U.S. Department of Labor

Assistant Secretary for
Employee Benefits Security Administration
Washington, D.C. 20210

August 11, 2020

Barbara Roper
Director of Investor Protection
Consumer Federation of America
1620 I St. NW, Suite 200
Washington, DC 20006

Dear Ms. Roper:

The Department of Labor (Department) received your letter about its June 3, 2020 information letter (the "Information Letter"). The Information Letter addresses how the Employee Retirement Income Security Act of 1974 (ERISA) fiduciary duties apply to the selection and monitoring of designated investment alternatives in participant-directed individual account plans, such as 401(k) plans.

When Congress enacted ERISA, it did not create a list of permissible investments for plan fiduciaries, and no provision of ERISA or the Department's regulations prohibits the inclusion of private equity in an individual account plan. Rather, ERISA established comprehensive standards to govern fiduciary conduct. Among other things, fiduciaries must discharge their duties, including those with respect to plan investments, solely in the interest of the plan's participants and beneficiaries and with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.

In this context, the Information Letter addresses designated investment alternatives in individual account plans that include a private equity component (or "sleeve") as part of a professionally managed asset allocation fund and is limited to fiduciary considerations under ERISA. The Information Letter clarifies how ERISA's obligations of prudence and loyalty apply to the decision of a plan fiduciary to include, as a designated investment alternative, a multi-class asset allocation fund that includes a sleeve of private equity.

The Information Letter sets forth some of the important factors that are relevant to an ERISA plan fiduciary's decision in that context. For example, the Information Letter explains that the responsible plan fiduciary should evaluate the risks and benefits associated with the investment alternative by considering the following factors, as part of a prudent decision process:

(i) whether adding a particular asset allocation fund that has a private equity sleeve would offer plan participants a more diversified investment opportunity within an appropriate range of expected returns - net of fees -- over a multi-year period;

(ii) whether the asset allocation fund is overseen by plan fiduciaries (using third-party investment experts as necessary) or managed by investment professionals that have the capabilities, experience, and stability to effectively manage an asset allocation fund that includes a private equity sleeve; and

(iii) whether the asset allocation fund has limited the private equity sleeve in a manner designed to address the unique characteristics of private equity in the context of a participant-directed individual account plan including liquidity and valuation features.

The information letter also pointed out that, as with any designated investment alternative, the plan fiduciary must consider whether it has the skills, knowledge, and experience to make the required determinations or whether the plan fiduciary needs to seek assistance from a qualified investment adviser or other investment professional.

The Information Letter does not authorize making private equity investments available to individual participants for direct investment on a standalone basis. Rather, the asset allocation funds addressed in the Information Letter must be designed to provide sufficient liquidity to participants to take benefit distributions and direct exchanges among the plan's investment line-up in accordance with plan terms and to meet periodic capital calls on private equity investments.

I note that when the letter was published, SEC Chairman Clayton commended the Department's efforts to improve investor choice and investor protection. The Information Letter, he said, "will provide our long-term Main Street investors with a choice of professionally managed funds that more closely match the diversified public and private market asset allocation strategies pursued by many well-managed pension funds as well as the benefit of selection and monitoring by ERISA fiduciaries."[1]

The Committee on Investment of Employee Benefit Assets (CIEBA), the largest organization of corporate pension investment officers in the nation, issued a press release regarding the Information Letter that stated, in part:

> [T]he DOL has taken a very helpful step to encourage DC plan fiduciaries to consider alternative investments as part of a prudent, diversified participant portfolio. Our members, who are stewards of both DC and Defined Benefit plans, have for years been effectively utilizing alternatives in their DB portfolios, and the DOL's guidance today is a very positive step toward further encouraging prudent fiduciaries to actively consider the merits of alternatives for their DC plans. The DOL information letter gives a roadmap for DC plan fiduciaries to follow when considering alternatives.[2]

The Department's purpose in issuing the Information Letter was to help working Americans who are saving for retirement. Reports and analysis from the Department of the Treasury, the SEC, and the World Bank have indicated that the number of publicly-traded companies decreased significantly since the late 1990s. The Department's letter clarified that ERISA permits defined contribution plan fiduciaries, charged with obligations of prudence and loyalty, to offer designated investment alternatives with a private equity sleeve under facts and circumstances calculated to be in the interest of plan

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[1] June 29, 2020 SEC Public Statement: Statement on the Department of Labor's Investment Advice Proposal, https://www.sec.gov/news/public-statement/clayton-dol-investment-advice-proposal-2020-6-29. The SEC recently issued a Risk Alert that discussed compliance issues that the SEC's Office of Compliance Inspections and Examinations has observed in investigations, and noted that many advisers have modified their practices to address the issues identified. EBSA believes the Risk Alert is another useful guide for plan fiduciaries considering investments in private equity.

[2] CIEBA June 3, 2020 Press Release: DOL Guidance Encourages Thoughtful Use of Alternative Investments in DC Plans, https://www.cieba.org/assets/DOL%20Guidance%20Encourages%20Thoughtful%20Use%20of%20Alternative%20Investments%20in%20DC%20Plans%20--%20FINAL.pdf.

participants and beneficiaries. The Information Letter also states that letter states that "the fiduciary must engage in an objective, thorough, and analytical process that compares the asset allocation fund [holding private equity] with appropriate alternative funds that do not include a private equity component, anticipated opportunities for investment diversification and enhanced investment returns, as well as the complexities associated with the private equity component."[3]

If you have additional information that you would like to share with us, please contact the Employee Benefits Security Administration's Office of Regulations and Interpretations at 202-693-8500.

Sincerely,

Jeanne Klinefelter Wilson

Jeanne Klinefelter Wilson
Acting Assistant Secretary

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[3] DOL Information Letter dated June 3, 2020, to Pantheon Ventures (US) L.P. and Partners Group (USA), Inc., https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/information-letters/06-03-2020