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114TH CONGRESS
2d Session
HOUSE OF REPRESENTATIVES
REPORT
114–

DISAPPROVING THE RULE SUBMITTED BY THE DEPARTMENT OF LABOR RELATING TO THE DEFINITION OF THE TERM "FIDUCIARY"

APRIL --, 2016.—Ordered to be printed

Mr. KLINE, from the Committee on Education and the Workforce, submitted the following

R E P O R T

together with

_____ VIEWS

[To accompany H. J. Res. 88]

[Including cost estimate of the Congressional Budget Office]

The Committee on Education and the Workforce, to whom was referred the joint resolution (H .J. Res. 88) disapproving the rule submitted by the Department of Labor relating to the definition of the term "Fiduciary", having considered the same, reports favorably thereon without amendment and recommends that the joint resolution do pass.

H.J.Res. 88

COMMITTEE REPORT

PURPOSE

House Joint Resolution 88, as ordered reported by the Committee on Education and the Workforce (Committee) on April 21, 2016, expresses congressional disapproval of the U.S. Department of Labor (DOL or Department) rule amending the regulatory definition of "fiduciary" [1] under the *Employee Retirement Income Security Act of 1974* (ERISA)[2] and the *Internal Revenue Code of 1986* (Code).[3]

COMMITTEE ACTION

112th CONGRESS

Full Committee Hearing Reviewing Policies and Priorities at the U.S. Department of Labor

On February 16, 2011, the Committee held a hearing entitled "Policies and Priorities at the U.S. Department of Labor" to examine, among other things, DOL's Employee Benefits Security Administration's (EBSA) October 2010 proposed regulation significantly expanding the definition of "fiduciary" under ERISA and the Code. The Honorable Hilda L. Solis, then-Secretary of the U.S. Department of Labor, was the sole witness. During the hearing, Rep. Judy Biggert (R-IL) and Carolyn McCarthy (D-NY) expressed concerns regarding DOL's proposed rule, specifically regarding the Department's lack of coordination with the Securities and Exchange Commission (SEC).[4]

Subcommittee Hearing Assessing the Impact of the Labor Department's Proposal on Workers and Retirees

On July 26, 2011, the Subcommittee on Health, Employment, Labor, and Pensions (HELP) held a hearing entitled "Redefining 'Fiduciary': Assessing the Impact of the Labor Department's Proposal on Workers and Retirees" to examine the consequences of EBSA's 2010 proposed rule. Witnesses included the Honorable Phyllis Borzi, Assistant Secretary of Labor, Employee Benefits Security Administration, Washington, D.C.; Mr. Kenneth Bentsen, Executive Vice President, Securities Industry and Financial Markets Association, Washington, D.C.; Mr. Kent Mason, Partner, Davis & Harman LLP, Washington, D.C.; Mr. Donald Myers, Partner, Morgan, Lewis & Bockius LLP, Washington, D.C.; Mr. Norman Stein, Professor, Earle Mack

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[1] Definition of the Term "Fiduciary"; Conflict of Interest Rule-Retirement Investment Advice, 81 Fed. Reg. 20946 (Apr. 8, 2016).
[2] 29 U.S.C. §1001 *et seq.* ERISA section citations will be used throughout.
[3] 26 U.S.C. §1 *et seq.* [hereinafter the Code].
[4] *Policies and Priorities at the U.S. Department of Labor: Hearing Before the H. Comm. on Educ. and the Workforce,* 112th Cong. 15, 38 (Feb. 16, 2011).

School of Law, Drexel University, Philadelphia, Pennsylvania; and Mr. Jeffrey Tarbell, Director, Houlihan Lokey, San Francisco, California.[5]

Full Committee Hearing Reviewing the President's Fiscal Year 2013 Budget Proposal for the Department of Labor

On March 21, 2012, the Committee held a hearing entitled "Reviewing the President's Fiscal Year 2013 Budget Proposal for the Department of Labor." Then-Secretary Solis was the sole witness. During the hearing, members of both parties thanked Secretary Solis for withdrawing the 2010 proposed fiduciary rule.[6]

113th CONGRESS

Full Committee Hearing Reviewing the President's Fiscal Year 2015 Budget Proposal for the Department of Labor

On March 26, 2014, the Committee held a hearing entitled "Reviewing the President's Fiscal Year 2015 Budget Proposal for the Department of Labor." The Honorable Thomas E. Perez, Secretary of the U.S. Department of Labor, was the sole witness. During this hearing, Chairman John Kline reiterated bipartisan concerns regarding DOL's ongoing fiduciary rulemaking. Addressing the consequences of the Department's proposed rule, Chairman Kline urged Secretary Perez to keep in mind "what the impact will be on important advice that people, particularly low-income people, might need."[7]

114th CONGRESS

Full Committee Hearing Reviewing the President's Fiscal Year 2016 Budget Proposal for the Department of Labor

On March 18, 2015, the Committee held a hearing entitled "Reviewing the President's Fiscal Year 2016 Budget Proposal for the Department of Labor." Secretary Perez was the sole witness. During the hearing, Rep. Frederica Wilson (D-FL) warned that a new proposed fiduciary rule should not "impact the availability of affordable investment advice."[8]

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[5] *Redefining 'Fiduciary': Assessing the Impact of the Labor Department's Proposal on Workers and Retirees: Hearing Before the Subcomm. on Health, Employment, Labor, and Pensions of the H. Comm. on Educ. and the Workforce,* 112th Cong. (July 26, 2011).

[6] *Reviewing the President's Fiscal Year 2013 Budget Proposal for the Department of Labor: Hearing Before the H. Comm. on Educ. and the Workforce,* 112th Cong. (Mar. 21, 2012).

[7] *Reviewing the President's Fiscal Year 2015 Budget Proposal for the Department of Labor: Hearing Before the H. Comm. on Educ. and the Workforce,* 113th Cong. 86 (Mar. 26, 2014) (closing statement of Rep. John Kline, Chairman, H. Comm. on Educ. and the Workforce).

[8] *Reviewing the President's Fiscal Year 2016 Budget Proposal for the Department of Labor: Hearing Before the H. Comm. on Educ. and the Workforce,* 114th Cong. (Mar. 18, 2015) (statement of Rep. Frederica S. Wilson, Member, H. Comm. on Educ. and the Workforce).

Subcommittee Hearing Examining Restricting Access to Financial Advice: Evaluating the Costs and Consequences for Working Families and Retirees

On June 17, 2015, the HELP Subcommittee held a hearing entitled "Restricting Access to Financial Advice: Evaluating the Costs and Consequences for Working Families and Retirees" to examine the new DOL Notice of Proposed Rulemaking amending the regulatory definition of "fiduciary" under ERISA. Witnesses before the Subcommittee included Secretary Perez; Mr. Jack Haley, Executive Vice President, Fidelity Investments, Boston, Massachusetts; Mr. Dean Harman, CFP, Managing Director, Harman Wealth Management, The Woodlands, Texas; Mr. Dennis Kelleher, President and CEO, Better Markets, Washington, D.C.; Mr. Kent Mason, Partner, Davis & Harman LLP, Washington, D.C.; and Dr. Brian Reid, Ph.D., Chief Economist, Investment Company Institute, Washington, D.C. During the hearing, Dr. Reid testified in opposition to DOL's reproposed fiduciary rule, saying, "[A]ny policy that impairs retirement savers' ability to get the help that they need will significantly harm the prospects of millions of workers. Unfortunately, the DOL proposal will do just that."[9]

Subcommittee Hearing Examining the Principles for Ensuring Retirement Advice Serves the Best Interests of Working Families and Retirees

On December 2, 2015, the HELP Subcommittee held a hearing entitled "Principles for Ensuring Retirement Advice Serves the Best Interests of Working Families and Retirees" to further examine the DOL NPRM amending the regulatory definition of "fiduciary" under ERISA. Notably, the Subcommittee considered the potential negative effects of the NPRM on small businesses and low- and middle-income families. Witnesses before the Subcommittee included the Honorable Bradford (Brad) Campbell, Counsel, Drinker Biddle & Reath LLP, Washington, D.C.; Ms. Rachel A. Doba, President, DB Engineering, LLC, Indianapolis, Indiana; Mr. Jules O. Gaudreau, Jr. ChFC, CIC, President, The Gaudreau Group, Inc., Wilbraham, Massachusetts; and Ms. Marilyn Mohrman-Gillis, Esq., Managing Director, Public Policy & Communications, Certified Financial Planner Board of Standards, Washington, D.C. During the hearing, [10] witnesses praised a set of bipartisan principles outlined by Reps. David (Phil) Roe (R-TN), Richard Neal (D-MA), Peter Roskam (R-IL), and Michelle Lujan Grisham (D-NM) for a legislative solution to help strengthen retirement security.[11]

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[9] *Restricting Access to Financial Advice: Evaluating the Costs and Consequences for Working Families and Retirees: Hearing Before the Subcomm. on Health, Employment, Labor, and Pensions of the H. Comm. on Educ. and the Workforce,* 114th Cong. (Jun. 17, 2015) (oral testimony of Dr. Brian Reid, Ph.D., Chief Economist, Inv. Co. Inst.).

[10] *Principles for Ensuring Retirement Advice Serves the Best Interests of Working Families and Retirees: Hearing Before the Subcomm. on Health, Employment, Labor, and Pensions of the H. Comm. on Educ. and the Workforce,* 114th Cong. (Dec. 2, 2015).

[11] Press Release, H. Comm. on Educ. and the Workforce, Bipartisan House Members Outline Legislative Principles to Ensure Retirement Advisors Protect Clients' Best Interests (Nov. 5, 2015), http://edworkforce.house.gov/news/documentsingle.aspx?DocumentID=399747.

