INVESTMENT

AND RETIREMENT SAVINGS

CCMC has worked with the administration and Congress to advocate for policies that make it easier for Americans to save and invest for their future by enhancing their access to investment options and advice, while ensuring strong protections are in place. While much has been accomplished, serious threats to this goal remain. From standards of conduct for retail and retirement plan customers, ESG factors in plan investments, proxy voting rules, and the challenges with proposals to impose a financial transaction tax (FTT), CCMC anticipates the debates surrounding these and other important investor issues to continue.

Standards of conduct for brokers and investment advisers has been a hot topic in Washington over the past decade. When the fiduciary rule issued by the DOL was overturned by courts in 2018, the SEC—the agency with eight-plus decades of relevant experience—established Regulation Best Interest (Reg BI) to clarify the standards of conduct for brokers and investment advisers, while also preserving investor choice. Importantly, subsequent rulemakings from the DOL, Financial Industry Regulatory Authority (FINRA), and Municipal Securities Rulemaking Board (MSRB) have sought to align their standards with Reg BI to bring greater clarity to investment professionals and investors.

Finally, we expect continued calls from some policymakers to impose a financial transaction tax on equity, bonds, and derivatives transactions. While the most recent legislative attempts for an FTT began in 2012, the U.S. has already lived through an unsuccessful experiment with an FTT. The U.S. imposed an FTT in 1914, but it was repealed in an overwhelming bipartisan vote by a Democratic Congress in 1965.

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SEC AND DOL: IMPLEMENT APPROPRIATE BEST-INTEREST STANDARD OF CONDUCT FOR INVESTMENT ADVICE

The SEC is the primary regulator for investment advice and capital markets, and therefore it is appropriate for it to take the lead in developing and implementing standards of conduct. CCMC strongly supports the SEC's Reg BI, adopted on June 5, 2019, which went into effect on June 30, 2020. Reg BI sets a strong, consistent national standard that prohibits broker-dealers from placing their own interests ahead of their clients' interests. CCMC believes that Reg BI strikes an appropriate balance between consumer protection and investor choice. Reg BI preserves investor access to various types of advice and investment products, improves investors' understanding of their choices, and protects investors from conflicted advice.

ACTION: Policymakers should support Reg BI and the necessary alignment of rules at the MSRB, FINRA, and DOL.

ACTION: Policymakers should support federal pre-emption for Reg BI and other federally aligned rules to avoid a state-by-state patchwork of standards that confuses investors and unnecessarily increases the cost of investing.

DOL: IMPROVE INVESTMENT ADVICE FOR WORKERS AND RETIREES

In July 2020, the DOL released a proposed class exemption permitting reasonable compensation for investment advice fiduciaries providing advice and engaging in certain principal transactions with ERISA plans, participants, and Individual Retirement Account (IRA) holders. Providing exemptive relief is an important step in harmonizing Reg BI and ERISA standards to the extent possible. In addition, the DOL's proposal provides other important clarification for investment advisers by reinstating the 1975 regulation defining fiduciary.

The Chamber supports the DOL's proposed exemption, and provided comments about necessary improvements to the proposal. Specifically, the Chamber urged the DOL to remove its new interpretation of the five-part test in the preamble of the rulemaking in order to restore clarity and prevent confusion about the scope of fiduciary investment advice.

ACTION: DOL should finalize a rule aligned with SEC's Regulation Best-Interest.

SEC AND CONGRESS: MODERNIZE E-DELIVERY OF CERTAIN INVESTMENT DOCUMENTS

Investors receive various documents about their business with broker-dealers and investment advisers to apprise them of the securities they are purchasing. These disclosures include, but are not limited to, prospectuses, mutual fund notices, trade confirmations, and account statements. However, these documents are oftentimes not delivered electronically—instead paper reports are mailed to investors, which have higher costs and less utility for consumers.

