core investment line-up. This additional flexibility does come with additional selection, monitoring, and disclosure requirements for the plan fiduciaries.

If a plan sponsor is receiving numerous requests to invest in securities not offered in the plan, then investigating the merits of the brokerage window makes sense. Absent this demand, taking on the additional fiduciary responsibilities may be something a plan sponsor looks to avoid.

** This is not legal advice, and this is a memo for educational purposes only based on ERISA best practices which you believe that the plan follows but that you understand that ERISA does not apply. However, California law and applicable guidance thereunder likely is aligned with ERISA and should be considered as a best practice. Legal counsel should be consulted for specific guidance.*