MINORITY VIEWS
H.J. RES. 88, A Joint Resolution Disapproving of the Department of Labor's Conflict of Interest Rule
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Committee Democrats strongly oppose H.J. RES. 88, which would block the Department of Labor's (DOL's) final rule protecting workers' hard-earned retirement savings and ensuring financial advisors act in the best interest of their retirement clients.

For far too long, some financial advisors have exploited loopholes in a decades-old DOL regulation that governs investment advice for retirement savers. As a result of these loopholes, these unscrupulous advisors were able to steer their retirement clients toward financial products that yielded the advisor a big commission but were not in their clients' best interest.

This practice is referred to as providing "conflicted advice." Conflicted advice costs retirement plan participants $17 billion in losses every year and could result in a loss of almost a quarter of an individual's savings over a 35-year period.[1]

The most common point at which conflicted advice occurs is when workers are about to retire and roll over their employer-based retirement account, such as a 401(k), into an Individual Retirement Account (IRA) or other financial product. According to the White House, "a typical worker who receives conflicted advice when rolling over a 401(k) balance to an IRA at age 45 will lose an estimated 17 percent from her account by age 65. In other words, if a worker has $100,000 in retirement savings at age 45, without conflicted advice it would grow to an estimated $216,000 by age 65 adjusted for inflation, but if she receives conflicted advice it would grow to $179,000—a loss of $37,000 or 17 percent."[2]

Committee Democrats believe that, after a lifetime of hard-work and sacrifice, these workers should be guaranteed that the financial advice they receive about their retirement savings will be in their best interest. Retirement savers expect that the advice they receive is in their best interest, and they rely on it accordingly. Unfortunately, under the existing loophole-ridden regulation, that is not always the case. The DOL's final rule provides a responsible solution by expanding the circumstances under which advisers must abide by a fiduciary standard and requiring them to disclose conflicts of interest. The final rule will help hardworking Americans enjoy a more secure and dignified retirement.

H.J. RES. 88 nullifies this rule and leaves in place the unacceptable status quo that enables certain financial advisors to put their interests ahead of their clients'.

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[1] Council of Economic Advisors, *The Effects of Conflicted Investment Advice on Retirement Savings* 17-18 (Feb. 2015); available at: https://www.whitehouse.gov/sites/default/files/docs/cea_coi_report_final.pdf.

[2] White House, "Fact Sheet: Middle Class Economics: Strengthening Retirement Security by Cracking Down on Conflicts of Interest in Retirement Savings," (April 2016); available at: https://www.whitehouse.gov/the-press-office/2016/04/06/fact-sheet-middle-class-economics-strengthening-retirement-security.

COMMITTEE REPUBLICANS MOVED WITH RECORD-BREAKING HASTE TO BLOCK THE DOL'S FINAL RULE

DOL's final rule was the product of a thorough and transparent process. The DOL conducted hundreds of meetings on the rule and provided the American public nearly six months to provide feedback. On April 8, 2016, DOL published its final conflict of interest rule in the Federal Register, which included significant changes in response to the feedback DOL had received.[3] Nonetheless, eleven days later on April 19, 2016, three House Republicans introduced H.J. RES. 88, a joint resolution of disapproval of the rule under the Congressional Review Act (CRA). On Thursday, April 21, the Committee on Education and the Workforce held a mark-up of H.J. RES. 88.

In contrast to the DOL's deliberative process, Committee Republicans rushed ahead with a mark-up of H.J. RES. 88 only 48 hours after it was introduced. On top of this, Committee Republicans convened a mark-up of H.J. RES. 88 only thirteen days after the publication of DOL's final conflict of interest rule in the Federal Register. Based on a Congressional Research Service (CRS) historical review of mark-ups of joint resolutions of disapproval under the CRA that have been convened by House and Senate Committees, thirteen days appears to be *the shortest timespan ever* between issuance or publication of a final rule and a Committee's CRA mark-up. On average, there have been 55 days between issuance or publication of a final rule and a scheduled mark-up of a CRA resolution of disapproval.

THE DOL MADE SIGNIFICANT CHANGES TO THE RULE IN RESPONSE TO COMMENTS FROM STAKEHOLDERS

Committee Democrats believe the DOL struck an appropriate balance between accommodating congressional, industry, and other stakeholder concerns without compromising core retirement investor protections. Throughout the process, Secretary Perez repeatedly stated that the final rule would reflect the feedback provided by stakeholders. Secretary Perez lived up to his word, as the final rule was changed in meaningful ways in response to stakeholder input. For instance, the majority of the comments focused on the best interest contract exemption (BICE). The DOL made important modifications to the BICE's disclosure and notice requirements as well as the timing and execution of the contract to make the final rule more workable overall.

The ill-advised haste with which Committee Republicans have rushed to judgment on this rule is all the more curious when considering these and other modifications, as well as the initial positive reactions to the rule from industry and others.

A VARIETY OF STAKEHOLDERS, INCLUDING INDUSTRY, EXPRESSED SUPPORT FOR THE DOL'S FINAL RULE AND ACKNOWLEDGED THE FINAL RULE'S RESPONSIVENESS TO THEIR FEEDBACK

[3] 81Fed. Reg. 20945 (April 2016); available at: https://www.federalregister.gov/articles/2016/04/08/2016-07924/definition-of-the-term-fiduciary-conflict-of-interest-rule-retirement-investment-advice.

