H.R. 4293 and H.R. 4294: EVEN WEAKER THAN THE CURRENT STANDARDS THAT FAIL TO PROTECT RETIREMENT SAVERS

Late last year, Representatives Phil Roe, Peter Roskam, Richard Neal and John Larson introduced legislation they describe as an "alternative" to the Department of Labor's (DoL) conflict of interest rulemaking. In fact, however, their legislation would be a big step backward. Far from being a pro-retirement security alternative to DoL action, the legislation would weaken the already inadequate protections afforded by current outdated regulations.

The two bills reflect the statutory overlap governing workplace retirement plans and plan participants and individual retirement accounts (IRAs). H.R. 4293, the "Affordable Retirement Advice Protection Act," amends the Employee Retirement Income Security Act (ERISA); H.R. 4294, the "Strengthening Access to Valuable Education and Retirement Support Act," amends the Internal Revenue Code. In our view, these two bills together would preserve the ability of financial professionals to put their own interests ahead of their customers' interests when providing services perceived and relied upon as objective advice by working families and retirees.

The Bills Codify Existing Loopholes that Enable Advisers to Avoid their Fiduciary Duty

The first test for any proposal put forward as an alternative to the DoL rule is whether it solves the problem the DoL has identified and seeks to solve. That is, does it close the loopholes in the current outdated regulatory definition of investment advice that have enabled some financial professionals to put their own financial interests ahead of their customers' interests when providing retirement investment advice? The answer is an emphatic "No!" Rather than closing the harmful loopholes in the regulatory definition, these bills would codify them, thereby legislatively blessing the continuation of the problem the DOL rulemaking is intended to solve.

- The bills narrowly define fiduciary investment advice as advice that either: 1) is rendered subject to an advisor's written acknowledgement that the advice is being offered under a fiduciary standard or 2) is subject to a "mutual agreement, arrangement or understanding" between the adviser and the customer that the customer "intends to materially rely" on the advice. Under this definition, firms would retain their ability to avoid their fiduciary obligations just by providing a written disclaimer that the advice is not intended to be materially relied on by the customer — a common industry practice today. Indeed, such disclaimers constitute one of the primary means by which firms avoid fiduciary obligations under current law.

- In addition, the bills would provide a broad new "seller's exception," denying retirement savers the protections of a fiduciary standard precisely when a retirement saver faces the greatest conflicts and financial risks. The sole requirement for relying on this seller's exception is that the financial professional provide written disclosure that he or she is acting in a marketing or sales capacity without the intent to provide investment advice or otherwise act as a fiduciary or "under the obligations of a best interest recommendation." This new loophole would make it even easier than it is today for firms to evade fiduciary responsibility.

- Although the definition of investment advice in each bill includes roll-over recommendations, the narrow statutory definition, along with the bills' education carve-out, would make it altogether too easy for advisers to continue to encourage roll-overs that benefit them financially but expose their customers to increased costs that erode their retirement savings over time.

In sum, while the stated goal of the legislation is to ensure that all advisers are required to serve their customers' best interests, the bills would have precisely the opposite effect.

The Bills Weaken DoL's Best Interest Standard for Retirement Investment Advice

The best interest standard that would apply under the bills is substantially weaker than that in the DoL rule as proposed. The Labor Department proposal recognizes that if we want financial advisers to act in their customers' best interests, we have to stop rewarding them for advice that is *not* in their customers' best interests. Accordingly, DoL's proposed best interest standard requires firms to act "without regard to the financial or other interests of the Adviser, Financial Institution or any Affiliate, Related Entity, or other party." Firms operating under the rule's best interest contract exemption would have to eliminate common practices that encourage and reward harmful advice—including paying their advisors more to recommend higher risk, more costly, and/or less liquid investments.

The "without regard to" language in the DoL best interest standard is taken directly from Section 913 of the Dodd-Frank Act, which sets out the appropriate fiduciary standard applicable to broker-dealers and investment advisers under the securities laws. Still, industry groups that claim to support SEC rulemaking under its Section 913 authority oppose this language in the DoL rule — and these bills follow their lead. Not only is the "without regard to" language missing from the bills; also missing is any requirement for firms to mitigate conflicts of interest. Overall, the bills do nothing to eliminate the toxic web of incentives that encourage and reward advice that is not in retirement investors' best interest.

Instead of requiring the mitigation of financial conflicts, the bills rely exclusively on disclosure to protect investors. But extensive academic research leaves no doubt that disclosure alone is inadequate and does not provide investors with the tools they need to protect their interests.

In sum, the weak and ineffective approach of the so-called "alternative" to the DoL rulemaking would ensure that there are no meaningful changes in harmful industry practices and, thus, no real benefits to retirement savers. Rather, some financial professionals would gain the right to claim they operate under a best interest standard without having, in fact, to do so.

The Bills Hand Opponents of a Fiduciary Standard a New Weapon to Kill the Rule

The Congressional Review Act gives Congress the ability to overturn a final agency regulation by passing a joint resolution of disapproval that, if enacted, will block the rule —a more than adequate incentive to assess carefully and act on constructive suggestions to revise the rule. These bills, however, include a provision modeled on the so-called REINS Act, which would require affirmative congressional action for the DoL rule to be implemented, regardless of modifications to the proposed rule to accommodate valid criticisms and constructive suggestions. Under such an approach, industry opponents of a fiduciary standard could more easily prevent a needed rule change. Apart from the impact on this particular rule, this change could set a terrible precedent for any effort to strengthen regulations opposed by industry.