

March 31, 2025

The Honorable French Hill
Chairman
Committee on Financial Services
U.S. House of Representatives
Washington, D.C. 20515

The Honorable Maxine Waters
Ranking Member
Committee on Financial Services
U.S. House of Representatives
Washington, D.C. 20515

The Honorable Ann Wagner
Chairman
Subcommittee on Capital Markets
Committee on Financial Services
U.S. House of Representatives
Washington, D.C. 20515

The Honorable Brad Sherman
Ranking Member
Subcommittee on Capital Markets
Committee on Financial Services
U.S. House of Representatives
Washington, D.C. 20515

Re: Request for Feedback on Legislative Proposals to Increase Investor Access and Facilitate Capital Formation

Dear Chairman Hill, Ranking Member Waters, Chairman Wagner, and Ranking Member Sherman:

We write on behalf of the Committee on Investment of Employee Benefit Assets, Inc. (“CIEBA”), in support of efforts to modernize defined contribution (DC) plan investments by expanding access to private market opportunities and addressing legal and regulatory barriers that hinder plan sponsors from achieving the best possible investment outcomes for American workers. We commend your efforts to explore policies that improve long-term retirement security and appreciate the opportunity to share our perspective with the Committee and Subcommittee.

SUMMARY

CIEBA strongly supports modernizing DC plan investments by incorporating private market opportunities and, just as importantly, addressing concerns over frivolous DC plan litigation. We emphasize the importance of legislative and regulatory reforms to protect fiduciaries from opportunistic litigation, allowing fiduciaries to adopt innovative and prudent investment strategies that enhance retirement security for American workers

BACKGROUND and DISCUSSION

1. CIEBA – Investment Fiduciaries who support efforts to expand access to investment opportunities in DC Plans. CIEBA represents 118 of the largest private-sector retirement plan sponsors, overseeing more than \$2 trillion in defined benefit and defined contribution plan assets. Our members are experienced fiduciaries responsible for managing the retirement savings of millions of participants and are committed to fiduciary best practices and prudent investment strategies.

We recognize the importance of expanding access to diversified, risk-adjusted investment opportunities in DC plans, which we believe is critical to enhancing retirement security. To that end, CIEBA supports legislative and regulatory efforts that would allow plan sponsors to incorporate private market investments, which have historically been utilized primarily by defined benefit (DB) plans, into DC plans in a manner that is both prudent and cost-effective.

2. Private markets play a vital role in driving economic growth, innovation, and investment opportunities. The number of publicly traded companies has dropped significantly over the past two decades, as firms increasingly choose private capital over public markets to enhance their growth.¹ As a result, DB plans and large institutional investors have increasingly turned to private markets for diversification and enhanced risk-adjusted returns. In fact, based on CIEBA’s proprietary survey of CIEBA Members for 2023 plan years, 28.2% CIEBA Member DB plan assets were invested in private market investments, reflecting the diversification and higher risk-adjusted return opportunities afforded through private market investments.

A recent study from the Georgetown University Center for Retirement Initiatives found that incorporating private equity and other alternative investments into target date funds could improve long-term retirement income expectations by 8% and worst-case outcomes by 6%.² These benefits should not be limited to large institutional investors or DB plans alone, and expanding access to these investment options for DC plan participants would strengthen retirement security while maintaining fiduciary oversight consistent with the Employee Retirement Income Security Act of 1974 (“ERISA”).

3. Existing guidance has provided a framework for DC Plan Fiduciaries to invest in private markets, but frivolous litigation risk exists. The Department of Labor’s (DOL) June 3, 2020, Information Letter (“Information Letter”), issued to Partners Group and Pantheon Ventures, was a very important step in modernizing DC plan investment strategies. The letter provided clarity that private equity investments may be prudently incorporated into DC plans, as long as fiduciaries evaluate such investments consistent with ERISA’s rigorous fiduciary standards.³ The Information Letter, issued by the Trump Administration, marked the first clear acknowledgment by the DOL that DC plan fiduciaries can include private equity investments within an asset allocation fund.

The Biden Administration left the Trump Administration’s guidance in place, providing additional clarification to ensure responsible implementation.⁴ The Information Letter also provided a framework to guide fiduciaries in evaluating such investments in accordance with ERISA. However, ongoing regulatory uncertainty and, most importantly, litigation risk have discouraged broader adoption, necessitating additional legislative and regulatory clarity to facilitate prudent innovation, while ensuring robust participant protections.

4. Frivolous litigation activity has skyrocketed, hindering advancements that could benefit participants. One of the most pressing issues facing DC plan fiduciaries today is the proliferation of excessive-fee and imprudent-investment lawsuits, many of which are by any measure meritless, but still costly to defend. In recent years, there has been a notable increase in litigation targeting retirement plan fiduciaries. Between 2016 and 2023, over 450 lawsuits were filed, reflecting disputes over alleged mismanagement or overpayment to service providers. In 2023 alone, there were 42 excessive fee

¹ The number of public companies peaked around 7,400 in the mid-1990s and has since declined to approximately 3,400 today. Avoid the Size Trap, Wilshire Indexes Research, April 2024, *available at* www.wilshireindexes.com/index-research-papers/avoid-the-size-trap.

² Georgetown University Center for Retirement Initiatives, “Can Asset Diversification & Access to Private Markets Improve Retirement Outcomes?” (2022) ([here](#)).

³ U.S. Department of Labor, Information Letter to J. Breyfogle (Jun. 3, 2020) ([here](#)).

⁴ U.S. Department of Labor, Supplemental Statement on Private Equity in Defined Contribution Plan Designated Investment Alternatives (Dec. 21, 2021) ([here](#)).

lawsuit settlements, with an aggregate settlement value of \$353 million, averaging \$8.4 million per settlement.

Notably, while the number of lawsuits decreased between 2023 and 2024, the reasons for the decline may be less than reassuring. The report suggests that the reason the plaintiffs' lawyers filed fewer of these kinds of lawsuits in 2023 was that they were simply too busy from the backlog of cases they filed in recent years.⁵ The threat of litigation has made plan fiduciaries more cautious, potentially hindering the adoption of innovative investment strategies, including the incorporation of private equity options that could benefit participants.

5. CIEBA supports targeted reforms to protect plans from frivolous and costly litigation. We support policies that will implement targeted reforms to protect plan fiduciaries from this frivolous and costly ERISA litigation. Without such protections and out of fear of undue legal exposure, DC plan fiduciaries are often forced toward overly conservative investment options. The risk of facing a opportunistic lawsuits puts a finger on the scale to skew risk/return analysis on the investment merits, which ultimately limits return potential for participants. Thoughtful reform would empower fiduciaries to adopt more diversified and modern investment strategies, including private equity, without undue legal risk, ultimately improving retirement security for millions of Americans.

In conclusion, CIEBA strongly supports efforts to modernize DC plan investment structures by expanding access to private market opportunities and addressing the growing threat of frivolous ERISA litigation. By implementing thoughtful reforms that provide fiduciaries with greater flexibility and clarity, we can help millions of American workers achieve improved retirement security.

We appreciate the opportunity to share our perspective and would welcome the opportunity to collaborate further on these critical issues.

Sincerely,



Dennis Simmons
Executive Director, CIEBA

⁵Daniel Aronowitz, *Summary of 2023 Excess Fee and Performance Litigation*, Encore Fiduciary (Jan. 8, 2024) available at <https://encorefiduciary.com/summary-of-2023-excess-fee-and-performance-litigation/>.