CIEBA
The Committee on Investment of Employee Benefit Assets

July 21, 2015

Filed Via Email at e-ORI@dol.gov

Office of Regulations and Interpretations
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

RE: RIN 1210-AB32 (Conflict of Interest Rule)
ZRIN 1210-ZA25 (Best Interest Contract Exemption)

Ladies and Gentlemen:

The Committee on Investment of Employee Benefit Assets (CIEBA) welcomes the Department of Labor's (DOL's) efforts to enhance retirement security for American workers and appreciates this opportunity to provide comments on the proposed conflict of interest rule and the proposed best interest contract exemption.

CIEBA members are the chief investment officers of more than 100 of the Fortune 500 companies who individually manage and administer Employee Retirement Income Security Act (ERISA) - governed corporate retirement plan assets. CIEBA members voluntarily sponsor plans and manage almost $2 trillion of retirement assets on behalf of 17 million participants, representing a very significant portion of the largest private defined benefit and defined contribution pension plans in the US.

As the largest organization of corporate pension investment officers, CIEBA represents the interests of employee benefit plan sponsors before legislators, Congress, regulators and the media. Since 1985, CIEBA has provided a nationally recognized forum and voice for corporate pension plan sponsors on investment and fiduciary issues.

As voluntary sponsors of this country's largest defined benefit and defined contribution plans, CIEBA members have a strong commitment to the long-term health and viability of the retirement system, and as plan fiduciaries and investment professionals responsible for millions of 401(k) plan participants, we are committed to helping plan participants prepare for retirement.

Summary

As further discussed below, CIEBA believes that:

- Generally, the final rule should clarify that the "carve-outs" from investment advice are simply safe harbors and not the exclusive means to avoid fiduciary status.
- Plan sponsors should be allowed to continue to identify specific plan investment options as part of participant education.
- FINRA standards should not be applied to plan sponsors and their communications with participants, particularly where the communications are not individualized.
- The final rule should clarify when a plan sponsor's communication to participants on the benefits of keeping assets in an employer's plan after termination of employment crosses the line from education to advice.
- The seller's carve out should not be expanded because it could create a loophole where participants would be expecting, but would not receive, unbiased investment advice that is in their best interest. However, the proposed rule should clarify that any threshold adopted for the carve out will apply to the aggregate of all plans in the sponsor's controlled group.
- The platform provider carve out should be expanded to ensure that providers are not deemed fiduciaries merely because they offer investment options that are tailored to the needs of the plan or its participants.
- The carve out for plan sponsor employees who provide advice to a plan fiduciary should be clarified to include any other employee who provides advice or other information to the person who provides the advice to the plan fiduciary.
- The final rule should make clear that an employee's "normal compensation" does not constitute a "fee or other compensation, direct or indirect, in connection with the advice" where the employee's advice is outside the scope of the employees' duties for the plan sponsor.
- Where call center employees are employed by a third-party service provider, their fiduciary status should not be imputed to plan sponsors.
- Plan sponsors, as fiduciaries, should be allowed to offer any investments that they believe are prudent for their participants.
- There should not be a separate streamlined exemption for so-called high-quality, low-fee investments.
- Recommendations made in the context of responding to an RFP issued by, or on behalf of, a plan sponsor should not be considered fiduciary advice.

Background

CIEBA welcomes the DOL's efforts to enhance retirement security for American workers. At the same time, we are concerned about potential conflicts of interest, particularly in the marketing of IRAs to 401(k) plan participants when they leave employment. When 401(k) participants leave employment and seek assistance in deciding what to do with their account balances, they may not fully understand the potential impact of conflicted advice on their investment alternatives. CIEBA believes that participants deserve thorough, prudent, and unbiased advice from all providers involved in the management of those assets.

In 2010, CIEBA provided comments in response to DOL's earlier proposed rule. CIEBA appreciates that DOL considered its prior comments and addressed our concerns in the new proposal. CIEBA is pleased that this proposed rule provides that non-individualized communications, such as newsletters, do not fall within the fiduciary definition, but that specific rollover recommendations directed to individual plan participants should be treated as fiduciary advice.

