Committee on Investment of
Employee Benefit Assets Inc.

April 29, 2022

Submitted electronically

The Honorable Ali Khawar
Acting Assistant Secretary of Labor
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Re: Compliance Assistance Release 2022-01

We write to express our concerns with Compliance Assistance Release 2022-01 related to "401(k) Plan Investments in Cryptocurrencies" (the "Release"). We are sympathetic to the Department's desire to protect participants from investments the Department views as imprudent. However, we respectfully submit that our view is that the Release borders on being fundamentally inconsistent with the Employee Retirement Income Security Act of 1974, as amended ("ERISA"). As discussed below, the Release is inherently problematic, and we urge the Department to withdraw it as soon as possible.

CIEBA represents 113 of the country's largest pension funds and defined contribution plans. Our Members manage more than $2 trillion of defined benefit and defined contribution 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 largest and most sophisticated private retirement savings pension and 401(k) plans in the United States. Since 1985, CIEBA has provided a nationally recognized forum and voice for corporate plan fiduciaries on investment and fiduciary issues.

As with any particular asset class or particular investment category, CIEBA has not taken a formal position with respect to the appropriateness of cryptocurrencies and digital assets as retirement plan investments. Although we are not aware of any CIEBA Member that makes cryptocurrencies or digital assets available as an investment option in their 401(k) plan, it is important that fiduciaries have the discretion to evaluate and reevaluate the prudence and appropriateness of all investments over time.

As you are aware, ERISA generally does not prohibit benefit plans from making any particular investments. Instead, ERISA permits those who manage benefit plans to exercise discretion when selecting investments, and it deems them to be fiduciaries, meaning they are subject to the highest standard of care under the law. This structure has served the private retirement system extremely well for decades because it allows investment professionals to adapt to changing circumstances while ensuring that participants have the protection of having a fiduciary charged with acting in the exclusive economic best interests of participants. Thus, CIEBA members view the role of the fiduciary – and fiduciary discretion – as sacrosanct.

The Release is fundamentally inconsistent with this core tenet of ERISA. It breaks with decades of precedent by making judgments about the risks of cryptocurrencies and digital assets, effectively implying that an entire asset class may be imprudent. This approach is particularly problematic given that we are not aware of any formal study conducted by the Department that would justify its position, nor has the DOL solicited public feedback on the issue. We are very concerned that the Release substitutes the Department's own views for those of fiduciaries even though the Department has not demonstrated the level of diligence in forming those views that the Department would expect from fiduciaries.[1]

Moreover, the Release fails to provide a justification for singling out cryptocurrency and digital assets for unique treatment. There are dozens of other investments with similar risk profiles, and the Department has not deemed it necessary to issue guidance. The sole justification for the Release is that the Department is "aware of firms marketing investments in cryptocurrencies to 401(k) plans as potential investment options for plan participants." However, there are thousands of firms marketing any number of investments, and it is unclear why the Department has prioritized cryptocurrencies and digital assets.

We also are extremely concerned that the Department has created confusion with respect to the fiduciary implications of offering brokerage windows. There is language in the Release indicating that fiduciaries may have an obligation to prudently select and monitor cryptocurrencies offered through a *bona fide* brokerage window. This position has implications beyond cryptocurrencies, and as we cautioned recently in our testimony before the ERISA Advisory Council, imposing new requirements on employers with respect to brokerage windows will jeopardize their willingness to offer the option.[2]

CIEBA appreciates the important role the Department plays in the private requirement system, and we recognize the Department may believe it is necessary to take positions with which CIEBA Members disagree. However, we are increasingly concerned that the Department is formulating positions without the benefit of feedback from the regulated community. For example, we are not necessarily opposed to sub-regulatory guidance, but we share the concerns articulated by others that the Department recently has taken to creating substantive obligations through a process that is neither transparent nor subject to the rigor of notice-and-comment rulemaking. Moreover, the Department has threatened to enforce the Release by investigating fiduciaries, despite the fact that prudent fiduciaries would have to expend considerable resources over many years to respond to such investigations.

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[1] In fact, the Department recently held itself to a higher standard with respect to its own guidance. Specifically, the Department reviewed its own guidance and determined it was necessary to issue supplementary information because representations in the prior guidance "were not balanced with counter-arguments and research data from independent sources." Department of Labor, *Supplemental Statement on Private Equity in Defined Contribution Plan Designated Investment Alternatives* (Dec. 21, 2021). The Release suffers from these very same flaws.

[2] Advisory Council on Employer Welfare and Pension Benefit Plans, *Understanding Brokerage Windows in Self-Directed Retirement Plans* (Dec. 2021).

We are confident the Department issued the Release in a good faith attempt to protect participant's retirement savings. However, as stated previously, the Release is inherently problematic, and we urge the Department to withdraw it as soon as possible. There are ways to address the Department's concerns with cryptocurrencies, digital assets, and other issues without impinging on the sanctity of the fiduciary decision-making process.

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We greatly appreciate the Department's consideration of our views and we be happy to discuss this issue further.

Sincerely,

Dennis Simmons
Executive Director