

September 18, 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 supplemental 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 U.S.

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.

Set forth below are our supplemental comments on DOL's proposal.

For a fee or other compensation. During the hearing, DOL officials raised a critical point that we believe merits further attention in the final regulation. DOL officials addressed a situation where a human resources employee of a plan sponsor provides investment assistance to a plan participant. The issue raised was whether such investment assistance could qualify as fiduciary advice under the proposal. The DOL officials clarified that unless the human resources employee receives additional compensation for providing such assistance, the assistance is not provided "for a fee or other compensation, whether direct or indirect," as is required under the statute and the proposal for the assistance to be fiduciary advice. Accordingly, if we assume that the human

resources employee is simply receiving his or her normal compensation, the human resources employee would not be a fiduciary by reason of the assistance described above.

The point clarified by the DOL officials at the hearing is very important to CIEBA members and we appreciate the DOL taking the opportunity to make such clarification at the hearing. However, at this juncture, the point is inconsistent with the current language of the proposal, so we ask that the proposal be clarified in this regard. Under the plan sponsor employee carve-out in Proposed Regulation §2510.3-21(b)(2), a plan sponsor employee is not an investment advice fiduciary by reason of providing advice to a plan fiduciary if the plan sponsor employee only receives his or her normal compensation. If the receipt of only normal compensation by a plan sponsor employee were sufficient to exclude the employee from investment fiduciary status, then (1) there would be no need for the carve-out, and (2) there would not be a reason to limit the carve-out to advice provided to plan fiduciaries (as opposed to advice provided to anyone).

Accordingly, we respectfully request that the DOL clarify the proposal to textually align with the point made at the hearing – in the absence of any special compensation (i.e., beyond an employee's typical employment based compensation) for advice, plan sponsor employees providing advice to anyone are not investment advice fiduciaries. This clarification would apply, for example, to any plan sponsor employees providing advice to participants or beneficiaries, without regard to whether the plan sponsor employee is in the human resources department, is a manager responding to requests for assistance from those working for her or an employee discussing their preferred plan investment options over lunch with another colleague.

Moreover, this clarification should not be framed solely in terms of plan sponsor employees, but rather should be framed more broadly. For example, a plan sponsor representative might attend an industry meeting run by a trade association to which the plan sponsor belongs. During the meeting, trade association employees may express views on plan investment and/or distribution issues. Such views may be expressed broadly in the meeting to a group of plan sponsors, and thus might not be individualized or directed to a particular plan sponsor. But generally after a presentation to a group, one or more members of the group will ask individualized follow-up questions. If a trade association employee answers those follow-up questions, such an employee could arguably be a fiduciary by reason of being paid by the trade association to answer members' questions.

So just as with plan sponsor employees, trade association employees and all other types of employees should only be treated as investment advice fiduciaries if they receive separate additional compensation for advice (i.e., beyond an employee's employment based compensation).

Counterparty carve-out. The trade association context highlights another key issue. There are many situations where an investment or retirement expert makes a presentation to an audience, such as an audience of large employers at a trade association meeting. The expert may describe, for example, trends in selecting 401(k) plan investment options or defined benefit plan investment trends. As noted above, the presentation may not be individualized to any member of the audience but the follow-up questions from attendees after the presentation generally call for individualized answers. This type of constructive dialogue would be effectively shut down if

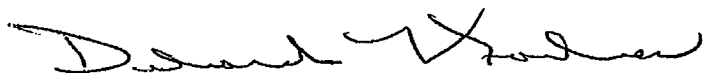
such discussions are fiduciary in nature, because of the potential liabilities that would be triggered by such discussions.

As a practical matter, such speakers likely accept invites to speak at trade associations in part to promote themselves and their firms. In that context, the post-presentation discussion should fall within the counterparty carve-out in Proposed Regulation §2510.3-21(b)(1). But at a group meeting, there will be no mechanism to satisfy the requirements in the counterparty carve-out prior to answering an informal question. Obviously, if no transaction results from the post-presentation discussion, there is no issue, but if a transaction does occur in connection with the discussion, it is not at all clear how to exempt that discussion from treatment as fiduciary advice.

In our view, informal give and take following a presentation to a trade group should not be treated as fiduciary advice with attendant fiduciary liability. There is no formal engagement between the presenter and the one asking the question. The discussion is viewed as informal by both parties and, in our view, it should not be deemed to be “fiduciary advice.” The lack of clarity regarding this issue could impede the ability of pension trade associations to obtain speakers and have such speakers answer questions from its members at association meetings. Trade associations are an important tool through which both large and small employers learn of and explore pension and investment developments.

We respectfully request that you address these concerns regarding the above mentioned scenarios in the final rule and/or its accompanying release and clarify that such scenarios do not rise to the level of providing “fiduciary advice” or create fiduciary liability. 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,

A handwritten signature in black ink, appearing to read "Deborah K. Forbes", with a stylized, cursive script.

Deborah K. Forbes
Executive Director