MINORITY VIEWS
H.R. 2823, THE "AFFORDABLE RETIREMENT ADVICE FOR SAVERS ACT"
115TH CONGRESS, 1ST SESSION
OCTOBER 25, 2017

H.R. 2823, the "Affordable Retirement Advice for Savers Act," would repeal the Department of Labor's (DOL's) "Conflict of Interest" rule (or fiduciary rule) finalized during the Obama Administration, and will also codify loopholes that enable financial professionals to avoid their fiduciary obligations. The bill will dramatically weaken protections for retirement savers and will allow conflicts of interest to once again go unchecked. H.R. 2823 was reported by straight party-line votes of 23 ayes and 17 nays. Committee Democrats unanimously opposed the bill.

BACKGROUND ON FIDUCIARY RULE AND COMMITTEE REPUBLICANS' OPPOSITION TO IT

Many Americans seek out and rely on financial advice to help them invest their retirement nest egg. This is one of the biggest financial decisions they will make in their lives. In making it, Americans trust that the financial advice given to them is in their best interests. Unfortunately, that was not always the case. For years, loophole-ridden rules enabled unscrupulous financial advisors to provide what is referred to as "conflicted advice." This is when the profit motives of financial advisors are prioritized over the best interests of their retirement clients. Conflicted advice most often occurs when workers are about to retire and roll over their employer-based retirement account, such as a 401(k), into an IRA or other financial account. Conflicted advice has been estimated to cost retirement plan participants $17 billion in losses every year and result in a loss of almost a quarter of an individual's savings over a 35-year period.[1]

Recognizing the existing rules were harming workers and retirement savers, the Obama Administration's DOL diligently worked to fix them. The DOL pursued a comprehensive and transparent rulemaking process, conducting hundreds of meetings and providing the American public a total of nearly six months to offer comments. In April 2016, the DOL finalized the "Conflict of Interest Rule," which is commonly referred to as the "fiduciary rule." The final rule strengthened and updated decades-old regulations and ensured that financial advisors put the interest of their retirement clients first.[2]

Even before the fiduciary rule was finalized, Committee Republicans opposed it. In February 2016, Committee Republicans advanced two bills that sought to undermine the fiduciary rule.[3]

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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://permanent.access.gpo.gov/gpo55500/cea_coi_report_final.pdf

[2] 81 Fed. Reg. 20945, Definition of the Term "Fiduciary," Conflict of Interest Rule – Retirement Investment Advice, (April 8, 2016); available at: https://www.federalregister.gov/documents/2016/04/08/2016-07924/definition-of-the-term-fiduciary-conflict-of-interest-rule-retirement-investment-advice

[3] Committee on Education and the Workforce Markup of H.R. 4293 and H.R. 4294, Committee on Education and the Workforce, House Report 114-511 and 114-512, (February 2, 2016); available at: https://www.gpo.gov/fdsys/pkg/CRPT-114hrpt511/pdf/CRPT-114hrpt511.pdf and https://www.gpo.gov/fdsys/pkg/CRPT-114hrpt512/pdf/CRPT-114hrpt512-pt2.pdf

Then, less than two weeks after the fiduciary rule was finalized and published in the Federal Register, Committee Republicans rushed to judgment and hastily considered a Congressional Review Act (CRA) joint resolution of disapproval nullifying it.[4]

On July 19, 2017, Committee Republicans relentlessly pressed on with their misguided opposition to the fiduciary rule to mark-up H.R. 2823. In fact, the Committee's consideration of H.R. 2823 was the fifth hearing or markup attacking the fiduciary rule in the past two years alone.[5] As Ranking Member Scott noted in his opening statement during the markup of H.R. 2823,"that is five more hearings or markups than we have had on increasing the minimum wage, five more hearings than we have had on providing paid family or medical leave, five more hearings than we have had protecting older workers from discrimination, five more hearings than we have had on strengthening the OSHA whistleblower protection law, and five more hearings than we have had on protecting coal miners' pensions."[6]

Committee Democrats continue to believe the fiduciary rule is a responsible solution to a real problem and strongly oppose efforts, such as H.R. 2823, which undermine key protections for retirement savers. H.R. 2823 is opposed by the following organizations: AARP, AFL-CIO, AFSCME, American Association for Justice, Americans for Financial Reform, Consumer Federation of America, Economic Policy Institute Policy Center, Financial Planning Coalition (which is comprised of the Certified Financial Planner Board of Standards, Financial Planning Association, and the National Association of Personal Financial Advisors), National Employment Law Project, and the Pension Rights Center.

