

**ERISA Pension Plans' Perspective –
No Unilateral Change of Swap Terms
by Data Collectors and the Use of
Required Electronic Technology**

Main Objectives

▶ Preserving Plan Protections

- Pension plans' fiduciaries negotiate carefully with their swap dealer counterparties terms that are in the best interest of the participants (as required by the Employee Retirement Income Security Act of 1974 (ERISA)) for their uncleared, non-exchange traded swaps.
- These swaps must be reported under the Dodd-Frank Act (DFA).

▶ Reporting

- **The terms of an uncleared, non-exchange traded swap should not be unilaterally modified, directly or indirectly, through the affirmation, confirmation, processing or reporting (collectively, “Reporting”) of that swap.**
- Entities that might engage in Reporting include:
 - swap data repositories (SDRs)
 - swap execution facilities (to the extent non-exchange traded swaps are Reported (SEFs)),
 - designated clearing organizations (to the extent non-exchange traded swaps are Reported (DCOs*))
and
 - middleware providers to these entities.
- Collectively, we refer to these entities as "Data Collectors".

Note: None of the comments herein address a DCO's clearing and margin functions or emergency powers.

Main Objectives

▶ **Unilateral Modification of Terms & Contracts of Adhesion**

- Data Collectors may require uniform swap terms that are inconsistent with the terms carefully negotiated by the plan fiduciary for uncleared, non-exchange traded swaps.
- CFTC rules should not permit Data Collectors to force pension plan fiduciaries to agree to these terms or sign agreements of any kind which unilaterally change the terms of the plan's uncleared, non-exchange traded swaps.

▶ **ERISA Mandate**

- ERISA plan fiduciaries must be able to fulfill their fiduciary mandate under ERISA without conflicting with CFTC rules.

ERISA Plans

- ▶ **Plans regulated by the ERISA* are unique users of OTC derivatives because:**
 - ERISA plans use swaps to manage risk and to reduce the volatility of the plan funding obligations, *e.g.*, minimize the effect of interest rate swings.
 - ERISA plans' many fiduciaries utilize *customized swaps* solely for the benefit of the participants.
 - ERISA plans and their fiduciaries *are already subject to the oversight* of multiple regulators, including the Department of Labor and the Internal Revenue Service.
 - Each ERISA fiduciary is required to *act solely in the best interests* of plan participants.
 - Each transaction executed by an ERISA fiduciary with a dealer is required to be done *at "arms length."*
 - Each ERISA fiduciary is subject to the *highest fiduciary standard* under any US regulatory scheme – that of a prudent expert.

* The Employee Retirement Income Security Act of 1974

Reaching Legislative Intent

▶ Legislative Intent

- DFA was intended to promote transparency and security in OTC derivatives.
- DFA was not intended to eliminate plans' ability to negotiate protective terms.
- DFA was not intended to abrogate or dilute protective requirements of ERISA.
- DFA was not intended to give Data Collectors the power to mandate terms of uncleared, non-exchange traded swaps.

Pension Plans Objectives

▶ **Customized Protective Terms**

- Pension plan fiduciaries need to continue to be able to negotiate custom protective terms for pension plans for uncleared, non-exchange traded swaps. Otherwise, the law would have the effect of decreasing, rather than increasing, the security of plans, contrary to the policies behind ERISA.

▶ **Unintended Consequences**

- Only material economic terms (e.g., price, strike, notional amount, rate and counterparty information) should be required to be reported to an SDR. Otherwise, the Reporting effort could be economically prohibitive to participants and/or inadvertently mandate terms for uncleared, non-exchange traded swaps.

▶ **Accommodate Reporting of Customized Data**

- Any Reporting system should be required to accommodate “custom” terms (perhaps just noting that a term is a “custom” term could suffice).

▶ **Neutrality of Market Utilities**

- Data Collectors who facilitate Reporting should be:
 - “neutral” trade information collection/processing resources, and
 - restricted from unilaterally revising terms agreed upon by the counterparties to an uncleared, non-exchange traded swap.