H.R. 4293, Affordable Retirement Advice Protection Act, Introduced

On December 18, 2015, Rep. Phil Roe, Chairman of the HELP Subcommittee, introduced the *Affordable Retirement Advice Protection Act* (H.R. 4293) [12] with five cosponsors.[13] Recognizing the threat of DOL's proposed rule, Rep. Roe introduced the bipartisan bill to protect consumers and preserve access to affordable financial advice for low- and middle-income families. The legislation amends ERISA to ensure retirement advisors act in their clients' best interests and prohibits DOL from implementing its flawed proposal unless Congress affirmatively approves the final rule.

H.R. 4294, Strengthening Access to Valuable Education and Retirement Support Act of 2015, Introduced

On December 18, 2015, Rep. Peter Roskam, along with Reps. Phil Roe, Richard Neal, John Larson (D-CT), Tom Reed (R-NY), and Michelle Lujan Grisham (D-NM), introduced the *Strengthening Access to Valuable Education and Retirement Support Act of 2015* (H.R. 4294).[14] Recognizing the threat of DOL's proposed rule, the bipartisan bill was introduced to protect consumers and preserve access to affordable financial advice for low- and middle-income families. The legislation amends the Code to ensure retirement advisors act in their clients' best interests and prohibits DOL from implementing its flawed proposal unless Congress affirmatively approves the final rule.

Committee Passes H.R. 4293, Affordable Retirement Advice Protection Act

On February 2, 2016, the Committee considered H.R. 4293, the *Affordable Retirement Advice Protection Act.*[15] Rep. Roe offered an amendment in the nature of a substitute making technical changes to the introduced bill. The Committee voted to adopt the amendment in the nature of a substitute by voice vote. One additional amendment was offered but was voted down by voice vote. The Committee favorably reported H.R. 4293, as amended, to the House of Representatives by a vote of 22–14.

Committee Passes H.R.4294, Strengthening Access to Valuable Education and Retirement Support Act of 2015

On February 2, 2016, the Committee considered H.R. 4294, the *Strengthening Access to Valuable Education and Retirement Support Act of 2015.*[16] Representative Earl L. (Buddy) Carter (R-GA) offered an amendment in the nature of a substitute making technical changes to the introduced bill. The Committee voted to adopt the amendment in the nature of a substitute by

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[12] H.R. 4293, 114th Cong. (2015).
[13] Original co-sponsors of H.R. 4293 include Representatives Richard Neal (D-MA), Peter Roskam (R-IL), John Larson (D-CT), Earl L. "Buddy" Carter (R-GA), and David Scott (D-GA).
[14] H.R. 4294, 114th Cong. (2015).
[15] *H.R. 4293, Affordable Retirement Advice Protection Act: Markup Before the H. Comm. on Educ. and the Workforce,* 114th Cong. (Feb. 2, 2016).
[16] *H.R. 4294, Strengthening Access to Valuable Education and Retirement Support Act of 2015: Markup Before the H. Comm. on Educ. and the Workforce,* 114th Cong. (Feb. 2, 2016).

voice vote. One additional amendment was offered and subsequently withdrawn. The Committee favorably reported H.R. 4294, as amended, to the House of Representatives by a vote of 22–14.

H.J.Res. 88, Disapproving the Rule Submitted by the Department of Labor Relating to the Definition of the Term "Fiduciary," Introduced

On April 19, 2016, Rep. Roe, along with Reps. Charles Boustany (R-LA) and Ann Wagner (R-MO), introduced H.J.Res. 88, *Disapproving the rule submitted by the Department of Labor relating to the definition of the term "Fiduciary,"* pursuant to the *Congressional Review Act*.

Committee Passes H.J.Res. 88, Disapproving the Rule Submitted by the Department of Labor Relating to the Definition of the Term "Fiduciary"

On April 21, 2016, the Committee considered H.J.Res. 88 and reported the resolution favorably to the House of Representatives by a vote of 22–14.

BACKGROUND

PRESENT LAW

Congressional Review Act

The *Congressional Review Act* (CRA), enacted in 1996, established special congressional procedures for disapproving a broad range of regulatory actions (largely encompassing, but not limited to, rules) issued by federal agencies.[17] Before a rule covered by the CRA can take effect, the federal agency promulgating the rule must submit it to Congress. If Congress passes a joint resolution disapproving the rule, and the resolution is enacted, the rule cannot take effect or continue in effect. The agency also may not reissue the rule or any rule "substantially the same," except under authority of a subsequently-enacted law.[18]

The CRA established special expedited procedures for congressional action on joint resolutions of disapproval.[19] The CRA dictates that, in both houses, to qualify for expedited consideration, a disapproval resolution must be submitted within 60 days after Congress receives the rule, exclusive of recess periods. It then lays out a set of action periods and deadlines that must be met before the joint resolution can receive privileged treatment in the Senate. Only one rule, a 2000 DOL rule on ergonomics, has been successfully disapproved by Congress using the CRA process.[20]

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[17] 5 U.S.C. § 801.
[18] 5 U.S.C. § 801 (b)(2).
[19] 5 U.S.C. § 802.
[20] "Ergonomics Program," 65 Fed. Reg. 68262 (Nov. 14, 2000); Joint Resolution providing for congressional disapproval of the rule submitted by the Department of Labor under chapter 8 of title 5, United States Code, relating to ergonomics, Pub. L. 107-5 (Mar. 20, 2001).

Retirement Savings and Fiduciary Requirements Under The Employee Retirement Income Security Act of 1974 (ERISA) and the Code

The Code provides two general vehicles for tax-favored retirement savings: employer-sponsored retirement plans and individual retirement arrangements (IRAs).[21] Various requirements must be met for tax-favored treatment to apply. ERISA, generally administered by the Secretary of Labor, similarly applies various requirements with respect to employee pension benefit plans (pension plans).[22] The most common type of employer-sponsored plan is a qualified retirement plan, which may be a defined contribution plan or a defined benefit plan.[23]

Under a defined contribution plan, benefits are based on an individual account for each participant, to which are allocated contributions, earnings, and losses.[24] Defined contribution plans commonly allow participants to direct the investment of their accounts, usually by choosing among investment options offered under the plan. Under a defined benefit plan, benefits are determined under a plan formula and funded by the general assets of the trust established under the plan, which are invested by plan fiduciaries; individual accounts are not maintained for employees participating in the plan.[25]

In general, under ERISA and the Code, a fiduciary is a person who (1) exercises any discretionary authority or discretionary control respecting management of the plan or exercises any authority or control respecting management or disposition of plan assets, (2) renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (3) has any discretionary authority or discretionary responsibility in the administration of the plan.[26]

ERISA requires a fiduciary of a plan to discharge his duties with respect to the plan solely in the interest of the participants and beneficiaries, for the exclusive purpose of providing benefits to participants and their beneficiaries as well as defraying reasonable expenses of administering the plan, and with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.[27] With respect to plan

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[21] Code Sections 219, 408, and 408A provide rules for IRAs.

[22] ERISA applies also to employee welfare benefit plans. ERISA generally does not apply to church plans or plans of governmental employers.

[23] Code § 401(a). A qualified annuity plan under section 403(a) is similar to a qualified retirement plan (and subject to similar requirements) except that plan assets consist of annuity contracts, rather than investments held in a trust or custodial account. References herein to a qualified retirement plan include a qualified annuity plan. Simplified employee pension (SEP) plans under section 408(k) and SIMPLE IRA plans under section 408(p) are employer-sponsored plans funded through contributions by the employer to an IRA established for each employee.

[24] Defined contribution plan (or individual account plan) is defined at ERISA section 3(34).

[25] As defined in ERISA section 3(35), a defined benefit plan generally is any plan that is not a defined contribution plan.

[26] ERISA § 3(21), Code §4975(e)(3).

[27] ERISA § 404(a)(1). ERISA section 402(a)(1) requires a plan to be established pursuant to a written instrument that provides for one or more named fiduciaries who jointly or severally have authority to control and manage the operation and administration of the plan. For this purpose, the term "named fiduciary" means a fiduciary who is named in the plan instrument, or who, pursuant to a procedure specified in the plan, is identified as a fiduciary by a

assets, ERISA requires a fiduciary to diversify the investments of the plan so as to minimize the risk of large losses unless under the circumstances it is clearly prudent not to do so.

A plan fiduciary who breaches any of the fiduciary responsibilities, obligations, or duties imposed by ERISA (including the prohibited transaction rules discussed *infra*) is personally liable to make good to the plan any losses to the plan resulting from such breach and to restore to the plan any profits the fiduciary has made through the use of plan assets.[28] A plan fiduciary may be liable also for a breach of responsibility by another fiduciary (a "co-fiduciary") in certain circumstances, for example, if the fiduciary's failure to fulfill his own fiduciary duties enabled the co-fiduciary to commit the breach.[29] Certain fiduciary violations may result in the imposition of civil penalties.[30]

ERISA provides a special rule in the case of a defined contribution plan that permits participants to exercise control over the assets in their individual accounts (often referred to as "participant-directed investments").[31] Under the special rule, if a participant exercises control over the assets in his or her account, the participant is not deemed to be a fiduciary by reason of such exercise, and no person who is otherwise a fiduciary is liable for any loss, or by reason of any breach, resulting from the participant's exercise of control.

General Prohibited Transaction Rules

ERISA and the Code prohibit a plan fiduciary from causing the plan to engage in certain transactions ("prohibited transactions") between the plan and a "party in interest" (referred to as a "disqualified person" in the Code).[32] Parties in interest include a fiduciary of the plan; a person providing services to the plan; an employer with employees covered by the plan; an employee organization for which any of whose members are covered by the plan; and certain owners, officers, directors, highly compensated employees, family members, and related entities.[33] The prohibited transaction rules under the Code apply also to IRAs, Archer MSAs, HSAs, and Coverdell ESAs.[34]

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person who is an employer or employee organization with respect to the plan or by an employer and an employee organization acting jointly.

[28] ERISA § 409. Under ERISA section 502(a)(2), an action for a breach of fiduciary responsibility may be brought by DOL, a plan participant or beneficiary, or another fiduciary.

[29] ERISA § 405.

[30] ERISA § 502(i) and (l).

