JUST THE FACTS—NOT THE RHETORIC

An Analysis of H.R. 4294, the "SAVERS ACT"

And

H.R. 4293, the "Affordable Retirement Advice Protection Act"

The financial services industry touts H.R. 4294, the "Strengthening Access to Valuable Education and Retirement Support Act of 2015" (or SAVERS Act) and its companion bill, H.R. 4293, the "Affordable Retirement Advice Protection Act,"[1] as offering a more workable alternative to achieve the Department of Labor's (DoL) goal of ensuring the investment advice retirement savers receive is in their best interest. While the bills include some provisions that on the surface appear to be consistent with this goal, other conflicting provisions cancel out all of the legislation's apparent protections.

While the most favorable interpretation of H.R. 4293 and H.R. 4294 leads us to conclude that they would do little, if anything, to improve protections for retirement savers, a more skeptical reading is that the bills would be a step backward from the status quo because they would undermine existing protections. In reaching this conclusion, we evaluated the bills based on the following criteria:

- Do the bills apply a best interest standard to the full range of services perceived, and reasonably relied on, as retirement investment advice by working people and retirees?
- Can individual investors enforce the best interest standard?
- Do the bills reduce financial incentives for advisers to act in ways that are not in their clients' best interests?

As explained below, the answer to each of these questions is an unequivocal NO.

The bills fail to ensure that all retirement investment advice is subject to a best interest standard.

- **Just as current regulations permit financial advisers to do now, the bills would allow firms to use boilerplate disclaimers to avoid their fiduciary obligations.**

Gaps in the current regulatory definition of investment advice under ERISA and the Internal Revenue Code make it easy for financial firms to avoid having a fiduciary obligation to their clients when providing services that customers perceive, and reasonably rely on, as objective

[1] H.R. 4294 amends the Internal Revenue Code, which regulates fiduciary investment advice regarding Individual Retirement Accounts (IRAs) and private-sector employee benefit plans. H.R. 4293 amends the Employee Retirement Income Security Act (ERISA) which regulates fiduciary investment advice regarding only private-sector employee benefit plans.

professional retirement investment advice. Under current rules, the advice must be provided on a *regular basis* (one-time advice is not covered), and there must be *mutual agreement* between the adviser and the advice recipient that the recommendation will form *the primary basis* for the investment decision in order for that recommendation to be considered fiduciary investment advice.

The disclaimers advice providers now use to take advantage of these loopholes and evade their fiduciary obligations to retirement investors look like these:

- "*Although consultations are one-on-one, guidance provided by Fidelity is educational in nature, is not individualized and is not intended to serve as the primary or sole basis for your investment or tax-planning decisions."*

- "*Any recommendations provided by your [Prudential] Planner for your IRAs or any retirement plan assets you have the right to self-direct are not intended to be the sole or primary basis for your investment decisions."*

- "*MassMutual is not authorized and will not make recommendations that the Plan Sponsor or a participant may rely on as a primary basis for investment decisions. In making the investments under our products available, MassMutual is not acting as a fiduciary to the Plan. The Plan Sponsor or its delegate is responsible for selecting the investment options that are available under the Plan.*"

Whether or not they are read or understood by retirement investors, such disclaimers are enough to protect the firm and the adviser from having a fiduciary obligation to their clients. And, in spite of the disclaimers, we know that retirement investors do rely on the advice, often to their detriment.[2]

