114TH CONGRESS
2d Session
HOUSE OF REPRESENTATIVES
REPORT
114–511

AFFORDABLE RETIREMENT ADVICE PROTECTION ACT

APRIL 20, 2016.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. KLINE, from the Committee on Education and the Workforce, submitted the following

R E P O R T

together with

MINORITY VIEWS

[To accompany H.R. 4293]

[Including cost estimate of the Congressional Budget Office]

The Committee on Education and the Workforce, to whom was referred the bill (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, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment is as follows:

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Affordable Retirement Advice Protection Act".

SEC. 2. PURPOSE.

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

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

(2) breach the best interest standard for the provision of investment advice, are subject to liability under the Employee Retirement Income Security Act of 1974.

SEC. 3. RULES RELATING TO THE PROVISION OF INVESTMENT ADVICE.

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

(1) DEFINITION OF INVESTMENT ADVICE.—Section 3(21) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002(21)) is amended by adding at the end the following:

"(C)(i) For purposes of clause (ii) of subparagraph (A), the term 'investment advice' means a recommendation that—

"(I) relates to—

"(aa) the advisability of acquiring, holding, disposing, or exchanging any moneys or other property of a plan by the plan, plan participants, or plan beneficiaries, including any recommendation 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 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 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 materially rely on such recommendation in making investment or management decisions with respect to any moneys or other property of such plan.

"(ii) For purposes of clause (i)(II)(bb), any disclaimer of a mutual agreement, arrangement, or understanding shall only state the following: 'This information is not individualized to you, and you are not intended to materially rely on this information in making investment or management decisions.'. Such disclaimer shall not be effective unless such disclaimer is in writing and is communicated in a clear and prominent manner and an objective person would reasonably conclude that, based on all the facts and circumstances, there was not a mutual agreement, arrangement, or understanding.

"(iii) For purposes of clause (i)(II)(bb), information shall not be considered to be a recommendation made pursuant to a mutual agreement, arrangement, or understanding, and such information shall contain the disclaimer required by clause (ii), if—

"(I) it is provided in conjunction with full and fair disclosure in writing to a plan, plan participant, or beneficiary that the person providing the information is doing so in its marketing or sales capacity, including any information regarding the terms and conditions of the engagement of the person providing the information, and that the person is not intending to provide investment advice within the meaning of this subparagraph or to otherwise act within and under the obligations of the best interest standard as described in this subparagraph;

"(II) the person providing the information is a counterparty or service provider to the plan in connection with any transaction based on the information (including a service arrangement, sale, purchase, loan, bilateral contract, swap (as defined in section 1a of the Commodity Exchange Act (7 U.S.C. 1a)), or security-based swap (as defined in section 3(a) of the Securities Exchange Act (15 U.S.C. 78c(a)))), but only if—

"(aa) the plan is represented, in connection with such transaction, by a plan fiduciary that is independent of the person providing the information, and, except in the case of a swap or security-based swap, independent of the plan sponsor; and

"(bb) prior to such transaction, the independent plan fiduciary represents in writing to the person providing the information that it is aware that the person has a financial interest in the transaction and that it has determined that the person is not intending to provide investment advice within the meaning of this subparagraph or to otherwise act as a fiduciary to the plan subject to section 404;

"(III) the person providing the information is an employee of any sponsoring employer or employee organization who provides the information to the plan for no fee or other compensation other than the employee's normal compensation;

"(IV) the person providing the information discloses in writing to the plan fiduciary that the person is not undertaking to provide investment advice as a fiduciary to the plan subject to section 404 and the information consists solely of—

"(aa) making available to the plan, without regard to the individualized needs of the plan, securities or other property through a platform or similar

mechanism from which a plan fiduciary may select or monitor investment alternatives, including qualified default investment alternatives, into which plan participants or beneficiaries may direct the investment of assets held in, or contributed to, their individual accounts; or

"(bb) in connection with a platform or similar mechanism described in item (aa)—

"(AA) identifying investment alternatives that meet objective criteria specified by the plan, such as criteria concerning expense ratios, fund sizes, types of asset, or credit quality; or

"(BB) providing objective financial data and comparisons with independent benchmarks to the plan;

