Opening Statement of Robert C. "Bobby" Scott, Ranking Member
Committee on Education and the Workforce
U.S. House of Representatives
Committee Markup of H.R. 4293 and H.R. 4294
February 2, 2016

This morning we are marking up H.R. 4293, the Affordable Retirement Advice Protection Act as well as the provisions of H.R. 4294, the Strengthening Access to Valuable Education and Retirement Support Act of 2015 that are within our Committee's jurisdiction. I understand that the Ways and Means Committee is scheduled to mark-up the other provisions of H.R. 4294 tomorrow morning.

These bills represent a deeply flawed response to the Department of Labor's effort to update and modernize the definition of who is a fiduciary under ERISA as a result of giving investment advice.

I am a supporter of the Department's effort because I believe the existing regulations are insufficient to ensure workers and their families receive the protections they deserve when investing their retirement savings. Americans' retirement savings are in need of protection, and that's what the Department's effort is all about.

These regulations were issued in 1975 when the majority of retirement assets were held in defined benefit plans managed by professionals. Employer-based 401(k) plans did not exist and the IRAs had just been established. Today – as my colleagues know – the retirement planning and savings landscape has changed significantly with more than $12 trillion in 401(k) plans and IRAs that are being managed by individuals. Many of these individuals do not have sufficient experience or expertise in managing investment portfolios and must rely on professional financial advisers to plan and save for retirement.

While many of these advisors do right by their clients, others do not. There are a lot of different financial products that Americans can purchase. Some have extremely high fees, while comparable products – and perhaps even better ones – have lower fees. And the current standard allows for unscrupulous advisors to give conflicted advice and push a financial product from which they will reap a bigger profit even if that product is not in the best interest of their client. As Secretary Perez has said, and I quote "the corrosive power of fine print and buried fees can eat away like a chronic illness at a person's savings."

The Department is simply working to ensure that Americans – particularly those who have saved throughout their career and are now preparing for retirement – are guaranteed to receive advice that's in their best interest.

That's why I and many others have been supportive of the Department's efforts, and we trust the Department will appropriately modify the final rule to account for the legitimate comments they received during the rulemaking process.

But I believe that – no matter what Members think about the Department's rulemaking effort – Members should vote NO on these two bills.

First, these bills permit unscrupulous financial advisors to continue to act in their own financial interests, rather than put the best interests of their clients first.

These bills would enable unscrupulous advisers to use fine print and boilerplate language no one understands to disclose and disclaim away their fiduciary obligation.

The bill includes a narrow definition for when an adviser would have to disclose to a client that the adviser is offering advice under a fiduciary standard. But the bill provides a loophole for advisers to avoid fiduciary obligation as long as a written disclaimer is provided that says – and I quote:

"This information is not individualized to you, and there is no intent for you to materially rely on this information in making investment and management decisions."

This seems like the fine print that is buried in credit card disclosures that nobody pays attention to.

The bill also enables financial advisers to evade fiduciary responsibility by issuing a written disclaimer that information is being provided to a client in a "marketing or sales capacity." Whatever that means.

Second, the bills establish a constitutionally-suspect process requiring Congress to affirmatively approve the DOL rule within 60 days after the bill's enactment. The requirement appears to be modeled after partisan anti-regulatory legislation known as the REINS Act.

Questions and concerns have been raised about the constitutionality of the REINS Act, and those questions and concerns apply with equal force to these bills. As the Democrats on the House Judiciary Committee wrote last Congress in their Minority Views of the Reins Act, the bill – and I quote – "raises constitutional concerns because it may provide for what arguably is an unconstitutional one-House legislative veto."

In the Supreme Court case *INS v. Chadha*, the Court invalidated a House veto of a particular Immigration and Naturalization Service deportation suspension because it failed to satisfy the bicameralism and presentment clauses of the U.S. Constitution.

These bills state that "no such rule or administrative position promulgated by the Department of Labor" may become effective unless a bill or joint resolution is enacted in 60 days. Let's say the Senate passed such a joint resolution but the House defeated it.

Isn't it reasonable to ask whether that would effectively re-establish a one-house veto that was struck down by the Supreme Court in *INS v. Chadha*?

This congressional power grab of the DOL's rulemaking authority is likely also in violation of the constitutionally-mandated separation of powers between the executive and legislative branches of government. But the Committee rushed to mark-up these bills, so there will not be a legislative hearing on them to fully explore this and other questions.

Mr. Chairman, I urge my colleagues to oppose these bills.

I yield back.

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