[2] CFA research on mutual fund investors found, for example, that nearly two thirds of those who invest through a financial professional **either rely solely** on the professional's recommendation without doing any additional research (28%) or **rely very heavily** on the recommendation, while reviewing at least some written material prior to the purchase (36%). (Roper, Barbara and Brobeck, Stephen, "Mutual Fund Purchase Practices, An Analysis of Survey Results," June 2006, available at http://bit.ly/1IicqGD.) The CFA survey is consistent with other research, including an SEC financial literacy study which found that investors are heavily reliant on their financial adviser both to explain the disclosures they receive and to recommend a course of action. (See, e.g., Staff of the Securities and Exchange Commission, "Study Regarding Financial Literacy Among Investors (As Required by Section 917 of the Dodd-Frank Wall Street Reform and Consumer Protection Act)," August 2012, available at https://www.sec.gov/news/studies/2012/917-financial-literacy-study-part1.pdf; Siegel & Gale, LLC, "Investor Research Report," Submitted to the Securities and Exchange Commission on July 26, 2012, available at http://1.usa.gov/1MfBbss; and IFF Research Ltd, Investment Disclosure Research, prepared for the Financial Services Authority by IFF Research Ltd., November 2006, available at http://bit.ly/1LmSJ6Z.) Moreover, it is not only individuals who rely heavily on advice. Plan sponsors also often lack experience and expertise in retirement planning, forcing them to rely on advice from financial firms they mistakenly regard as objective advisers. Fidelity found that "many small business owners are struggling to understand the features and benefits of their current retirement plans." (Press Release, "Fidelity® Survey Finds More Than Half of Nation`s Six Million Small Businesses May Not Have Optimal Retirement Plans," February 22, 2012, available at http://reut.rs/1Kgqcg9.) And the non-partisan Center for Retirement Research at Boston College found that instead of serving plan participants' best interests, mutual fund companies tend to influence 401(k) menus in ways that favor their own funds, especially their poor-quality funds, with potentially adverse effects on plan participants' retirement savings. Veronika K. Pool,

The DoL rule proposal closes the loopholes that allow advice providers to disclaim away their fiduciary obligations to their retirement investor clients.

The DoL proposed rule adopts a broad functional definition of fiduciary investment advice that turns on whether the advice is individualized for the advice recipient, whether it includes a call to action, and whether the adviser is compensated for the advice. It also explicitly covers rollover recommendations. The proposed rule does not permit financial professionals who in fact are providing individualized investment recommendations simply to opt out of a fiduciary duty to their retirement investor clients through legal disclaimers of responsibility. Under the DoL proposed rule, if a financial professional acts like an advice provider and talks like an advice provider, she is in fact an advice provider with a duty to act in her clients' best interests.

- **H.R. 4293 and H.R. 4294 take steps to close existing loopholes—but they create new ones**.
  - **The new "mutual agreement or understanding" loophole**:

What the bills give with one hand, they take away with the other. Like the DoL proposal, H.R. 4293 and H.R. 4294 eliminate the requirements that advice be provided on a regular basis and form the primary basis for the investment decision and explicitly include rollover recommendations in the definition of fiduciary investment advice. But they add new loopholes that are at least as broad as those they close. For example, they replace the requirement that the advice form the *primary* basis for the investment decision with a new requirement that the advice form a *material* basis for the investment decision, and they require a mutual agreement or understanding between the adviser and the advice recipient to that effect. **But any standard that requires both parties to agree necessarily will continue to leave retirement advice recipients unprotected**.[3] No such requirement for a mutual agreement or understanding exists under the securities law definition of investment advice or the revised definition proposed by DoL.

Firms and advisers will easily continue to evade the best interest standard through boilerplate disclaimers that are just slightly different than the ones they use today. This is not a hypothetical concern—the bills explicitly instruct financial firms on how they can do this. Instead of stating that the information "is not intended to serve as the primary or sole basis for your investment or tax-planning decisions," they will simply state, "This information is not individualized to you, and there is no intent for you to materially rely on this information in making investment or management decisions."

The bills' requirement that the disclaimer be communicated in a clear and prominent manner does not close this loophole. There is no reason to believe, based on either common personal experience (think of all the disclaimers we all get in the mail and discard without reading) or a

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Clemens, Sialm, and Irina Stefanescu, "Are 401(k) Investment Menus Set Solely for Plan Participants?" August 2015, available at http://bit.ly/Fhyu97.)

