

114TH CONGRESS
1ST SESSION

H. R. 4293

To amend the Employee Retirement Income Security Act of 1974 to ensure that retirement investors receive advice in their best interests, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

DECEMBER 18, 2015

Mr. ROE of Tennessee (for himself, Mr. NEAL, Mr. ROSKAM, Mr. LARSON of Connecticut, Mr. CARTER of Georgia, and Mr. DAVID SCOTT of Georgia) introduced the following bill; which was referred to the Committee on Education and the Workforce

A BILL

To amend the Employee Retirement Income Security Act of 1974 to ensure that retirement investors receive advice in their best interests, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Affordable Retirement
5 Advice Protection Act”.

6 **SEC. 2. PURPOSE.**

7 The purpose of this Act is to provide that advisors
8 who—

1 (1) provide advice that is impermissible under
 2 the prohibited transaction provisions under section
 3 406 of the Employee Retirement Income Security
 4 Act of 1974, or

5 (2) breach the best interest standard for the
 6 provision of investment advice,

7 are subject to liability under the Employee Retirement In-
 8 come Security Act of 1974.

9 **SEC. 3. RULES RELATING TO THE PROVISION OF INVEST-**
 10 **MENT ADVICE.**

11 (a) AMENDMENTS TO THE EMPLOYEE RETIREMENT
 12 INCOME SECURITY ACT OF 1974.—

13 (1) DEFINITION OF INVESTMENT ADVICE.—

14 Section 3(21) of the Employee Retirement Income
 15 Security Act of 1974 (29 U.S.C. 1002(21)) is
 16 amended by adding at the end the following:

17 “(C)(i) For purposes of clause (ii) of subparagraph
 18 (A), the term ‘investment advice’ means a recommenda-
 19 tion that—

20 “(I) relates to—

21 “(aa) the advisability of acquiring, holding,
 22 disposing, or exchanging any moneys or other
 23 property of a plan by the plan, plan partici-
 24 pants, or plan beneficiaries, including any rec-
 25 ommendation whether to take a distribution of

benefits from such plan or any recommendation relating to the investment of any moneys or other property of such plan to be rolled over or otherwise distributed from such plan;

“(bb) the management of moneys or other property of such plan, including recommendations relating to the management of moneys or other property to be rolled over or otherwise distributed from such plan; or

“(cc) the advisability of retaining or ceasing to retain a person who would receive a fee or other compensation for providing any of the types of advice described in this subclause; and
“(II) is rendered pursuant to—

“(aa) a written acknowledgment of the obligation of the advisor to comply with section 404 with respect to the provision of such recommendation; or

“(bb) a mutual agreement, arrangement, or understanding, which may include limitations on scope, timing, and responsibility to provide ongoing monitoring or advice services, between the person making such recommendation and the plan that such recommendation is individualized to the plan and such plan intends to

1 materially rely on such recommendation in
2 making investment or management decisions
3 with respect to any moneys or other property of
4 such plan.

5 “(ii) For purposes of clause (i)(II)(bb), any dis-
6 claimer of a mutual agreement, arrangement, or under-
7 standing shall only state the following: ‘This information
8 is not individualized to you, and there is no intent for you
9 to materially rely on this information in making invest-
10 ment or management decisions.’. Such disclaimer shall not
11 be effective unless such disclaimer is in writing and is
12 communicated in a clear and prominent manner and an
13 objective person would reasonably conclude that, based on
14 all the facts and circumstances, there was not a mutual
15 agreement, arrangement, or understanding.

16 “(iii) For purposes of clause (i)(II)(bb), information
17 shall not be considered to be a recommendation made pur-
18 suant to a mutual agreement, arrangement, or under-
19 standing, and such information shall contain the dis-
20 claimer required by clause (ii), if—

21 “(I) it is provided in conjunction with full and
22 fair disclosure in writing to a plan, plan participant,
23 or beneficiary that the person providing the informa-
24 tion is doing so in its marketing or sales capacity,
25 including any information regarding the terms and

1 conditions of the engagement of the person providing
2 the information, and that the person is not intending
3 to provide investment advice within the meaning of
4 this subparagraph or to otherwise act within and
5 under the obligations of the best interest standard
6 as described in this subparagraph;

7 “(II) the person providing the information is a
8 counterparty or service provider to the plan in con-
9 nection with any transaction based on the informa-
10 tion (including a service arrangement, sale, pur-
11 chase, loan, bilateral contract, swap (as defined in
12 section 1a of the Commodity Exchange Act (7
13 U.S.C. 1a)), or security-based swap (as defined in
14 section 3(a) of the Securities Exchange Act (15
15 U.S.C. 78c(a))))), but only if—