Examples

- ▶ If pension plans are required to sign a non-negotiable User Agreement of one of the few Data Collectors, pension plans would have to:
 - Consent to new, perhaps unfavorable terms and conditions for uncleared, non-exchange traded swaps (which can be further changed without meaningful consent by or meaningful notice to the pension plan's fiduciary).
 - Agree that terms to an uncleared, non-exchange traded swap as agreed upon between the pension plan fiduciary and its dealer counterparty would only govern the trade if not “expressly modified” by the Data Collectors' User Agreement.

These examples are based upon real-life experiences that illustrate how pensions funds' ability to negotiate terms in OTC swaps can be impaired by Data Collectors' User Agreements.

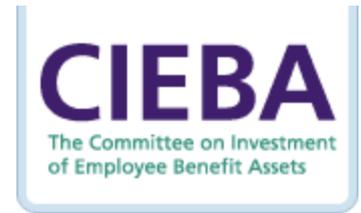
Examples (cont.)

- ▶ If plans' terms can be overridden by Data Collectors and the use of Data Collectors is effectively required by law, then the user agreements of Data Collectors would be given the force of law.
 - Neither Congress nor the Administration intended to give Data Collectors the power to mandate terms for uncleared, non-exchange traded swaps.
 - Ways to avoid the result of "private law writing" would be:
 - (1) to prohibit Data Collectors from overriding terms of uncleared, non-exchange traded swaps; or
 - (2) to permit market users that reject Data Collectors agreements to report the trades to the government (CFTC/SEC), rather than to the SDRs; AND
 - (3) to prohibit market participants and market utilities from requiring that certain Data Collectors be used.

Proposals for Regulation

- ▶ **To protect pension plans, plan participants, and to remain compliant with the mandates of ERISA, the CFTC/SEC should adopt regulations which:**
 - Prohibit Data Collectors from directly or indirectly (including through the use of middleware) unilaterally modifying in any fashion the terms of uncleared, non-exchange traded swaps.
 - Allow the use of "Main Street technology" (e.g., Excel spreadsheets, e-mail, pdfs of confirmations) for reporting of swaps.
 - Require SDRs to import "custom" swap trade terms or to have data field options to designate that a swap trade term is a "custom" term.
 - Prohibit Data Collectors from requiring that clients use specified Data Collectors (such as middleware) as a condition to reporting swaps.

ABOUT CIEBA



The Committee on the Investment of Employee Benefit Assets, better known as CIEBA, is the voice of the Association for Financial Professionals (AFP) on employee benefit plan asset management and investment issues. CIEBA represents more than 100 of the country's largest private sector retirement funds. Its members manage \$1.4 trillion of defined benefit and defined contribution plan assets, on behalf of 17 million plan participants and beneficiaries.

CIEBA was formed in 1985 to provide a nationally recognized forum and voice in Washington for ERISA-governed corporate pension plan sponsors on fiduciary and investment issues. Members are the senior corporate financial officers who individually manage and administer ERISA-governed corporate pension plan assets.

CIEBA's mission is to improve retirement security and increase investment management effectiveness by:

- ▶ Informing pension plan sponsors of legislative, regulatory and investment issues affecting defined benefit and defined contribution plans
- ▶ Providing a forum for discussion of these issues and development of effective solutions
- ▶ Helping its members address these issues and effectively discharge their fiduciary responsibilities
- ▶ Serving as an information resource for legislative and regulatory bodies
- ▶ Supporting constructive policy and legislative initiatives
- ▶ Building understanding and support for the private sector pension system

CIEBA is committed to strengthening the private sector pension system so that it continues as a major source of retirement income for millions of Americans. Its members also recognize that the private pension system's assets provide a significant source of long-term capital essential for growth.

Robert Hunkeler, Vice President of Investments at International Paper, is the current chairman of CIEBA.

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- ▶ We are professionals in the benefits field with expertise in investments, retirement, health insurance, accounting, actuarial science, banking, law, and benefits consulting who provide service and support to corporate benefit plan sponsors.
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