[3] Indeed, the disclaimer itself is likely to be enough to satisfy the bill's "facts and circumstances" test, conveying as it does that the firm does not agree that it is providing fiduciary investment advice and thus "proving" that no "mutual" agreement exists.

rich body of academic research, that retirement investors will carefully read the disclaimers[4] or understand their implications.[5] Indeed, these disclaimers likely will have the same impact as those now provided to investors cautioning them that "past performance is no guarantee of future results"—which is to say that they are unlikely to have any effect at all on retirement investors' decisions or behavior.

The legislation's limitations on use of the disclaimer to situations where "an objective person would reasonably conclude, based on all the facts and circumstances, that there was not a mutual agreement, arrangement, or understanding" will be equally ineffective in protecting retirement investors. If the goal is to ensure that working families and retirees are protected from the harmful impact of a financial adviser's conflicts of interest, the relevant question is whether the retirement saver herself reasonably concludes that the services constitute fiduciary investment advice. But that is not the standard applied by this facts and circumstances test, which asks only whether there is a *mutual* agreement, which requires agreement by both parties.

Because it turns on whether there is a mutual agreement between the adviser and the advice recipient, the bills' facts and circumstances test is logically read as exculpating the advisor from any fiduciary obligation. **After all, the disclaimer itself signals that the adviser does not agree that the advice is intended to form a material basis for the investment decision**. An "objective person" could therefore "reasonably conclude" that there is not a "mutual agreement" between the adviser and advice recipient—even where the investor clearly and reasonably expects to rely on the advice.

Even if the bills were amended to clarify that a disclaimer could not be used to avoid a fiduciary duty in situations where, based on all the facts and circumstances, an investor reasonably expects to rely on the recommendation, several important questions remain unanswered. Could financial firms continue to call their sales representatives "financial advisors" and use the disclaimer to avoid a best interest standard? Could they still call their service "retirement advice" and market their services based on acting as trusted advisers and use the disclaimers to avoid fiduciary liability? There is no indication in the bill that it is intended to ban these inherently misleading practices.

- **The new "seller's exception" loophole**

Retirement investment advice providers can take advantage of this new loophole merely by asserting in writing that "*the person providing the information is doing so in its marketing or sales capacity*" and "*is not intending to provide investment advice within the meaning of this subparagraph or to otherwise act as a fiduciary to the plan or under the obligations of a best interest recommendation.*" The bills fail to define what constitutes "information," and nothing in

[4] 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." (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://bit.ly/23UmiEa.

[5] Siegel & Gale, LLC, Investor Research Report, Submitted to the Securities and Exchange Commission on July 26, 2012, available at http://1.usa.gov/1MfBbss.)

the bills suggests that it could not include an individualized recommendation to purchase a specific investment product—understood by most people to be best interest investment advice.[6]

Indeed, the logical assumption is that an exemption labeled as a "seller's exception" is, in fact, intended to provide a broad exemption for sales recommendations, the effect of which would be to deny retirement savers the protection of a best interest standard precisely when the conflicts of interest and risks to the investor are greatest.

The research is clear that investors do not understand the distinctions between sales representatives and advisers, in no small part because sales representatives are free to call themselves "financial advisors" and market their services as if they were advisory services.[7] Many investors don't know whether their own financial professional is a broker or an adviser even after the differences have been explained to them.[8] And additional survey research has found that retirement plan participants, like investors generally, expect all financial advisers to act in their best interest.[9]

The only obligation the legislation imposes on those financial professionals who choose to take advantage of the "seller's exception" loophole is that they disclose that they are acting in a sales, and not an advice, capacity. Here again, the required disclosure is virtually identical to that used currently when firms want to avoid their fiduciary obligation to operate under a best interest standard. Here are two examples of how firms use such disclosures:[10]

- *"Any implementation through your MSI Planner is done in the planner's capacity as a registered representative of MSI or one of its affiliates and/or an insurance agent of Metropolitan Life Insurance Company and/or other affiliated or unaffiliated insurance companies. In acting in these other capacities your MSI Planner is acting as a salesman."*

[6] A 2010 study commissioned by CFA, AARP, North American Securities Administrators Association, CFP Board of Standards and the Investment Adviser Association found that investors overwhelming expect the financial professionals they rely on to be fiduciaries: 65 percent of 18-34 year olds and 57 percent of households with $100,000 or more in household income mistakenly thought that "insurance agents" have a fiduciary duty to their clients; 70 percent of 45-54 year olds and 62 percent of college graduates were incorrect in thinking that stockbrokers are held to a fiduciary duty; 76 percent of investors were wrong in believing that "financial advisors" are held to a fiduciary duty. (U.S. Investors & The Fiduciary Standard: A National Opinion Survey, ORC/Infogroup, September 15, 2010, available at http://bit.ly/1fMAERB.)

