



# ERISA Advisory Council pulls back the curtain on brokerage windows

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The ERISA Advisory Council released a detailed [report](#) on its recent examination of brokerage windows in defined contribution (DC) plans, previously an area of controversy due to shifting guidance from the Department of Labor (DOL). Though the council considered several topics, its sole recommendation is for DOL to conduct additional fact-finding on “brokerage window only” (BWO) plans — DC plans that offer one or more brokerage windows but no designated investment alternatives (DIAs). The DOL-appointed council can't issue guidance, but these findings may help alleviate concerns for plan fiduciaries currently offering — or looking to offer — a brokerage window by making the case for DOL to preserve the status quo.

## Framing previous DOL guidance

Brokerage windows allow DC plan participants to invest their account balances in a variety of investment offerings beyond their plans' selection of DIAs. In [guidance](#) issued a decade ago, DOL confirmed that a brokerage window isn't a DIA under the participant disclosure rules. However, the agency controversially suggested that some investments available through a brokerage window may need to be treated as DIAs — and be subject to associated fiduciary oversight and investment-related disclosures — if enough participants invest in those products.

After significant outcry from the regulated community, [revised DOL guidance](#) withdrew this interpretation. In its report, the council acknowledged the lack of DOL guidance on the application of ERISA's fiduciary standards to brokerage windows and noted that plan fiduciaries don't routinely monitor the underlying investments. In 2014, DOL published a [request for information](#) (RFI) on the need for more brokerage window guidance but has never taken further action.

## View of the current landscape

The council's report discusses the availability and utilization of brokerage windows in DC plans, drawing on testimony from a variety of constituencies, including plan sponsor representatives, consultants and recordkeepers. The report also presents recent data on the prevalence of brokerage windows and participant demographics from several major recordkeepers.

- **Larger plans are more likely to offer brokerage windows.** The council found that larger plans and plans sponsored by employers in certain sectors are more likely to offer brokerage windows. Much of the testimony reflects the use of brokerage windows to accommodate a small subset of participants with specialized investment needs — including faith-based motivations or preferences for ESG investments — while allowing plan fiduciaries to maintain a manageable number of DIAs.
- **BWO plans.** Several third-party administrators said that plans of small start-up businesses and professional groups in the medical and legal fields sometimes offer only brokerage windows and no DIAs. Although the 2014 RFI questioned whether a decision to offer only brokerage windows might be driven by efforts to avoid the participant disclosure rules, the council heard no testimony indicating this was the case.
- **Characteristics of participants using brokerage windows.** Data and testimony from recordkeepers indicate that brokerage windows are currently used by a small percentage of participants. These participants typically have longer employment, higher salaries and above-average account balances. In the council's view, these characteristics show higher levels of investment experience and financial sophistication.
- **Plan-imposed investment restrictions.** Plan fiduciaries may impose utilization restrictions on brokerage windows, including limiting the percentage of a participant's account balance that can be invested. Plan fiduciaries sometimes choose to restrict the available investment offerings to particular types — such as mutual funds — or prohibit investment in employer stock. About half of plans impose such restrictions, but almost all plans forbid municipal bonds and other investments deemed inappropriate for DC plans.

## Council's evaluation and recommendation

The report's sole recommendation was that DOL conduct further fact-finding for BWO plans. The council was concerned that a lack of a default provider in some BWO plans could discourage employees with less financial experience from participating. The lack of a default provider also raises questions about the extent to which plan fiduciaries are evaluating the cost and quality of brokerage services. The council also expressed concerns about the lack of certain plan features — like loans and automatic enrollment — in BWO plans.

The council considered several other potential actions DOL could take, but ultimately determined they weren't necessary:

- **No need for a definition of brokerage window.** While DOL hasn't defined the term "brokerage window" — the concept is defined by what it isn't, rather than what it is — the council concluded that the lack of confusion in the marketplace suggests DOL doesn't need to adopt a formal definition.
- **Cost of more disclosure outweighs benefits.** The council considered the need for additional participant disclosure to highlight the lack of fiduciary monitoring of underlying investments, expenses associated with these investments and the potential for inadequate diversification. Based on the characteristics of the participants who use brokerage windows and examples of current disclosures furnished by brokerage window providers, the council concluded that the benefits of more disclosure would be marginal and outweighed by associated costs.
- **No need for DOL to educate.** In light of the testimony about available brokerage window offerings and participant utilization, the council's consensus view is that DOL doesn't currently need to conduct educational campaigns about brokerage windows for plan fiduciaries or participants. The report noted the recent growth in brokerage window offerings and increasing interest from plan participants — particularly younger ones — perhaps signaling a future need for such education.

## Related resources

- [Understanding brokerage windows in self-directed retirement plans](#) (ERISA Advisory Council, Dec. 26, 2021)
- [RFI regarding standards for brokerage windows in participant-directed individual account plans](#) (Federal Register, Aug. 21, 2014)
- [Field Assistance Bulletin No. 2012-02R](#) (DOL, July 30, 2012)

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