

Union Calendar No. 391

114TH CONGRESS
2^D SESSION

H. R. 4293

[Report No. 114-511]

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

APRIL 20, 2016

Additional sponsors: Ms. MICHELLE LUJAN GRISHAM of New Mexico, Mr. REED, Mr. YOUNG of Indiana, Mr. BYRNE, Mr. BOUSTANY, Mr. WILSON of South Carolina, Mr. CLAY, Mr. HOLDING, Mr. RENACCI, Ms. JENKINS of Kansas, Mrs. WALORSKI, Mr. MACARTHUR, Mr. PAULSEN, Mr. ASHFORD, Mr. ZINKE, Mr. DUNCAN of Tennessee, Mr. THOMPSON of Pennsylvania, Mr. GIBBS, Mr. GUTHRIE, Mr. BISHOP of Michigan, Mr. TIBERI, Mr. MEEHAN, Mr. NUNES, Mr. REICHERT, Mr. ALLEN, Mr. BARLETTA, Mr. MARCHANT, Mr. OLSON, Mr. CRAMER, Mr. LATTA, Mr. AMODEI, Mr. GOHMERT, and Mr. SESSIONS

APRIL 20, 2016

Reported with an amendment, committed to the Committee of the Whole House on the State of the Union, and ordered to be printed

[Strike out all after the enacting clause and insert the part printed in *italie*]

[For text of introduced bill, see copy of bill as introduced on December 18, 2015]

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—*

9 (1) *provide advice that is impermissible under*
10 *the prohibited transaction provisions under section*
11 *406 of the Employee Retirement Income Security Act*
12 *of 1974, or*

13 (2) *breach the best interest standard for the pro-*
14 *vision of investment advice,*
15 *are subject to liability under the Employee Retirement In-*
16 *come Security Act of 1974.*

17 **SEC. 3. RULES RELATING TO THE PROVISION OF INVEST-**
18 **MENT ADVICE.**

19 (a) *AMENDMENTS TO THE EMPLOYEE RETIREMENT*
20 *INCOME SECURITY ACT OF 1974.—*

21 (1) *DEFINITION OF INVESTMENT ADVICE.—Sec-*
22 *tion 3(21) of the Employee Retirement Income Secu-*
23 *rity Act of 1974 (29 U.S.C. 1002(21)) is amended by*
24 *adding at the end the following:*

1 “(C)(i) For purposes of clause (ii) of subparagraph
2 (A), the term ‘investment advice’ means a recommendation
3 that—

4 “(I) relates to—

5 “(aa) the advisability of acquiring, holding,
6 disposing, or exchanging any moneys or other
7 property of a plan by the plan, plan partici-
8 pants, or plan beneficiaries, including any rec-
9 ommendation whether to take a distribution of
10 benefits from such plan or any recommendation
11 relating to the investment of any moneys or
12 other property of such plan to be distributed
13 from such plan;

14 “(bb) the management of moneys or other
15 property of such plan, including recommenda-
16 tions relating to the management of moneys or
17 other property to be distributed from such plan;
18 or

19 “(cc) the advisability of retaining or ceas-
20 ing to retain a person who would receive a fee
21 or other compensation for providing any of the
22 types of advice described in this subclause; and

23 “(II) is rendered pursuant to—

24 “(aa) a written acknowledgment of the obli-
25 gation of the advisor to comply with section 404

1 *with respect to the provision of such rec-*
2 *ommendation; or*

3 “(bb) *a mutual agreement, arrangement, or*
4 *understanding, which may include limitations*
5 *on scope, timing, and responsibility to provide*
6 *ongoing monitoring or advice services, between*
7 *the person making such recommendation and the*
8 *plan that such recommendation is individualized*
9 *to the plan and such plan intends to materially*
10 *rely on such recommendation in making invest-*
11 *ment or management decisions with respect to*
12 *any moneys or other property of such plan.*