H.R. 2823 Turns Back the Clock, Enabling Unscrupulous Advisors To Once Again Put Their Financial Interests Ahead Of Their Retirement Clients'

Under the Employee Retirement Income Security Act of 1974 (ERISA), the DOL possesses the authority to define who is a fiduciary as a result of providing retirement investment advice.[7] In 1975, the DOL issued regulations specifying that an advisor must meet a five-part test to be a

[4] Committee on Education and the Workforce Markup of H.J.RES.88, House Report 114-527, (April 21, 2016); available at https://www.gpo.gov/fdsys/pkg/CRPT-114hrpt527/pdf/CRPT-114hrpt527-pt1.pdf. On April 28, 2016, the House voted on H.J.RES.88 and it passed on a party-line vote of 234-183. Every House Democrat opposed it. After Senate passage of H.J.RES.88, President Obama vetoed it. On June 22, 2016, the House attempted to override the President's veto. This effort was unsuccessful, and every House Democrat opposed the veto override.

[5] Restricting Access to Financial Advice: Evaluating the Costs and Consequences for Working Families and Retirees," HELP Subcommittee, June 17, 2015; "Principles for Ensuring Retirement Advice Serves the Best Interests of Working Families and Retirees," HELP Subcommittee, December 2, 2015; Markup of H.R. 4293 and H.R. 4294, full Committee, February 2, 2016; Markup of H.J.RES.88, full Committee, April 21, 2016

[6] Opening Statement of Ranking Member Bobby Scott, Committee on Education and Workforce Markup of H.R. 2823, (July 19, 2017); available at: http://democrats-edworkforce house.gov/imo/media/doc/RCBS%20OS%20(Fiduciary%20Markup)%20071917.pdf

[7] 29 U.S.C. 1002(21)(a)(ii). Additionally, according to the DOL, the Reorganization Plan of 1978 (5 U.S.C. App. (2000)) gives the DOL the authority to define "fiduciary" under both ERISA and the Internal Revenue Code (IRC).

fiduciary. Specifically, the advisor must make recommendations (1) on investing in, purchasing, or selling securities or other property, or give advice as to the value; (2) on a regular basis; (3) pursuant to a mutual understanding that the advice; (4) that serve as a primary basis for investment decisions; and, (5) that are individualized to the particular needs of the plan regarding such matters as, among other things, investment policies or strategy, overall portfolio composition, or diversification of plan investments.

This five-part test did not keep pace with the changed retirement savings and planning landscape, and emerging loopholes were ripe for exploitation. For instance, an unscrupulous advisor, who provides individualized or one-time investment advice to a retirement client about rolling over assets from an employer-sponsored retirement plan (such as a 401(k)) to a high-fee IRA, does not have to abide by a fiduciary obligation because the advisor is not giving advice on a regular basis.

After receiving input from experts and the public, the Obama Administration's DOL scrapped the five-part test in favor of a more inclusive definition, one that covers rollover decisions and IRAs. Under the 2016 fiduciary rule, "the following recommendations constitute investment advice, if they are done for a fee or other compensation: the advisability of buying, selling, holding, or exchanging investments; how investments should be invested after being rolled over, transferred, or distributed from an IRA; the management of investments; or IRAs, including whether, in what form, in what amount, and to what destination rollovers, distributions from IRAs and transfers from IRAs should be made. In addition, the person who makes a recommendation as listed above must (1) represent or acknowledge that the person is acting as a fiduciary, (2) provide a written or verbal understanding that the advice is based on the particular needs of the advice recipient; or (3) direct the advice to a specific recipient."[8]

The 2016 DOL rule also specifies that "certain activities do *not* constitute investment advice. These activities include marketing by platform providers who market without regard to the needs of individual plans or participants; making available general communications, such as general circulation newsletters; providing investment advice; providing advice to independent fiduciaries with financial expertise (as defined in the regulations); and executing securities transactions. In addition, individuals who are employees of a plan sponsor or employee organization and do not receive compensation for the advice beyond their normal compensation are not considered to be providing investment advice."[9]

H.R. 2823 repeals the 2016 fiduciary rule and its component parts. In its place, H.R. 2823 establishes a loophole-ridden standard that unscrupulous advisors could easily skirt by simply issuing boilerplate written disclaimers or disclosures.

