

116TH CONGRESS  
1ST SESSION

# S. 2352

To amend the Internal Revenue Code of 1986 to modify nondiscrimination rules to protect older, longer service participants in retirement plans.

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IN THE SENATE OF THE UNITED STATES

JULY 31, 2019

Mr. CARDIN (for himself and Mr. PORTMAN) introduced the following bill;  
which was read twice and referred to the Committee on Finance

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## A BILL

To amend the Internal Revenue Code of 1986 to modify nondiscrimination rules to protect older, longer service participants in retirement plans.

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 “Retirement Security  
5 Preservation Act of 2019”.

6 **SEC. 2. MODIFICATION OF NONDISCRIMINATION RULES TO**  
7 **PROTECT OLDER, LONGER SERVICE PARTICI-**  
8 **PANTS.**

9 (a) IN GENERAL.—Section 401 of the Internal Rev-  
10 enue Code of 1986 is amended—

1           (1) by redesignating subsection (o) as sub-  
2           section (p); and

3           (2) by inserting after subsection (n) the fol-  
4           lowing new subsection:

5           “(o) SPECIAL RULES FOR APPLYING NON-  
6 DISCRIMINATION RULES TO PROTECT OLDER, LONGER  
7 SERVICE AND GRANDFATHERED PARTICIPANTS.—

8           “(1) TESTING OF DEFINED BENEFIT PLANS  
9           WITH CLOSED CLASSES OF PARTICIPANTS.—

10           “(A) BENEFITS, RIGHTS, OR FEATURES  
11           PROVIDED TO CLOSED CLASSES.—A defined  
12           benefit plan which provides benefits, rights, or  
13           features to a closed class of participants shall  
14           not fail to satisfy the requirements of sub-  
15           section (a)(4) by reason of the composition of  
16           such closed class or the benefits, rights, or fea-  
17           tures provided to such closed class, if—

18           “(i) for the plan year as of which the  
19           class closes and the 2 succeeding plan  
20           years, such benefits, rights, and features  
21           satisfy the requirements of subsection  
22           (a)(4) (without regard to this subpara-  
23           graph but taking into account the rules of  
24           subparagraph (I)),

1 “(ii) after the date as of which the  
2 class was closed, any plan amendment  
3 which modifies the closed class or the ben-  
4 efits, rights, and features provided to such  
5 closed class does not discriminate signifi-  
6 cantly in favor of highly compensated em-  
7 ployees, and

8 “(iii) the class was closed before April  
9 5, 2017, or the plan is described in sub-  
10 paragraph (C).

11 “(B) AGGREGATE TESTING WITH DEFINED  
12 CONTRIBUTION PLANS PERMITTED ON A BENE-  
13 FITS BASIS.—

14 “(i) IN GENERAL.—For purposes of  
15 determining compliance with subsection  
16 (a)(4) and section 410(b), a defined benefit  
17 plan described in clause (iii) may be aggre-  
18 gated and tested on a benefits basis with  
19 one or more defined contribution plans, in-  
20 cluding with the portion of one or more de-  
21 fined contribution plans which—

22 “(I) provides matching contribu-  
23 tions (as defined in subsection  
24 (m)(4)(A)),

1 “(II) provides annuity contracts  
2 described in section 403(b) which are  
3 purchased with matching contribu-  
4 tions or nonelective contributions, or

5 “(III) consists of an employee  
6 stock ownership plan (within the  
7 meaning of section 4975(e)(7)) or a  
8 tax credit employee stock ownership  
9 plan (within the meaning of section  
10 409(a)).

11 “(ii) SPECIAL RULES FOR MATCHING  
12 CONTRIBUTIONS.—For purposes of clause  
13 (i), if a defined benefit plan is aggregated  
14 with a portion of a defined contribution  
15 plan providing matching contributions—

16 “(I) such defined benefit plan  
17 must also be aggregated with any por-  
18 tion of such defined contribution plan  
19 which provides elective deferrals de-  
20 scribed in subparagraph (A) or (C) of  
21 section 402(g)(3), and

22 “(II) such matching contribu-  
23 tions shall be treated in the same  
24 manner as nonelective contributions,

1 including for purposes of applying the  
2 rules of subsection (l).

