Self-Directed Plan Services

Offering a brokerage window

A discussion of the fiduciary considerations

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Background

The appeal of flexibility

As the defined contribution marketplace matures, there is a growing trend toward offering participants an alternative to the plan's "core" menu[1] of fiduciary-selected investments. That alternative is an individual brokerage account or brokerage window.[2] The reasons for the trend may vary, for example, wanting to give greater flexibility to participants who are comfortable making their own investment decisions or wanting to facilitate the ability of participants to work with a Registered Investment Advisor (RIA) as an investment manager. Whatever the reason, the decision to offer a brokerage window[3] creates opportunities for plan sponsors and participants, but requires that fiduciaries engage in a prudent process in making the decision.

Fiduciary roles and responsibilities

The first topic of this article, and its principal focus, is the fiduciary process for deciding whether to offer a brokerage window and selecting the provider of the window. The second covers the requirements under the Department of Labor's (DOL) participant disclosure rules.[4] Finally, we consider the implications of the selection of an RIA to serve as an investment advisor for a participant's individual brokerage window. We look at that issue in two ways: when the fiduciaries designate an investment advisor for participant choice and when a participant selects his own advisor.

[1] We use the term "core" lineup or "core" investments to refer to the investment alternatives designated by the fiduciaries among which the participants may decide how to invest their accounts. In the 404a-5 participant disclosure regulation, these are referred to as the "designated investment alternatives" or DIAs. In this article, we are assuming that the plan offers a core lineup of designated investment alternatives, and/or professionally managed portfolio investments, such as target date or risk-based funds, and that the brokerage window is in addition to that lineup.

[2] See, Hewitt Associates, Trends and Experience in 401(k) Plans (2009) and 2013 Hot Topics in Retirement.. Hewitt reported that the offering of brokerage windows in 401(k) plans increased by just under 50% from 2007 to 2009 and that 27% of plans surveyed had "recently completed" the addition of brokerage windows in 2013.

[3] Arrangements under which participants may select investments beyond those designated by the plan are referred to by a variety of names, including brokerage window, self-directed brokerage account, individual brokerage account, and others. In order to simplify, we have elected to use the term "brokerage window" throughout this article.

[4] ERISA Regulation Section 2550.404a-5.

Deciding to offer a brokerage window is a fiduciary decision, but there is little guidance on the considerations a fiduciary should use in making the decision. That said, the analysis that a fiduciary would need to undertake is consistent with its general decision-making responsibilities and does not appear to be especially burdensome.

The process for selecting the provider of the window is more clearly defined, and if the fiduciaries follow a straightforward process of assessing the provider's credentials, qualifications, reasonableness of compensation, and reputation—and pay attention to participant feedback along the way—they should satisfy the prudence requirement. As explained in DOL guidance:[5]

"fiduciaries of . . . plans with . . . brokerage windows . . . are still bound by ERISA section 404(a)'s statutory duties of prudence and loyalty . . . , including taking into account the nature and quality of services provided in connection with" the brokerage window.

Fiduciaries are not liable for advice given by an RIA to a participant, or for investment management by an RIA, for investments in a brokerage window, though if the fiduciaries select the RIA or limit the participant choices, they will have a duty to prudently select and monitor the RIA.[6]

[5] DOL Field Assistance Bulletin 2012-02R, Q&A 39, July 30, 2012.

[6] See, e.g., DOL Interpretive Bulletin 96-1, paragraph e., and DOL Field Assistance Bulletin 2007-01, Q&A 2 and footnote 7.

Fiduciary process

Is offering a brokerage window a fiduciary decision?

The first question is whether the decision to offer a brokerage window is a fiduciary one. The answer is that it is because the fiduciaries are exercising their discretion concerning how to implement the plan provision giving participants the right to direct their accounts. The considerations for deciding whether to offer a brokerage window have not been specified in the law or by the DOL. That said, the overarching requirement for any fiduciary decision is that it be made through a prudent process. This requires the fiduciaries to gather the relevant information, assess that information, and then make an informed and reasoned decision. Unfortunately, that leaves open the issue of what information to gather and how to assess it.

