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CAPITAL INSURANCE AFFILIATES
THE CAPITAL FOUNDATION
CAPITAL BANK PARTNERS
CAPITAL ADVISERS, INC.

To Whom It May Concern:

On November 3, 2023, the Department of Labor (the "Department") published its notice of proposed rulemaking regarding, and offered for comment, a revised regulation defining "investment advice for a fee" under section 3(21) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"). The Department simultaneously proposed for comment revisions to its existing Prohibited Transaction Exemptions ("PTE") 2020-02, 84-24, 75-1, 77-4, 80-83, 83-1 and 86-128 (together with the proposed regulation, the "Proposal").[1]

In practice, the Proposal would overlay the existing "best interest" regulation of our financial advisers with an additional regulatory regime that would:

- Be too complex, too cumbersome, and far too costly to manage, which will lead to additional costs that would ultimately be borne by retirement investors;
- Make it significantly harder for consumers to have access to and receive high-quality, personalized retirement advice; and
- Impair the investment and advisory choices available, particularly for clients with small account balances.

The Proposal does all this in a manner that is inconsistent with ERISA.

Our Advisors Enhance the Financial Security of Retirement Investors: Assistance from investment professionals enhances the financial security of retirement investors.[2] To see how this might occur, consider how our advisors assist clients with retirement security in the context of their overall financial picture.

- Our financial advisors emphasize the importance of commencing and retaining retirement savings and encouraging employers to adopt plans and individuals to participate in those plans and/or IRAs.
- Financial advisors help clients weather market volatility, where inexperienced retail investors often make impulsive and ill-informed decisions like buying securities at market highs and selling at market lows.
- Financial advisors offer their skill and expertise to help clients navigate major financial pressures imposed by medical concerns, bankruptcy, deaths in the family, and caring for aging family members.
- Financial advisors protect investors from cashing out their retirement accounts for short-term needs and help prevent retirement asset "leakage".
- Finally, investors need professional financial advisors to assist them with decisions related to estate and tax planning and making their assets last through their retirement.

Our Firm Supports a Best Interest Standard: As a member of the Financial Services Institute, our firm strongly opposed the Department's 2010 and 2015 proposals, advocating instead for a carefully-crafted "best interest" standard of conduct that:

- Protects affordable choice for investors among investment professionals, and
- Is workable, in the context of the very heavy regulation to which investment professionals are otherwise subject.

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[1] 88 Fed. Reg. 75890 et seq. (Nov. 3, 2023).
[2] See the Financial Services Institute's August 6, 2020, comment letter on proposed PTE 2020-02, pages 5-6, for citations to this research that predated recent regulatory and industry developments.

We supported the SEC rulemaking that resulted in the adoption of Regulation Best Interest. We also supported the adoption of PTE 2020-02. In particular, we applauded the Department's approach to ensure that PTE 2020-02 imposed a best interest obligation on broker-dealers that both (i) aligned with Regulation BI and with registered investment advisers' fiduciary duty under the Investment Advisers Act of 1940, as amended, and (ii) was faithful to ERISA.

Our concerns for the Proposal thus have to do with its adverse consequences for retirement investors, and the increase in costs and complexities of providing essential investment services for them while ensuring access to affordable retirement advice, products, and services for all our investors/clients.

1. The proposed 60-day effective date is unreasonable, unattainable, and must be changed.

2. The Proposal is unjustified on an empirical basis and exceeds the Department's authority.
   - The regulatory impact analysis provides no empirical evidence of the incidence in 2023 of adverse outcomes for retirement investors due to conflicted interests on the part of investment intermediaries.
     - In the interest of properly serving investors, our firm invests heavily in our compliance programs.
     - A "best interest" standard of conduct has already been adopted, and is enforced by our compliance programs as well as robust SEC and FINRA examination and enforcement.
   - The cost/benefit analysis in the regulatory impact statement cannot quantify the benefits and grossly underestimates the true costs. Our firm projects compliance costs greatly in excess of those estimated in the regulatory impact analysis.
   - The Proposal is in contradiction to the *Chamber of Commerce v. DOL* opinion, in which the Fifth Circuit vacated the Department's 2016 rulemaking and admonished the Department for "its overreaching definition of 'investment advice fiduciary ...'" that "conflicts with the plain text of 'investment advice fiduciary' provision as interpreted in light of contemporary understandings, and ... is inconsistent with the entirety of ERISA's 'fiduciary' definition."[3]
     - The Department of Labor is not the universal "standard of conduct" regulator for the financial services industries.
     - The Proposal is not technically limited to retirement assets and, in any event, it is untenable for our financial advisors to distinguish between an investor's retirement and non-retirement accounts.

3. Given its scope, the Proposal raises so many issues and problems that it cannot be cured, including those noted below.
   - The proposed fiduciary definition is framed as a facts and circumstances analysis, but the preamble effectively contends that financial advisers are always fiduciaries.
   - The functional prohibition on disclaimers in the Proposal is counterproductive to the interests of plans and participants.
   - The Proposal neither asserts nor demonstrates that PTE 2020-02 in its current form is inadequate, and insufficient time has passed since its full effective date to make such a determination. Absent such evidence, it is unreasonable for the Department to compel our firm to rebuild its compliance systems less than two years after the exemption took effect.
   - The proposed amendments are at a minimum more restrictive than, and may conflict with, SEC and FINRA rules.
   - The Proposal as drafted does not support the Department's stated goals of providing additional clarity and additional protections for retirement investors.
     - The proposed amendments go well beyond the fundamental duties expected of fiduciaries.
     - The proposed amendments (Including those under consideration but not yet formally proposed) would overwhelm investors. The proposed amendments would add costs and complexity, increasing our firm's liability without any practical utility for retirement investors, and thereby decrease availability and utilization.

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[3] 885 F.3d 360 (5th Cir. 2018).

- The simultaneous revocation of five class exemptions will be extremely disruptive to the industry.
- The recordkeeping access proposals are unduly burdensome and put our firm at risk for violations of other laws. Full access to business records should be limited to appropriate regulators.

4. We note for the record that the comment period allowed to respond to this proposal has been inadequate.
For all the foregoing reasons, as elaborated in the comment letter submitted by the Financial Services Institute, the Proposal should be withdrawn.

Thank you for considering our comments. Should you have any questions, please contact Richard Bryant, Capital Investment Companies, phone number: (919)831-2370.