[7] A 2005 study commissioned by the SEC found that investors were generally "unclear about the distinctions" between various types of financial professionals and assumed that financial advisors and financial consultants (titles typically adopted by brokers) provided "a broader scope of long-term planning advice" than brokers. (Siegel & Gale, LLC and Gelb Consulting Group, Inc., Results of Investor Focus Group Interviews About Proposed Brokerage Account Disclosures, Report to the Securities and Exchange Commission, March 10, 2005, available at http://1.usa.gov/1MkdujW.)

[8] Hung, Angela A., Noreen Clancy, Jeff Dominitz, Eric Talley, Claude Berrebi and Farrukh Suvankulov. Investor and Industry Perspectives on Investment Advisers and Broker-Dealers. Santa Monica, CA: RAND Corporation, 2008, available at http://bit.ly/1OrrZ3v.

[9] Brown, S. Kathi, Fiduciary Duty and Investment Advice: Attitudes of 401(k) and 403(b) Participants, AARP Research, September 2013, available at http://bit.ly/1HO5d5f

[10] These examples are used by firms to avoid their fiduciary duty under the Investment Advisers Act, which covers investment advice about securities but not sales recommendations by brokers when they are acting strictly in their sales capacity.

- "*Implementation of your [Lincoln Financial] plan is not part of this financial planning contract. However, if you specifically request, Sagemark Consulting, and its affiliates, acting in a sales capacity, will recommend specific investment, insurance and other products through which your financial plan can be implemented.*"

If sellers are able to avoid a best interest obligation to their clients simply by providing these disclaimers, there is every reason to believe they will do so, including when making rollover recommendations.

- **The new "mutual agreement" requirement and "seller's exception" would enshrine in statute two loopholes that, together, are at least as big as the current regulatory loopholes.**

Not only do H.R. 4293 and H.R. 4294 fail to ensure that *all* financial professionals act in their customers' best interests, they also effectively transform the best interest standard into a voluntary obligation assumed only by those advisers who do not include the "mutual agreement" or "seller's exception" disclaimers in their legal boilerplate. As a result, the legislation is unlikely to expand even modestly the number of financial professionals who are subject to a best interest standard. In fact, the "seller's exception" is so broad it likely will leave retirement savers worse off than they are under the current rules. Firms that want to continue making individualized recommendations, including rollover recommendations, that put their own financial interests ahead of their clients' best interests will face no difficulties in doing so. And the losses that retirement savers suffer as a result will continue unabated.

- **H.R. 4294 includes a "best interest" standard of sorts[11], but it is weak and unenforceable by IRA investors.**

H.R. 4294 would create a "best interest" standard for IRA accounts that is different from and weaker than the standard established by Congress for non-retirement accounts.

Many financial firms and their lobbyists profess to support SEC rulemaking to ensure a uniform "best interest" standard for investment advice under the securities laws, emphasizing the importance of having a consistent standard for retirement and non-retirement accounts—and DoL has been responsive to this concern. The best interest standard in DoL's proposal is modeled directly on section 913 of the Dodd-Frank Act, which provides the framework for a harmonized fiduciary standard under the securities laws for broker-dealers and investment advisers. **Inexplicably, the authors of H.R. 4294 have chosen to model their best interest standard not on the securities law fiduciary duty, as outlined in section 913—but on the**

