

115TH CONGRESS
1ST SESSION

H. R. 3857

To amend the Securities Exchange Act of 1934 to establish standards of conduct for brokers and dealers that are in the best interest of their retail customers.

IN THE HOUSE OF REPRESENTATIVES

SEPTEMBER 27, 2017

Mrs. WAGNER (for herself, Mr. BARR, Mr. MESSER, Mr. TROTT, Mr. POSEY, Mr. WILLIAMS, Mr. BUDD, Mr. HOLLINGSWORTH, and Mr. KUSTOFF of Tennessee) introduced the following bill; which was referred to the Committee on Financial Services, and in addition to the Committees on Ways and Means, and Education and the Workforce, 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

A BILL

To amend the Securities Exchange Act of 1934 to establish standards of conduct for brokers and dealers that are in the best interest of their retail customers.

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 “Protecting Advice for
5 Small Savers Act of 2017” or the “PASS Act of 2017”.

1 **SEC. 2. REPEAL OF DEPARTMENT OF LABOR FIDUCIARY**
2 **RULE.**

3 The final rule of the Department of Labor titled
4 “Definition of the Term ‘Fiduciary’ Conflict of Interest
5 Rule—Retirement Investment Advice” and related prohib-
6 ited transaction exemptions published April 8, 2016 (81
7 Fed. Reg. 20946), shall have no force or effect.

8 **SEC. 3. STANDARDS OF CONDUCT FOR BROKERS AND**
9 **DEALERS.**

10 (a) STANDARD OF CONDUCT FOR BROKERS AND
11 DEALERS WHEN MAKING RECOMMENDATIONS TO RETAIL
12 CUSTOMERS.—

13 (1) IN GENERAL.—The second subsection (k) of
14 section 15 of the Securities Exchange Act of 1934
15 (15 U.S.C. 78o(k)) (relating to standards of con-
16 duct) is amended to read as follows:

17 “(k) STANDARD OF CONDUCT FOR RECOMMENDA-
18 TIONS TO RETAIL CUSTOMERS.—

19 “(1) IN GENERAL.—The standard of conduct
20 for a broker or dealer (or registered representative)
21 when providing recommendations to a retail cus-
22 tomer is as follows:

23 “(A) RECOMMENDATION TO RETAIL CUS-
24 TOMER.—When a broker or dealer (or reg-
25 istered representative) makes a recommendation
26 to a retail customer, the recommendation shall

1 be in the retail customer's best interest at the
2 time it is made by—

3 “(i) reflecting reasonable diligence;
4 and

5 “(ii) reflecting the reasonable care,
6 skill, and prudence that a broker or dealer
7 (or registered representative) would exer-
8 cise based on the customer's investment
9 profile.

10 “(B) DISCLOSURE TO RETAIL CUS-
11 TOMER.—

12 “(i) IN GENERAL.—Before a broker or
13 dealer (or registered representative) exe-
14 cutes a transaction for the first time for
15 each retail customer based on a rec-
16 ommendation to such retail customer, such
17 broker or dealer (or registered representa-
18 tive) shall disclose prior to the point of sale
19 to such customer, in a clear and concise
20 manner—

21 “(I) the type and scope of serv-
22 ices the broker or dealer (or registered
23 representative) provides;

24 “(II) the standard of conduct
25 that applies to the relationship;

1 “(III) the types of compensation
2 the broker or dealer (or registered
3 representative) receives; and

4 “(IV) any material conflict of in-
5 terest.

6 “(ii) CONTENT OF DISCLOSURE.—The
7 Commission may issue regulations deter-
8 mining the content of the disclosure re-
9 quired in clause (i). Such regulations may
10 provide for a disclosure of fees received by
11 the broker or dealer, whether from the re-
12 tail customer or a third party, prior to the
13 execution of the transaction.

14 “(C) MATERIAL CONFLICT OF INTER-
15 EST.—A broker or dealer (or registered rep-
16 resentative) shall avoid, disclose, or otherwise
17 reasonably manage any material conflict of in-
18 terest with a retail customer.

