EDUCATION AND THE WORKFORCE
COMMITTEE CHAIRWOMAN VIRGINIA FOXX

BILL SUMMARY

AFFORDABLE RETIREMENT ADVICE FOR SAVERS ACT

Introduced by Rep. Phil Roe (R-TN), the *Affordable Retirement Advice for Savers Act* (H.R. 2823) repeals the Obama administration's fiduciary rule and protects access to affordable retirement advice for low- and middle-income families. The legislation also establishes a statutory definition of "investment advice" and ensures retirement advisors serve their clients' best interests.

BACKGROUND

Under the *Employee Retirement Income Security Act* (ERISA), anyone that exercises discretionary authority over a benefit plan's management, assets, or administration or provides "investment advice" for a fee to the plan is a "fiduciary." Once this relationship is established, a fiduciary must act "solely in the interest of the participants and beneficiaries" for the "exclusive purpose" of providing benefits and defraying expenses. The fiduciary must also act "with the skill, prudence, and diligence" of a prudent person.

For more than 40 years, the Department of Labor (DOL) used a five-part test to determine fiduciary status under ERISA with respect to providers of "investment advice." Under that test, an advisor was an ERISA fiduciary if the advice: (1) was provided on a "regular basis"; (2) was provided for a fee, either direct or indirect; (3) was provided pursuant to a "mutual agreement, arrangement, or understanding"; (4) was individualized to the plan's particular needs; and (5) served as a "primary basis" for the investment decision. ERISA and the Internal Revenue Code bar fiduciaries to employer-provided plans and IRAs from certain transactions. These complex restrictions are collectively known as the "prohibited transaction" rules.

ACCESS TO AFFORDABLE RETIREMENT ADVICE

In 2016, DOL under the Obama administration finalized a new fiduciary rule and changes to the prohibited transaction rules designed to expand fiduciary liability and impose new requirements on retirement service providers. The rule effectively eliminated the "regular basis," "mutual agreement," and "primary basis" prongs of the five-part test. DOL also issued exemptions from the prohibited transaction rules if the retirement service provider fulfilled a number of conditions. The centerpiece of the "Best Interest Contract Exemption" is a requirement that the advisor sign a contract promising to provide advice only in the client's best interest. However, the exemption was unworkable.

Under this exemption and the regulation, advisors would be subject to class action litigation, and previously provided basic services would trigger fiduciary liability. Legal liability associated with commission-based accounts would increase, reducing a critical pathway to advice for those with fewer savings. Financial advisors would also not be able to service small businesses without triggering fiduciary liability, likely leading to a market exodus. As a result, the rule would jeopardize access to affordable retirement advice, undermine the creation of small business retirement plans, and leave many Americans with no choice but to fend for themselves or search for advice online.

H.R. 2823 overturns the Obama administration's regulation in order to:

- Protect access to affordable retirement advice for low- and middle-income families.
- Ensure small businesses have access to the advice they need to set up retirement plans for their employees.
- Permit advice for basic services, such as assistance in rolling over funds from a 401(k).

STRONG PROTECTIONS FOR RETIREMENT SAVERS

Unlike the Obama administration's fiduciary rule, H.R. 2823 ensures retirement advisors act in their clients' best interests without hurting low- and middle-income retirement savers. It does this by amending ERISA and the Internal Revenue Code to establish a statutory definition of "investment advice" and ensure that all financial professionals providing personalized advice about retirement investments, distributions, or the use of other advisors are legally required to act in the best interest of their clients.

The bill defines "investment advice" more broadly than DOL's 1975 regulation, expanding the universe of activities that are subject to fiduciary liability. Under the bill, a fiduciary relationship occurs any time an advisor provides one of a broad array of recommendations relating to retirement accounts. The relationship occurs when there is an acknowledgement of fiduciary status or a mutual agreement that the advice is personalized and that the advice recipient intends to materially rely on the recommendation when making decisions about plan assets.

The bill also prohibits an advisor from disclaiming a mutual agreement unless the advisor makes certain explicit disclosures and an objective person would reasonably conclude there was no mutual agreement. Additionally, advice is exempt from the prohibited transaction rules so long as only reasonable compensation is paid and certain disclosure requirements are met. The bill also amends the tax code to provide an exemption from the prohibited transaction rules if, among other requirements, an advisor places the interest of the client above the advisor's own.

H.R. 2823:

- Ensures personalized advice about investments, distributions, or hiring other advisors triggers fiduciary obligations.
- Requires financial professionals who advise IRAs to act in the best interests of their clients.
- Adds a provision to the tax code requiring, as a condition of an exemption, that the advisor act with "care, skill, prudence, and diligence" based on the situation and must place the interest of the client above its own.
- Preserves the ability of retirement savers to receive financial education, such as examples of investment alternatives that fit within asset classes.
- Encourages creation of new small-business retirement plans by permitting advisors to provide information to small businesses without incurring fiduciary liability.
- Enables personalized advice for low-balance accounts by rejecting the Obama administration's rules requiring commission-based advisors to comply with impractical reporting requirements.
- Permits advice regarding 401(k) distributions (including rollovers), so long as the advice is in the participant's best interest.
- Provides workable compliance and transition rules, unlike the Obama administration's fiduciary rule. For example, under the bill, advisors would have two years to comply with the new requirements.