[31] ERISA § 404(c), implemented by regulations at 29 C.F.R. sec. 2550.404c-1. 29 C.F.R. sec. 2550.404c-5 provides rules for qualified default investment alternatives (QDIAs) if a participant does not select any investment options.

[32] ERISA § 406; Code § 4975. Unless otherwise noted, "party in interest" refers to both a party in interest for ERISA purposes and a disqualified person under the Code. Under Code section 4975, similar rules apply to qualified retirement plans under Code sec. 401(a) and qualified annuities under Code sec. 403(a) of private employers, as well as individual retirement arrangements (IRAs) under Code section 408, health savings accounts (HSAs) under Code section 223, Archer Medical Savings Accounts (MSAs) under Code section 220, and Coverdell education savings accounts (Coverdell ESAs) under Code section 530. The prohibited transaction rules under the Code generally do not apply to governmental plans or church plans. However, under section 503, the trust holding assets of a governmental or church plan may lose its tax-exempt status in the case of a prohibited transaction listed in section 503(b).

[33] ERISA § 3(14); Code § 4975(e)(2).

[34] These are included in the definition of "plan" under Code section 4975(e)(1).

Under both ERISA and the Code, prohibited transactions include the following, whether direct or indirect, between a plan and a party in interest: (1) the sale or exchange or leasing of property, (2) the lending of money or other extension of credit, (3) the furnishing of goods, services, or facilities, or (4) the transfer to, or use by or for the benefit of, a party in interest of any assets of the plan. Under ERISA only, a prohibited transaction also includes an acquisition, on behalf of the plan, of any employer security or employer real property in violation of ERISA restrictions.[35]

These rules also provide that a fiduciary, with respect to a plan, must not (1) deal with the assets of the plan in his own interest or for his own account, (2) in his individual or in any other capacity, act in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries, or (3) receive any consideration for his own personal account from any party dealing with the plan in connection with a transaction involving the assets of the plan.[36]

Certain transactions are statutorily exempt from prohibited transaction treatment; for example, certain loans to plan participants and arrangements with a party in interest for legal, accounting, or other services necessary for the establishment or operation of a plan if no more than reasonable compensation is paid for the services.[37] In addition, an administrative exemption may be granted, on either an individual or class basis, subject to a finding that the exemption is administratively feasible, in the interests of the plan and of its participants and beneficiaries, and protective of the rights of participants and beneficiaries of the plan.[38] Before an administrative exemption is granted, notice must be provided to interested persons, notice must be published in the Federal Register of the pendency of the exemption, and interested persons must be given an opportunity to provide comments.

Excise Tax on Prohibited Transactions

If a prohibited transaction occurs, the disqualified person who participated in the transaction is generally subject to a two-tiered excise tax.[39] The first tier tax is 15 percent of the amount involved in the transaction. The second tier tax, imposed if the prohibited transaction is not corrected within a certain period, is 100 percent of the amount involved.

For purposes of the excise tax, the amount involved with respect to a prohibited transaction is generally the greater of (1) the amount of money and the fair market value of the other property given or (2) the amount of money and the fair market value of the other property received.[40] For purposes of the excise tax, "correction" and "correct" mean, with respect to a

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[35] ERISA sec. 407 restricts the acquisition or holding of employer securities and employer real property by a plan.
[36] ERISA § 406(b); 26 U.S.C. § 4975(c)(1)(E) and (F).
[37] ERISA § 408(b); Code §4975(d)(2).
[38] ERISA § 408(a).
[39] In the case of an IRA, HSA, Archer MSA or Coverdell ESA, the sanction for some prohibited transactions is the loss of tax-favored status, rather than an excise tax. See Code section 408(e)(2), also cross-referenced in Code sections 220(e)(2), 223(e)(2) and 530(e).
[40] In the case of certain transactions for services for which more than reasonable compensation is paid, the amount involved is only the excess compensation.

prohibited transaction, undoing the transaction to the extent possible, but in any case, placing the plan in a financial position not worse than it would be if the disqualified person were acting under the highest fiduciary standards.

Jurisdiction over the Prohibited Transaction Rules

Jurisdiction over the Code provisions governing qualified retirement plans and similar ERISA provisions is divided between the Department of the Treasury (Treasury) and DOL by an executive order, referred to as Reorganization Plan No. 4 of 1978 (Reorganization Plan).[41] As part of this division, with certain exceptions, Treasury authority was transferred to DOL with respect to regulations, rulings, opinions, and exemptions under the prohibited transaction provisions of the Code.[42] As a result, DOL regulations and other guidance relating to prohibited transactions applies for Code purposes, as well as for ERISA purposes, and DOL has the authority to grant individual and class exemptions applicable under the Code.

Rules Relating to Investment Advice Prior to DOL's Final Rule

Fiduciary Status

As described above, a fiduciary includes a person who renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of the plan, or has any authority or responsibility to do so.

An existing DOL regulation issued in 1975 provides that a person is deemed to be rendering "investment advice" to an employee benefit plan for this purpose only if he –

- Renders advice to the plan as to the value of securities or other property, or makes a recommendation as to the advisability of investing in, purchasing, or selling securities or other property; and

- Either directly or indirectly, for example, through or together with any affiliate, (a) has discretionary authority or control, whether or not pursuant to agreement, arrangement, or understanding, with respect to purchasing or selling securities or other property for the plan, or (b) has rendered advice such that (1) the advice is rendered on a "regular basis;" (2) the advice is for a fee, either direct or indirect; (3) the advice is provided pursuant to a "mutual agreement, arrangement, or understanding;" (4) the advice is individualized to the plan's particular needs; and (5)

[41] Reorganization Plan No. 4 of 1978, 43 Fed. Reg. 47713 (Oct. 17, 1978).

[42] §§ 102 and 105 of Reorganization Plan No. 4 of 1978, 43 Fed. Reg. 47713. Rules for coordination concerning certain fiduciary actions are provided under section 103 of the Reorganization Plan. In addition, under section 3003 of ERISA, Treasury and DOL are directed to consult with each other from time to time with respect to the prohibited transaction rules and exemptions.

the advice serves as a "primary basis" for the investment decision (known as the "five-part test").[43]

The 1975 regulation further provides that a person who is a fiduciary with respect to a plan by reason of rendering investment advice (as described *supra*) for a fee or other compensation, direct or indirect, with respect to any moneys or other property of the plan, or having any authority or responsibility to do so, is not deemed to be a fiduciary regarding any assets of the plan with respect to which the person does not have any discretionary authority, discretionary control, or discretionary responsibility; does not exercise any authority or control; does not render investment advice (as described *supra*) for a fee or other compensation; and does not have any authority or responsibility to render such investment advice. However, this rule does not exempt the person from ERISA liability attributable to a breach of responsibility by a co-fiduciary or exclude the person from the definition of the term "party in interest" based on providing services to the plan with respect to any assets of the plan.

In addition to the 1975 regulation, other guidance issued by DOL in 1996 (Interpretive Bulletin 96-1) provides that the furnishing of mere investment education to a participant or beneficiary in a participant-directed individual account plan does not constitute the rendering of investment advice.[44] For this purpose, investment education includes the following categories of information and materials: plan information, general financial and investment information, asset allocation models, and interactive investment materials. Interpretive Bulletin 96-1 more fully describes these categories and notes the information and materials merely represent examples that may be furnished to participants and beneficiaries without such information and materials constituting investment advice and that there may be many other examples of information, materials, and educational services, which, if furnished to participants and beneficiaries, would not constitute investment advice. Accordingly, Interpretive Bulletin 96-1 provides that no inferences should be drawn from the description of the four categories with respect to whether the furnishing of any information, materials, or educational services not described therein may constitute investment advice.

Statutory Exemptions Relating to Investment Advice

If certain requirements are met, specific transactions relating to investment advice are exempt from prohibited transaction treatment if the advice is provided by a fiduciary advisor through an eligible investment advice arrangement.[45] The exemptions apply to (1) the provision of investment advice to a plan participant or beneficiary with respect to a security or other property available as an investment under the plan, (2) an investment transaction (that is, a sale, acquisition, or holding of a security or other property) pursuant to the advice, and (3) the direct

[43] 29 C.F.R. § 2510.3-21(c).

[44] 29 C.F.R. § 2905.96-1. This treatment applies irrespective of who provides the information (for example, the plan sponsor, fiduciary or service provider), the frequency with which the information is shared, the form in which the information and materials are provided (for example, on an individual or group basis, in writing or orally, or via video or computer software), or whether an identified category of information and materials is furnished alone or in combination with other identified categories of information and materials.

[45] ERISA § 408(b)(14) and (g), enacted by section 601 of the Pension Protection Act of 2006, Pub. L. No. 109-280.

or indirect receipt of fees or other compensation in connection with the provision of the advice or an investment transaction pursuant to the advice.

For purposes of the exemptions, an eligible investment advice arrangement is generally an arrangement that either (1) provides that any fees (including any commission or compensation) received by the fiduciary advisor for investment advice or with respect to an investment transaction with respect to plan assets do not vary depending on the basis of any investment option selected (sometimes referred to as "fee-leveling") or (2) uses a computer model under an investment advice program that meets specified requirements in connection with the provision of investment advice to a participant or beneficiary.[46] The arrangement must be expressly authorized by a plan fiduciary other than (A) the person offering the investment advice program, (B) any person providing investment options under the plan, or (C) any affiliate of (A) or (B).[47] In addition, the fiduciary advisor must provide disclosures applicable under securities laws; any investment transaction must occur solely at the direction of the investment advice recipient; the compensation received by the fiduciary advisor and affiliates in connection with the investment transaction must be reasonable; and the terms of the investment transaction must be at least as favorable to the plan as an arm's length transaction would be.