19 “(2) NONVIOLATION OF STANDARD OF CON-
20 DUCT.—The following is not, by itself, a violation of
21 the standard of conduct described in paragraph (1):

22 “(A) The receipt of compensation, includ-
23 ing transaction-based compensation, by a
24 broker or dealer (or registered representative)

1 or any affiliate of such broker or dealer (or reg-
2 istered representative).

3 “(B) The recommendation by a broker or
4 dealer (or registered representative) to a retail
5 customer of principal transactions (including
6 cross transactions), or the recommendation of
7 affiliated, unaffiliated, or proprietary products
8 or services, or a limited range of products or
9 services.

10 “(3) NO REQUIREMENT TO RECOMMEND LEAST
11 EXPENSIVE PRODUCT.—Nothing in this subsection
12 shall require a broker or dealer (or registered rep-
13 resentative) to recommend the least expensive secu-
14 rity or investment strategy (however quantified) or
15 to analyze all possible securities, other products, or
16 investment strategies before making a recommenda-
17 tion.

18 “(4) DEFINITIONS.—In this subsection:

19 “(A) COMPENSATION.—The term ‘com-
20 pensation’ includes commissions or sales
21 charges, or other fees or variable compensation,
22 for or related to the sale of securities or for the
23 servicing of customer accounts, whether paid by
24 the retail customer or received from a third
25 party.

1 “(B) CUSTOMER’S INVESTMENT PRO-
2 FILE.—The term ‘customer’s investment profile’
3 has the meaning of such term as described in
4 Rule 2111 of the Financial Industry Regulatory
5 Authority as of the date of the enactment of
6 this subsection.

7 “(C) INSTITUTIONAL ACCOUNT.—The term
8 ‘institutional account’ has the same meaning
9 given such term in Rule 4512 of the Financial
10 Industry Regulatory Authority as of the date of
11 the enactment of this subsection.

12 “(D) MATERIAL CONFLICT OF INTER-
13 EST.—The term ‘material conflict of interest’
14 means a financial interest of a broker or dealer
15 (or registered representative) that a reasonable
16 person would expect to affect the impartiality of
17 a recommendation.

18 “(E) REASONABLE DILIGENCE.—The term
19 ‘reasonable diligence’ has the meaning of such
20 term as described in Rule 2111 of the Financial
21 Industry Regulatory Authority as of the date of
22 the enactment of this subsection.

23 “(F) RECOMMENDATION.—The term ‘rec-
24 ommendation’ means either of the following rec-
25 ommendations (under the meaning ascribed to

1 such term in Rule 2111 of the Financial Indus-
2 try Regulatory Authority) for which the broker
3 or dealer (or registered representative) making
4 the recommendation receives or will receive
5 compensation:

6 “(i) A non-discretionary recommenda-
7 tion to buy, hold, or sell securities, or to
8 follow an investment strategy involving se-
9 curities, for taxable or non-taxable ac-
10 counts.

11 “(ii) A non-discretionary recommenda-
12 tion to rollover or transfer assets in an em-
13 ployer-sponsored retirement plan to an in-
14 dividual retirement account.

15 “(G) RETAIL CUSTOMER.—The term ‘re-
16 tail customer’ means a natural person or legal
17 entity, or the legal representative of such nat-
18 ural person or legal entity, in each case other
19 than an institutional account, who—

20 “(i) receives a recommendation from a
21 broker or dealer (or registered representa-
22 tive); and

23 “(ii) implements such recommenda-
24 tion with such broker or dealer primarily

1 for personal, family, retirement, or house-
2 hold purposes.

3 “(5) SUPERSESSION.—The provisions of this
4 subsection shall supersede and preempt State law,
5 other than a State law that regulates insurance
6 products that are not securities, insofar as they may
7 now or hereafter relate to a broker or dealer, or reg-
8 istered representative of a broker or dealer.