13 “(ii) *For purposes of clause (i)(II)(bb), any disclaimer*
14 *of a mutual agreement, arrangement, or understanding*
15 *shall only state the following: ‘This information is not indi-*
16 *vidualized to you, and you are not intended to materially*
17 *rely on this information in making investment or manage-*
18 *ment decisions.’. Such disclaimer shall not be effective un-*
19 *less such disclaimer is in writing and is communicated in*
20 *a clear and prominent manner and an objective person*
21 *would reasonably conclude that, based on all the facts and*
22 *circumstances, there was not a mutual agreement, arrange-*
23 *ment, or understanding.*

24 “(iii) *For purposes of clause (i)(II)(bb), information*
25 *shall not be considered to be a recommendation made pursu-*

1 *ant to a mutual agreement, arrangement, or understanding,*
2 *and such information shall contain the disclaimer required*
3 *by clause (ii), if—*

4 “(I) *it is provided in conjunction with full and*
5 *fair disclosure in writing to a plan, plan participant,*
6 *or beneficiary that the person providing the informa-*
7 *tion is doing so in its marketing or sales capacity,*
8 *including any information regarding the terms and*
9 *conditions of the engagement of the person providing*
10 *the information, and that the person is not intending*
11 *to provide investment advice within the meaning of*
12 *this subparagraph or to otherwise act within and*
13 *under the obligations of the best interest standard as*
14 *described in this subparagraph;*

15 “(II) *the person providing the information is a*
16 *counterparty or service provider to the plan in con-*
17 *nection with any transaction based on the informa-*
18 *tion (including a service arrangement, sale, purchase,*
19 *loan, bilateral contract, swap (as defined in section*
20 *1a of the Commodity Exchange Act (7 U.S.C. 1a)), or*
21 *security-based swap (as defined in section 3(a) of the*
22 *Securities Exchange Act (15 U.S.C. 78c(a))), but*
23 *only if—*

24 “(aa) *the plan is represented, in connection*
25 *with such transaction, by a plan fiduciary that*

1 *is independent of the person providing the infor-*
2 *mation, and, except in the case of a swap or se-*
3 *curity-based swap, independent of the plan spon-*
4 *sor; and*

5 “(bb) prior to such transaction, the inde-

6 *pendent plan fiduciary represents in writing to*
7 *the person providing the information that it is*
8 *aware that the person has a financial interest in*
9 *the transaction and that it has determined that*
10 *the person is not intending to provide investment*
11 *advice within the meaning of this subparagraph*
12 *or to otherwise act as a fiduciary to the plan*
13 *subject to section 404;*

14 “(III) the person providing the information is

15 *an employee of any sponsoring employer or employee*
16 *organization who provides the information to the*
17 *plan for no fee or other compensation other than the*
18 *employee’s normal compensation;*

19 “(IV) the person providing the information dis-

20 *closes in writing to the plan fiduciary that the person*
21 *is not undertaking to provide investment advice as a*
22 *fiduciary to the plan subject to section 404 and the*
23 *information consists solely of—*

24 “(aa) making available to the plan, without

25 *regard to the individualized needs of the plan,*

1 *securities or other property through a platform*
2 *or similar mechanism from which a plan fidu-*
3 *ciary may select or monitor investment alter-*
4 *natives, including qualified default investment*
5 *alternatives, into which plan participants or*
6 *beneficiaries may direct the investment of assets*
7 *held in, or contributed to, their individual ac-*
8 *counts; or*

9 “(bb) *in connection with a platform or*
10 *similar mechanism described in item (aa)—*

11 “(AA) *identifying investment alter-*
12 *natives that meet objective criteria specified*
13 *by the plan, such as criteria concerning ex-*
14 *penditure ratios, fund sizes, types of asset, or*
15 *credit quality; or*

16 “(BB) *providing objective financial*
17 *data and comparisons with independent*
18 *benchmarks to the plan;*

19 “(V) *the information consists solely of valuation*
20 *information; or*

21 “(VI) *the information consists solely of—*

22 “(aa) *information described in Department*
23 *of Labor Interpretive Bulletin 96–1 (29 C.F.R.*
24 *2509.96–1, as in effect on January 1, 2015), re-*
25 *gardless of whether such education is provided to*