16 “(aa) the plan is represented, in connection
17 with such transaction, by a plan fiduciary who
18 is independent of the person providing the in-
19 formation, and, except in the case of a swap or
20 security-based swap, independent of the plan
21 sponsor; and

22 “(bb) prior to such transaction, the inde-
23 pendent plan fiduciary represents in writing to
24 the person providing the information that it is
25 aware that the person has a financial interest

1 in the transaction and that it has determined
2 that the person is not intending to provide in-
3 vestment advice within the meaning of this sub-
4 paragraph or to otherwise act as a fiduciary to
5 the plan subject to section 404;

6 “(III) the person providing the information is
7 an employee of any sponsoring employer or employee
8 organization who provides the information to the
9 plan for no fee or other compensation other than the
10 employee’s normal compensation;

11 “(IV) the person providing the information dis-
12 closes in writing to the plan fiduciary that the per-
13 son is not undertaking to provide investment advice
14 as a fiduciary to the plan subject to section 404 and
15 the information consists solely of—

16 “(aa) making available to the plan, without
17 regard to the individualized needs of the plan,
18 securities or other property through a platform
19 or similar mechanism from which a plan fidu-
20 ciary may select or monitor investment alter-
21 natives, including qualified default investment
22 alternatives, into which plan participants or
23 beneficiaries may direct the investment of as-
24 sets held in, or contributed to, their individual
25 accounts; or

1 “(bb) in connection with a platform or
2 similar mechanism described in item (aa)—

3 “(AA) identifying investment alter-
4 natives that meet objective criteria speci-
5 fied by the plan, such as criteria con-
6 cerning expense ratios, fund sizes, types of
7 asset, or credit quality; or

8 “(BB) providing objective financial
9 data and comparisons with independent
10 benchmarks to the plan;

11 “(V) the information consists solely of valuation
12 information; or

13 “(VI) the information consists solely of—

14 “(aa) information described in Department
15 of Labor Interpretive Bulletin 96–1 (29 C.F.R.
16 2509.96–1, as in effect on January 1, 2015),
17 regardless of whether such education is pro-
18 vided to a plan or plan fiduciary or a partici-
19 pant or beneficiary;

20 “(bb) information provided to participants
21 or beneficiaries regarding the factors to con-
22 sider in deciding whether to elect to receive a
23 distribution from a plan or an individual retire-
24 ment plan (as defined in section 7701(a)(37) of
25 the Internal Revenue Code of 1986) and wheth-

er to roll over such distribution to a plan or an individual retirement plan (as defined in section 7701(a)(37) of the Internal Revenue Code of 1986), so long as any examples of different distribution and rollover alternatives are accompanied by all material facts and assumptions on which the examples are based; or

“(cc) any additional information treated as education by the Secretary.”.

(2) EXEMPTION RELATING TO INVESTMENT ADVICE.—Section 408(b) of the Employee Retirement Income Security Act of 1974 is amended by adding at the end the following:

“(21)(A) Any transaction, including a contract for service, between a person providing investment advice described in section 3(21)(A)(ii) and the advice recipient in connection with such investment advice, and any transaction consisting of the provision of such investment advice, if the following conditions are satisfied:

“(i) No more than reasonable compensation is paid (as determined under section 408(b)(2)) for such investment advice.

“(ii) If the investment advice is based on a limited range of investment options (which

1 may consist, in whole or in part, of proprietary
2 products), such limitations, including a clearly-
3 stated notice that the same or similar invest-
4 ments may be available at a different cost
5 (greater or lesser) from other sources, shall be
6 clearly disclosed to the advice recipient prior to
7 any transaction based on the investment advice.
8 The notice shall only state the following: ‘The
9 same or similar investments may be available at
10 a different cost (greater or lesser) from other
11 sources.’.

12 “(iii) If the investment advice may result
13 in variable compensation to the person pro-
14 viding the investment advice (or any affiliate of
15 such person), the receipt of such compensation,
16 including a clearly-stated notice that the same
17 or similar investments may be available at a
18 different cost (greater or lesser) from other
19 sources, shall be clearly disclosed to the advice
20 recipient. The notice shall only state the fol-
21 lowing: ‘The same or similar investments may
22 be available at a different cost (greater or less-
23 er) from other sources.’ For purposes of this
24 subparagraph, clear disclosure of variable com-
25 pensation means notification prior to any trans-

1 action based on the recommendation, in a man-
2 ner calculated to be understood by the average
3 individual, of the following:

4 “(I) A notice that the person pro-
5 viding the recommendation (or its affiliate)
6 may receive varying amounts of fees or
7 other compensation with respect to such
8 transaction.