3 “(iii) PLANS DESCRIBED.—A defined  
4 benefit plan is described in this clause if—

5 “(I) the plan provides benefits to  
6 a closed class of participants,

7 “(II) for the plan year as of  
8 which the class closes and the 2 suc-  
9 ceeding plan years, the plan satisfies  
10 the requirements of section 410(b)  
11 and subsection (a)(4) (without regard  
12 to this subparagraph but taking into  
13 account the rules of subparagraph  
14 (I)),

15 “(III) after the date as of which  
16 the class was closed, any plan amend-  
17 ment which modifies the closed class  
18 or the benefits provided to such closed  
19 class does not discriminate signifi-  
20 cantly in favor of highly compensated  
21 employees, and

22 “(IV) the class was closed before  
23 April 5, 2017, or the plan is described  
24 in subparagraph (C).

1           “(C) PLANS DESCRIBED.—A plan is de-  
2           scribed in this subparagraph if, taking into ac-  
3           count any predecessor plan—

4                   “(i) such plan has been in effect for  
5                   at least 5 years as of the date the class is  
6                   closed, and

7                   “(ii) during the 5-year period pre-  
8                   ceding the date the class is closed, there  
9                   has not been a substantial increase in the  
10                  coverage or value of the benefits, rights, or  
11                  features described in subparagraph (A) or  
12                  in the coverage or benefits under the plan  
13                  described in subparagraph (B)(iii) (which-  
14                  ever is applicable).

15           “(D) DETERMINATION OF SUBSTANTIAL  
16           INCREASE FOR BENEFITS, RIGHTS, AND FEA-  
17           TURES.—In applying subparagraph (C)(ii) for  
18           purposes of subparagraph (A)(iii), a plan shall  
19           be treated as having had a substantial increase  
20           in coverage or value of the benefits, rights, or  
21           features described in subparagraph (A) during  
22           the applicable 5-year period only if, during such  
23           period—

24                   “(i) the number of participants cov-  
25                   ered by such benefits, rights, or features

1 on the date such period ends is more than  
2 50 percent greater than the number of  
3 such participants on the first day of the  
4 plan year in which such period began, or

5 “(ii) such benefits, rights, and fea-  
6 tures have been modified by one or more  
7 plan amendments in such a way that, as of  
8 the date the class is closed, the value of  
9 such benefits, rights, and features to the  
10 closed class as a whole is substantially  
11 greater than the value as of the first day  
12 of such 5-year period, solely as a result of  
13 such amendments.

14 “(E) DETERMINATION OF SUBSTANTIAL  
15 INCREASE FOR AGGREGATE TESTING ON BENE-  
16 FITS BASIS.—In applying subparagraph (C)(ii)  
17 for purposes of subparagraph (B)(iii)(IV), a  
18 plan shall be treated as having had a substan-  
19 tial increase in coverage or benefits during the  
20 applicable 5-year period only if, during such pe-  
21 riod—

22 “(i) the number of participants bene-  
23 fitting under the plan on the date such pe-  
24 riod ends is more than 50 percent greater  
25 than the number of such participants on

1 the first day of the plan year in which such  
2 period began, or

3 “(ii) the average benefit provided to  
4 such participants on the date such period  
5 ends is more than 50 percent greater than  
6 the average benefit provided on the first  
7 day of the plan year in which such period  
8 began.

9 “(F) CERTAIN EMPLOYEES DIS-  
10 REGARDED.—For purposes of subparagraphs  
11 (D) and (E), any increase in coverage or value  
12 or in coverage or benefits, whichever is applica-  
13 ble, which is attributable to such coverage and  
14 value or coverage and benefits provided to em-  
15 ployees—

16 “(i) who became participants as a re-  
17 sult of a merger, acquisition, or similar  
18 event which occurred during the 7-year pe-  
19 riod preceding the date the class is closed,  
20 or

21 “(ii) who became participants by rea-  
22 son of a merger of the plan with another  
23 plan which had been in effect for at least  
24 5 years as of the date of the merger,



1 shall be disregarded, except that clause (ii)  
2 shall apply for purposes of subparagraph (D)  
3 only if, under the merger, the benefits, rights,  
4 or features under 1 plan are conformed to the  
5 benefits, rights, or features of the other plan  
6 prospectively.