DOL's 2016 FINAL REGULATION AND "BIC" EXEMPTION

On April 6, 2016, DOL finalized a regulation that will replace the current regulation relating to investment advice with a new standard as to whether a person is a fiduciary based on rendering investment advice, generally applicable on April 10, 2017.[48] Under the regulation, a person is a fiduciary based on rendering investment advice if the person–

- Provides to a plan, a plan fiduciary, an IRA, or an IRA owner certain types of recommendations or statements (as described below) that constitute investment advice with respect to plan or IRA assets in exchange for a fee or other compensation; and

- Either directly or indirectly (such as through an affiliate) (1) represents or acknowledges that it is acting as a fiduciary with respect to the investment advice, or (2) renders the advice pursuant to a written or verbal agreement, arrangement, or understanding that the advice is individualized to, or that the advice is specifically directed to, the advice recipient for consideration in making investment or management decisions with respect to securities or other property of the plan or IRA.[49]

[46] Various requirements with respect to notices and disclosure, recordkeeping and audits must also be met.
[47] Affiliate for this purpose means an affiliated person as defined under section 2(a)(3) of the Investment Company Act of 1940, 15 U.S.C. § 80a-2(a)(3).
[48] Definition of the Term "Fiduciary," 81 Fed. Reg. at 20946. The regulation will apply for purposes of ERISA and the prohibited transaction rules of the Code.
[49] Definition of the Term "Fiduciary," 81 Fed. Reg. at 20997

Under the final regulation, investment advice includes –

- A recommendation as to the advisability of acquiring, holding, disposing of, or exchanging securities or other property, including a recommendation to take a distribution of benefits or a recommendation as to the investment of securities or other property to be rolled over or otherwise distributed from the plan or IRA;[50] and

- A recommendation as to the management of securities or other property, including recommendations as to the management of securities or other property to be rolled over or otherwise distributed from the plan or IRA.

Subject to specified requirements, the final regulation provides exceptions from the definition of fiduciary for (1) certain counterparties in transactions with "independent fiduciaries with financial expertise;" (2) swap and security-based swap transactions with an employee benefit plan; (3) employees of an employee benefit plan sponsor. Additionally, platform providers to employee benefit plans, persons providing selection and monitoring assistance to employee benefit plans, persons providing general financial communications (such as talk show hosts), and persons providing certain investment education (including to an IRA or IRA owner, but under standards somewhat different from the standards in the existing DOL guidance) are deemed not to be providing "investment advice." However, these exceptions do not apply if the person represents or acknowledges that the person is acting as a fiduciary with respect to the advice.

In conjunction with the regulation, DOL finalized new prohibited transaction class exemptions, including a "best interest contract" or BIC exemption,[51] as well as changes to various existing class exemptions. The BIC exemption generally applies to compensation received by an investment advisor or related party in connection with a transaction (that is, a purchase, sale, or holding of assets) resulting from investment advice provided to "retirement investors," meaning plan participants or beneficiaries who direct the investment of the assets in their accounts, IRA owners who make investment decisions with respect to their IRAs, and "retail fiduciaries," such as independent plan fiduciaries managing less than $50 million. Only advice in the "best interest" of the saver under the regulation qualifies for the exemption.

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[50] Definition of the Term "Fiduciary," 81 Fed. Reg. at 20964; DOL Advisory Opinion 2005-23A (Dec. 7, 2005) addresses the question of whether a recommendation that a participant in a pension plan roll over his or her account balance to an IRA to take advantage of investment options not available under the plan constitutes investment advice with respect to plan assets. The advisory opinion expresses the view that, with respect to a person who is not otherwise a plan fiduciary, merely advising a plan participant to take an otherwise permissible plan distribution, even when the advice is combined with a recommendation as to how the distribution should be invested, does not constitute investment advice within the meaning of the existing DOL investment advice regulations defining when a person is a fiduciary by virtue of providing investment advice with respect to employee benefit plan assets. The advisory opinion provides that DOL does not view a recommendation to take a distribution as advice or a recommendation concerning a particular investment (that is, purchasing or selling securities or other property) as contemplated by the regulations and that any investment recommendation regarding the proceeds of a distribution would be advice with respect to funds that are no longer plan assets. Part IV.A(2) of the preamble to the regulation notes the regulation supersedes Advisory Opinion 2005-23A.

[51] Best Interest Contract Exemption, 81 Fed. Reg. 21002 (Apr. 8, 2016).

The BIC class exemption requires that the advisor and financial institution enter into a written contract with the retirement investor at the time of the transaction. Among other requirements:

- The contract must affirmatively state that the advisor and financial institution are fiduciaries under ERISA, the Code, or both, with respect to any investment advice to the retirement investor;

- Under the contract, the advisor and financial institution must specifically agree to adhere to certain impartial conduct standards, which include providing investment advice that is in the best interest of the retirement investor, not recommending an investment in an asset if they (or affiliates) will receive more than reasonable compensation in relation to the total services they provide to the retirement investor with respect to the investment, and not providing any statements about an asset, fees, material conflict of interest, and any other matter related to the retirement investor's investment decision that are misleading;

- Under the contract, the advisor and financial institution must provide certain warranties and make certain disclosures related to fees and conflicts of interest;

- The contract must not have exculpatory provisions disclaiming or otherwise limiting liability of the advisor or financial institution for a violation of the contract's terms, or a provision under which a plan, IRA, or retirement investor waives or qualifies its right to bring or participate in a class action or other representative action in court in a dispute with the advisor or financial institution;[52] and

- The advisor must comply with a myriad of internet disclosure requirements, including a discussion of the firm's business model, a schedule of typical fees, a list of all product manufacturers and other parties with whom there exists an arrangement to provide third-party payments (and how such payments affect advisor compensation), and disclosures regarding incentives provided to advisors to recommend certain products.

SUMMARY OF H.J.RES. 88

Under the joint resolution, Congress expresses its disapproval of the rule submitted by DOL relating to the definition of the term "fiduciary." If enacted, the joint resolution would prohibit the regulation from going into effect.

[52] As described in DOL's background discussion of the exemption, the contract terms to which advisors and financial institutions must agree in order to qualify for the BIC class exemption create a cause of action that DOL expects will be used by aggrieved retirement investors. Best Interest Contract Exemption, 81 Fed. Reg. at 21022.

COMMITTEE VIEWS

History of DOL's Rulemaking

DOL's Withdrawn 2010 Proposal

The Obama administration has long argued the regulatory definition of an "investment advice" fiduciary is insufficiently restrictive.[53] To address this concern, in 2010, DOL's EBSA issued a complicated proposed regulation expanding the definition of "fiduciary."[54] On September 19, 2011, in the face of bipartisan opposition from the Committee and others in Congress related to access to advice and cost, EBSA withdrew its original proposal and announced it would repropose a revised rulemaking.[55]

DOL's April 2015 Notice of Proposed Rulemaking

At a February 2015 speech at AARP, President Obama announced his intention to go forward with this rulemaking.[56] In this speech and subsequent public statements, the administration rebranded the proposed regulation as a consumer protection against "backdoor payments and hidden fees" generated by structural conflicts of interest in the retirement advice industry. Then a Council of Economic Advisors report argued "conflicted advice" costs Americans $17 billion annually.[57] This figure assumed IRA investors were duped into rolling over 401(k) funds into high cost mutual funds by advisors and brokers and, as a result, pay on average 1 percent more annually. These assumptions came under intense scrutiny from analysts who argue IRA holders actually pay only 0.16 percent more and that these fees are justifiable due to a higher level of service.[58]

Despite this criticism, on April 20, 2015,[59] DOL proposed a regulation and a package of amendments (2015 NPRM) to the prohibited transaction rules designed to expand the universe of activities that trigger fiduciary liability. The proposal effectively eliminated the "regular basis," "mutual agreement," and "primary basis" prongs of the five-part test for investment advice. An application of the existing prohibited transaction rules using this new definition would have

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[53] *E.g., Redefining 'Fiduciary': Assessing the Impact of the Labor Department's Proposal on Workers and Retirees: Hearing Before the Subcomm. on Health, Employment, Labor, and Pensions of the H. Comm. on Educ. and the Workforce,* 112th Cong. (July 26, 2011) (testimony of the Hon. Phyllis Borzi, Asst. Secr'y of Labor of the Emp. Benefits Sec. Admin.).

[54] Definition of the Term "Fiduciary," 75 Fed. Reg. 65263 (Oct. 15, 2010) [hereinafter 2010 Proposal].

[55] *See* Press Release, Dept. of Labor, U.S. Labor Department's EBSA to re-propose rule on definition of a fiduciary (Sept. 19, 2011), http://www.dol.gov/ebsa/newsroom/2011/11-1382-NAT.html.

[56] Press Release, White House Office of the Press Secretary, Remarks by the President at the AARP (Feb. 23, 2015), http://www.whitehouse.gov/the-press-office/2015/02/23/remarks-president-aarp.

[57] Council of Economic Advisors, The Effects of Conflicted Investment Advice on Retirement Saving, (Feb. 2015) http://www.whitehouse.gov/sites/default/files/docs/cea_coi_report_final.pdf.

[58] Letter from David M. Abbey, Deputy Gen. Counsel, Retirement Policy, Inv. Co. Inst. and Brian Reid, Chief Economist, Inv. Co. Inst., to the Hon. Howard Shelanski, Admin., Office of Info. and Reg. Aff., OMB (Apr. 7, 2015), http://www.ici.org/pdf/15_ici_omb_data.pdf.

[59] Definition of the Term "Fiduciary"; Conflict of Interest Rule-Retirement Investment Advice, 80 Fed. Reg. 21928 (Apr. 20, 2015) [hereinafter 2015 Proposal].

functionally barred commission-based retirement accounts, where the advisor receives payment when transactions are executed (as opposed to an "advisory account," where the advisor receives a flat fee or percentage of assets annually to manage the account). Because non-fiduciary commission-based accounts are the most cost-effective way to engage low- and middle-income savers, this proposal risked millions of individuals with IRAs losing access to advice. Purportedly to address this, DOL also proposed the BIC Exemption, an exemption from the prohibited transaction rules if the IRA provider fulfilled a number of conditions.

The BIC exemption was widely panned as so unworkable that it provided little relief. It included a requirement the advisor sign a contract prior to providing any recommendation promising to provide advice only in the client's best interest.[60] Other requirements included projecting the cost of each recommended asset purchase for one-, five-, and ten- year periods after the transaction; maintaining a website with all compensation information for the firm and each individual advisor or affiliate for each potential investment offered; and recommending only certain types of investment products.