In 2018, the SEC completed a rulemaking recognizing the value of e-delivery for shareholder reports under Rule 30e-3 for mutual funds, ETFs, and other investment funds that becomes effective January 2021. The commission also invited comment on additional opportunities to modernize delivery of other fund information. The COVID-19 crisis has accelerated the evolution toward a digital economy and confirmed an option for e-delivery of certain documents that benefits investors. Legislation such as the SEC Relief to Slow the Spread of Coronavirus Act of 2020 (H.R. 6242–116th) recognizes the value in shifting more documentation to e-delivery.

ACTION: The SEC should reconsider its past interpretations and revise outdated rules to permit e-delivery of investment documents.

ACTION: Congress should enact legislation to permanently expand the scope of documents eligible for e-delivery (prospectuses, mutual fund notices, trade confirmations, and account forms).

CONGRESS: OPPOSE THE FINANCIAL TRANSACTION TAX

In the past, some policymakers have called for the imposition of a financial transaction tax on stock trades and similar transactions in order to pay for various unrelated initiatives, such as infrastructure spending. These proposals miss the fact that an FTT will hurt average investors, reduce savings, increase the time an individual must work before being able to retire, and make it harder for America's job creators to contribute to economic growth. In fact, FTTs have been tried in the past, both in the U.S. and abroad, and have failed to either raise revenue or curb undesired financial behavior. Such taxes have created havoc in the markets where they have been imposed. In short, an FTT will hurt the liquidity of the U.S. capital markets and dramatically increase the cost of trading, further restricting retail investors from accessing markets, reducing retirement savings growth, and damaging the American economy.

ACTION: Policymakers should OPPOSE any proposal—at the federal or state level—to impose an FTT on financial transactions, including stocks and other financial instruments.

DOL: UPDATE FINANCIAL FACTORS IN SELECTING PLAN INVESTMENTS

The basic premise underlying ERISA is that a fiduciary should act solely in the interest of the plan participant, so while social causes may be laudable, investments without regard to social causes may yield a higher return, and thereby secure a better retirement for participants. Therefore, economic return should be the primary consideration for an ERISA fiduciary.

Over the past 25 years, the DOL has issued several iterations of sub-regulatory guidance on this issue. During the same period, interest surrounding investments that promise the furtherance of various environmental or social objectives has only grown. Establishing a regulatory framework is an appropriate and overdue step and will help provide certainty to plan fiduciaries and other market participants. On October 30, 2020, the DOL released a final rule that would require plan fiduciaries only to consider pecuniary interest in making investment decisions. The Chamber supports the Department of Labor's efforts to clarify the duties of ERISA fiduciaries in the context of pension and retirement plan investments.

ACTION: Policymakers should support DOL's efforts to clarify the duties of ERISA fiduciaries in the context of pension and retirement plan investments.

SEC AND CONGRESS: REFORM SEC INVESTIGATION AND ENFORCEMENT PROGRAMS

A strong and fair SEC is an essential element of maintaining efficient capital markets. Having a strong securities regulator is necessary for investors and businesses to have the certainty necessary to transfer capital for its best use with an expectation of return, which allows market participants to engage in reasonable risk taking on a level playing field. A rigorous enforcement regime ensures efficient markets by rooting out fraudsters and other bad actors, but if not properly calibrated, it will also serve to discourage legitimate businesses that may be seeking growth capital. The certainty of clear rules of the road also means that SEC enforcement should have a fair process for all to ensure that the rights of the accused are preserved while allowing the process to achieve its goals of finding the truth, punishing the wrongdoers, and preventing future harm.

In 2015, CCMC issued a report recommending various reforms to the SEC's processes and practices for enforcement. The commission has recently adopted some reforms aligned with these recommendations, but there are further opportunities for improvement.

ACTION: The SEC should permit defendants the opportunity to use the federal courts as the forum for enforcement actions instead of in-house administrative proceedings at the SEC.

ACTION: The SEC should make reforms to the Wells Process, such as providing reasonable notice to recipients and improved access to investigative files.

ACTION: The SEC should make updates to its policy for admissions, such as publishing guidance on how the issue of requiring admissions will be incorporated into settlement negotiations.

ACTION: The SEC should improve the efficiency of the investigation process by, for example, promptly providing written notification that an investigation has been closed.