For financial advisors to be subject to the fiduciary requirement under H.R. 2823, they must render investment advice for a fee pursuant to 1) `written acknowledgement' of the fiduciary

[8] Congressional Research Service, "DOL's 2016 Fiduciary Rule on Investment Advice," (July 5, 2017); available at: http://www.crs.gov/reports/pdf/IF10686

[9] *Id.*

obligation; or 2) `a mutual agreement, arrangement, or understanding' that it is `individualized' to the retirement client and the retirement client `intends to materially rely' on the advice. This framework is similar to the loophole-ridden 1975 regulations that were replaced by the DOL's 2016 fiduciary rule and would enable financial advisors to easily avoid their fiduciary obligations to their clients. At least with the deficient 1975 regulations, once advisors became fiduciaries they could not disclaim away their fiduciary obligation. That is not the case with H.R. 2823.

- Under H.R. 2823, financial advisors would be able to avoid fiduciary obligations by providing a written disclaimer that states, "[t]his communication is not individualized to you, and you are not intended to rely materially on this communication in making investment or management decisions." In practice, as the Consumer Federation of America noted in its letter opposing H.R. 2823, "a retirement saver could reasonably believe she was receiving personalized advice (based, for example, on how the services were marketed), rely exclusively on that advice in making her investment decision, and still not be deemed to be in an advisory relationship under the terms of this bill so long as the adviser provided the required boilerplate disclaimer"[10]

- Under H.R. 2823, financial advisors would be able to avoid fiduciary obligations if they indicate and disclose in writing that they are acting in a "marketing or sales capacity." The concern is that advisors would be able to provide an unlimited amount of advice to their clients as long as they provide a written disclosure that they are only providing advice in a "marketing or sales capacity," which are terms that are not defined in the bill.

- Under H.R. 2823, financial advisors would be able to avoid fiduciary obligations if they claim to have made a "good faith" error or omission in their disclosure.

According to the Financial Planning Coalition, which is comprised of the Certified Financial Planner Board of Standards, Financial Planning Association, and National Association of Personal Financial Advisors, H.R. 2823 "would weaken, not strengthen, protections for retirement savers; and would re-open loopholes in the definition of investment advice that the DOL closed in the Fiduciary Rule. In addition, the bill would weaken the standard that applies to advice by allowing financial firms and advisors to easily disclose away any fiduciary obligations owed to their clients."[11]

While Committee Democrats believe disclosures and disclaimers are no substitute for a binding and enforceable fiduciary standard, there is also research to suggest that, on their own, disclosures and disclaimers can be ineffective and even detrimental to clients:

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[10] Consumer Federation of America, Letter to Chairwoman Foxx and Ranking Member Scott Opposing H.R. 2823, July 17, 2017, available at: http://democrats-edworkforce.house.gov/imo/media/doc/CFA_ltr%20of%20opposition-H.R.%202823.pdf

[11] Financial Planning Coalition, Letter to Chairwoman Foxx, Ranking Member Scott, and Education and Workforce Committee Members Opposing H.R. 2823, July 17, 2017, available at: http://democrats-edworkforce.house.gov/imo/media/doc/FPC_ltr%20of%20opposition-H.R.%202823.pdf

- According to an industry association study, "two-thirds of Americans with defined contribution (DC) plans or IRAs admit to spending less than five minutes examining their retirement plan disclosures — one in five say they rarely or never read the disclosure paperwork at all."[12]

- Disclosures often fail to make clients aware of the nature of their advisors' conflicts, let alone understand the potential implications of such conflicts.[13]

- Disclosure of advisor conflicts can backfire since clients can interpret disclosure of advisor conflicts as a sign of honesty.[14] In this case, disclosure may even be harmful to workers and retirees seeking to invest their savings because they could potentially create an illusion of fiduciary protection

H.R. 2823 Ignores Real World Realities Regarding Fiduciary Rule's Implementation

The fiduciary rule was initially implemented on June 9, 2017, and there exists some preliminary evidence of how it is impacting the financial marketplace and faring in the legal system. Initial reports suggest that the financial services industry is adapting to and capably complying with the rule.

According to the Consumer Federation of America, "since the rule was finalized a little over a year ago, firms of all types and sizes have announced implementation plans that prove that the rule is both workable and working as intended to rein in conflicts, improve investment products, and reduce investor costs, all while preserving access to advice for even the smallest accountholders."[15]

According to Morningstar, the industry is "adapting in ways that will benefit investors by reducing conflicts of interest and adding transparency."[16] In fact, one official at Wells Fargo

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[12] Life Insurance Management Research Association (LIMRA), "Many Americans Don't Fully Read Retirement Plan Disclosures; Few Know What Fees they Pay," (August 2012); available at: http://www.limra.com/Posts/PR/News_Releases/LIMRA_Study__Many_Americans_Don_t_Fully_Read_Retirement_Plan_Disclosures;_Few_Know_What_Fees_They_Pay.aspx.