"(V) the information consists solely of valuation information; or

"(VI) the information consists solely of—

"(aa) information described in Department of Labor Interpretive Bulletin 96–1 (29 C.F.R. 2509.96–1, as in effect on January 1, 2015), regardless of whether such education is provided to a plan or plan fiduciary or a participant or beneficiary;

"(bb) information provided to participants or beneficiaries regarding the factors to consider in deciding whether to elect to receive a distribution from a plan or an individual retirement plan (as defined in section 7701(a)(37) of the Internal Revenue Code of 1986) and whether 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 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 may consist, in whole or in part, of proprietary products), such limitations shall be clearly disclosed to the advice recipient prior to any transaction based on the investment advice in the form of a notice that only states the following: 'This recommendation is based on a limited range of investment options, and the same or similar investments may be available at a different cost (greater or lesser) from other sources.'.

"(iii) If the investment advice may result in variable compensation to the person providing the investment advice (or any affiliate of such person), the receipt of such compensation shall be clearly disclosed to the advice recipient prior to any transaction based on the investment advice. For purposes of this subparagraph, clear disclosure of variable compensation shall include, in a manner calculated to be understood by the average individual, each of the following:

"(I) A notice that states only the following: 'This recommendation may result in varying amounts of fees or other compensation to the person providing the recommendation (or its affiliate), and the same or similar investments may be available at a different cost (greater or lesser) from other sources.'. Any regulations or administrative guidance implementing this subclause may not require this notice to be updated more than annually.

"(II) A description of any fee or other compensation that is directly or indirectly payable to the person (or its affiliate) by the advice recipient with respect to such transaction (expressed as an amount, formula, percentage of assets, per capita charge, or estimate or range of such compensation).

"(III) A description of the types and ranges of any compensation that may be directly or indirectly payable to the person (or its affiliate) by any third party in connection with such transaction (expressed as an amount, formula, percentage of assets, per capita charge, or estimate or range of such compensation).

"(IV) Upon request of the advice recipient, a disclosure of the specific amounts of compensation described in clause (iii) that the person will

receive in connection with the particular transaction (expressed as an amount, formula, percentage of assets, per capita charge, or estimate of such compensation).

"(B) No recommendation will fail to satisfy the conditions described in clauses (i) through (iii) of subparagraph (A) solely because the person, acting in good faith and with reasonable diligence, makes an error or omission in disclosing the information specified in such clauses, provided that the person discloses the correct information to the advice recipient as soon as practicable, but not later than 30 days from the date on which the person knows of such error or omission.

"(C) Any notice provided pursuant to a requirement under clause (ii) or clause (iii)(I) of subparagraph (A) shall have no effect on any other notice otherwise required without regard to this title, and shall be provided in addition to, and not in lieu of, any other such notice.

"(D) For purposes of this paragraph, the term 'affiliate' has the meaning given in subsection (g)(11)(B).".

(b) EFFECTIVE DATE.—

(1) MODIFICATION OF CERTAIN RULES, AND RULES AND ADMINISTRATIVE POSITIONS PROMULGATED BEFORE ENACTMENT BUT NOT EFFECTIVE ON JANUARY 1, 2015, PROHIBITED.—The Department of Labor is prohibited from amending any rules or administrative positions promulgated under, or applicable for purposes of, section 3(21) of the Employee Retirement Income Security Act of 1974 (including Department of Labor Interpretive Bulletin 96–1 (29 C.F.R. 2509.96–1) and Department of Labor Advisory Opinion 2005–23A), and no such rule or administrative position promulgated by the Department of Labor prior to the date of the enactment of this Act but not effective on January 1, 2015, may become effective unless a bill or joint resolution referred to in paragraph (3) is enacted as described in such paragraph not later than 60 days after the date of the enactment of this Act.

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

(3) EXCEPTION.—If a bill or joint resolution is enacted prior to the 61st day after the date of the enactment of this Act that specifically approves any rules or administrative positions promulgated under, or applicable for purposes of, section 3(21) of the Employee Retirement Income Security Act of 1974 that are not in effect on January 1, 2015, the amendments made by subsection (a) of this section shall not take effect.

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

(d) TRANSITION.—If the amendments made by subsection (a) of this section take effect, then nothing in this section shall be construed to prohibit the issuance of guidance to carry out such amendments so long as such guidance is necessary to implement such amendments. Until such time as regulations or other guidance are issued to carry out such amendments, a plan or a fiduciary shall be treated as meeting the requirements of such amendments if the plan or fiduciary, as the case may be, complies with a reasonable good faith interpretation of such amendments.