A wide range of stakeholders – including industry representatives – have expressed their initial support for the final rule. For instance, John Thiel, who is the head of Merrill Lynch's Wealth Management, said they were "pleased that Secretary Perez and the Department of Labor staff have worked to address many of the practical concerns raised during the comment period."[4]
Roger Ferguson, the president and CEO of TIAA, said "based on our preliminary analysis, it appears the Department has gone a long way toward making the best interest standard the industry standard."[5]

Morgan Stanley said the Labor Department's final version of fiduciary rules were "meaningfully softened in several aspects" from the original proposal.[6]

The Financial Industry Regulatory Authority (FINRA), which was one of the most vigorous critics of the DOL's proposed rule, and which "filed one of the most pointed comment letters last summer about the proposed rule," appears to have changed its view after seeing the final rule.[7] FINRA's chairman and chief executive, Richard Ketchum, "praised DOL for 'making some very significant changes' to the measure that will make it operate better."[8] Mr. Ketchum reportedly said that he thinks the "final rule is much better."[9]

At the same time, DOL has maintained the support of a wide and diverse coalition of stakeholders that have championed the conflict of interest rule since the promulgation of the proposed rule. Such organizations comprise the "Save Our Retirement Coalition" and include: AARP, AFL-CIO, Alliance for Retired Americans, American Association for Justice, American Association of University Women, American Federation of Government Employees (AFGE), American Federation of State, County and Municipal Employees (AFSCME), Americans for Financial Reform, Association of University Centers on Disabilities, Better Markets, B'nai B'rith International, Center for Economic Justice, Center for Responsible Lending, Committee for the Fiduciary Standard, Consumer Action, Consumer Federation of America, Consumers Union, Demos, International Association of Machinists and Aerospace Workers, International Brotherhood of Boilermakers, International Brotherhood of Electrical Workers (IBEW), International Union, United Automobile, Aerospace, & Agricultural Implement Workers of America (UAW), Justice in Aging, Leadership Conference on Civil and Human Rights, Main Street Alliance, Metal Trades Department, AFL-CIO, National Active and Retired Federal Employees Association (NARFE), National Consumers League, National Council of La Raza, National Women's Law Center, NAACP, National Education Association, Public Citizen, Public Investors Arbitration Bar Association, Rebalance IRA, United Food and Commercial Workers

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[4] Reuters, "Merrill Lynch Sees Many Industry Concerns Addressed In Retirement Advice Rule," (April 2016); available at: http://in.reuters.com/article/bank-of-america-fiduciary-idINL2N1790TQ.

[5] Reuters, "TIAA Statement on Department of Labor Fiduciary Rule," (April 2016); available at: http://www.reuters.com/article/dc-tiaa-idUSnBw065764a+100+BSW20160406.

[6] Wall Street Journal, "Reactions to the Labor Department's Fiduciary Rule," (April 2016); available at: http://www.wsj.com/articles/reactions-to-the-labor-departments-fiduciary-rule-1459954904.

[7] Investment News, "An Original Critic, FINRA's Ketchum Praises Improvements in Final DOL Fiduciary Rule," (April 2016); available at: http://www.investmentnews.com/article/20160415/FREE/160419932/an-original-critic-finras-ketchum-praises-improvements-in-final-dol.

[8] *Id.*

[9] *Id.*

(UFCW), United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (USW), U.S. PIRG, and Young Invincibles.

The Save Our Retirement Coalition issued a letter in opposition to H.J. RES. 88 that voiced thoughtful support for the rule. The Coalition's letter said "the rule will at long last require all financial professionals who provide retirement investment advice to put their clients' best interests ahead of their own financial interests. By taking this essential step, the rule will help all Americans -- many of whom are responsible for making their own decisions about how best to invest their retirement savings -- keep more of their hard-earned savings so they can enjoy a more financially secure and independent retirement."[10]

Roll Call Votes on Final Passage

H.J.RES.88 was reported by straight party-line votes of 22 ayes and 14 nays. No Democratic Committee Members voted in favor of the bill.

Congresswoman Frederica Wilson (D-FL) issued a statement following the Committee mark-up, saying she "was unavoidably detained and missed the vote." According to Congresswoman Wilson's statement, she would have voted "nay" had she been present.

Conclusion

In its record-setting rush to nullify the DOL's final rule through a CRA joint resolution of disapproval, Committee Republicans are jeopardizing workers' ability to receive retirement investment advice that is in their best interest. Committee Democrats reject this misguided and unnecessarily partisan approach.

Instead of wasting precious time and resources on this joint resolution, the Education and Workforce Committee should be helping working families make ends meet so that they can provide a better future for their children and grandchildren. For instance, in the scarce time that remains this year, the Committee should be taking up legislation that would boost workers' wages, help workers achieve a better balance between work and family life, end workplace discrimination, and strengthen our retirement system.

For the reasons stated above, among others, we stood together in opposing H.J. RES. 88 when it was hastily considered by the Education and Workforce Committee. We respectfully recommend that the full House of Representatives do the same.

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[10] Save our Retirement Coalition, "Oppose the Resolution to block DOL's final conflict of interest rule," (April 2016); available at: http://saveourretirement.com/2016/04/re-oppose-the-resolution-to-block-dols-final-conflict-of-interest-rule/.

ROBERT C. "BOBBY" SCOTT
Ranking Member

RUBÉN HINOJOSA

SUSAN A. DAVIS

RAÚL M. GRIJALVA

JOE COURTNEY

MARCIA L. FUDGE

JARED POLIS

FREDERICA S. WILSON

SUZANNE BONAMICI

MARK POCAN

MARK TAKANO

HAKEEM S. JEFFRIES

KATHERINE M. CLARK

ALMA S. ADAMS

MARK DeSAULNIER