Under this proposed exemption and the proposed regulation, advisors would be subject to class action litigation, and previously-provided non-fiduciary "education" would now trigger fiduciary liability. Finally, advisory firms would not be able to market to small businesses without triggering fiduciary liability, likely leading to a market exodus. In sum, the proposal jeopardized Americans' access to affordable advice.

The 2015 NPRM received thousands of comments, including numerous letters from members of Congress.[61] Notably, 46 House Democrats signed a letter led by HELP Subcommittee Ranking Member Jared Polis (D-CO) calling for publication of the revised rule prior to finalizing, as well as a supplemental comment period.[62] Another letter, signed by 96 House Democrats, expressed concerns the proposal could reduce access to investment advice for both small businesses and low- and middle-income individuals.[63] In all, over half of House Democrats signed letters questioning the DOL's proposal.

On July 21, 2015, every Republican member of the Committee signed a comment letter calling for the proposal to be withdrawn and highlighting testimony from a hearing held by the

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[60] *Restricting Access to Financial Advice: Evaluating the Costs and Consequences for Working Families and Retirees: Hearing Before the Subcomm. on Health, Employment, Labor, and Pensions of the H. Comm. on Educ. and the Workforce,* 114th Cong. 8 (Jun. 17, 2015) (written testimony of Jack Haley, Exec. Vice President, Fidelity Invs.).

[61] Comments received through September 24, 2015, are published on EBSA's website, http://www.dol.gov/ebsa/regs/cmt-1210-AB32-2.html.

[62] *See, e.g.*, Letter from the Hon. Jared Polis, *et al* to the Hon. Thomas E. Perez, Sec'y, Dep't of Labor (Oct. 30, 2015), http://df2d4c59ccf47b6bc124-2951e9520e07371e6076e0c8af900fc2.r54.cf5.rackcdn.com/wp-content/uploads/Secretary-Perez-Fiduciary-Comment-Period-Letter-10-30-15.pdf.

[63] Letter from the Hon. Gwen Moore, *et al* to the Hon. Thomas E. Perez, Sec'y, Dep't of Labor (Sept. 24, 2015) (on file with the Committee).

HELP Subcommittee on June 17, 2015.[64] This comment letter also explained the Committee's longstanding interest in pursuing a responsible best interest standard.

Concerns with DOL's Final Regulation

On April 6, 2016, DOL finalized its regulation, significantly altering the retirement services marketplace. Based on overwhelming testimony from a diverse group of stakeholders during two HELP Subcommittee hearings, the final rule (even as revised from the 2015 NPRM) disrupts advisory relationships, contains a multitude of technical shortcomings, and brings about a number of unacceptable consequences. The final rule restricts access to affordable financial advice for lower- and middle-income Americans and makes it harder for employers – especially small businesses – to set up retirement plans. For these reasons, even if the final rule represents a modest improvement from the 2015 NPRM, the rule should still be rejected.

Restricted Access to Advice

The final regulation will have the net effect of locking lower- and middle-income investors out of the advice market. Advisors should have a legal duty to act in the "best interests" of their clients; however, "fiduciary" status under the regulation will result in the legal prohibition of most transactions because of how the advisor is compensated.[65] DOL claims its goal is not to eliminate commission-based accounts,[66] but it failed to adequately rectify this gaping inadequacy in the final rule. For example, while the BIC exemption permits advisors to continue to receive commissions, there are several onerous disclosure and information-gathering requirements that will increase costs, which will be passed on to investors. Alternatively, those costs will make continued advice to small- and mid-size accounts unaffordable and therefore unavailable. Mr. Dean Harman, CFP, Harman Wealth Management, summarized these concerns, saying:

> *Unfortunately, these and other flawed assumptions cause the DOL to offer a proposal that is poorly designed for investors and unduly burdensome for financial advisors and financial institutions. The result is that the proposal will drive up costs putting retirement advice out of the reach of many investors.* [67]

Moreover, the disclosure requirements could overwhelm investors with the volume of fine print, resulting in confusion or functional non-disclosure. This was a concern of many in the industry,

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[64] Letter from the Hon. John Kline, Chairman, H. Comm. on Educ. and the Workforce, *et al* to the Hon. Thomas E. Perez, Sec'y, Dep't of Labor (July 21, 2015), http://edworkforce.house.gov/uploadedfiles/7-21-15-dol_fiduciary_rule.pdf.

[65] *Id.* at 3, 4.

[66] *Restricting Access to Financial Advice: Evaluating the Costs and Consequences for Working Families and Retirees: Hearing Before the Subcomm. on Health, Employment, Labor, and Pensions of the H. Comm. on Educ. and the Workforce,* 114th Cong. 5 (Jun. 17, 2015) (written testimony of The Hon. Thomas E. Perez, U.S. Sec'y, Dept. of Labor).

[67] *Restricting Access to Financial Advice: Evaluating the Costs and Consequences for Working Families and Retirees: Hearing Before the Subcomm. on Health, Employment, Labor, and Pensions of the H. Comm. on Educ. and the Workforce,* 114th Cong. 10 (Jun. 17, 2015) (written testimony of Dean Harman, CFP, Managing Dir., Harman Wealth Management).

including Mr. Jules Gaudreau, Jr. ChFC, CIC, President of The Gaudreau Group, Inc., who echoed this sentiment at a December 2, 2015, HELP Subcommittee hearing, stating:

> *It is, therefore, important to make sure that the U.S. retirement savings and tax policies encourage individuals to take personal responsibility for the need to save to protect their financial futures. It is also important to be sure that the rules in place to protect these savers and savings do not so burden the mechanisms for saving that the rules themselves become a barrier to achieving the goal of post-retirement financial security. ... Clear, understandable disclosure of this relevant information is a must. However, it is easy to overwhelm a retirement saver, especially one who is in need of basic financial education. Too much disclosure leads to overload and possibly paralysis in the decision-making process. The DOL proposal, as drafted this past April, fails this important balancing test. It requires too much information – and it requires it of financial advisors who usually do not have access to the data the DOL requires.*[68]

Even worse, the final rule reduces the educational material that can be provided to IRA holders. For example, if an IRA provider notes a sample asset allocation, it cannot mention examples of funds in those asset classes without triggering fiduciary duties. Therefore, IRA owners will likely be deprived of that educational information.

Furthermore, unlike the 2015 NPRM, under the final rule, all variable and fixed-index annuities will need to comply with the new requirements. Moreover, the BIC exemption continues to envision class action litigation under state law. The costs associated with this litigation will drive costs up for those least able to bear it, namely low- and middle-income retirement savers. More technically, DOL continues to require compliance within an unreasonably short amount of time, with most requirements being effective within one year.

The final rule adopts the proposal's narrowing of the five-part test for determining whether the advisor rendered "investment advice" and the framework of the BIC exemption, and amended a few of the most obviously unworkable requirements. For example, a contract stating the advisor's intent to provide advice in the best interest of the client is no longer required prior to *any* recommendation; instead, a contract is required at the time a transaction is executed. The one-, five-, and ten-year cost projections are no longer required, and other disclosure requirements were modified to be more practical. Exemptive relief is not limited to recommendations involving only certain products. Nevertheless, the remaining burdensome requirements will serve to discourage savings, to the detriment of small business owners and low- and middle-income savers.

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[68] *Principles for Ensuring Retirement Advice Serves the Best Interests of Working Families and Retirees: Hearing Before the Subcomm. on Health, Employment, Labor, and Pensions of the H. Comm. on Educ. and the Workforce,* 114th Cong. 3, 4 (Dec. 2, 2015) (written testimony of Jules Gaudreau, Jr., ChFC, CIC, President, The Gaudreau Group, Inc.).

Fewer Employer-Provided Retirement Plans

Small business owners provide nearly half a trillion dollars in retirement savings for 9 million households.[69] Employers are very concerned the new rule will make it much harder for small businesses to set up retirement plans and for plan participants to receive advice.

Destructively, like the 2015 NPRM, DOL's final rulemaking holds large and small businesses to different standards, with greater restrictions and additional burdens placed on small businesses. Under most circumstances, merely selling your services is not fiduciary "investment advice."[70] In one counterproductive exception, however, retirement advisors would automatically trigger fiduciary duties if they sell to a plan managing under $50 million in assets, such as a small business's plan.[71] To continue to provide services to small businesses, advisors will either need to increase fees or qualify for an exemption. The Honorable Brad Campbell testified at the December 2, 2015, HELP Subcommittee Hearing about a similar discriminatory rule in the 2015 NPRM, saying:

> *Small plans and small-account IRA owners may be most in need of basic investment advice, but they would be least likely to be served by the Proposal due to the increased compliance costs and increased legal liability risks it unnecessarily creates.*[72]

Because of the complicated new requirements, institutions providing retirement plans would be prohibited from offering assistance to small business plan sponsors in selecting investment options to offer their employees. However, larger plans do not have this requirement. While public policy should encourage employers to help workers save for retirement, it is harmful for DOL to refuse to provide an exemption for information provided to small businesses. Even worse, the final DOL rule actually will drive up costs for these small firms, while shielding larger businesses from the same costs. As Ms. Rachel Doba, President of DB Engineering LLC, noted at the same HELP Subcommittee hearing:

> *DOL seems to believe that small business owners, such as me, are not as sophisticated as large businesses and, therefore, need additional protections. The validity of this rationale is based on faulty assumptions, and does not justify discriminatory treatment.*[73]

Echoing these concerns, the National Federation of Independent Business sent a letter to DOL criticizing the 2015 NPRM because advisors will no longer provide advice to small

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[69] U.S. Chamber of Commerce, *Locked Out of Retirement: The Threat to Small Business Retirement Savings* (Jun. 9, 2015), http://www.centerforcapitalmarkets.com/wp-content/uploads/2013/08/US-Chamber-Locked-Out-of-Retirement-White-Paper.pdf.