PURPOSE

H.R. 4293, the *Affordable Retirement Advice Protection Act* (ARAPA), prohibits the Department of Labor (DOL or department) from implementing its proposed regulation* amending the regulatory definition of "fiduciary" [1] under the *Employee Retirement In-*

*The Committee ordered this bill reported to the House of Representatives on February 2, 2016, and this report reflects the Committee's views on that date. In the intervening time, the Department of Labor has published a final regulatory package that changed certain aspects of the previously proposed rule and exemptions discussed herein. *See, e.g.*, Definition of the Term "Fiduciary"; Conflict of Interest Rule-Retirement Investment Advice, 81 Fed. Reg. 20945 (Apr. 8, 2016). Despite these revisions, the Committee continues to have serious concerns the final regulation will reduce access to affordable retirement advice. Press Release, H. Comm. on Educ. and the Workforce, Committee Leaders Respond to Labor Department's Final Fiduciary Rule (Apr. 6, 2016), *http://edworkforce.house.gov/news/documentsingle.aspx?DocumentID=400576*.

come Security Act of 1974 (ERISA)[2] and the *Internal Revenue Code of 1986* (Code),[3] unless Congress affirmatively approves the final rule. Instead, the bill updates current law to ensure that all financial professionals providing personalized advice about investments, distributions, or the use of other fiduciaries are legally required to act in the best interest of their customers. However, unlike the DOL proposed regulation, ARAPA ensures low- and medium-income savers and small businesses have continued access to affordable retirement advice.

COMMITTEE ACTION

112TH CONGRESS

Full Committee hearing reviewing Policies and Priorities at the U.S. Department of Labor

On February 16, 2011, the Committee on Education and the Workforce (Committee) held a hearing entitled "Policies and Priorities at the U.S. Department of Labor" to examine, among other things, DOL's Employee Benefits Security Administration's (EBSA) October 2010 proposed regulation significantly expanding the definition of "fiduciary" under ERISA and the Code. The Honorable Hilda L. Solis, then-Secretary of the U.S. Department of Labor, was the sole witness. During the hearing, Representatives Judy Biggert (R–IL) and Carolyn McCarthy (D–NY) expressed concerns regarding DOL's proposed rule, specifically in regard to the department's lack of coordination with the Securities and Exchange Commission.[4]

Subcommittee hearing Assessing the Impact of the Labor Department's Proposal on Workers and Retirees

On July 26, 2011, the Subcommittee on Health, Employment, Labor, and Pensions (HELP) held a hearing entitled "Redefining Fiduciary': Assessing the Impact of the Labor Department's Proposal on Workers and Retirees" to examine the consequences of EBSA's 2010 proposed rule. Witnesses included the Honorable Phyllis Borzi, Assistant Secretary of Labor, Employee Benefits Security Administration, Washington, D.C.; Mr. Kenneth Bentsen, Executive Vice President, Securities Industry and Financial Markets Association, Washington, D.C.; Mr. Kent Mason, Partner, Davis & Harman LLP, Washington, D.C.; Mr. Donald Myers, Partner, Morgan, Lewis & Bockius LLP, Washington, D.C.; Mr. Norman Stein, Professor, Earle Mack School of Law, Drexel University, Philadelphia, Pennsylvania; and Mr. Jeffrey Tarbell, Director, Houlihan Lokey, San Francisco, California.

Full Committee hearing Reviewing the President's Fiscal Year 2013 Budget Proposal for the Department of Labor

On March 21, 2012, the Committee held a hearing entitled "Reviewing the President's Fiscal Year 2013 Budget Proposal for the Department of Labor." Then-Secretary Solis was the sole witness. During the hearing, Representatives of both parties thanked Sec-

---

[1] Definition of the Term "Fiduciary"; Conflict of Interest Rule-Retirement Investment Advice, 80 Fed. Reg. 21928 (Apr. 20, 2015).
[2] 29 U.S.C. § 1001 *et seq*. ERISA section citations will be used throughout.
[3] 26 U.S.C. § 1 *et seq*. [hereinafter the Code].

