Would A Brokerage Window Limit An ERISA Plan's Fiduciary Risk?

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If employer sponsors of retirement plans want to reduce their fiduciary responsibility, one way that's recently been proposed is for them to offer their participants a brokerage window with expanded investment plan options. Or at least that's a path forward that's been suggested after the Supreme Court's recent "Hughes v. Northwestern University" decision, said former Department of Labor attorneys at the Wagner Law Group in a new blog today.

The court's decision in Hughes held that defined contribution plans have a fiduciary duty to determine the prudence of *all* the investment alternatives on the plan's menu. It's not enough to have a long, diverse list of options (including some low-cost ones) if the menu might confuse participants.

Brokerage windows, when posed as a possible solution to this problem, would allow plan participants to choose their own investments within a self-directed retirement account, beyond the menu of plan alternatives—and typically without investments being vetted or monitored by plan fiduciaries.

"Brokerage windows could provide an opportunity to offer unfettered investment options coupled with a limited curated investment menu that fiduciaries could readily evaluate and monitor," said Wagner counsel Mark Greenstein. As a former acting division chief for the U.S. Department of Labor, Greenstein produced advisory opinions on fiduciary responsibility and prohibited transaction prohibitions.

"While there is limited regulatory guidance on the use of brokerage windows, the [DOL's] ERISA Advisory Council recently examined the law and concluded that no further regulation is needed," Greenstein wrote.

Instead, the council's report to the U.S. labor secretary suggested that the DOL conduct additional fact-finding on participant needs in brokerage window-only plans, he noted.

The Northwestern University plans at issue in the Supreme Court's Hughes decision offered more than 400 options. The court rejected the notion that fiduciary duties were met if there were enough prudent low-fee options available for participants to design diversified investment portfolios, the Wagner attorneys said.

“Going forward, the high standard of fiduciary responsibility embraced by the court in Hughes may discourage fiduciaries from designating numerous investment alternatives on participant investment menus,” said Ivelisse J. Berio LeBeau, a Wagner partner and a former DOL attorney in the Office of the Solicitor who works with benefit plan sponsors and fiduciaries in federal and state court actions alleging breach of fiduciary duty.

“Fiduciaries considering less robust plan investment menus, however, may also be concerned that reduced investment options could discourage participation or could trigger challenges from participants that investment options are too restrictive,” Berio LeBeau added.

The question is whether a brokerage window would be a solution for employers trying to reduce their fiduciary responsibility, she said.

The answer is still unclear. In a March commentary discouraging Employee Retirement Income Security Act (ERISA) plan fiduciaries from allowing cryptocurrency investments, the Department of Labor cited the Supreme Court’s decision in Hughes, underscoring that fiduciaries cannot allow any imprudent investment options and strongly suggesting that a cryptocurrency option would not be appropriate.

Since brokerage windows could be used to circumvent designated investment options, the department further cautioned that a plan fiduciary permitting investments in cryptocurrency through a brokerage window should be ready to explain how such a decision was consistent with duties of prudence and loyalty under ERISA, Berio LeBeau said.

“The DOL’s statement that plan fiduciaries could be responsible for the prudence of investment choices made through a brokerage window suggests that fiduciaries retain an undefined level of fiduciary responsibility for the investment of all plan assets, regardless of how participants make their investment directions,” she added.

While the guidance was directed at cryptocurrency, the underlying policy is not necessarily limited to digital assets, the attorneys said.

“The principles supporting the Supreme Court’s decision in Hughes lend credence to the DOL’s suggestion,” said Barry Salkin, another partner at Wagner. “If fiduciaries are responsible for the prudence of all available investment options—whether there are 10, 50 or 500—it stands to reason that there may be some level of fiduciary responsibility with respect to offered brokerage windows.”

Now the question is when, whether and how the DOL or the federal courts develop standards for plan fiduciaries to apply when designing and monitoring individual account plans with brokerage windows, Salkin said.

“Fiduciaries seeking to use brokerage windows to both limit fiduciary responsibility for vetting investment alternatives and expand available investment opportunities should consider approaching brokerage window design as a fiduciary act and carefully design rules and safeguards mindful of legal requirements and considering participant demographics, interests and needs,” he said.

“Approaching brokerage window design as a fiduciary act is not an admission that fiduciary duties apply,” the attorneys argued.

But since the DOL has not defined the parameters of responsibility, fiduciaries who exercise their duties of prudence and loyalty in designing brokerage window rules “should be ahead of the game and poised to demonstrate compliance as fiduciary standards unfold in light of Hughes and developing DOL policy,” Salkin added.
