Consumer Federation of America

May 17, 2023

Congresswoman Maxine Waters
Ranking Member
House Financial Services Committee
2221 Rayburn House Office Building
Washington, DC 20515

Congressman Patrick McHenry
Chairman
House Financial Services Committee
2129 Rayburn House Office Building
Washington, DC 20515

Re: May 24th Markup of House Financial Services Committee Bills

Dear Chairman McHenry and Ranking Member Waters,

Consumer Federation of America (CFA)[1] writes to you in strong opposition to six bills that we understand will be considered in the May 24th Committee markup. Among other things, the bills being considered would:

- expose public school teachers' retirement security to harmful sales-driven conflicts of interest and unrecoverable losses;
- increase the amount of risky, costly, illiquid, and opaque private funds that are sold to retail investors, who may not be able to appreciate the risks or sustain the risk of losses of these investments; and
- undermine the SEC's and state regulators' ability to oversee and police private securities markets.

For these reasons,

- **Vote NO on The Retirement Fairness for Charities and Educational Institutions Act;**
- **Vote NO on The Increasing Investor Opportunities Act;**
- **Vote NO on The Access to Small Business Investor Capital Act;**
- **Vote NO on The Helping Angels Lead Our Startups (HALOS) Act;**
- **Vote NO on The bill to except quotations of Rule 144A fixed-income securities from certain regulatory requirements, and for other purposes; and**
- **Vote NO on The bill to amend the Investment Advisers Act of 1940 to codify certain Securities and Exchange Commission no-action letters that exclude brokers and**

[1] CFA is a non-profit association of more than 250 national, state, and local pro-consumer organizations. It was formed in 1968 to represent the consumer interest through research, advocacy and education.

dealers compensated for certain research services from the definition of investment adviser, and for other purposes.

Vote NO on The Retirement Fairness for Charities and Educational Institutions Act of 2023

While advertised as providing "parity" between 401(k)s and 403(b)s so that both accounts can invest in collective investment trusts (CITs), in reality this bill would overhaul the securities laws to allow other unregistered securities, including unregistered variable annuities and unregistered pooled investment vehicles to be sold by unregistered investment professionals to ERISA and non-ERISA 403(b) plans and plan participants. Neither these unregistered products themselves nor the sales of these unregistered products would be subject to regulation, review, and oversight by the SEC. This is a dangerous and harmful endeavor that would jeopardize the retirement security of many 403(b) participants, including most prominently, public school teachers.

Currently, the securities laws require mutual funds and variable annuities that are sold to 403(b) plans to register with the SEC. By registering, they disclose essential information, including their key features, risks, and costs. SEC staff review these disclosures to ensure that they provide full and fair disclosures and comply with rules relating to the proper form and content of registration statements. In short, SEC staff work to ensure that investors have the information they need to make informed investment decisions about these products.

Under the bill, however, variable annuities and pooled investment vehicles would no longer have to register to be sold to 403(b) plans. Specifically, the bill would amend the Investment Company Act and the Securities Act to allow 403(b) plans to invest in unregistered variable annuities and unregistered pooled investment vehicles. Accordingly, these unregistered securities would not have to provide any disclosures about their operations to the SEC or investors and would completely escape SEC regulation, oversight, and staff review. As a result, investors would be denied the information they need to make informed investment decisions about these products.

In addition, by not having to register, unregistered pooled investment vehicles would not have to comply with the substantive investor protections under the Investment Company Act, including provisions that limit transactions with affiliates, prohibit the suspension of redemptions (except under limited circumstances), require a board of directors that must include disinterested directors, limit leverage, impose a fiduciary duty on the fund's managers regarding the receipt of compensation for services, require shareholder approval for certain fundamental changes, limit sales loads, and require proper valuation of fund assets. Without these protections, the pooled investment vehicles that are manufactured and sold to 403(b) plans could start to look more like hedge funds and private equity funds than mutual funds.

Furthermore, the bill would allow unregistered financial professionals to sell these unregistered products to 403(b) plans. Currently, the securities laws require financial professionals selling mutual funds and variable annuities to 403(b) plans to register with the SEC and be subject to the Exchange Act's protections. However, the bill would amend the Exchange Act to allow

intermediaries selling interests in connection with 403(b) plans to sell those interests without having to register as broker-dealers.

By not having to register as broker-dealers, intermediaries selling to 403(b) plans won't be subject to SEC regulation and oversight. This means financial professionals selling unregistered securities won't have to comply with sales practice rules, such as Regulation Best Interest, advertising rules designed to ensure advertisements are fair and balanced, disclosures about their business practices, recordkeeping requirements, or supervisory responsibilities. In addition, they would not be subject to examination and oversight by the SEC and FINRA.

Since non-ERISA 403(b)s are commonly offered to public school teachers, the practical effect of this bill would be to remove any meaningful safeguards for teachers saving for retirement. The bill would allow and encourage the sale of unregistered products that have detrimental features, by unregistered financial professionals who have no obligation to comply with broker-dealer consumer protections, to public school teachers. As a result, this bill would dangerously foist inordinate risk upon public school teachers, who are often among the most vulnerable retirement savers.

If any parity between 401(k)s and 403(b)s is to be provided with regard to different types of products that can be sold to these different types of retirement accounts, then a more thoughtful approach would be to ensure that such parity is limited to the extent the same consumer protections are provided to 401(k)s. Specifically, since 401(k)s are covered under ERISA and there is an ERISA fiduciary making sure the plan is run solely in the interest of its participants, any parity contemplated with regard to 403(b)s should require that those same ERISA protections apply. Accordingly, only ERISA 403(b) plans and participants would be covered under this bill.