[11] H.R. 4294 applies not only to individual retirement investors, but also to employee retirement plans, like 401(k) plans. While H.R. 4293—which affects only employee retirement plans because it amends ERISA—does not change the advisor's fiduciary duty under ERISA—it does, like H.R. 4294, permit conflicted advice to be provided in a greater number of circumstances with little or no safeguards.

suitability standard that applies to securities sales, as outlined in guidance issued by the Financial Industry Regulatory Authority (FINRA).[12]

Thus, instead of requiring the adviser to act in the best interests of the customer without regard to their own interests, which is the section 913 standard, the legislation requires the adviser to "place the interests of the plan or advice recipient above its own." While the two standards may sound similar, the prohibition against placing the seller's interests ahead of the customer's has not been enforced by FINRA, the SEC, or the courts as requiring brokers to seek to do what is best for the customer or even to minimize their conflicts of interest.[13] All of the cases identified by FINRA in which brokers have been cited for "placing his or her interests ahead of the customer's interests" have involved fundamental violations of suitability and fraud.[14] In no case were brokers held accountable, under this standard, for recommending substandard investments when less risky, less costly options were available that would have objectively been a better option for the investor.

By basing their standard on the FINRA standard rather on than the Dodd-Frank Act fiduciary standard, the drafters of the legislation reinforce, rather than strengthen, the status quo when it comes to protecting retirement investors from biased advice. Certainly, the regulators, and probably the courts, that are called on to interpret the standard are likely to distinguish it as weaker than the best interest standard established by section 913, since it fails to require them either to seek to do what is best for the customer or to rein in conflicts of interest.

- **The H.R. 4294 so called "best interest" standard raises many questions.**
  - If the statute is intended to impose a best interest standard that is the same as the securities law standard, why use different language?
  - If it is meant to be a different standard, what is the intent behind that difference? Does it simply mirror the existing suitability standard? If not, how is it different?
  - How will retirement savers be expected to understand the difference in standards that would then apply to their retirement and non-retirement accounts should the SEC eventually get around to adopting a uniform fiduciary standard under section 913?

Unlike the DoL best interest standard, the H.R. 4294 so-called "best interest" standard would, in effect, be unenforceable.

The DoL rule proposal requires financial firms and advisers who receive commissions and other forms of sales-based compensation to enter into a legally enforceable contract in which they pledge to act as fiduciaries and make investment recommendations in the customer's best

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[12] FINRA, Regulatory Notice 11-02, Know Your Customer and Suitability, January 2011, http://bit.ly/1LnB6DU.
[13] CFA comment letter, page 10-
[14] For an analysis of the cases, see page 10-13 of CFA's July 21, 2015 letter to the Department of Labor in support of the conflict of interest rule proposal (http://bit.ly/1SzS9BH) explaining why the "best interest" standard imposed under FINRA's suitability rules falls short of a true fiduciary best interest standard.

interest. Although advisers remain free to require customers to take their disputes to arbitration, this contract requirement provides an effective enforcement mechanism for the best interest standard. This is critical for IRA owners, who otherwise would not have a direct legal mechanism to hold financial advisers accountable for failing to act in their best interests. That is because IRAs, unlike private-sector 401(k)s and other retirement plans, are covered solely by the Internal Revenue Code's rules for investment advice and not by ERISA,[15] and the Tax Code does not provide a private right of action.

In contrast, H.R. 4294 makes it difficult, if not impossible, for IRA owners to hold advisers accountable for meeting the "best interest" standard because it does not require advisers to enter into a legally binding commitment to their retirement investor clients. IRA owners would be forced to rely on the Internal Revenue Service (IRS) to enforce the law against advisers, even though the IRS has neither the resources nor the market expertise to perform this function effectively. As a result, and absent an investment of substantial new resources by Congress to fund the IRS, IRA owners who are harmed by their advisers are likely to be left without any remedy.

H.R. 4293 and H.R. 4294 do nothing to rein in common industry practices that encourage and reward advice that is not in the customer's best interest.