Defining a prudent process

We are not aware of any formal or informal regulatory guidance on this question nor of any litigation that has found the offering of a brokerage window to be imprudent; in fact, we are not aware of any cases that even assert that it is imprudent. Indeed, there appears to be an assumption built into ERISA, and accepted by the DOL, that permitting participants to direct their own investments is acceptable, regardless of whether the alternatives are limited to a core lineup or a much larger universe of investments (e.g., a brokerage window).[7] To the extent there is guidance on the subject, it relates to how to facilitate the process and how fiduciaries can protect themselves. All of the guidance is premised on the participants managing their own accounts and clearly contemplates that plans may offer brokerage windows.[8] While this does not dispose of the fiduciary process for deciding whether to offer such an arrangement, it does suggest that doing so is a permissible exercise of discretion and is not unusual or unanticipated.

[7] See Field Assistance Bulletin 2012-02R, Q&A 39, discussing a situation in which a fiduciary offered an investment platform that includes a brokerage window but no DIAs. The DOL states that "The regulation does not require that a plan have a particular number of DIAs, and nothing in this Bulletin prohibits the use of a platform or a brokerage window…." However, the DOL went on to add that "a plan fiduciary's failure to designate investment alternatives, for example, to avoid investment disclosures under the regulation, raises questions under ERISA section 404(a)'s general statutory fiduciary duties of prudence and loyalty."

[8] See, for example, ERISA Regulation §2550.404a-5(a); Field Assistance Bulletin 2012 02, Q&A 13 and 14; Field Assistance Bulletin 2012-02R, Q&A 39; ERISA Section 404(c) and the related regulation; ERISA Section 408(b)(14); and Interpretive Bulletin 96-1. What all of these have in common is that they address issues related to fiduciary and non-fiduciary obligations and options, assuming that a participant has the right to manage his own account.

We should point out that the plan sponsor or fiduciaries must make sure that the right to use the brokerage window is made effectively available to all participants in the plan (or at least a nondiscriminatory group of participants). This is not a fiduciary concern, but a requirement under the qualified plan rules[9] of the Internal Revenue Code to ensure that the plan does not violate the Code's non-discrimination rules. For example, it could be considered discriminatory if the minimum account size or a minimum fee for maintaining a brokerage window were set at a level that, realistically, only or predominantly highly compensated employees could utilize. Another threshold consideration is whether there is anything in the plan document that would preclude the offering of a brokerage window. So long as the plan contemplates participant direction of their accounts, but does not prohibit brokerage windows, it should be permissible to offer them.

Items for consideration

Turning to the fiduciary issue, in the absence of any direct authority, we believe that a conservative approach would be for the fiduciaries to consider several items. First, the fiduciaries may consider the investment sophistication of the employee population (that is, are there participants who would benefit from access to a brokerage window) and/or whether any employees desire to work with investment advisors who could assist them in investing through a brokerage window.

Also as a best practice, fiduciaries may want to tell participants that the investments in a brokerage window are not selected and monitored by the fiduciaries, and that participants should consider their level of investment knowledge or sophistication or whether they should use an RIA before opting to invest through a brokerage window.

Fiduciaries may also consider the benefits to participants of providing a brokerage window. This would include, for example, the ability of sophisticated participants to create a personalized portfolio based on their own needs or the opportunity for a participant who is working with or would like to work with an RIA to engage an advisor to manage his account on a discretionary basis, taking into consideration the participant's individual risk tolerance, other investments, and personal preferences.

Conclusion

There is no guidance on the fiduciary duty of deciding to offer a brokerage window. That said, the decision is not fundamentally different from other decisions made by fiduciaries in that they must engage in a prudent process and reach an informed and reasoned decision. In this context, fiduciaries may wish to consider the investment sophistication of the workforce and the benefits of the brokerage window to sophisticated participants or to those who work with advisors.

[9] See Treas. Reg. §1.401(a)(4)-4(c).

DOL requirements

Selecting the provider

Once the decision to offer the brokerage window is made, the fiduciaries have a second decision to make, which is selecting a provider of the window. Again, the fiduciaries must engage in a prudent process in making the decision. There is considerably more guidance available from the DOL describing the process for this decision. Consider, for example, in Field Assistance Bulletin (FAB) 2007-01, which relates to the selection of an investment advisor for participants, but which is generally applicable to fiduciary decision-making about service providers, like broker/dealers. In that FAB, the DOL stated the general principles:

"With regard to the prudent selection of service providers generally, the Department has indicated that a fiduciary should engage in an objective process that is designed to elicit information necessary to assess the provider's qualifications, quality of services offered and reasonableness of fees charged for the service. The process also must avoid self-dealing, conflicts of interest, or other improper influence."

