



July 29, 2020

Submitted electronically

Ms. Jeanne Klinefelter Wilson
Acting Assistant Secretary of Labor
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Re: Improving Investment Advice for Workers and Retirees – Strengthening Protections for Rollovers

Dear Acting Assistant Secretary Wilson:

The Committee on Investment of Employee Benefit Assets (CIEBA) welcomes the Department of Labor's (DOL's) efforts to enhance retirement security. We commend the DOL for its helpful and carefully considered guidance in the preamble to the proposed class exemption for "Improving Investment Advice for Workers and Retirees" (Proposed Exemption), which effectively holds firms that recommend rollovers to very high standards.

CIEBA appreciates the DOL's efforts and the opportunity to provide comments on the Proposed Exemption and the DOL's reinstatement of the five-part test (Five Part Test) for purposes of determining who is an investment advice fiduciary under section 3(21) of the Employee Retirement Income Security Act of 1974, as amended (ERISA).

1. Background on CIEBA – CIEBA represents many of the nation's most experienced investment fiduciaries. CIEBA represents more than 110 of the country's largest pension fund and 401(k) plan investment fiduciaries. Our members manage more than \$2 trillion of defined benefit and defined contribution plan assets on behalf of more than 17 million plan participants and beneficiaries.

CIEBA represents the interests of chief investment officer fiduciaries, virtually all of whom have decades of experience in serving as investment fiduciaries for many of the country's largest and most sophisticated private retirement savings pension and 401(k) plans. Since 1985, CIEBA has provided a nationally recognized forum and voice for corporate plan fiduciaries on investment and fiduciary issues.

Given that our members serve as fiduciaries for many of this country's largest defined benefit and defined contribution plans, which are voluntarily sponsored by their corporate employers, CIEBA has a particularly strong commitment to the long-term health and viability of the retirement system. As plan fiduciaries and investment professionals responsible for millions of 401(k) plan participants, we are committed to helping plan participants prepare for retirement.

2. Rollover decisions have become increasingly critical for participants. Our retirement savings system's transition over the past decades from a predominantly defined benefit plan system to a predominantly defined contribution plan system has shifted retirement planning responsibilities from plan sponsors to participants. Participants are now heavily involved in the decision of how much to contribute to their plans, how to invest those contributions, and whether and how to rollover 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.

Defined contribution 401(k) plans are an increasingly important source of retirement income and investing, and rollover decisions for the average saver can be daunting. As such, the average 401(k) participant needs both advice from trusted experts *and* safeguards from conflicted advice when considering whether and how to rollover their retirement savings. CIEBA members serve as trusted investment fiduciaries during the accumulation phase for many 401(k) participants, and our view is that anyone advising participants during the rollover or decumulation phase of retirement should also be held to the same, very high fiduciary standards as fiduciaries.

3. CIEBA supports the DOL's clarification that rollover advice is determined by facts and circumstances such as an ongoing financial relationship after an IRA rollover. CIEBA supports DOL's efforts to create a prohibited transaction class exemption that allows plan participants to receive investment advice in a manner that mitigates conflicts of interest. When participants 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. We believe that participants deserve thorough, prudent and unbiased advice from all providers involved in the lifespan of the management of their retirement savings.

As such, for years CIEBA has expressed the view that rollover providers should not be able to avoid fiduciary status and responsibility through the simple expedient of making an exculpatory statement that the provider is not providing advice on a "regular basis" (one of the prongs of the Five-Part Test). Our experience has been that providers sometimes in the past have provided a disclosure, oftentimes in a relatively inconspicuous manner in rollover account documentation, to the effect that the rollover advice is not intended to be "regular" and, therefore, the provider should not be considered to be acting as a fiduciary.

In our view, the DOL's guidance in the preamble to the Proposed Exemption is very helpful in that it clarifies that all of the surrounding facts and circumstances in connection with a rollover transaction, including the financial relationship a rollover provider will have with the investor after the rollover, will be taken into account in determining fiduciary status. We view this as a very positive step forward in providing needed protections for savers considering a rollover.

4. CIEBA supports the clarification that rollover providers must acknowledge fiduciary status and comply with a high standard of care in order to receive exemptive relief. CIEBA also supports the requirement that rollover providers seeking to rely on the Proposed Exemption must acknowledge fiduciary status and comply with a standard of care consistent with that under ERISA. We note that the Proposed Exemption is substantially similar to the DOL's Best Interest Contract Exemption, which CIEBA also supports. We feel that the clarifications that: (i) a rollover provider must affirmatively acknowledge that they are acting as a fiduciary with respect to a rollover, and (ii) the provider must comply with a high standard of care in connection with the rollover, will go a long way to ensuring that participants receive professional and unconflicted advice during the rollover process.

5. DOL should re-evaluate the Five-Part Test with respect to rollovers. CIEBA continues to believe that DOL should re-evaluate the Five Part Test, which was issued well before the proliferation of 401(k) plans. Those who market and recommend rollovers to plan participants should be fiduciaries under ERISA, and the Five Part Test should make it much more clear that rollover providers are almost invariably acting as fiduciaries in the context of the rollover. That said, we sincerely appreciate DOL's efforts to expand the application of ERISA in the context of rollovers by, among other things, withdrawing Advisory Opinion 2005-23A and broadening the application of the Five Part Test through interpretive guidance in the preamble.

6. CIEBA encourages enhanced education and enforcement efforts for those recommending rollovers. Finally, we encourage the Department to work more closely with the regulated community and its sister agencies to ensure that those recommending rollovers understand their legal duties and the consequences if they fall short. Despite all of the Department's work over the past decade, it is clear that some financial professionals - particularly those who are focused on IRAs and the retail market - are unfamiliar with the prohibited transaction rules. That is, at least in part, due to relatively limited enforcement efforts and a lack of education. DOL should take steps to address these problems and CIEBA would be pleased to help with any education efforts the DOL might be consider in this regard.

CIEBA appreciates the opportunity to comment on the Fiduciary Rule. Thank you for your consideration of our views and please feel free to reach out to me at Dennis.Simmons@CIEBA.org if you would like to discuss any aspects of this letter with CIEBA.

Sincerely,



Dennis Simmons
Executive Director