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BY ECF

Hon. James K. Bredar
Chief Judge, United States District Court for the District of Maryland
101 West Lombard Street
Chambers 5A
Baltimore, MD 21201

Re: Feinberg et al. v. T. Rowe Price Group, Inc. et al., D. Md. No. 1:17-cv-427

Dear Chief Judge Bredar:

We represent Defendants in the above-captioned case and write in response to Plaintiffs' Motion for Award of Attorneys' Fees (ECF No. 243). Defendants take no position on the ultimate reasonableness of the amount of attorneys' fees and expenses requested in Plaintiffs' motion. However, given the magnitude of the requested attorneys' fees and expenses—which represent more than half of the \$7 million Settlement Fund—Defendants raise for the Court's consideration an issue regarding the value of the brokerage window provided for in the Settlement Agreement that may bear on the Court's assessment of the reasonableness of Plaintiffs' request.

While Plaintiffs acknowledge in their motion that the monetary value of the brokerage window is "difficult to quantify," they contend that the brokerage window "has the potential to be the most valuable feature of the Settlement for Plan participants." ECF No. 243-1 at 7–8. In light of the emphasis that Plaintiffs place on the brokerage window, Defendants note that the Settlement Agreement limits Defendants' obligation to offer a brokerage window in the Plan in certain respects. Specifically, under the terms of the Settlement Agreement, Defendants may remove the brokerage window from the Plan before the end of the ten-year period otherwise provided for "if Defendants reasonably conclude that there has been a change in law or regulation relating to fiduciary monitoring or reporting requirements for investment offerings available through a Brokerage Window that makes such monitoring or reporting materially more burdensome or costly than it is today." ECF No. 234-4 (Settlement Agreement) § 7.4.

A number of commentators have suggested that recent guidance from the Department of Labor ("DOL") raises questions about possible changes to the regulatory environment that, if they ultimately come to pass, could lead Defendants to conclude that there has been the type of change contemplated under section 7.4 of the Settlement Agreement. On March 10, 2022, the DOL released guidance on the inclusion of cryptocurrencies as 401(k) plan investment options. See DOL, Compliance Assistance Release No. 2022-01 – 401(k) Plan Investments in

“Cryptocurrencies.”¹ The DOL guidance states that “plan fiduciaries responsible for ... allowing [cryptocurrency] investments through brokerage windows should expect to be questioned about how they can square their actions with their duties of prudence and loyalty” in light of cryptocurrency risks. See *id.* at 3.

The DOL has not previously alluded to the possibility that there may be fiduciary selection and monitoring obligations with respect to individual investment options—of any kind—that are offered in a brokerage window. And although the DOL guidance focuses on cryptocurrencies, industry commentators have observed that it may be difficult to limit a potential duty to select and monitor individual investments offered through a brokerage window to investments in cryptocurrencies only.² Commentators have therefore expressed uncertainty about whether the DOL’s recent cryptocurrency guidance reflects a broader change in DOL policy regarding fiduciary oversight of brokerage windows, noting that prior DOL statements have generally been understood to indicate that ERISA does *not* impose a fiduciary obligation to select and monitor individual investment options offered through brokerage windows.³ If the DOL were to require fiduciary oversight of individual investment options offered through brokerage windows, the monitoring obligations associated with maintaining such an offering in the Plan would become materially more burdensome and costly than they were at the time the Settlement Agreement was entered.

As things currently stand, Defendants do not believe that plan fiduciaries have a legal obligation to select and monitor individual investment options offered through brokerage windows. However, in light of the questions that have been raised based on the DOL’s recent cryptocurrency guidance, Defendants are continuing to evaluate DOL statements and

¹ Available at <https://www.dol.gov/agencies/ebsa/employers-and-advisers/plan-administration-and-compliance/compliance-assistance-releases/2022-01>.

² See, e.g., DOL Calls for “Extreme Care” Before 401(k) Plans Dive into Cryptocurrency Investments, available at <https://www.morganlewis.com/blogs/mlbenefits/2022/03/dol-calls-for-extreme-care-before-401k-plans-dive-into-cryptocurrency-investments> (noting that there “could be much more far-reaching implications beyond cryptocurrency investments”) (hereafter, “Extreme Care”); DOL Threatens to Investigate Fiduciaries over Cryptocurrencies in 401(k)s, available at <https://www.groom.com/resources/dol-threatens-to-investigate-fiduciaries-over-cryptocurrency-in-401ks> (noting that the “implications of DOL’s position may extend beyond cryptocurrencies”) (hereafter, “DOL Threatens”); Cryptocurrency in 401(k) Plans?, available at <https://www.erisapracticecenter.com/2022/03/cryptocurrency-in-401k-plans-might-be-more-like-crypto-nite-says-the-dol-in-its-latest-release> (observing that the DOL guidance “may have broader implications”).

³ See, e.g., Extreme Care, *supra* (explaining that “the DOL’s previous statements on self-directed brokerage windows have generally not been read as imposing a fiduciary duty with respect to the investments offered in a brokerage window”); DOL Threatens, *supra* (stating that the recent cryptocurrency guidance “appears to shift DOL’s position with respect to the fiduciary implications of offering brokerage windows”); Cryptocurrency in 401(k) Plans?, *supra* (noting that “most experts believe that plan fiduciaries do not have an obligation to monitor the underlying investments in a brokerage window, absent ‘extraordinary circumstances’”).

enforcement activity for any indications that the DOL has changed its policy in a way that would affect Defendants' fiduciary obligations with respect to offering a brokerage window in the Plan.

Respectfully submitted,

/s/ Brian D. Boyle

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cc: All Counsel of Record (by ECF)