1 *a plan or plan fiduciary or a participant or*
2 *beneficiary;*

3 “(bb) *information provided to participants*
4 *or beneficiaries regarding the factors to consider*
5 *in deciding whether to elect to receive a distribu-*
6 *tion from a plan or an individual retirement*
7 *plan (as defined in section 7701(a)(37) of the In-*
8 *ternal Revenue Code of 1986) and whether to roll*
9 *over such distribution to a plan or an individual*
10 *retirement plan (as defined in section*
11 *7701(a)(37) of the Internal Revenue Code of*
12 *1986), so long as any examples of different dis-*
13 *tribution alternatives are accompanied by all*
14 *material facts and assumptions on which the ex-*
15 *amples are based; or*

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

18 (2) *EXEMPTION RELATING TO INVESTMENT AD-*
19 *VICE.—Section 408(b) of the Employee Retirement*
20 *Income Security Act of 1974 is amended by adding*
21 *at the end the following:*

22 “(21)(A) *Any transaction, including a contract*
23 *for service, between a person providing investment ad-*
24 *vice described in section 3(21)(A)(ii) and the advice*
25 *recipient in connection with such investment advice,*

1 *and any transaction consisting of the provision of*
2 *such investment advice, if the following conditions are*
3 *satisfied:*

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

7 *“(ii) If the investment advice is based on a*
8 *limited range of investment options (which may*
9 *consist, in whole or in part, of proprietary prod-*
10 *ucts), such limitations shall be clearly disclosed*
11 *to the advice recipient prior to any transaction*
12 *based on the investment advice in the form of a*
13 *notice that only states the following: ‘This rec-*
14 *ommendation is based on a limited range of in-*
15 *vestment options, and the same or similar in-*
16 *vestments may be available at a different cost*
17 *(greater or lesser) from other sources.’.*

18 *“(iii) If the investment advice may result in*
19 *variable compensation to the person providing*
20 *the investment advice (or any affiliate of such*
21 *person), the receipt of such compensation shall be*
22 *clearly disclosed to the advice recipient prior to*
23 *any transaction based on the investment advice.*
24 *For purposes of this subparagraph, clear disclo-*
25 *sure of variable compensation shall include, in a*

1 *manner calculated to be understood by the aver-*
2 *age individual, each of the following:*

3 *“(I) A notice that states only the fol-*
4 *lowing: ‘This recommendation may result*
5 *in varying amounts of fees or other com-*
6 *penetration to the person providing the rec-*
7 *ommendation (or its affiliate), and the*
8 *same or similar investments may be avail-*
9 *able at a different cost (greater or lesser)*
10 *from other sources.’. Any regulations or ad-*
11 *ministrative guidance implementing this*
12 *subclause may not require this notice to be*
13 *updated more than annually.*

14 *“(II) A description of any fee or other*
15 *compensation that is directly or indirectly*
16 *payable to the person (or its affiliate) by*
17 *the advice recipient with respect to such*
18 *transaction (expressed as an amount, for-*
19 *mula, percentage of assets, per capita*
20 *charge, or estimate or range of such com-*
21 *penetration).*

22 *“(III) A description of the types and*
23 *ranges of any compensation that may be di-*
24 *rectly or indirectly payable to the person*
25 *(or its affiliate) by any third party in con-*

1 *nection with such transaction (expressed as*
2 *an amount, formula, percentage of assets,*
3 *per capita charge, or estimate or range of*
4 *such compensation).*

5 *“(IV) Upon request of the advice re-*
6 *ipient, a disclosure of the specific amounts*
7 *of compensation described in clause (iii)*
8 *that the person will receive in connection*
9 *with the particular transaction (expressed*
10 *as an amount, formula, percentage of assets,*
11 *per capita charge, or estimate of such com-*
12 *ensation).*