9 “(6) FIDUCIARY STATUS UNDER ERISA, THE IN-
10 TERNAL REVENUE CODE, THE INVESTMENT ADVIS-
11 ERS ACT OF 1940, OR OTHER FIDUCIARY REGIMES.—
12 The fact that a person may owe, or may in fact com-
13 ply with, the standard of conduct under this sub-
14 section shall not mean or create any presumption
15 that such person is a ‘fiduciary’ under the Employee
16 Retirement Income Security Act of 1974 (29 U.S.C.
17 1001 et seq.), section 4975 of the Internal Revenue
18 Code of 1986, the Investment Advisers Act of 1940
19 (15 U.S.C. 80b et seq.), or any other Federal, State,
20 or local statutory or regulatory fiduciary regime.”.

21 (2) APPLICATION.—The amendment made by
22 paragraph (1) shall apply to brokers and dealers (or
23 registered representative) on the date that is 18
24 months after the date of the enactment of this Act.

1 (b) RULEMAKING AUTHORITY.—Section 913 of the
2 Dodd-Frank Wall Street Reform and Consumer Protec-
3 tion Act is amended to read as follows:

4 **“SEC. 913. OBLIGATIONS OF BROKERS AND DEALERS AND**
5 **OTHER PERSONS AND ENTITIES.**

6 “(a) RULEMAKING.—

7 “(1) RULEMAKING BY THE COMMISSION.—The
8 Commission may issue regulations as the Commis-
9 sion determines is necessary to facilitate compliance
10 by brokers and dealers (including their registered
11 representative) with the obligations of such brokers
12 and dealers (and their registered representative)
13 under the second subsection (k) of section 15 of the
14 Securities Exchange Act of 1934 only if such rule-
15 making does not impose any obligation related to
16 standard of care on a broker or dealer (or its reg-
17 istered representative) that is in addition to, dupli-
18 cative of, or inconsistent with, the obligations set forth
19 in such subsection.

20 “(2) RULEMAKING BY THE SECRETARY OF
21 LABOR AND THE SECRETARY OF THE TREASURY.—

22 After the date of the enactment of the PASS Act of
23 2017, the Secretary of Labor and the Secretary of
24 the Treasury shall not promulgate any regulation
25 under the Employee Retirement Income Security Act

1 of 1974 (29 U.S.C. 1001 et seq.) or section 4975 of
2 the Internal Revenue Code of 1986, respectively, de-
3 fining the circumstances under which a person is
4 considered a fiduciary that would impose any obliga-
5 tion on a broker or dealer (or its registered rep-
6 resentative) or on a life insurer fulfilling the term
7 ‘insurance company’ as defined in section 3(a)(2) of
8 the Securities Act of 1933 (or its agents or distribu-
9 tors) that is in addition to, duplicative of, or incon-
10 sistent with, the obligations set forth in such sub-
11 section (k) of section 15 of the Securities Exchange
12 Act of 1934 (15 U.S.C. 78o).

13 “(b) EXEMPTION AVAILABLE TO CERTAIN PERSONS
14 WITH RESPECT TO MANUFACTURE OR SALE OF ANNU-
15 ITIES.—

16 “(1) EXEMPTION.—With respect to the manu-
17 facture or sale of annuities within paragraphs (2) or
18 (8) of section 3(a) of the Securities Act of 1933 (15
19 U.S.C. 77c(a)) or section 989J of the Dodd-Frank
20 Wall Street Reform and Consumer Protection Act
21 (15 U.S.C. 77c note), a person regulated by a State
22 insurance regulator may rely on the exemptions in
23 section 408(b)(21) of the Employee Retirement In-
24 come Security Act of 1974 (29 U.S.C. 1108(b)(21))
25 and section 4975(d)(24) of the Internal Revenue

1 Code of 1986 (as added by the PASS Act of 2017)
2 only if—

3 “(A) such person adopts and implements
4 practices on a nationwide basis for the sale of
5 annuity contracts that meet or exceed the min-
6 imum requirements set forth in the second sub-
7 section (k) of section 15 of the Securities Ex-
8 change Act of 1934 (15 U.S.C. 78o) and such
9 person is subject to regulation or examination
10 by a State insurance regulator for purposes of
11 assessing market conduct; or