7 “(G) RULES RELATING TO AVERAGE BEN-  
8 EFIT.—For purposes of subparagraph (E)—

9 “(i) the average benefit provided to  
10 participants under the plan will be treated  
11 as having remained the same between the  
12 2 dates described in subparagraph (E)(ii)  
13 if the benefit formula applicable to such  
14 participants has not changed between such  
15 dates, and

16 “(ii) if the benefit formula applicable  
17 to one or more participants under the plan  
18 has changed between such 2 dates, then  
19 the average benefit under the plan shall be  
20 considered to have increased by more than  
21 50 percent only if—

22 “(I) the total amount determined  
23 under section 430(b)(1)(A)(i) for all  
24 participants benefitting under the  
25 plan for the plan year in which the 5-

1 year period described in subparagraph  
2 (E) ends, exceeds

3 “(II) the total amount deter-  
4 mined under section 430(b)(1)(A)(i)  
5 for all such participants for such plan  
6 year, by using the benefit formula in  
7 effect for each such participant for  
8 the first plan year in such 5-year pe-  
9 riod,

10 by more than 50 percent. In the case of a  
11 CSEC plan (as defined in section 414(y)),  
12 the normal cost of the plan (as determined  
13 under section 433(j)(1)(B)) shall be used  
14 in lieu of the amount determined under  
15 section 430(b)(1)(A)(i).

16 “(H) TREATMENT AS SINGLE PLAN.—For  
17 purposes of subparagraphs (E) and (G), a plan  
18 described in section 413(c) shall be treated as  
19 a single plan rather than as separate plans  
20 maintained by each employer in the plan.

21 “(I) SPECIAL RULES.—For purposes of  
22 subparagraphs (A)(i) and (B)(iii)(II), the fol-  
23 lowing rules shall apply:

24 “(i) In applying section 410(b)(6)(C),  
25 the closing of the class of participants shall

1 not be treated as a significant change in  
2 coverage under section 410(b)(6)(C)(i)(II).

3 “(ii) Two or more plans shall not fail  
4 to be eligible to be aggregated and treated  
5 as a single plan solely by reason of having  
6 different plan years.

7 “(iii) Changes in the employee popu-  
8 lation shall be disregarded to the extent at-  
9 tributable to individuals who become em-  
10 ployees or cease to be employees, after the  
11 date the class is closed, by reason of a  
12 merger, acquisition, divestiture, or similar  
13 event.

14 “(iv) Aggregation and all other testing  
15 methodologies otherwise applicable under  
16 subsection (a)(4) and section 410(b) may  
17 be taken into account.

18 The rule of clause (ii) shall also apply for pur-  
19 poses of determining whether plans to which  
20 subparagraph (B)(i) applies may be aggregated  
21 and treated as 1 plan for purposes of deter-  
22 mining whether such plans meet the require-  
23 ments of subsection (a)(4) and section 410(b).

24 “(J) SPUN-OFF PLANS.—For purposes of  
25 this paragraph, if a portion of a defined benefit

1 plan described in subparagraph (A) or (B)(iii)  
 2 is spun off to another employer and the spun-  
 3 off plan continues to satisfy the requirements  
 4 of—

5 “(i) subparagraph (A)(i) or  
 6 (B)(iii)(II), whichever is applicable, if the  
 7 original plan was still within the 3-year pe-  
 8 riod described in such subparagraph at the  
 9 time of the spin off, and

10 “(ii) subparagraph (A)(ii) or  
 11 (B)(iii)(III), whichever is applicable,

12 the treatment under subparagraph (A) or (B)  
 13 of the spun-off plan shall continue with respect  
 14 to such other employer.

15 “(2) TESTING OF DEFINED CONTRIBUTION  
 16 PLANS.—

17 “(A) TESTING ON A BENEFITS BASIS.—A  
 18 defined contribution plan shall be permitted to  
 19 be tested on a benefits basis if—

20 “(i) such defined contribution plan  
 21 provides make-whole contributions to a  
 22 closed class of participants whose accruals  
 23 under a defined benefit plan have been re-  
 24 duced or eliminated,

1           “(ii) for the plan year of the defined  
2           contribution plan as of which the class eli-  
3           gible to receive such make-whole contribu-  
4           tions closes and the 2 succeeding plan  
5           years, such closed class of participants sat-  
6           isfies the requirements of section  
7           410(b)(2)(A)(i) (determined by applying  
8           the rules of paragraph (1)(I)),

9           “(iii) after the date as of which the  
10          class was closed, any plan amendment to  
11          the defined contribution plan which modi-  
12          fies the closed class or the allocations, ben-  
13          efits, rights, and features provided to such  
14          closed class does not discriminate signifi-  
15          cantly in favor of highly compensated em-  
16          ployees, and

17          “(iv) the class was closed before April  
18          5, 2017, or the defined benefit plan under  
19          clause (i) is described in paragraph (1)(C)  
20          (as applied for purposes of paragraph  
21          (1)(B)(iii)(IV)).