- **The problem is not individual bad actors**

Those who focus on the need to rein in "bad actors" miss the point behind the DoL rule proposal. All financial professionals, however honest and upright, can face enormous institutional pressures to act in ways that are not in their clients' best interests.[16] Common industry pay practices create strong financial incentives to recommend investments that are most rewarding for the firm and the adviser—even though they might not be the best investments for the customer.[17]

- Advisers easily can earn twice as much recommending one mutual fund over another. Since higher risk funds typically pay more than lower risk funds, this creates incentives to increase the risk in investor portfolios.

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[15] The Employee Retirement Income Security Act of 1974 or "ERISA" authorizes various private causes of action by employee benefit plan participants.

[16] See, for example, Barlyn, Suzanne, "Exclusive: Recording shows how UBS drove reluctant brokers to sell high-risk Puerto Rico funds," Reuters, Feb. 6, 2015, available at http://reut.rs/1SLX9ID ("In April 2011, two years before their prices sank, a slew of bond funds that were being sold by UBS's Puerto Rico arm appeared to its brokers to be such risky investments that they balked at promoting them to their clients. … Their views were unacceptable to Miguel Ferrer, then the chairman of UBS Financial Services Inc. of Puerto Rico, a unit of UBS AG. On June 2 of that year he told a meeting of the firm's brokers, held at its offices in the Golden Mile banking district of San Juan, they had to change their mindset or leave, according to an audio recording reviewed by Reuters"); See also Craig, Susanne and Silver-Greenberg, Jessica, "Former Brokers Say JPMorgan Favored Selling Bank's Own Funds Over Others," The New York Times, July 2, 2012, available at http://reut.rs/1SLX9ID ("I was selling JPMorgan funds that often had weak performance records, and I was doing it for no other reason than to enrich the firm.... I couldn't call myself objective.")

[17] Testimony of Mercer E. Bullard, President and Founder, Fund Democracy, Inc. and MDLA Distinguished Lecturer and Professor of Law, University of Mississippi School of Law, before the Subcommittees on Capital Markets and Government Sponsored Enterprises, and Oversight and Investigations, Committee on Financial Services, U.S. House of Representatives, "Preserving Retirement Security and Investment Choices for All Americans," September 10, 2015., available at http://1.usa.gov/1V0ySje

- When advisers recommend a variable or fixed-index annuity or a non-traded REIT,[18] the pay premium for the adviser gets an additional boost, but typically so do the investor's costs. And the liquidity of the investor's portfolio is reduced.

- Under some of the most egregious payment schemes, known as ratcheted payout grids,[19] an adviser who is approaching the next rung on the grid can make more money on a single investment recommendation than the entire value of the recommended investment.

Even advisers who would like nothing better than to do what is best for their customer can find both the pressure, and the rewards, hard to resist.[20]

The DOL rule proposal addresses this problem by requiring firms to reform practices that encourage or reward advice that is not in the customer's best interests. The legislation includes no such requirements. Instead, these bills rely exclusively on boilerplate disclosures to address conflicts of interest, including the conflicts associated with the sale of proprietary products. But extensive research shows that disclosures alone are ineffective in protecting investors from the harmful consequences of such conflicts.[21]

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[18] REITs, or real estate investment trusts, are a type of security that invests in real estate through property or mortgages. Unlike other more liquid versions, non-traded REITs do not trade on an exchange. (See, Hauptman, Micah, "Why Investors Should Think Twice About Nontraded REITs," *Wall Street Journal* blog, Nov. 13, 2015, available at http://on.wsj.com/1SpaUZy)