ACTION: The SEC should apply the rule of lenity in administrative investigations, enforcement actions, and adjudication by reading genuine statutory or regulatory ambiguities related to administrative violations and penalties in favor of the targeted party in enforcement, as recommended by the Office of Information and Regulatory Affairs (OIRA) Administrator on August 31, 2020, to implement Executive Order 13924.

SEC: CLARIFY HOW DISGORGEMENT AND PENALTIES WILL BE CALCULATED

Disgorgement is a legal remedy that seeks to make whole those harmed financially by returning ill-gotten funds to the harmed parties from wrongdoers. The SEC has routinely pursued disgorgement in federal courts as a form of "equitable relief," but the agency's authorizing statute does not list it as a judicial remedy.

In 2017, the U.S. Supreme Court held that, in SEC enforcement actions, disgorgement operates as a "penalty" and is therefore subject to the five-year statute of limitations applicable to enforcement proceedings seeking civil penalties. The court unanimously concluded that disgorgement "bears all the hallmarks of a penalty: It is imposed as a consequence of violating a public law and it is intended to deter, not to compensate."

The Chamber submitted a brief urging the Court to impose reasonable limitations on the SEC's ability to seek disgorgement, a view that was ultimately aligned with the court's decision. The chairman of the SEC subsequently expressed concern regarding the ruling, saying that the ruling could make it difficult to pursue complicated cases that would inevitably exceed the five-year statute of limitations.

In 2020, the court ruled in Liu v. SEC that the SEC may continue to obtain disgorgement in federal court, but with limitations. The court held that "courts must deduct legitimate expenses before ordering disgorgement" in SEC enforcement actions, thus limiting disgorgement awards to wrongdoers' net profits as opposed to total gross illicit gains.

ACTION: The SEC should explain how disgorgement and penalties will be calculated going forward. This action should memorialize how the Commission will handle the deduction of expenses from disgorgement, thus providing certainty to market participants that the SEC won't just increase its penalty demands to make up for the new limitation on disgorgement.

CONGRESS: REPEAL THE SEC'S AUTHORITY TO RESTRICT PRE-DISPUTE MANDATORY ARBITRATION

The Dodd-Frank Act conferred new authority on the SEC to limit the use of pre-dispute arbitration clauses. Arbitration is an important means of resolving disputes that provides significant benefits to investors and other participants in the securities markets. Arbitration has been commonly practiced for decades with a record of resolving disputes efficiently to the benefit of investors and the markets.

ACTION: Congress should repeal Section 921 of the Dodd-Frank Act.

FSOC: RECOMMEND PUBLIC PENSION SYSTEM REFORMS

Policymakers should examine the impact that the unfunded liabilities of state and local pension systems have on financial stability, economic growth, and investment returns for pensioners. According to some estimates, there is a greater than $4 trillion gap between the current projected funding levels of public pensions and their future liabilities. This gap threatens the retirement security of millions of American public sector workers and creates an enormous budget strain on many state and local governments.

The *2019 Annual Report* by FSOC noted that the different sets of accounting rules used by public pension funds "enable public plan sponsors to assume investment returns based on their own long-run expectations, which are significantly higher than average post-crisis returns . . . underfunded public plans are a significant source of fiscal pressure on several U.S. states and territories."

This problem is exacerbated by the open political activism of some of the largest public pension systems in the country, which has sacrificed investment returns for the personal objectives of those who oversee these pensions. According to a 2015 Manhattan Institute study, the social activism of certain pensions—including the California Public Employees Retirement System and the New York State Common Retirement System—directly resulted in diminished economic returns for pensioners. While the subjugation of economic return for uncorrelated objectives is prohibited for private retirement plans under ERISA, state and local plans are not subject to the heightened standards that ERISA requires.

ACTION: Congress should enact legislation requiring FSOC to publish a report annually detailing the extent of unfunded public pension liabilities, the primary causes for public pensions failing to meet stated investment benchmarks, and recommendations for reforms that states should enact.

ACTION: FSOC should hold public meetings, that include public testimony from stakeholders, analyzing the extent of unfunded public pension liabilities, the primary causes for public pensions failing to meet stated investment benchmarks, and recommendations for reforms that states should enact.