22          “(B) AGGREGATION WITH PLANS INCLUD-  
23          ING MATCHING CONTRIBUTIONS.—

24          “(i) IN GENERAL.—With respect to  
25          one or more defined contribution plans de-

1 scribed in subparagraph (A), for purposes  
2 of determining compliance with subsection  
3 (a)(4) and section 410(b), the portion of  
4 such plans which provides make-whole con-  
5 tributions or other nonelective contribu-  
6 tions may be aggregated and tested on a  
7 benefits basis with the portion of one or  
8 more other defined contribution plans  
9 which—

10 “(I) provides matching contribu-  
11 tions (as defined in subsection  
12 (m)(4)(A)),

13 “(II) provides annuity contracts  
14 described in section 403(b) which are  
15 purchased with matching contribu-  
16 tions or nonelective contributions, or

17 “(III) consists of an employee  
18 stock ownership plan (within the  
19 meaning of section 4975(e)(7)) or a  
20 tax credit employee stock ownership  
21 plan (within the meaning of section  
22 409(a)).

23 “(ii) SPECIAL RULES FOR MATCHING  
24 CONTRIBUTIONS.—Rules similar to the

1 rules of paragraph (1)(B)(ii) shall apply  
2 for purposes of clause (i).

3 “(C) SPECIAL RULES FOR TESTING DE-  
4 FINED CONTRIBUTION PLAN FEATURES PRO-  
5 VIDING MATCHING CONTRIBUTIONS TO CERTAIN  
6 OLDER, LONGER SERVICE PARTICIPANTS.—In  
7 the case of a defined contribution plan which  
8 provides benefits, rights, or features to a closed  
9 class of participants whose accruals under a de-  
10 fined benefit plan have been reduced or elimi-  
11 nated, the plan shall not fail to satisfy the re-  
12 quirements of subsection (a)(4) solely by reason  
13 of the composition of the closed class or the  
14 benefits, rights, or features provided to such  
15 closed class if the defined contribution plan and  
16 defined benefit plan otherwise meet the require-  
17 ments of subparagraph (A) but for the fact that  
18 the make-whole contributions under the defined  
19 contribution plan are made in whole or in part  
20 through matching contributions.

21 “(D) SPUN-OFF PLANS.—For purposes of  
22 this paragraph, if a portion of a defined con-  
23 tribution plan described in subparagraph (A) or  
24 (C) is spun off to another employer, the treat-  
25 ment under subparagraph (A) or (C) of the

1 spun-off plan shall continue with respect to the  
2 other employer if such plan continues to comply  
3 with the requirements of clauses (ii) (if the  
4 original plan was still within the 3-year period  
5 described in such clause at the time of the spin  
6 off) and (iii) of subparagraph (A), as deter-  
7 mined for purposes of subparagraph (A) or (C),  
8 whichever is applicable.

9 “(3) DEFINITIONS AND SPECIAL RULE.—For  
10 purposes of this subsection—

11 “(A) MAKE-WHOLE CONTRIBUTIONS.—Ex-  
12 cept as otherwise provided in paragraph (2)(C),  
13 the term ‘make-whole contributions’ means non-  
14 elective allocations for each employee in the  
15 class which are reasonably calculated, in a con-  
16 sistent manner, to replace some or all of the re-  
17 tirement benefits which the employee would  
18 have received under the defined benefit plan  
19 and any other plan or qualified cash or deferred  
20 arrangement under subsection (k)(2) if no  
21 change had been made to such defined benefit  
22 plan and such other plan or arrangement. For  
23 purposes of the preceding sentence, consistency  
24 shall not be required with respect to employees



1 who were subject to different benefit formulas  
2 under the defined benefit plan.

3 “(B) REFERENCES TO CLOSED CLASS OF  
4 PARTICIPANTS.—References to a closed class of  
5 participants and similar references to a closed  
6 class shall include arrangements under which  
7 one or more classes of participants are closed,  
8 except that one or more classes of participants  
9 closed on different dates shall not be aggre-  
10 gated for purposes of determining the date any  
11 such class was closed.

