Consumer Federation of America

July 17, 2017

The Honorable Virginia Foxx
Chair
Education and Workforce Committee
U.S. House of Representatives

The Honorable Bobby Scott
Ranking Member
Education and Workforce Committee
U.S. House of Representatives

Dear Chair Foxx, Ranking Member Scott, and Members of the Committee:

We are writing to express our strong opposition to H.R. 2823, the "Affordable Retirement Advice for Savers Act," which we understand is scheduled for mark-up on Wednesday. This bill is being sold as a more workable alternative to the Department of Labor's conflict of interest (or "fiduciary") rule, which it would repeal. In fact, this bill would leave retirement savers with fewer protections than they enjoyed *before* the DOL rule was finalized. It must not be enacted.

1) The bill reopens loopholes that give financial firms an easy escape hatch to avoid their fiduciary obligations when providing retirement investment advice. For decades before the DOL rule was adopted, loopholes in the definition of fiduciary investment advice enabled broker-dealers, insurance agents and other sales-based financial professionals to easily avoid their fiduciary obligations when providing investment recommendations to retirement plans, plan participants, and IRA investors. H.R. 2823 recreates those same loopholes using slightly different words, by requiring a mutual agreement or understanding between the advice provider and the advice recipient that the recommendation in question is personalized for the recipient and intended to serve as a material basis for the recipient's investment decision. As a result, a retirement saver could reasonably believe she was receiving personalized advice (based, for example, on how the services were marketed), rely exclusively on that advice in making her investment decision, and still not be deemed to be in an advisory relationship under the terms of this bill so long as the adviser provided the required boilerplate disclaimer. This approach not only ignores extensive research demonstrating the ineffectiveness of such disclaimers in protecting investors, it makes a mockery of the purpose of such investment recommendations and the reasons investors turn to financial professionals in the first place.

2) The bill adopts a weaker standard for retirement advice than applied before the DOL rule was adopted. Before DOL finalized its revised fiduciary rule, those financial professionals who did meet the definition of fiduciary investment advice under ERISA were held to a high fiduciary standard to act solely in the interest of the plan and plan participants. This standard recognized the delicate relationship of trust that exists between advisers and their clients, the national interest in ensuring that retirement savings are protected, and the potential for conflicts of interest to undermine those protections. Under H.R. 2823, however, investment recommendations to plans and plan participants would be permissible, regardless of the extent of the conflicts and without any obligation to serve the best interests of the customer, so long as no more than reasonable compensation is received and a few poorly timed boilerplate disclosures are provided. Advice to IRA investors would be subject to a purported best interest standard under the bill, but that standard is drafted using language from FINRA's suitability standard and imposes a due diligence requirement that is far weaker than FINRA's "know your customer" rules. In short, this best interest standard in name only would continue to allow self-interested sales recommendations to pass for best interest advice. Adding insult to injury, rollover recommendations are included in the definition of investment advice under both sections of the bill, leaving no way to determine which of these watered down standards would apply.

3) The bill gives free rein to practices that encourage and reward advice that is not in customers' best interest. The key to the DOL rule's effectiveness is its recognition that, if we want sales-based "advisers" to act in customers' best interest, we have to dismantle the complex web of toxic financial incentives that encourage and reward advice that is not in customers' best interest. This includes, in particular, paying brokers and insurance agents more to sell certain products that are more profitable for the adviser's firm over other readily available alternatives. Under common industry practices, the highest rewards often go for sales of opaque, illiquid, and high-cost products that offer a poor return for retirement savers or expose them to inappropriate risks. Instead of requiring firms to rein in such practices, as the DOL rule requires, H.R. 2823 would give them free rein as long as a few poorly worded boilerplate disclosures were provided. The proposed disclosures would give investors no idea of the magnitude of the conflicts involved. Study after study has shown that such disclosures are entirely ineffective in arming investors to protect themselves against the harmful impact of such conflicts. If these practices are allowed to persist, as they would be under this bill, investors will continue to be harmed and their retirement security will continue to be put at risk.

* * *

H.R. 2823 would strip away protections from working families and retirees just as the DOL fiduciary rule is beginning to deliver the best interest advice they expect and deserve. Since the rule was finalized a little over a year ago, firms of all types and sizes have announced implementation plans that prove that the rule is both workable and working as intended to rein in conflicts, improve investment products, and reduce investor costs, all while preserving access to advice for even the smallest accountholders. Indeed, since brokers and insurance agents are now required to provide fiduciary advice and not just self-interested sales recommendations dressed up as advice, retirement savers' access to *genuine* advice has been dramatically expanded as a result of the rule. The only thing standing between retirement savers and the full benefits of the rule is uncertainty over its fate caused by both the ongoing reconsideration of the rule by DOL and by legislative efforts such as this.

Enacting H.R. 2823 would put the retirement security of millions of Americans at risk. We urge you to act in the best interests of working families and retirees and oppose this bill when it is marked up this week.

Respectfully submitted,

Barbara Roper

Barbara Roper
Director of Investor Protection

Micah Hauptman

Micah Hauptman
Financial Services Counsel