The DOL is telling fiduciaries they must identify and assess the following:

1. Is the proposed provider qualified to offer the brokerage window service? As a part of this, the fiduciary would need to consider the experience and qualifications of the providers being considered and whether they are appropriately licensed under applicable securities laws.

2. What is the quality of the provider's service? That is, what is its reputation for providing prompt, efficient, accurate responses to participant directions? Are confirmations provided in a timely fashion along with account statements and other information?

3. Are the fees reasonable? This can be satisfied by determining how the costs compare to those of other providers, taking into consideration the quality and quantity of services being offered. Basic information about the provider's fee and services should be included in its 408(b)(2) disclosures.

One aspect of the provider's qualifications is the security of the account and the stability of the provider. In this regard, fiduciaries may consider issues such as where and how the assets in the brokerage window will be held and whether protections against loss or theft of securities are available through SIPC or other insurance.

In 2014, the DOL published a request for information (RFI) concerning brokerage windows in participant-directed plans. As explained by the DOL:

"The purpose of this RFI generally is to increase the Department's understanding of the prevalence and role of brokerage windows in participant-directed individual account plans covered by ERISA. In particular, the RFI will focus on why, under what circumstances, and how often these brokerage windows are offered and used in ERISA plans, and the legal and policy issues that relate to such usage. The Department wants to make sure that participants are not exposed to undue risks from brokerage windows and that plan fiduciaries properly understand the scope of their ongoing responsibilities with respect to brokerage windows."

In plain English, the DOL wants to make sure that (1) fiduciaries are evaluating and monitoring the providers of brokerage windows, including costs, and (2) participants are receiving adequate information about availability, services and costs related to brokerage accounts.

While not certain, it is possible that the DOL will issue additional guidance on brokerage windows. However, it is doubtful that any guidance will be finalized until 2016, if at all. If guidance is issued, we believe it will focus on the fiduciary responsibility to prudently select and monitor the provider of the brokerage accounts considering, for example, the fees, costs and services associated with the brokerage accounts and the reputation and stability of the provider of those accounts. That would likely favor lower cost, financially secure and well-established providers.

Monitoring provider selection

In the 2007 FAB, the DOL goes on to discuss the question of monitoring of the service provider after the initial selection has been made. The DOL describes the process as follows:

"…we anticipate that fiduciaries will periodically review, among other things, the extent to which there have been any changes in the information that served as the basis for the initial selection of the [provider], including whether the [provider] continues to meet applicable federal and state securities law requirements…. Fiduciaries also should take into account whether the investment advice provider is complying with the contractual provisions of the engagement; utilization of the [service] by the participants in relation to the cost of the services to the plan; and participant comments and complaints about the quality of the furnished [service]."

With regard to participant comments and complaints, the DOL noted that, to the extent the complaints raise questions concerning the quality of the service, this may require that the fiduciaries engage in a more detailed review.

One of the factors noted above was the reputation of the provider. Reputation may seem to be an odd factor to consider, but a provider with a good reputation has, presumably, been selected by others and has performed well. And this suggests that selecting this provider would not be imprudent.[10] Based on a number of court cases, it appears that if fiduciaries select a well-known, highly-regarded provider for their plan's brokerage window, and that provider has been selected by a number of other fiduciaries, there is little risk in the selection.

Conclusion

Again, the selection of the service provider for a brokerage window involves essentially the same process the fiduciaries employ in choosing any service provider–or for that matter, any investment–for the plan. This entails assessing the qualifications of the proposed service provider, including the financial stability of the entity, the price to be charged for maintaining the account and effecting trades, the provider's ability to execute trades, and the overall reputation of the provider. Selecting a provider with a good reputation helps support the position that the decision is prudent.

[10] For example, see Roth v. Sawyer-Cleator, 16 F.3d 915, 919 (8th Cir. 1994); Herman v. Mercantile Bank, N.A. 143 F.3d 419, 420 (8th Cir. 1998). See also Bussian v. RJR Nabisco, Inc., 223 F.3d 286, 300 (5th Cir. 2000): "ERISA's obligations are nonetheless satisfied if the provider selected would have been chosen had the fiduciary conducted a proper investigation"; and Fink v. National Savings & Trust Co., 772 F.2d 951, 962 (D.C. Cir. 1985).