To the extent a 403(b) is not an ERISA plan, it's entirely inappropriate to expand the types of assets that can be sold to these non-ERISA 403(b) accounts because there is no fiduciary making sure the plan is run solely in the interest of its participants. Already without any ERISA protections, this bill would strip away the remaining protections that these retirement savers currently have under the securities laws. Accordingly vote no on this dangerous and harmful legislation.

Vote NO on the Increasing Investor Opportunities Act

Currently, the SEC caps the amount that closed-end funds can invest in private funds at 15% of net assets, if the closed-end fund is sold to non-accredited investors. If a closed-end fund has more than 15% of net assets in private funds, it must sell that fund only to accredited investors. This bill would allow closed-end funds to invest 100% of their net assets in private funds and still be sold to non-accredited investors, which would effectively create a private fund for retail investors without these investors having to meet the accredited investor definition. This would increase the amount of risky, illiquid, and opaque private funds that are sold to retail investors, who may not be able to appreciate the risks or sustain the risk of loss of these investments. It would also allow for the layering of multiple levels of fund fees, which could make such investments exorbitantly expensive. Accordingly, vote no on this bill.

Vote NO on the Access to Small Business Investor Capital Act

Instead of requiring funds to reflect the acquired fund fees and expenses (AFFEs) of business development companies (BDCs) in their bottom line annual expenses, as funds are currently required to do, this bill would allow funds to hide such costs from their ongoing expenses and disclose BDC AFFEs in a footnote to the fee table. Allowing funds to hide BDC expense information from the bottom line annual fund expenses would obscure bottom line fund annual expense information, even when the costs associated with investing in BDCs may be material to the overall cost of the fund. It would also make it more difficult for retail investors to compare the total expenses for different funds and would likely confuse, if not mislead, retail investors who rely on expense ratio disclosures to make investment decisions. Accordingly, vote no on this bill.

Vote NO on the Helping Angels Lead Our Startups Act

This bill would direct the SEC to revise Regulation D so as not to extend the prohibition on general solicitation or general advertising to events with specified kinds of sponsors, including angel investor groups unconnected to broker-dealers or investment advisers, so long as certain conditions are met.

This bill would legislatively codify and further deregulate changes that the SEC made in 2020. Specifically, the SEC promulgated Rule 148, which states the conditions under which an issuer would not be deemed to have engaged in general solicitation at a demo day. This bill, however, would expand the types of eligible sponsors beyond what the SEC thought was appropriate. Even more troubling, this bill prohibits the SEC from issuing any rule that would apply additional filing requirements (including requirements to file information with the Commission before or after a general solicitation or general advertising) to a general solicitation or general advertising of such a security that were not in effect on the date of enactment of this Act. This bill would therefore undermine the SEC's ability to amend and improve Form D. This restriction would further hamper the SEC's and state regulator's ability to police the Reg D market.

Instead of hampering regulators from overseeing the Reg D market, the SEC should amend and improve Reg D to require the filing of a Form D before any offer or sale under Reg D, including any general solicitation under Rule 506(c). Further, the SEC should require the filing of a closing amendment to Form D upon the termination of an offering. These disclosures would provide important information to regulators about who is seeking private capital, how they are doing so, and potential risks that they pose to the investing public. Accordingly, vote no on this bill.

Vote NO on the bill to except quotations of Rule 144A fixed-income securities from certain regulatory requirements, and for other purposes

This bill would exempt fixed-income securities sold pursuant to Rule 144A from the requirements of Rule 15c2–11, which generally prohibits broker-dealers from publishing or submitting securities of private issuers in a quotation medium other than a national securities

exchange (i.e., OTC securities), unless the issuer has made current financial and other information publicly available as specified by the rule.

Since 1971, Rule 15c2-11 has applied to the publication or submission of quotations for any security, a defined term that has and continues to include fixed income securities. In response to compliance concerns from the industry, the SEC provided targeted and time-limited relief for fixed income transactions, including 144A transactions. This relief will give the SEC time to adopt a more permanent tailored framework for the quotation of Rule 144A transactions. Because this bill would use a blunt knife to carve out Rule 144A transactions entirely from Rule 15c2-11, it would impede the SEC and its expert staff from designing a more surgical and thoughtful approach that improves the transparency and functioning of the Rule 144A market. Accordingly, vote no on this bill.

Vote NO on the bill to amend the Investment Advisers Act of 1940 to codify certain Securities and Exchange Commission no-action letters that exclude brokers and dealers compensated for certain research services from the definition of investment adviser, and for other purposes.

Under former SEC Chairman Jay Clayton, the SEC granted temporary no-action relief to SIFMA in 2017 to allow some research providers to avoid registration in the US as investment advisers. However, because of that no-action relief, US investors, independent research providers, and small brokers are now at significant competitive disadvantages. Investors are being compelled to trade with brokers with whom they do not believe they are receiving best execution, and US investors (including mutual fund investors) are often paying for research that benefits other customers, including Europeans. For these and other reasons, at the urging of investors, including the Council of Institutional Investors, CFA Institute, and Healthy Markets Association, the SEC announced in July 2022 that it would let that temporary no-action relief finally expire in July 2023. The proposed legislation would both (1) reverse the SEC's well-reasoned decision, and continue exposing US investors to greater costs and risks, and (2) create a new, troubling loophole in Advisers' Act registration. Accordingly, vote no on this bill.

Respectfully submitted,

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