Discussion

As a preliminary matter, CIEBA is concerned that the use of the term "carve-out" implies that the activities would be investment advice but for the specific exception provided by the carve-out. The term "carve-out" is being interpreted as an "exception," but as DOL notes in the preamble to the proposed regulation, the carve-outs actually reflect those activities that Congress did not intend to cover as fiduciary investment advice. For example, Congress never intended to deem true investment education fiduciary in nature, yet there is a "carve-out" for education. We recommend that the Department remove any potential confusion by clarifying that the carve-outs are simply safe harbors and not the exclusive means to avoid fiduciary status.

The Investment Education Carve Out

The investment education carve out in the proposed rule would prohibit asset allocation models that identify specific investment options. CIEBA members rely on DOL's existing guidance (Interpretive Bulletin 96-1) and believe that this guidance should not be changed in any way that would jeopardize education programs developed under current law.

With the shift to 401(k)-type plans, investment advice has become increasingly important for workers when selecting among investments for their individual accounts. CIEBA is concerned that the proposed prohibition on identifying a plan's specific investment options may prevent plan sponsors from providing valuable asset allocation education to plan participants. Because plan participants may not understand how available investment options fit into various assets classes, plan sponsors should continue to be allowed to provide educational materials customized to their plans.

In the preamble to the proposal, DOL notes that they understand that they have proposed a significant change in the information and materials that may constitute investment education and asks whether this change is appropriate. Many plan sponsors currently offer participant educational materials that provide hypothetical asset allocations and show which specific plan funds fulfill those allocations. CIEBA believes that plan sponsors should be allowed to continue to identify specific plan investment options as part of participant education. Plan sponsors already act as fiduciaries in selecting and monitoring the investments offered in their plans and they are not paid for the investments selected by participants.

In the preamble to the proposed rule, DOL asks whether it should adopt some or all of the standards developed by the Financial Industry Regulatory Authority (FINRA) in defining communications that rise to the level of a recommendation for purposes of distinguishing between investment education and investment advice under ERISA. Generally, under the FINRA guidance, a recommendation of a particular security would be deemed to be advice rather than education. However, the FINRA standards apply to brokers and their communications with customers. CIEBA does not believe that this standard should be applied to plan sponsors and their communications with participants, particularly where the communications are not individualized.

Rollovers

The proposed rule would change DOL's current guidance and would specifically include as investment advice a recommendation as to the investment of securities to be rolled over from a plan. Thus, recommendations to withdraw plan assets and roll over those assets into an Individual Retirement Account (IRA) would fall within the scope of fiduciary advice. However, merely providing participants with information about plan distribution options will not be considered advice. CIEBA believes the final rule should clarify when a plan sponsor's communication to participants on the benefits of keeping assets in an employer's plan after termination of employment crosses the line from education to advice.

Seller's Carve Out

DOL recognizes that plan fiduciaries may receive recommendations that should not be treated as fiduciary investment advice. Accordingly, the proposed rule contains a limited carve out for communications with plan fiduciaries who have sufficient expertise to prudently evaluate a proposed transaction. The purpose of this carve out is to avoid imposing fiduciary obligations on sales pitches that do not raise conflict of interest concerns.

DOL asks whether the proposed seller's carve out should be available for advice given directly to plan participants, beneficiaries, and IRA owners. CIEBA opposes expanding the seller's carve out because it could create a loophole where participants would be expecting, but would not receive, unbiased investment advice that is in their best interest.

DOL also asks whether the scope of the seller's carve out, a minimum of 100 plan participants or $100 million in assets, are appropriate proxies for identifying sophisticated investors. While CIEBA cannot say with confidence whether the DOL's proposed participants/asset levels are appropriate proxies, we believe the proposed rule should clarify that any threshold adopted will apply to the aggregate of all plans in the sponsor's controlled group.

Platform Provider Carve Out

The proposed rule provides a carve out for platform providers who make available to plans securities from which a plan fiduciary may select or monitor investment alternatives. However, the carve out would make platform providers fiduciaries if they individualize investment options based on the needs of the plan or its participants. Many plans sponsored by CIEBA members have individualized platforms, but this individualization should not make the platform providers fiduciaries. The plan fiduciaries, not the platform providers, are still responsible for selecting the investment options available to plan participants and are also responsible for ongoing monitoring of those investment options.