[19] Under ratcheted payout grids, firms increase the portion of commissions that the salesperson keeps as they hit certain sales thresholds. For example, at $300,000 in commissions, the salesperson's share of commission income may "ratchet up" from 30% to 40%. And that increased payout rate applies not just to subsequent sales, but also to the previous $299,000 in commissions earned in the 12-month period. As a result, a broker who is approaching a new payout threshold at the end of the year can have tens of thousands of dollars in income riding on a single modest sales recommendation, creating a powerful incentive to recommend the product that gets him over the threshold even if it is not the best option for the investor. For a detailed description of how these payout systems work, see Testimony of Mercer E. Bullard, President and Founder, Fund Democracy, Inc. and MDLA Distinguished Lecturer and Professor of Law, University of Mississippi School of Law, before the Subcommittees on Capital Markets and Government Sponsored Enterprises, and Oversight and Investigations, Committee on Financial Services, U.S. House of Representatives, "Preserving Retirement Security and Investment Choices for All Americans," September 10, 2015, available at http://1.usa.gov/1V0ySje. For an illustration, see CFA Fact Sheet, "If Financial Firms Support a Best Interest Standard Why do they Encourage Harmful Advice?" available at http://bit.ly/1NYiMxv.

[20] See, for example, Davis, Owen, "A Seismic Shift For Retirement Savers — And Their Advisers — Rumbles Through Washington," International Business Times, Jan. 30, 2016, available at http://www.ibtimes.com/seismic-shift-retirement-savers-their-advisers-rumbles-through-washington-2286980. ("When Jim Hebenstreit left the television business in the early 2000s to become a financial adviser, his intentions were noble: He wanted to help ordinary people save for retirement. But pressure from management to meet quotas forced him to prioritize sales over measured advice. 'I was kind of shocked,' Hebenstreit said, comparing his job to used-car sales. 'I thought I could be an investment adviser, and I found out I was really a salesperson.'" "You're constantly burying your feelings about being conflicted," Hebenstreit said. "You have to make a living — and it's not technically illegal."

[21] A 2012 SEC study of disclosure effectiveness included a survey by Siegel & Gale that tested both investors' understanding and use of disclosures. (Siegel & Gale, LLC, Investor Research Report, Submitted to the Securities and Exchange Commission on July 26, 2012, available at http://1.usa.gov/1MfBbss) Siegel & Gale found that: among online survey respondents who recalled receiving a conflict of interest disclosure, just over half reported that they fully understood the potential impact on their advisory relationship and only a little over half of respondents who said they understood the conflicts of interest fully or even somewhat actually took action to protect their interests. There was also confusion about how different advisers charge and the unique conflicts that accompany

Retirement savers who turn to financial professionals for advice deserve advice they can trust, and not just a sales pitch dressed up as advice. The DoL rule proposal would bring us closer to achieving this goal by requiring all financial professionals to make a legally binding commitment to act in the best interests of their customers when providing retirement investment advice and by requiring firms to eliminate practices that encourage and reward harmful advice. In contrast, both bills make it easy for firms to avoid their best interest obligations; create an illusory best interest standard that is both weak and unenforceable in the case of H.R. 4294; and do nothing to rein in practices that encourage advice that is not in the customer's best interest. As a result, H.R. 4294 and H.R. 4293 would further entrench the harmful practices the DoL rule proposal is intended to address. Working families and retirees who struggle to afford a secure and independent retirement deserve better.

different advisers' compensation models. When investors' ability to comprehend actual disclosures was tested, the results were even more troubling. For example, having reviewed a sample disclosure that begins as follows, "In addition to sales loads and 12b-1 fees described in the prospectus, we receive other compensation…," just over half (54.8 percent) correctly answered a question about whether the firm gets compensation other than sales loads and 12b-1 fees. After reviewing a sample chart providing information on additional payments the firm receives from mutual fund companies, only 31.8 percent indicated they definitely knew what the term "annual asset fees" means, and another 46.2 percent indicated they thought they knew what it means. But survey respondents were generally unable to determine the significance of the information provided. New research shows that including a clear statement that the disclosures are legally required can help put recipients on their guard, but it is still not sufficient to counteract the strong tendency individuals have to rely on recommendations from a financial professional. Ahmed E. Taha and John V. Petrocelli, Disclosures About Disclosures: Can Conflict of Interest Warnings Be Made More Effective?
(June 2015). Journal of Empirical Legal Studies, Vol. 12, Issue 2, pp. 236-251, 2015. Available at SSRN: http://ssrn.com/abstract=2600722 or http://dx.doi.org/10.1111/jels.12071.