[70] Definition of the Term "Fiduciary," 81 Fed. Reg. at 20997-998.

[71] Definition of the Term "Fiduciary," 81 Fed. Reg. at 20999.

[72] *Principles for Ensuring Retirement Advice Serves the Best Interests of Working Families and Retirees: Hearing Before the Subcomm. on Health, Employment, Labor, and Pensions of the H. Comm. on Educ. and the Workforce,* 114th Cong. 5 (Dec. 2, 2015) (written testimony of the Hon. Bradford Campbell, Counsel, Drinker Biddle & Reath LLP).

[73] *Principles for Ensuring Retirement Advice Serves the Best Interests of Working Families and Retirees: Hearing Before the Subcomm. on Health, Employment, Labor, and Pensions of the H. Comm. on Educ. and the Workforce,* 114th Cong. 5 (Dec. 2, 2015) (written testimony of Ms. Rachel Doba, President, DB Engineering LLC).

businesses that establish retirement plans. Instead, the regulation will prohibit (or make cost-prohibitive) the arrangements currently prevalent.[74] Additionally, the Small Business Administration's Office of Advocacy submitted a comment letter to the Department warning, "the proposed rule would likely increase the [advisors'] costs and burdens associated with serving smaller plans ... [and] could limit financial advisors' ability to offer savings and investment advice to clients ... ultimately lead[ing] advisors to stop providing retirement services to small businesses."[75]

Legislation Addressing the Rulemaking

In an effort to provide an alternative to DOL's flawed proposed rule, on December 18, 2015, Rep. Phil Roe, with five bipartisan cosponsors, introduced H.R. 4293, the *Affordable Retirement Advice Protection Act* (ARAPA).[76] This bill was introduced concurrently with the bipartisan H.R. 4294, the *Strengthening Access to Valuable Education and Retirement Support Act of 2015* (SAVERS Act).[77] H.R. 4293 amends ERISA, while H.R. 4294 adds similar provisions to the Code. The bills achieve the DOL's stated goal of ensuring retirement advisors act in their clients' best interests. They do this by updating current law to ensure all financial professionals providing personalized advice about investments, distributions, or the use of other fiduciaries would be legally required to act in the best interest of their customers. However, unlike the DOL rules, ARAPA and the SAVERS Act ensure low- and medium-asset savers and small businesses have access to affordable retirement advice. The bills also prohibit DOL from finalizing its regulation unless Congress affirmatively approves the regulation. The Committee ordered these bills favorably reported on February 2, 2016.

Other legislation also attempted to mitigate the damage of DOL's rulemaking. In October 2013, the House passed the *Retail Investor Protection Act*, requiring DOL to postpone any rulemaking relating to the definition of "fiduciary" until after a potentially conflicting regulation from the SEC is promulgated, pursuant to authority in Dodd-Frank.[78] The House passed the bill by a vote of 255-166 (with 30 Democrats in support), but the Senate did not consider it. This Congress, the bill was reintroduced by Rep. Ann Wagner[79] and passed by a vote of 245-186.

Additionally, both the Fiscal Year 2016 Labor, Health and Human Services appropriations bills passed by the House and Senate Appropriations Committees included language prohibiting funds from being used to finalize, implement, administer, or enforce the

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[74] Letter from Amanda Austin, Vice President, Public Policy, Nat'l Fed'n of Indep. Bus. to the Emp. Benefits Sec. Admin. (May 5, 2015), http://www.dol.gov/ebsa/pdf/1210-AB32-2-00039.pdf.
[75] Comment letter from the Small Bus. Admin's Office of Advocacy 5, 6 (Jul. 17, 2015), http://www.dol.gov/ebsa/pdf/1210-AB32-2-00403.pdf.
[76] H.R. 4293, 114th Cong. (2015).
[77] H.R. 4294, 114th Cong. (2015).
[78] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 913 (2010).
[79] H.R. 1090, 114th Cong. (2015).

proposed rule.[80] However, this language was not included in the omnibus appropriations bill enacted in December 2015.

Finally, on April 19, 2016, Rep. Phil Roe, joined by Reps. Charles Boustany and Ann Wagner, introduced H.J.Res. 88, a joint resolution of disapproval under the CRA, disapproving the rule submitted by DOL relating to the definition of the term "fiduciary." The Committee ordered the joint resolution favorably reported on April 21, 2016, by a vote of 22-14.

CONCLUSION

The DOL rule will have a detrimental impact on low- and middle-income Americans and small businesses. The joint resolution of disapproval will ensure this regulatory change will not impair retirement security.

SECTION-BY-SECTION

Congress expresses its disapproval of the rule submitted by DOL relating to the definition of the term "fiduciary" and prohibits it from going into effect.

EXPLANATION OF AMENDMENTS

The amendments, including the amendment in the nature of a substitute, are explained in the body of this report.

APPLICATION OF LAW TO THE LEGISLATIVE BRANCH

Section 102(b)(3) of Public Law 104-1 requires a description of the application of this bill to the legislative branch. House Joint Resolution 88 expresses congressional disapproval of the U.S. Department of Labor (DOL or Department) rule amending the regulatory definition of "fiduciary" under the *Employee Retirement Income Security Act of 1974* (ERISA) and the *Internal Revenue Code of 1986* (Code).

UNFUNDED MANDATE STATEMENT

Section 423 of the Congressional Budget and Impoundment Control Act (as amended by Section 101(a)(2) of the Unfunded Mandates Reform Act, P.L. 104–4) requires a statement of whether the provisions of the reported bill include unfunded mandates. This issue is addressed in the CBO letter.

[80] The Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, Fiscal Year 2016, H.R. 3020, § 113 (2015); The Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, Fiscal Year 2016, S. 1695, § 110 (2015).

EARMARK STATEMENT

H.J.Res. 88 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9 of House Rule XXI.

ROLL CALL VOTES

Clause 3(b) of rule XIII of the Rules of the House of Representatives requires the Committee Report to include for each record vote on a motion to report the measure or matter and on any amendments offered to the measure or matter the total number of votes for and against and the names of the Members voting for and against. [insert]

Date: April 21, 2016

COMMITTEE ON EDUCATION AND THE WORKFORCE RECORD OF COMMITTEE VOTE

Roll Call: 1 Bill: H.J. Res. 88 Amendment Number: n/a

Disposition: Ordered favorably reported to the House by a vote of 22 yeas and 14 nays.

Sponsor/Amendment: Mr. Roe - Motion to report the resolution to the House with the recommendation that the resolution do pas

Name & State	Aye	No	Not Voting	Name & State	Aye	No	Not Voting
Mr. KLINE (MN) (Chairman)	X			Mr. SCOTT (VA) (Ranking)		X	
Mr. WILSON (SC)	X			Mr. HINOJOSA (TX)		X	
Mrs. FOXX (NC)	X			Mrs. DAVIS (CA)		X	
Mr. HUNTER (CA)	X			Mr. GRIJALVA (AZ)		X	
Mr. ROE (TN)	X			Mr. COURTNEY (CT)		X	
Mr. THOMPSON (PA)	X			Ms. FUDGE (OH)		X	
Mr. WALBERG (MI)	X			Mr. POLIS (CO)		X	
Mr. SALMON (AZ)	X			Mr. SABLAN (MP)			X
Mr. GUTHRIE (KY)	X			Ms. WILSON (FL)			X
Mr. ROKITA (IN)	X			Ms. BONAMICI (OR)		X	
Mr. BARLETTA (PA)	X			Mr. POCAN (WI)		X	
Mr. HECK (NV)	X			Mr. TAKANO (CA)		X	
Mr. MESSER (IN)	X			Mr. JEFFRIES (NY)		X	
Mr. BYRNE (AL)	X			Ms. CLARK (MA)		X	
Mr. BRAT (VA)	X			Ms. ADAMS (NC)		X	
Mr. CARTER (GA)	X			Mr. DeSAULNIER (CA)		X	
Mr. BISHOP (MI)	X						
Mr. GROTHMAN (WI)	X						
Mr. RUSSELL (OK)	X						
Mr. CURBELO (FL)	X						
Ms. STEFANIK (NY)	X						
Mr. ALLEN (GA)	X						

TOTALS: Aye: 22 No: 14 Not Voting: 2

Total: 38 / Quorum: 13 / Report: 20

(22 R - 16 D)

CORRESPONDENCE

Exchange of letters with the Committee on Ways and Means. [insert]

Congress of the United States
U.S. House of Representatives
COMMITTEE ON WAYS AND MEANS
1102 LONGWORTH HOUSE OFFICE BUILDING
(202) 225-3625
Washington, DC 20515-6348
http://waysandmeans.house.gov

April 22, 2016

The Honorable John Kline
Chairman
Committee on Education and the Workforce
2176 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Kline,

I am writing with respect to H. J. Res. 88, "Disapproving the rule submitted by the Department of Labor relating to the definition of the term Fiduciary." As you know, the Committee on Ways and Means was granted an additional referral on this legislation.

Because of your willingness to consult with my committee regarding this matter, I will waive consideration of this legislation by the Ways and Means Committee. By agreeing to waive formal consideration, the Ways and Means Committee does not waive its jurisdiction over H. J. Res. 88. Our Committee also reserves the right to seek appointment of an appropriate number of conferees to any House-Senate conference involving this legislaiton, and asks that you support any such request.

I would appreciate a response to this letter confirming this understanding with respect to H. J. Res. 88, and would ask that a copy of our exchange of letters on this matter be included in the Congressional Record during Floor consideration of H. J. Res. 88.

Sincerely,

Kevin Brady
Chairman

cc: The Honorable Sander Levin
The Honorable Bobby Scott
The Honorable Paul Ryan, Speaker
Thomas J. Wickham, Jr., Parliamentarian

22A

COMMITTEE ON EDUCATION
AND THE WORKFORCE
U.S. HOUSE OF REPRESENTATIVES
2176 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515–6100

April 25, 2016

The Honorable Kevin Brady
Chairman
Committee on Ways and Means
1102 Longworth House Office Building
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

Thank you for your letter regarding the Committee on Ways and Means jurisdictional interest in H.J.Res. 88. I appreciate your willingness to forgo further consideration of H.J.Res. 88 by your committee.