12 “(B) such person complies with a standard
13 substantially similar to such subsection (k) and
14 is regulated by a State insurance regulator with
15 respect to annuities within paragraphs (2) or
16 (8) of section 3(a) of the Securities Act of 1933
17 (15 U.S.C. 77c(a)) or section 989J of the
18 Dodd-Frank Wall Street Reform and Consumer
19 Protection Act (15 U.S.C. 77c note).

20 “(2) COORDINATION AND COOPERATION.—

21 Upon the request of any State insurance regulator,
22 the Commission or the Financial Industry Regu-
23 latory Authority shall provide such reasonable assist-
24 ance to the requesting Authority as needed in con-

1 nection with the coordination or implementation of
2 this section.

3 “(3) DEFINITION OF STATE INSURANCE REGU-
4 LATOR.—As used in this subsection, the term ‘State
5 insurance regulator’ means the principal insurance
6 regulatory authority of a State, the District of Co-
7 lumbia, any territory of the United States, Puerto
8 Rico, Guam, American Samoa, the Trust Territory
9 of the Pacific Islands, the Virgin Islands, and the
10 Northern Mariana Islands.

11 “(c) ADDITIONAL EXEMPTIONS.—A person who com-
12 plies with a standard substantially similar to the second
13 subsection (k) of section 15 of the Securities Exchange
14 Act of 1934 (15 U.S.C. 78o) may rely on the exemptions
15 in section 408(b)(21) of the Employee Retirement Income
16 Security Act of 1974 (29 U.S.C. 1108(b)(21)) and section
17 4975(d)(24) of the Internal Revenue Code of 1986 (as
18 added by the PASS Act of 2017) only if such person is—

19 “(1) registered as an investment adviser under
20 the Investment Advisers Act of 1940 (15 U.S.C.
21 80b–1 et seq.) or under the laws of the State in
22 which the person maintains its principal office and
23 place of business; or

24 “(2) a bank or similar financial institution su-
25 pervised by the United States or a State, or a sav-

1 ings association (as defined in section 3(b)(1) of the
2 Federal Deposit Insurance Act (12 U.S.C.
3 1813(b)(1)).”.

4 (c) EXEMPTION FROM PROHIBITED TRANSACTIONS
5 FOR BROKERS AND DEALERS, AND OTHER PERSONS AND
6 ENTITIES, WHEN MAKING RECOMMENDATIONS TO RE-
7 TAIL CUSTOMERS.—

8 (1) Section 408(b) of the Employee Retirement
9 Income Security Act of 1974 (29 U.S.C. 1108(b)) is
10 amended by adding at the end the following:

11 “(21) Any transaction involving a recommenda-
12 tion made by a broker or dealer (including its reg-
13 istered representative), or other persons or entities,
14 that is subject to the requirements of the second
15 subsection (k) of section 15 of the Securities Ex-
16 change Act of 1934 (15 U.S.C. 78o(k)).”.

17 (2) Section 4975(d) of the Internal Revenue
18 Code of 1986 is amended by adding at the end the
19 following:

20 “(24) any transaction involving a recommenda-
21 tion made by a broker or dealer (including its reg-
22 istered representatives), or other persons or entities,
23 that is subject to the requirements of the second
24 subsection (k) of section 15 of the Securities Ex-
25 change Act of 1934 (15 U.S.C. 78o(k)).”.

1 (d) REPEAL OF CERTAIN PROVISIONS.—The fol-
2 lowing provisions are hereby repealed:

3 (1) The second subsection (l) and subsection
4 (m) of section 15 of the Securities Exchange Act of
5 1934 (15 U.S.C. 78o).

6 (2) Subsections (g), (h), and (i) of section 211
7 of the Investment Advisers Act of 1940 (15 U.S.C.
8 80b–11).

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