Disclosure to participants

One possible attraction of a brokerage window is that the fiduciaries are relieved of the obligation to select and monitor investments for the participants and are relieved of liability for the participant choices. (This latter point assumes that the plan otherwise complies with the ERISA 404(c) requirements, as discussed later under "Other Considerations.") While the DOL raised the possibility that some additional disclosures regarding the investments in brokerage windows might be required, it modified its position in Field Assistance Bulletin (FAB) 2012-02R. In the revised guidance, the DOL indicated that "whether an investment alternative is a 'designated investment alternative' (DIA) for purposes of the [404a-5 participant disclosure] regulation depends on whether it is specifically identified as available under the plan." Without saying explicitly that neither the window itself nor any of the investments chosen by participants who use the window is a DIA, the implication is that they are not. Therefore, the investment-related disclosures of the participant disclosure regulation do not apply to either the window or the participant-selected investments.

Conclusion

The participant disclosure requirements under ERISA Regulation Section 2550.404a-5 impose limited disclosure obligations on fiduciaries with respect to a brokerage window, but do not require the same disclosures that are mandated for DIAs, for example, the market performance of the investments in the accounts.

Considerations in the selection and oversight of RIAs

In some cases, participants will ask RIAs to manage their 401(k) accounts through individual brokerage windows. This enables the RIA to select from a wide range of investments in order to develop a portfolio tailored for the specific needs of the participant. That raises the question of whether the fiduciaries have any responsibility for overseeing the RIAs or their investment choices. As with most things under ERISA, the answer is that it depends. In this case, it depends on whether or not the fiduciaries designate one or more RIAs from which the participants may select. If so, the fiduciaries have responsibilities. If not, they do not. (The discussion in this section applies to both RIAs that provide nondiscretionary investment advice and to RIAs that exercise discretionary control—or management—over the investments.)

The DOL addressed this topic in Interpretive Bulletin 96-1, dealing with participant investment education. In subsection (e) of the Bulletin, the DOL said:

> *"As with any designation of a service provider to a plan, the designation of a person(s) to provide investment educational services or investment advice to plan participants and beneficiaries is an exercise of discretionary authority or control with respect to management of the plan; therefore, persons making the designation must act prudently and solely in the interest of the plan participants and beneficiaries, both in making the designation(s) and in continuing such designation(s). [Citations omitted.]*
>
> *… The Department also notes that a plan sponsor or fiduciary would have no fiduciary responsibility or liability with respect to the actions of a third party selected by a participant or beneficiary to provide education or investment advice where the plan sponsor or fiduciary neither selects nor endorses the educator or advisor, nor otherwise makes arrangements with the educator or advisor to provide such services."*

Key question: who chooses the RIA?

In essence, the DOL distinguishes between the situation in which (i) the plan fiduciary designates an RIA or a list of RIAs to assist participants and (ii) the participant is free to choose any advisor he wishes. In the first instance, the fiduciaries must prudently select and monitor the designated RIA(s), though they are not responsible for the investment decisions made by the advisor. For example, in FAB 2007- 01, the DOL noted that *"fiduciaries offering programs of investment advice services… have no duty to monitor the specific investment advice given by the investment advice provider to any particular recipient of the advice."*[11]

This is further illustrated in Example 8 in the 404(c) regulation, where the DOL describes a plan in which the fiduciary designates three reputable investment managers for participant accounts. The participant selects one, M, who incurs losses in the participant's account through imprudence in managing the investments. The DOL states that the fiduciary is not responsible for M's imprudence, but does have a duty to monitor M's performance to determine the suitability of retaining M as an investment manager, and M's imprudence would be a factor that the fiduciary would need to consider. Keep in mind, though, that this is a situation in which the fiduciaries designated the investment manager for use by participants.

The DOL also makes it clear in the language quoted above that when the fiduciary does not designate or endorse an advisor and the participant makes the selection entirely on his own, the fiduciary has no responsibility or liability. Example 9 in the 404(c) regulation illustrates this situation. There, the participant instructs the fiduciary to appoint an investment manager for his account who then causes losses in the participant's account. The DOL indicates that the plan fiduciary has no liability for the investment manager's imprudence that leads to the losses and also has no duty to monitor the manager since it did not designate that manager.

There is another fiduciary protection that may apply in the case of a participant who selects a discretionary investment manager for his account. ERISA effectively provides a "safe harbor" for the investment decisions made by an "investment manager," indicating that a fiduciary is not responsible for the investment decisions made by the manager.[12] An investment manager is defined in Section 3(38) to include an RIA that is given discretionary authority over a plan's assets and that agrees in writing that it is acting as a fiduciary. In light of the obligation of service providers under the 408(b)(2) regulation to disclose fiduciary status, these conditions should ordinarily be satisfied.