I agree the Committee on Ways and Means has a valid jurisdictional interest in H.J.Res. 88, and the committee's jurisdiction will not be adversely affected by your decision to forgo further consideration of the bill. Your committee will be appropriately consulted and involved as this or similar legislation moves forward. As you have requested, I will include a copy of your letter and this response in the committee report for H.J.Res. 88 and in the *Congressional Record* during the Floor consideration of this bill. As always, thank you for your cooperation.

Sincerely,

John Kline

JOHN KLINE
Chairman

CC: The Honorable Paul Ryan, Speaker
The Honorable Bobby Scott
The Honorable Sander Levin
Mr. Thomas J. Wickham, Jr., Parliamentarian

22B

STATEMENT OF GENERAL PERFORMANCE GOALS AND OBJECTIVES

In accordance with clause (3)(c) of House Rule XIII, the goal of House Joint Resolution 88 is to disapprove of the U.S. Department of Labor (DOL or Department) rule amending the regulatory definition of "fiduciary" under the *Employee Retirement Income Security Act of 1974* (ERISA) and the *Internal Revenue Code of 1986* (Code).

DUPLICATION OF FEDERAL PROGRAMS

No provision of H.J.Res 88 establishes or reauthorizes a program of the Federal Government known to be duplicative of another Federal program, a program that was included in any report from the Government Accountability Office to Congress pursuant to section 21 of Public Law 111-139, or a program related to a program identified in the most recent Catalog of Federal Domestic Assistance.

DISCLOSURE OF DIRECTED RULE MAKINGS

The committee estimates that enacting H.J.Res. 88 does not specifically direct the completion of any specific rule makings within the meaning of 5 U.S.C. 551.

STATEMENT OF OVERSIGHT FINDINGS AND RECOMMENDATIONS OF THE COMMITTEE

In compliance with clause 3(c)(1) of rule XIII and clause 2(b)(1) of rule X of the Rules of the House of Representatives, the committee's oversight findings and recommendations are reflected in the body of this report.

NEW BUDGET AUTHORITY AND CBO COST ESTIMATE

With respect to the requirements of clause 3(c)(2) of rule XIII of the Rules of the House of Representatives and section 308(a) of the Congressional Budget Act of 1974 and with respect to requirements of clause 3(c)(3) of rule XIII of the Rules of the House of Representatives and section 402 of the Congressional Budget Act of 1974, the committee has received the following estimate for H.J.Res. 88 from the Director of the Congressional Budget Office: [insert]

CONGRESSIONAL BUDGET OFFICE
U.S. Congress
Washington, DC 20515

Keith Hall, Director

April 25, 2016

Honorable John Kline
Chairman
Committee on Education and the Workforce
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Chairman.

The Congressional Budget Office has prepared the enclosed cost estimate for H.J. Res. 88, a joint resolution providing for congressional disapproval under chapter 8 of title 5, United States Code, of a rule submitted by the Department of Labor relating to the definition of the term "Fiduciary".

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Noah Meyerson, who can be reached at 226-2820.

Sincerely,

Keith Hall

Enclosure

cc: Honorable Robert C. "Bobby" Scott
Ranking Member

CONGRESSIONAL BUDGET OFFICE
COST ESTIMATE

April 25, 2016

H.J. Res. 88

A joint resolution providing for congressional disapproval under chapter 8 of title 5, United States Code, of a rule submitted by the Department of Labor relating to the definition of the term "Fiduciary"

As ordered reported by the House Committee on Education and the Workforce on April 21, 2016

H.J. Res. 88 would disapprove the final rule submitted by the Department of Labor (DOL) and published in the Federal Register on April 8, 2016, relating to investment advice within pension and retirement plans; those regulations are sometimes referred to as the "fiduciary rule." H.J. Res. 88 would invoke a legislative process established by the Congressional Review Act (Public Law 104-121) to disapprove the new rule. If H.J. Res. 88 is enacted, the rule would have no force or effect.

CBO expects that, if this legislation were enacted, DOL would likely not propose a new rule related to the definition of fiduciary because the Congressional Review Act prohibits agencies from issuing any new rule in substantially the same form as a disapproved rule, unless specifically authorized by subsequent legislation.

Under the Employee Retirement Income Security Act of 1974 (ERISA) and the Internal Revenue Code, a person who is paid to provide investment advice is considered a fiduciary and is obligated to work in the best sole interest of their clients. The rule published on April 8 broadens the definition of investment advice within pension and retirement plans and therefore applies the fiduciary standard to more advisors.

CBO and the staff of the Joint Committee on Taxation (JCT) estimate that the bill would have a negligible effect on revenues over the 2016-2026 period. Enacting the bill would not affect direct spending. Because enacting H.J. Res. 88 would affect revenues, pay-as-you-go procedures apply.

CBO and JCT estimate that enacting H.J. Res. 88 would not increase net direct spending or on-budget deficits in any of the four consecutive 10-year periods beginning in 2027.

CBO and JCT have determined that the bill contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would impose no costs on state, local, or tribal governments.

On February 10, 2016, CBO transmitted a cost estimate of H.R. 4294, the Strengthening Access to Valuable Education and Retirement Support Act of 2015, as ordered reported by the House Committee on Ways and Means on February 3, 2016.

On April 20, 2016, CBO transmitted a cost estimate of H.R. 4293, the Affordable Retirement Advice Protection Act, as ordered reported by the House Committee on Education and the Workforce on February 2, 2016.

On April 20, 2016, CBO transmitted a cost estimate of H.R. 4294, the Strengthening Access to Valuable Education and Retirement Support Act of 2015, as ordered reported by the House Committee on Education and the Workforce on February 2, 2016.

All three bills contained a provision that would prevent the fiduciary rule or any similar regulations from becoming effective unless a bill or joint resolution approving them was passed within 60 days of enactment of the proposed legislation. Like H.J. Res. 88, those bills would have a negligible effect on revenues and would not affect direct spending.

The CBO staff contact for this estimate is Noah Meyerson. The estimate was approved by Theresa Gullo, Assistant Director for Budget Analysis.

THOMAS A. BARTHOLD
CHIEF OF STAFF

BERNARD A. SCHMITT
DEPUTY CHIEF OF STAFF

Congress of the United States

JOINT COMMITTEE ON TAXATION
502 FORD HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6453
(202) 225-3621
http://www.jct.gov

AP
HD

APR 2 5 2016

Honorable John Kline
Committee on Education and the Workforce
U.S. House of Representatives
2176 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Kline:

This is in response to your request dated April 20, 2016, for an estimate of the revenue effects of a proposed joint resolution under the Congressional Review Act relating to regulations issued by the Department of Labor on the definition of fiduciary for purposes of the prohibited transaction rules of the Employee Retirement Income Security Act of 1974 and the Internal Revenue Code of 1986. The proposed resolution would disapprove the regulations, so the regulations would have no force or effect.

We assume for purposes of this estimate that the resolution is approved within the 60-day time period prescribed by the Congressional Review Act. We estimate that the proposed resolution would have a negligible effect on Federal fiscal year budget receipts.

I hope this information is helpful to you. If we can be of further assistance in this matter, please let me know.

Sincerely,

Thomas A. Barthold

Thomas A. Barthold

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COMMITTEE COST ESTIMATE

Clause 3(d)(1) of rule XIII of the Rules of the House of Representatives requires an estimate and a comparison of the costs that would be incurred in carrying out H.J.Res. 88 However, clause 3(d)(2)(B) of that rule provides that this requirement does not apply when the committee has included in its report a timely submitted cost estimate of the bill prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

The requirements of clause 3(e) of rule XIII of the Rules of the House of Representatives do not apply to H.J.Res. 88

MINORITY VIEWS
H.J. RES. 88, A Joint Resolution Disapproving of the Department of Labor's Conflict of Interest Rule
114th CONGRESS, SECOND SESSION
APRIL 26, 2016

Committee Democrats strongly oppose H.J. RES. 88, which would block the Department of Labor's (DOL's) final rule protecting workers' hard-earned retirement savings and ensuring financial advisors act in the best interest of their retirement clients.

For far too long, some financial advisors have exploited loopholes in a decades-old DOL regulation that governs investment advice for retirement savers. As a result of these loopholes, these unscrupulous advisors were able to steer their retirement clients toward financial products that yielded the advisor a big commission but were not in their clients' best interest.

This practice is referred to as providing "conflicted advice." Conflicted advice costs retirement plan participants $17 billion in losses every year and could result in a loss of almost a quarter of an individual's savings over a 35-year period.[1]

The most common point at which conflicted advice occurs is when workers are about to retire and roll over their employer-based retirement account, such as a 401(k), into an Individual Retirement Account (IRA) or other financial product. According to the White House, "a typical worker who receives conflicted advice when rolling over a 401(k) balance to an IRA at age 45 will lose an estimated 17 percent from her account by age 65. In other words, if a worker has $100,000 in retirement savings at age 45, without conflicted advice it would grow to an estimated $216,000 by age 65 adjusted for inflation, but if she receives conflicted advice it would grow to $179,000—a loss of $37,000 or 17 percent."[2]

Committee Democrats believe that, after a lifetime of hard-work and sacrifice, these workers should be guaranteed that the financial advice they receive about their retirement savings will be in their best interest. Retirement savers expect that the advice they receive is in their best interest, and they rely on it accordingly. Unfortunately, under the existing loophole-ridden regulation, that is not always the case. The DOL's final rule provides a responsible solution by expanding the circumstances under which advisers must abide by a fiduciary standard and requiring them to disclose conflicts of interest. The final rule will help hardworking Americans enjoy a more secure and dignified retirement.

H.J. RES. 88 nullifies this rule and leaves in place the unacceptable status quo that enables certain financial advisors to put their interests ahead of their clients'.