CIEBA believes that DOL should expand the platform provider carve out to ensure that providers are not deemed fiduciaries merely because they offer investment options that are tailored to the needs of the plan or its participants.

Plan Sponsor Employees Who Provide Advice to a Plan Fiduciary

The proposed rule provides a carve out for an employee of a plan sponsor who provides advice to a plan fiduciary and who receives no compensation beyond the employee's normal compensation for work performed for the plan sponsor. While the proposed carve out appears to apply only to the person who provides advice to a plan fiduciary, CIEBA believes that the carve out should be clarified to include any other employee who provides advice or other information to the person who provides the advice to the plan fiduciary.

Plan Sponsor Employees Who Provide Informal Recommendations to Co-Workers

Plan sponsor employees who provide informal investment recommendations to co-workers outside of the employees' job duties are not compensated for that advice by the plan sponsor. To avoid confusion, the final regulation should make clear that an employee's "normal compensation" does not constitute a "fee or other compensation, direct or indirect, in connection with the advice" where the advice is outside the scope of the employees' duties for the plan sponsor.

Call Center Employees

If call center employees make specific investment recommendations to plan participants, they and their employers may be treated as fiduciaries. Where call center employees are employed by a third-party service provider, their fiduciary status should not be imputed to plan sponsors. The proposed rule should clarify that plan sponsors do not have fiduciary liability for a service provider's call center employees' actions.

Eligible Assets

Under the proposed rule, the BIC exemption is available for advice regarding only certain specified asset classes and investments, and is limited to investments that are commonly purchased by plans and participants. Excluded from the definition are futures, puts, calls, straddles, or any other option to buy or sell an equity security, foreign corporate bonds, municipal bonds, over-the-counter equity, micro cap securities, penny stocks, structured products, hedge funds and private equity funds.

DOL asks if the proposed definition of "assets" includes all common investments of retail investors or whether additional investments should be included in the scope of the exemption. CIEBA believes that these asset limitations are inappropriate. Plan sponsors, as fiduciaries, should be allowed to offer any investments that they believe are prudent for their participants. We recommend that the final exemption should apply without regard to these limitations.

High-Quality, Low-Fee Investments

DOL also asks whether it should issue a separate streamlined exemption that would allow advisers to receive otherwise prohibited compensation in connection with advice to invest in certain high-quality, low-fee investments. CIEBA believes investment advice should be based on a fair, balanced, and prudent analysis of all relevant information. While fees are a relevant factor in analyzing an investment, they are only one aspect of that analysis. CIEBA believes that DOL should not issue a separate streamlined exemption for so-called high-quality, low-fee investments.

Requests for Proposals

When issuing requests for proposals (RFPs), plan sponsors may ask service providers to discuss available investments or describe their services in ways that could be construed to provide fiduciary advice. DOL should modify the seller's carve out to clarify that a recommendation made in the context of responding to an RFP issued by, or on behalf of, a plan sponsor should not be considered fiduciary advice.

Conclusion

The transition from a defined benefit plan system to a defined contribution plan system has shifted retirement planning responsibilities from plan sponsors to participants. Participants have to decide how much to contribute to their plans, how to invest those contributions, and what to do with their retirement assets when they retire or change jobs. Poor decisions can significantly reduce their retirement assets, while good decisions can significantly improve their retirement outcomes.

CIEBA believes that 401(k) plans are an increasingly important source of retirement income, but that investing is a highly complex subject which may be beyond the scope of the average 401(k) participant. As a result, the average 401(k) participant needs safeguards from conflicted advice. Anyone advising participants about their 401(k) assets should be held to the same fiduciary standards as plan sponsors.

CIEBA understands that this new rule could increase the compliance costs of brokers and investment advisors. Some advisors have even threatened to stop providing advice to middle- and lower-income Americans if they are required to act in best interest of their clients. Despite these threats, CIEBA believes that conflicted, affordable advice is no substitute for good advice.

CIEBA appreciates the opportunity to comment on proposed conflict of interest rule and the best interest contract exemption. If you have questions or if we can be of further assistance, please contact me at 301-961-8677. Thank you for your consideration of our views.

Sincerely,

Deborah K. Forbes
Executive Director