retary Solis for withdrawing the 2010 proposed fiduciary rule and inquired as to what criteria would be considered in a subsequent regulatory proposal.[5]

113TH CONGRESS

Full Committee hearing Reviewing the President's Fiscal Year 2015 Budget Proposal for the Department of Labor

On March 26, 2014, the Committee held a hearing entitled "Reviewing the President's Fiscal Year 2015 Budget Proposal for the Department of Labor." The Honorable Thomas E. Perez, Secretary of the U.S. Department of Labor, was the sole witness. During this hearing, Committee on Education and the Workforce Chairman John Kline reiterated bipartisan concerns regarding DOL's ongoing fiduciary rulemaking. Addressing the consequences of the department's proposed rule, Chairman Kline urged Secretary Perez to keep in mind "what the impact will be on important advice that people, particularly low-income people, might need."[6]

114TH CONGRESS

Full Committee hearing reviewing the President's Fiscal Year 2016 Budget Proposal for the Department of Labor

On March 18, 2015, the Committee held a hearing entitled "Reviewing the President's Fiscal Year 2016 Budget Proposal for the Department of Labor." Secretary Perez was the sole witness. During the hearing, Representative Frederica Wilson (D–FL) warned that a new proposed fiduciary rule should not "impact the availability of affordable investment advice."[7]

Subcommittee hearing examining Restricting Access to Financial Advice: Evaluating the Costs and Consequences for Working Families and Retirees

On June 17, 2015, the HELP Subcommittee held a hearing entitled "Restricting Access to Financial Advice: Evaluating the Costs and Consequences for Working Families and Retirees'" to examine the new DOL Notice of Proposed Rulemaking (NPRM) amending the regulatory definition of "fiduciary" under ERISA. Witnesses before the Subcommittee included Secretary Perez; Mr. Jack Haley, Executive Vice President, Fidelity Investments, Boston, Massachusetts; Mr. Dean Harman, CFP, Managing Director, Harman Wealth Management, The Woodlands, Texas; Mr. Dennis Kelleher, President and CEO, Better Markets, Washington, D.C.; Mr. Kent Mason, Partner, Davis & Harman LLP, Washington, D.C.; and Dr. Brian Reid, Ph.D., Chief Economist, Investment Company Institute, Washington, D.C. During the hearing, Dr. Reid testified opposing DOL's reproposed fiduciary rule, saying, "[A]ny policy that impairs retirement savers" ability to get the help that they need will significantly harm the prospects of millions of workers. Unfor-

[5] *Reviewing the President's Fiscal Year 2013 Budget Proposal for the Department of Labor: Hearing Before the H. Comm. on Educ. and the Workforce*, 112th Cong. (Mar. 21, 2012).

[6] *Reviewing the President's Fiscal Year 2015 Budget Proposal for the Department of Labor: Hearing Before the H. Comm. on Educ. and the Workforce*, 113th Cong. 86 (Mar. 26, 2014) (closing statement of Rep. John Kline, Chairman, H. Comm. on Educ. and the Workforce).

[7] *Reviewing the President's Fiscal Year 2016 Budget Proposal for the Department of Labor: Hearing Before the H. Comm. on Educ. and the Workforce*, 114th Cong. (Mar. 18, 2015) (statement of Rep. Frederica S. Wilson, Member, H. Comm. on Educ. and the Workforce).

tunately, the DOL proposal will do just that."[8] Additionally, Jack Haley of Fidelity Investments testified in support of a "best-interest fiduciary standard crafted in a way that allows workers choice and access to the services they need and desire."[9]

Subcommittee hearing examining the Principles for Ensuring Retirement Advice Serves the Best Interests of Working Families and Retirees

On December 2, 2015, the HELP Subcommittee held a hearing entitled "Principles for Ensuring Retirement Advice Serves the Best Interests of Working Families and Retirees'" to further examine the DOL NPRM amending the regulatory definition of "fiduciary" under ERISA. Notably, the Subcommittee considered the potential negative effects of the NPRM on small businesses and low- and middle-income families. Witnesses before the Subcommittee included the Honorable Bradford (Brad) Campbell, Counsel, Drinker Biddle & Reath LLP, Washington, D.C.; Ms. Rachel A. Doba, President, DB Engineering, LLC, Indianapolis, Indiana; Mr. Jules O. Gaudreau, Jr. ChFC, CIC, President, The Gaudreau Group, Inc., Wilbraham, Massachusetts; and Ms. Marilyn Mohrman-Gillis, Esq., Managing Director, Public Policy & Communications, Certified Financial Planner Board of Standards, Washington, D.C. During the hearing,[10] witnesses praised the bipartisan principles outlined by Representatives Phil Roe (R–TN), Richard Neal (D–MA), Peter Roskam (R–IL), and Michelle Lujan Grisham (D–NM) for a legislative solution to help strengthen retirement security.