Conclusion

In the most common situation, in which the participant selects an investment manager for his account, the plan fiduciaries will have no liability with respect to the investment decisions made by the RIA. This is true whether the fiduciary designates an RIA, makes a list of RIAs from which the participants may select, or leaves the decision entirely up to the participants, though in the first and second situations, the fiduciary retains the obligation to prudently select and monitor the RIAs.

[11] Field Assistance Bulletin 2007-01, Q&A 2.

[12] ERISA Section 405(d)(1). The appointing fiduciary is still responsible for prudently selecting and monitoring the manager.

Other considerations

How does offering a brokerage window affect a fiduciary's protection under ERISA?

One question that arises in the context of brokerage windows is the application of the protection afforded fiduciaries under ERISA Section 404(c) and the related regulation. That is, does the 404(c) protection apply? (404(c) protects the fiduciaries from losses arising out of investment decisions made by the participants.) In the case of core options, the fiduciaries are responsible for the selection and monitoring of the options, so realistically, the protection they receive in a 404(c) plan is for the investment allocation decisions made by the participants among the core options.

Since the participants make all of the investment decisions in a brokerage window—both the selection and monitoring of the investments and the allocation decisions among the investments they choose—the obvious question is, does a brokerage window give fiduciaries even greater protection? Yes, but only if the plan complies with the 404(c) requirements, which include providing disclosures to the participants that the plan intends to operate as a 404(c) plan, selecting a "broad range" of investment options, and providing the 404a-5 regulatory disclosures about the plan and the designated investment alternatives in the plan. The "broad range" requirement means that the plan must offer at least three investment alternatives, each of which is diversified and has materially different risk and return characteristics, and which in the aggregate enable a participant to allocate his account in a way that meets his own risk and return objectives and minimizes through diversification the overall risk of loss in the account. Generally, where a plan offers a core lineup, it will meet the broad range requirement. Assuming the plan otherwise complies with 404(c), then the fiduciaries should receive protection for the investment decisions made by the participants (or their advisors, as described earlier) in a brokerage window. But it appears that, unless the plan satisfies the broad range requirement—that is, unless there are at least three designated investment alternatives offered by the plan—404(c) protection would not be available.

In FAB 2012-02R, the DOL addressed the disclosure requirements for brokerage windows in Q&A 13. (Keep in mind that those 404a-5 disclosures must be provided in order to have 404(c) fiduciary protection.) In the answer, the DOL explained that the plan administrator (e.g., the 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." It lists a number of items that would need to be included. It also describes the information regarding expenses that may be charged against the participant's individual account, rather than on a plan-wide basis. Beyond that, recognizing that providing details about the investment options available through the brokerage window could be burdensome to plans and participants, the DOL explained that "a general statement that [various] fees exist and that they may be charged against the individual account of a purchasing or selling participant or beneficiary, and directions as to how the participant can obtain information about such fees in connection with any particular investment" would satisfy the disclosure requirement.

These disclosures satisfy the initial and annual disclosure requirement, but the plan must still provide the quarterly dollar amount disclosures related to the individual expenses that are actually charged against a participant's account. These do not include the expenses built into the investments selected by the participant, but do include items such as brokerage charges, minimum account fees, wire transfer fees, and front-end sales loads. We anticipate that in most cases, the disclosures required by the 404a-5 regulation will be made by the plan recordkeeper, so there should be little burden on plan sponsors—other than to be aware of the requirements and make sure that they are being satisfied.

Conclusion

While offering a brokerage window may relieve the fiduciaries of some exposure to liability and some disclosure requirements, it is not an option that the fiduciaries may "set and forget." They should still take steps to ensure that the plan complies with the 404(c) requirements, including the selection of at least a limited core lineup of funds, in order to obtain relief from participant claims related to the investments in the brokerage window. Fiduciaries should be aware that they will continue to have disclosure obligations related to the window.

Key takeaways

The decision to offer a brokerage window is a fiduciary one, but the steps necessary to fulfill the prudence requirement for the decision are not particularly burdensome. The fiduciaries:

1. Must engage in a prudent process to decide on whether to have a brokerage window;
2. Must engage in a prudent process to select and monitor a particular provider for the window;
3. Must comply with the 404a-5 disclosure requirements to participants; and
4. Should obtain the protections of 404(c) by complying with the requirements described earlier in this article.