12 “(C) HIGHLY COMPENSATED EMPLOYEE.—  
13 The term ‘highly compensated employee’ has  
14 the meaning given such term in section  
15 414(q).”.

16 (b) PARTICIPATION REQUIREMENTS.—Paragraph  
17 (26) of section 401(a) of the Internal Revenue Code of  
18 1986 is amended by adding at the end the following new  
19 subparagraph:

20 “(I) PROTECTED PARTICIPANTS.—

21 “(i) IN GENERAL.—A plan shall be  
22 deemed to satisfy the requirements of sub-  
23 paragraph (A) if—

24 “(I) the plan is amended—

1                   “(aa) to cease all benefit ac-  
2                   cruals, or

3                   “(bb) to provide future ben-  
4                   efit accruals only to a closed  
5                   class of participants,

6                   “(II) the plan satisfies subpara-  
7                   graph (A) (without regard to this sub-  
8                   paragraph) as of the effective date of  
9                   the amendment, and

10                   “(III) the amendment was adopt-  
11                   ed before April 5, 2017, or the plan is  
12                   described in clause (ii).

13                   “(ii) PLANS DESCRIBED.—A plan is  
14                   described in this clause if the plan would  
15                   be described in subsection (o)(1)(C), as ap-  
16                   plied for purposes of subsection  
17                   (o)(1)(B)(iii)(IV) and by treating the effec-  
18                   tive date of the amendment as the date the  
19                   class was closed for purposes of subsection  
20                   (o)(1)(C).

21                   “(iii) SPECIAL RULES.—For purposes  
22                   of clause (i)(II), in applying section  
23                   410(b)(6)(C), the amendments described in  
24                   clause (i) shall not be treated as a signifi-

1           cant change in coverage under section  
2           410(b)(6)(C)(i)(II).

3           “(iv) SPUN-OFF PLANS.—For pur-  
4           poses of this subparagraph, if a portion of  
5           a plan described in clause (i) is spun off to  
6           another employer, the treatment under  
7           clause (i) of the spun-off plan shall con-  
8           tinue with respect to the other employer.”.

9           (c) EFFECTIVE DATE.—

10           (1) IN GENERAL.—Except as provided in para-  
11           graph (2), the amendments made by this section  
12           shall take effect on the date of the enactment of this  
13           Act, without regard to whether any plan modifica-  
14           tions referred to in such amendments are adopted or  
15           effective before, on, or after such date of enactment.

16           (2) SPECIAL RULES.—

17           (A) ELECTION OF EARLIER APPLICA-  
18           TION.—At the election of the plan sponsor, the  
19           amendments made by this section shall apply to  
20           plan years beginning after December 31, 2013.

21           (B) CLOSED CLASSES OF PARTICIPANTS.—  
22           For purposes of paragraphs (1)(A)(iii),  
23           (1)(B)(iii)(IV), and (2)(A)(iv) of section 401(o)  
24           of the Internal Revenue Code of 1986 (as added  
25           by this section), a closed class of participants

1 shall be treated as being closed before April 5,  
2 2017, if the plan sponsor's intention to create  
3 such closed class is reflected in formal written  
4 documents and communicated to participants  
5 before such date.

6 (C) CERTAIN POST-ENACTMENT PLAN  
7 AMENDMENTS.—A plan shall not be treated as  
8 failing to be eligible for the application of sec-  
9 tion 401(o)(1)(A), 401(o)(1)(B)(iii), or  
10 401(a)(26) of such Code (as added by this sec-  
11 tion) to such plan solely because in the case  
12 of—

13 (i) such section 401(o)(1)(A), the plan  
14 was amended before the date of the enact-  
15 ment of this Act to eliminate one or more  
16 benefits, rights, or features, and is further  
17 amended after such date of enactment to  
18 provide such previously eliminated benefits,  
19 rights, or features to a closed class of par-  
20 ticipants, or

21 (ii) such section 401(o)(1)(B)(iii) or  
22 section 401(a)(26), the plan was amended  
23 before the date of the enactment of this  
24 Act to cease all benefit accruals, and is  
25 further amended after such date of enact-

1                   ment to provide benefit accruals to a closed  
2                   class of participants.

3                   Any such section shall only apply if the plan  
4                   otherwise meets the requirements of such sec-  
5                   tion and in applying such section, the date the  
6                   class of participants is closed shall be the effec-  
7                   tive date of the later amendment.

○