9 “(II) A description of any fee or other
10 compensation that is directly payable to
11 the person (or its affiliate) from the advice
12 recipient with respect to such transaction
13 (expressed as an amount, formula, percent-
14 age of assets, per capita charge, or esti-
15 mate or range of such compensation).

16 “(III) A description of the types and
17 ranges of any indirect compensation that
18 may be paid to the person (or its affiliate)
19 by any third party in connection with such
20 transaction (expressed as an amount, for-
21 mula, percentage of assets, per capita
22 charge, or estimate of such ranges of com-
23 pensation).

24 “(IV) Upon request of the advice re-
25 cipient, a disclosure of the specific

1 amounts of compensation described in
2 clause (iii) that the person will receive in
3 connection with the particular transaction
4 (expressed as an amount, formula, percent-
5 age of assets, per capita charge, or esti-
6 mate of such compensation).

7 “(B) No recommendation will fail to satisfy the
8 conditions described in clauses (i) through (iii) of
9 subparagraph (A) solely because the person, acting
10 in good faith and with reasonable diligence, makes
11 an error or omission in disclosing the information
12 specified in such clauses, provided that the person
13 discloses the correct information to the advice recipi-
14 ent as soon as practicable, but not later than 30
15 days from the date on which the person knows of
16 such error or omission.

17 “(C) For purposes of this paragraph, the term
18 ‘affiliate’ has the meaning given in subsection
19 (g)(11)(B).”.

20 (b) EFFECTIVE DATE.—

21 (1) MODIFICATION OF CERTAIN RULES, AND
22 RULES AND ADMINISTRATIVE POSITIONS PROMUL-
23 GATED BEFORE ENACTMENT BUT NOT EFFECTIVE
24 ON JANUARY 1, 2015, PROHIBITED.—The Depart-
25 ment of Labor is prohibited from amending any

1 rules or administrative positions promulgated under,
2 or applicable for purposes of, section 3(21) of the
3 Employee Retirement Income Security Act of 1974
4 (including Department of Labor Interpretive Bul-
5 letin 96–1 (29 C.F.R. 2509.96–1) and Department
6 of Labor Advisory Opinion 2005–23A), and no such
7 rule or administrative position promulgated by the
8 Department of Labor prior to the date of the enact-
9 ment of this Act but not effective on January 1,
10 2015, may become effective unless a bill or joint res-
11 olution referred to in paragraph (3) is enacted as de-
12 scribed in such paragraph not later than 60 days
13 after the date of the enactment of this Act.

14 (2) GENERAL EFFECTIVE DATE OF AMEND-
15 MENTS.—Except as provided in paragraph (3), the
16 amendments made by subsection (a) of this section
17 shall take effect on the 61st day after the date of
18 the enactment of this Act and shall apply with re-
19 spect to information provided or recommendations
20 made on or after 2 years after the date of the enact-
21 ment of this Act.

22 (3) EXCEPTION.—If a bill or joint resolution is
23 enacted prior to the 61st day after the date of the
24 enactment of this Act that specifically approves any
25 rules or administrative positions promulgated under,

1 or applicable for purposes of, section 3(21) of the
2 Employee Retirement Income Security Act of 1974
3 that is not in effect on January 1, 2015, the amend-
4 ments made by subsection (a) of this section shall
5 not take effect.

6 (c) GRANDFATHERED TRANSACTIONS AND SERV-
7 ICES.—The amendments made by subsection (a) shall not
8 apply to any service or transaction rendered, entered into,
9 or for which a person has been compensated prior to the
10 date on which the amendments made by subsection (a)
11 of this Act become effective under subsection (b)(2).

12 (d) TRANSITION.—If the amendments made by sub-
13 section (a) of this section take effect, then nothing in this
14 section shall be construed to prohibit the issuance of guid-
15 ance to carry out such amendments so long as such guid-
16 ance is necessary to implement such amendments. Until
17 such time as regulations or other guidance are issued to
18 carry out such amendments, a plan and a fiduciary shall
19 be treated as meeting the requirements of such amend-
20 ments if the plan or fiduciary, as the case may be, makes
21 a good faith effort to comply with such requirements.

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