As explained in this article, these requirements can be satisfied by fiduciaries engaging in the same prudent process that they use for their other fiduciary decisions. That is, while the information the fiduciaries review may change from decision to decision, the process is constant. Also, fiduciaries should work with their providers to ensure that participants receive the disclosures to comply with the DOL's 404a-5 and 404(c) regulations.

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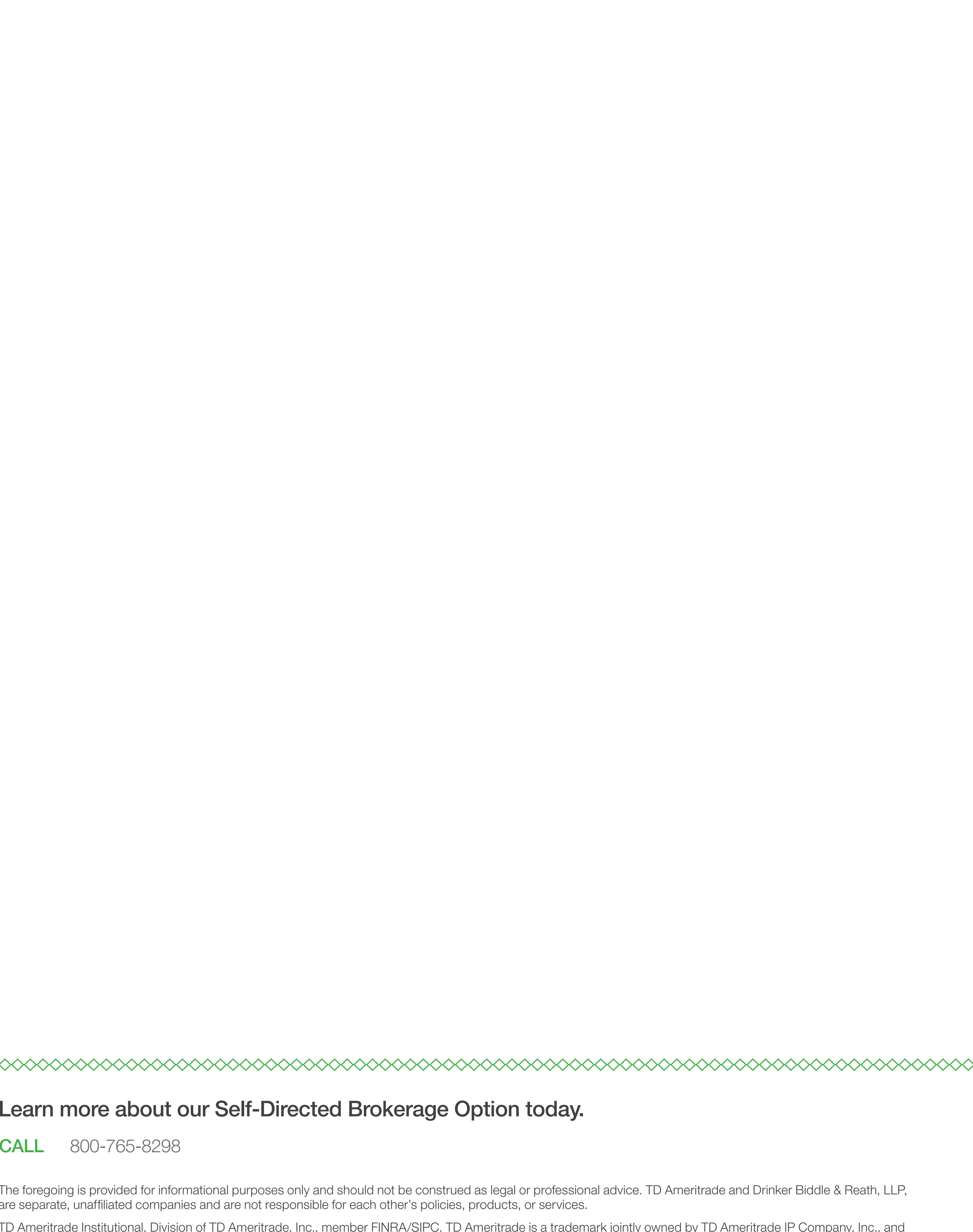

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