Opening Statement of Ranking Member Bobby Scott
Committee on Education and the Workforce
Markup of H.R. 2823, the "Affordable Retirement Advice for Savers Act"
July 19, 2017 – 2:30 p.m.

This morning, we are marking-up H.R.2823, the so-called Affordable Retirement Advice for Savers Act.

Today's Committee action represents yet another attack on the Obama Administration's fiduciary rule, which simply ensures that financial advisors act in the best interests of their retirement clients.

In February 2016, Committee Republicans rushed to judgment and marked-up two bills seeking to replace the Obama Administration's fiduciary rule two months before it was even finalized. Those bills did not come to the floor for a vote.

Then, in April 2016, Committee Republicans hastily considered a Congressional Review Act joint resolution of disapproval nullifying the fiduciary rule less than two weeks after it was finalized and published in the Federal Register.

Consideration of H.R. 2823 is actually the fifth Committee hearing or mark-up aimed at criticizing or eliminating the fiduciary rule in the past two years alone.

That's five more hearings or mark-up than we have held on increasing the minimum wage, five more hearings than we have held on providing for paid family and medical leave, five more hearing than we have held on protecting older workers from discrimination, five more hearings than we have held on strengthening OSHA's whistleblower protection law, and five more hearings than we have held on protecting coal miners pensions.

The bill being marked-up today repeals the fiduciary rule and proposes a far weaker, loophole-ridden standard that unscrupulous advisors could easily skirt by simply issuing boilerplate written disclaimers or disclosures.

For 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 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 1975 regulations, which were replaced by the fiduciary rule because the regulations were widely recognized as deficient and not applicable to the current retirement savings landscape. But the bill does not simply turn back the clock and reinstitute portions of regulations that were issued when employer-based 401(k) plans did not exist and the IRAs had just been established.

The bill also includes loopholes for unscrupulous advisors to avoid fiduciary obligation as long as a written disclaimer is provided saying – and I quote from page 5:

“This communication is not individualized to you, and you are not intended to rely materially on this communication in making investment or management decisions.” Close quote.

What this means in real terms is that retirement clients could have every reason to believe that they and their families were receiving personalized advice and they could rely entirely on this advice in making the biggest financial decision of their lives. Yet, under the bill, unscrupulous advisors would not have a fiduciary obligation as long as they supplied the required boilerplate disclaimer.

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 – quote – “marketing or sales capacity.” Close quote.

The legitimate 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."

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 to their clients. This seems problematic, as who is the arbiter of "good faith?"

At least with the deficient 1975 regulations that the bill resembles, once advisors became fiduciaries, they could not disclaim away their fiduciary obligation. That is not the case with H.R. 2823.

If all of this sounds familiar, it is because these provisions and loopholes I've described were included in the legislation our Committee marked-up in February 2016 before the fiduciary rule was finalized.

I will give my Republican Committee colleagues some credit for their consistency. However, while Committee Republicans' opposition and proposed alternative to the fiduciary rule remains the same as it was before the rule was finalized, it's not February 2016 anymore.

The fiduciary rule is final now, and it was initially implemented last month. We have some sense of what has been happening in the retirement marketplace in response to the fiduciary rule.

And what we have seen so far does not appear to confirm the opponents' claims and doomsday scenarios that have been made for years.

In fact, we have seen the opposite.

We have seen the financial services industry adapting to and seemingly capably complying with the fiduciary rule.

Investment firms and advisors appropriately planned over the past year and incurred the up-front compliance costs to be ready for the fiduciary rule when it was initially implemented – and we have not heard much disruption. One official at Wells Fargo 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."

We also have seen the financial services industry innovating and, according to Morningstar, "adapting in ways that will benefit investors by reducing conflicts of interest and adding transparency."

We have seen courts in three separate jurisdictions reject plaintiffs' arguments against the rule. A federal district court in Kansas found that any delay through injunction will "produce a public harm that outweighs any harm that plaintiff may sustain from the rule change."

And most importantly, since the rule was initially implemented last month, 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 eliminate these protections for workers and return us to the days when investment advisors could easily rip-off their retirement clients.

We should reject this bill and instead commit ourselves to ensuring the fiduciary rule is implemented on schedule and in its present form.

I thank the Chair and yield back.