13 *“(B) No recommendation will fail to satisfy the*
14 *conditions described in clauses (i) through (iii) of*
15 *subparagraph (A) solely because the person, acting in*
16 *good faith and with reasonable diligence, makes an*
17 *error or omission in disclosing the information speci-*
18 *fied in such clauses, provided that the person discloses*
19 *the correct information to the advice recipient as soon*
20 *as practicable, but not later than 30 days from the*
21 *date on which the person knows of such error or omis-*
22 *sion.*

23 *“(C) Any notice provided pursuant to a require-*
24 *ment under clause (ii) or clause (iii)(I) of subpara-*
25 *graph (A) shall have no effect on any other notice oth-*

1 *erwise required without regard to this title, and shall*
2 *be provided in addition to, and not in lieu of, any*
3 *other such notice.*

4 *“(D) For purposes of this paragraph, the term*
5 *‘affiliate’ has the meaning given in subsection*
6 *(g)(11)(B).”.*

7 *(b) EFFECTIVE DATE.—*

8 *(1) MODIFICATION OF CERTAIN RULES, AND*
9 *RULES AND ADMINISTRATIVE POSITIONS PROMUL-*
10 *GATED BEFORE ENACTMENT BUT NOT EFFECTIVE ON*
11 *JANUARY 1, 2015, PROHIBITED.—The Department of*
12 *Labor is prohibited from amending any rules or ad-*
13 *ministrative positions promulgated under, or applica-*
14 *ble for purposes of, section 3(21) of the Employee Re-*
15 *irement Income Security Act of 1974 (including De-*
16 *partment of Labor Interpretive Bulletin 96–1 (29*
17 *C.F.R. 2509.96–1) and Department of Labor Advi-*
18 *sory Opinion 2005–23A), and no such rule or admin-*
19 *istrative position promulgated by the Department of*
20 *Labor prior to the date of the enactment of this Act*
21 *but not effective on January 1, 2015, may become ef-*
22 *fective unless a bill or joint resolution referred to in*
23 *paragraph (3) is enacted as described in such para-*
24 *graph not later than 60 days after the date of the en-*
25 *actment of this Act.*

1 (2) *GENERAL EFFECTIVE DATE OF AMEND-*
2 *MENTS.—Except as provided in paragraph (3), the*
3 *amendments made by subsection (a) of this section*
4 *shall take effect on the 61st day after the date of the*
5 *enactment of this Act and shall apply with respect to*
6 *information provided or recommendations made on or*
7 *after 2 years after the date of the enactment of this*
8 *Act.*

9 (3) *EXCEPTION.—If a bill or joint resolution is*
10 *enacted prior to the 61st day after the date of the en-*
11 *actment of this Act that specifically approves any*
12 *rules or administrative positions promulgated under,*
13 *or applicable for purposes of, section 3(21) of the Em-*
14 *ployee Retirement Income Security Act of 1974 that*
15 *are not in effect on January 1, 2015, the amendments*
16 *made by subsection (a) of this section shall not take*
17 *effect.*

18 (c) *GRANDFATHERED TRANSACTIONS AND SERV-*
19 *ICES.—The amendments made by subsection (a) shall not*
20 *apply to any service or transaction rendered, entered into,*
21 *or for which a person has been compensated prior to the*
22 *date on which the amendments made by subsection (a) of*
23 *this Act become effective under subsection (b)(2).*

24 (d) *TRANSITION.—If the amendments made by sub-*
25 *section (a) of this section take effect, then nothing in this*

1 *section shall be construed to prohibit the issuance of guid-*
2 *ance to carry out such amendments so long as such guid-*
3 *ance is necessary to implement such amendments. Until*
4 *such time as regulations or other guidance are issued to*
5 *carry out such amendments, a plan or a fiduciary shall*
6 *be treated as meeting the requirements of such amendments*
7 *if the plan or fiduciary, as the case may be, complies with*
8 *a reasonable good faith interpretation of such amendments.*

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[Report No. 114-511]

A BILL

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