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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://www.whitehouse.gov/sites/default/files/docs/cea_coi_report_final.pdf.

[2] White House, "Fact Sheet: Middle Class Economics: Strengthening Retirement Security by Cracking Down on Conflicts of Interest in Retirement Savings," (April 2016); available at: https://www.whitehouse.gov/the-press-office/2016/04/06/fact-sheet-middle-class-economics-strengthening-retirement-security.

COMMITTEE REPUBLICANS MOVED WITH RECORD-BREAKING HASTE TO BLOCK THE DOL'S FINAL RULE

DOL's final rule was the product of a thorough and transparent process. The DOL conducted hundreds of meetings on the rule and provided the American public nearly six months to provide feedback. On April 8, 2016, DOL published its final conflict of interest rule in the Federal Register, which included significant changes in response to the feedback DOL had received.[3] Nonetheless, eleven days later on April 19, 2016, three House Republicans introduced H.J. RES. 88, a joint resolution of disapproval of the rule under the Congressional Review Act (CRA). On Thursday, April 21, the Committee on Education and the Workforce held a mark-up of H.J. RES. 88.

In contrast to the DOL's deliberative process, Committee Republicans rushed ahead with a mark-up of H.J. RES. 88 only 48 hours after it was introduced. On top of this, Committee Republicans convened a mark-up of H.J. RES. 88 only thirteen days after the publication of DOL's final conflict of interest rule in the Federal Register. Based on a Congressional Research Service (CRS) historical review of mark-ups of joint resolutions of disapproval under the CRA that have been convened by House and Senate Committees, thirteen days appears to be *the shortest timespan ever* between issuance or publication of a final rule and a Committee's CRA mark-up. On average, there have been 55 days between issuance or publication of a final rule and a scheduled mark-up of a CRA resolution of disapproval.

THE DOL MADE SIGNIFICANT CHANGES TO THE RULE IN RESPONSE TO COMMENTS FROM STAKEHOLDERS

Committee Democrats believe the DOL struck an appropriate balance between accommodating congressional, industry, and other stakeholder concerns without compromising core retirement investor protections. Throughout the process, Secretary Perez repeatedly stated that the final rule would reflect the feedback provided by stakeholders. Secretary Perez lived up to his word, as the final rule was changed in meaningful ways in response to stakeholder input. For instance, the majority of the comments focused on the best interest contract exemption (BICE). The DOL made important modifications to the BICE's disclosure and notice requirements as well as the timing and execution of the contract to make the final rule more workable overall.

The ill-advised haste with which Committee Republicans have rushed to judgment on this rule is all the more curious when considering these and other modifications, as well as the initial positive reactions to the rule from industry and others.

A VARIETY OF STAKEHOLDERS, INCLUDING INDUSTRY, EXPRESSED SUPPORT FOR THE DOL'S FINAL RULE AND ACKNOWLEDGED THE FINAL RULE'S RESPONSIVENESS TO THEIR FEEDBACK

[3] 81Fed. Reg. 20945 (April 2016); available at: https://www.federalregister.gov/articles/2016/04/08/2016-07924/definition-of-the-term-fiduciary-conflict-of-interest-rule-retirement-investment-advice.

A wide range of stakeholders – including industry representatives – have expressed their initial support for the final rule. For instance, John Thiel, who is the head of Merrill Lynch's Wealth Management, said they were "pleased that Secretary Perez and the Department of Labor staff have worked to address many of the practical concerns raised during the comment period."[4] Roger Ferguson, the president and CEO of TIAA, said "based on our preliminary analysis, it appears the Department has gone a long way toward making the best interest standard the industry standard."[5]

Morgan Stanley said the Labor Department's final version of fiduciary rules were "meaningfully softened in several aspects" from the original proposal.[6]

The Financial Industry Regulatory Authority (FINRA), which was one of the most vigorous critics of the DOL's proposed rule, and which "filed one of the most pointed comment letters last summer about the proposed rule," appears to have changed its view after seeing the final rule.[7] FINRA's chairman and chief executive, Richard Ketchum, "praised DOL for 'making some very significant changes' to the measure that will make it operate better."[8] Mr. Ketchum reportedly said that he thinks the "final rule is much better."[9]

At the same time, DOL has maintained the support of a wide and diverse coalition of stakeholders that have championed the conflict of interest rule since the promulgation of the proposed rule. Such organizations comprise the "Save Our Retirement Coalition" and include: AARP, AFL-CIO, Alliance for Retired Americans, American Association for Justice, American Association of University Women, American Federation of Government Employees (AFGE), American Federation of State, County and Municipal Employees (AFSCME), Americans for Financial Reform, Association of University Centers on Disabilities, Better Markets, B'nai B'rith International, Center for Economic Justice, Center for Responsible Lending, Committee for the Fiduciary Standard, Consumer Action, Consumer Federation of America, Consumers Union, Demos, International Association of Machinists and Aerospace Workers, International Brotherhood of Boilermakers, International Brotherhood of Electrical Workers (IBEW), International Union, United Automobile, Aerospace, & Agricultural Implement Workers of America (UAW), Justice in Aging, Leadership Conference on Civil and Human Rights, Main Street Alliance, Metal Trades Department, AFL-CIO, National Active and Retired Federal Employees Association (NARFE), National Consumers League, National Council of La Raza, National Women's Law Center, NAACP, National Education Association, Public Citizen, Public Investors Arbitration Bar Association, Rebalance IRA, United Food and Commercial Workers

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[4] Reuters, "Merrill Lynch Sees Many Industry Concerns Addressed In Retirement Advice Rule," (April 2016); available at: http://in.reuters.com/article/bank-of-america-fiduciary-idINL2N1790TQ.

[5] Reuters, "TIAA Statement on Department of Labor Fiduciary Rule," (April 2016); available at: http://www.reuters.com/article/dc-tiaa-idUSnBw065764a+100+BSW20160406.

[6] Wall Street Journal, "Reactions to the Labor Department's Fiduciary Rule," (April 2016); available at: http://www.wsj.com/articles/reactions-to-the-labor-departments-fiduciary-rule-1459954904.

[7] Investment News, "An Original Critic, FINRA's Ketchum Praises Improvements in Final DOL Fiduciary Rule," (April 2016); available at: http://www.investmentnews.com/article/20160415/FREE/160419932/an-original-critic-finras-ketchum-praises-improvements-in-final-dol.

[8] *Id.*

[9] *Id.*

(UFCW), United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (USW), U.S. PIRG, and Young Invincibles.

The Save Our Retirement Coalition issued a letter in opposition to H.J. RES. 88 that voiced thoughtful support for the rule. The Coalition's letter said "the rule will at long last require all financial professionals who provide retirement investment advice to put their clients' best interests ahead of their own financial interests. By taking this essential step, the rule will help all Americans -- many of whom are responsible for making their own decisions about how best to invest their retirement savings -- keep more of their hard-earned savings so they can enjoy a more financially secure and independent retirement."[10]

ROLL CALL VOTES ON FINAL PASSAGE

H.J.RES.88 was reported by straight party-line votes of 22 ayes and 14 nays. No Democratic Committee Members voted in favor of the bill.

Congresswoman Frederica Wilson (D-FL) issued a statement following the Committee mark-up, saying she "was unavoidably detained and missed the vote." According to Congresswoman Wilson's statement, she would have voted "nay" had she been present.

CONCLUSION

In its record-setting rush to nullify the DOL's final rule through a CRA joint resolution of disapproval, Committee Republicans are jeopardizing workers' ability to receive retirement investment advice that is in their best interest. Committee Democrats reject this misguided and unnecessarily partisan approach.

Instead of wasting precious time and resources on this joint resolution, the Education and Workforce Committee should be helping working families make ends meet so that they can provide a better future for their children and grandchildren. For instance, in the scarce time that remains this year, the Committee should be taking up legislation that would boost workers' wages, help workers achieve a better balance between work and family life, end workplace discrimination, and strengthen our retirement system.

For the reasons stated above, among others, we stood together in opposing H.J. RES. 88 when it was hastily considered by the Education and Workforce Committee. We respectfully recommend that the full House of Representatives do the same.

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[10] Save our Retirement Coalition, "Oppose the Resolution to block DOL's final conflict of interest rule," (April 2016); available at: http://saveourretirement.com/2016/04/re-oppose-the-resolution-to-block-dols-final-conflict-of-interest-rule/.

ROBERT C. "BOBBY" SCOTT
Ranking Member

RUBÉN HINOJOSA

SUSAN A. DAVIS

RAÚL M. GRIJALVA

JOE COURTNEY

MARCIA L. FUDGE

JARED POLIS

FREDERICA S. WILSON

SUZANNE BONAMICI

MARK POCAN

MARK TAKANO

HAKEEM S. JEFFRIES

KATHERINE M. CLARK

ALMA S. ADAMS

MARK DeSAULNIER

114TH CONGRESS
2D SESSION

H. J. RES. 88

[Report No. 114–]

Disapproving the rule submitted by the Department of Labor relating to the definition of the term "Fiduciary".

IN THE HOUSE OF REPRESENTATIVES

APRIL 19, 2016

Mr. ROE of Tennessee (for himself, Mr. BOUSTANY, and Mrs. WAGNER) introduced the following joint resolution; which was referred to the Committee on Education and the Workforce, and in addition to the Committee on Ways and Means, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

APRIL --, 2016

Reported from the Committee on Education and the Workforce

JOINT RESOLUTION

Disapproving the rule submitted by the Department of Labor relating to the definition of the term "Fiduciary".

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That Congress disapproves the rule submitted by the Department of Labor relating to "Definition of the Term 'Fiduciary'; Conflict of Interest Rule—Retirement Invest-

ment Advice" (published at 81 Fed. Reg. 20946 (April 8, 2016)), and such rule shall have no force or effect.

114TH CONGRESS
2D SESSION

H. J. RES. 88

Disapproving the rule submitted by the Department of Labor relating to the definition of the term "Fiduciary".

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114TH CONGRESS
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114TH CONGRESS
2D SESSION

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