[13] Department of Labor, "Fiduciary Investment Advice, Regulatory Impact Analysis," (April 2015); available at: http://www.dol.gov/ebsa/pdf/conflictsofinterestria.pdf.

[14] *Id.*

[15] Consumer Federation of America, Letter to Chairwoman Foxx and Ranking Member Scott Opposing H.R. 2823, July 17, 2017, available at: http://democrats-edworkforce.house.gov/imo/media/doc/CFA_ltr%20of%20opposition-H.R.%202823.pdf

[16] Morningstar, "Early Evidence on the Department of Labor Conflict of Interest Rule: New Share Classes Should Reduce Conflicted Advice, Likely Improving Outcomes for Investors," April 2017, available at: https://corporate1.morningstar.com/ResearchLibrary/article/802119/early-evidence-on-the-department-of-labor-conflict-of-interest-rule/

Advisors said she would liken the June 9th initial implementation date of the fiduciary rule to "…Y2K. We did a lot of preparation and a lot of work for a day that ended up feeling a lot like any other day."[17] In short, industry reports contradict the doomsday claims of Committee Republicans' about the fiduciary rule or their rationale for H.R. 2823.

Additionally, courts in three separate jurisdictions rejected plaintiffs' arguments against the fiduciary rule.[18] Specifically, the courts found that the DOL not only has the statutory duty to promulgate the rule under ERISA, but that its fiduciary rule is a reasonable, workable solution that protects America's retirement savers. According to the holding by one court, any delay of the fiduciary rule through injunction "will produce a public harm that outweighs any harm that plaintiff may sustain from the rule change."[19] Another court held "the DOL adequately weighed the monetary and non-monetary costs on the industry of complying with the rules, against the benefits to consumers [and in] doing so, the DOL conducted reasonable cost-benefit analysis."[20] The plaintiffs in each case have appealed.

DEMOCRATIC AMENDMENT

Congresswoman Alma Adams offered a substitute amendment to codify the fiduciary rule into law. The amendment failed on a voice vote.

ROLL CALL VOTES ON FINAL PASSAGE

H.R. 2823 was reported by straight party-line votes of 23 ayes and 17 nays. Committee Democrats unanimously opposed the bill.

CONCLUSION

Since the fiduciary rule was initially implemented in June, financial advisors are now required to be fiduciaries to their retirement clients. All working Americans are just now beginning to receive retirement investment advice that's in their best interests. H.R. 2823 would abruptly eliminate these protections for workers and replace them with a loophole-ridden framework that would put their retirement savings at risk.

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[17] St. Louis Post Dispatch, "Despite Complaints, fiduciary rule phase-in is going smoothly," June 18, 2017, available at: http://www.stltoday.com/business/columns/david-nicklaus/despite-complaints-fiduciary-rule-phase-in-is-going-smoothly/article_d0dfd00a-4706-5d87-b8a9-029a7cfee9da.html

[18] *Mkt. Synergy Grp., Inc. v. U.S. Dep't of Labor*, 16-CV-4083-DDC-KGS (D. Kan. Feb. 17, 2017); *Chamber of Commerce v. Hugler* , No. 3:16-cv-1476-M (N.D. Tex. Feb. 8, 2017); *Nat'l Ass'n for Fixed Annuities v. Perez*, 16-cv-1035, 2016 WL 6573480 (D.D.C. Nov. 4, 2016)

[19] *Mkt. Synergy Grp., Inc. v. U.S. Dep't of Labor*, 16-CV-4083-DDC-KGS at 62, 2016 WL 6948061 (D. Kan. Nov. 28, 2016).

[20] *Chamber of Commerce v. Hugler* , 16-cv-1476-M (N.D. Tex. Feb. 8, 2017).

Rather than continuing to undermine retirement savings protections, the Committee should instead focus on addressing real economic challenges confronting working people and their families. Committee Democrats remain committed to advancing responsible solutions that help workers earn and collectively bargain for decent wages, achieve a better balance between work and family life, end workplace discrimination, and retire with security and dignity. Clearly, H.R. 2823 is not among these solutions.

For the reasons stated above, among others, Committee Democrats unanimously opposed H.R. 2823 when the Committee on Education and the Workforce considered it on July 19, 2017. We urge the full House of Representatives to do the same.

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