H.R. 4293, Affordable Retirement Advice Protection Act, introduced

On December 18, 2015, Representative Phil Roe (R–TN), Chairman of the HELP Subcommittee, introduced the *Affordable Retirement Advice Protection Act* (H.R. 4293),[11] with five cosponsors.[12] Recognizing the threat of DOL's proposed rule, Representative Roe introduced the bipartisan bill to protect consumers and preserve access to affordable financial advice for low- and middle-income families. The legislation amends ERISA to require retirement advisors act in their clients' best interest, and prohibits DOL from implementing its flawed proposal unless Congress affirmatively approves the final rule.

Committee passes H.R. 4293, Affordable Retirement Advice Protection Act

On February 2, 2016, the Committee on Education and the Workforce considered H.R. 4293, the *Affordable Retirement Advice*

---

[8] *Restricting Access to Financial Advice: Evaluating the Costs and Consequences for Working Families and Retirees: Hearing Before the Subcomm. on Health, Employment, Labor, and Pensions of the H. Comm. on Educ. and the Workforce*, 114th Cong. (Jun. 17, 2015) (oral testimony of Dr. Brian Reid, Ph.D., Chief Economist, Investment Company Institute).

[9] *Restricting Access to Financial Advice: Evaluating the Costs and Consequences for Working Families and Retirees: Hearing Before the Subcomm. on Health, Employment, Labor, and Pensions of the H. Comm. on Educ. and the Workforce*, 114th Cong. (Jun. 17, 2015) (oral testimony of Mr. Jack Haley, Executive Vice President, Fidelity Investments).

[10] *Principles for Ensuring Retirement Advice Serves the Best Interests of Working Families and Retirees: Hearing Before the Subcomm. on Health, Employment, Labor, and Pensions of the H. Comm. on Educ. and the Workforce*, 114th Cong. (Dec. 2, 2015).

[11] H.R. 4293, 114th Cong. (2015).

[12] Original co-sponsors of H.R. 4293 include Representatives Richard Neal (D–MA), Peter Roskam (R–IL), John Larson (D–CT), Earl L. "Buddy" Carter (R–GA), and David Scott (D–GA).

Protection Act.[13] Representative Roe offered an amendment in the nature of a substitute, making technical changes to the introduced bill. The Committee voted to adopt the amendment in the nature of a substitute by voice vote. One additional amendment was offered but was voted down by voice vote. The Committee favorably reported H.R. 4293, as amended, to the House of Representatives by a vote of 22–14.

BACKGROUND

PRESENT LAW

Pension plans and fiduciary requirements under ERISA

ERISA, generally administered by the Secretary of Labor (Secretary), applies various requirements with respect to employee pension benefit plans (pension plans).[14] A pension plan may be a defined contribution plan (also referred to as an "individual account plan") or a defined benefit plan.

Under a defined contribution plan, benefits are based on an individual account for each participant, to which are allocated contributions, earnings, and losses.[15] Defined contribution plans commonly allow participants to direct the investment of their accounts, usually by choosing among investment options offered under the plan. Under a defined benefit plan, benefits are determined under a plan formula, and benefits under a defined benefit plan are funded by the general assets of the trust established under the plan, which are invested by plan fiduciaries; individual accounts are not maintained for employees participating in the plan.[16]

ERISA requires a fiduciary of a plan to discharge his duties with respect to the plan solely in the interest of the participants and beneficiaries, for the exclusive purpose of providing benefits to participants and their beneficiaries and defraying reasonable expenses of administering the plan, and with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.[17] With respect to plan assets, ERISA requires a fiduciary to diversify the investments of the plan so as to minimize the risk of large losses unless under the circumstances it is clearly prudent not to do so.

A plan fiduciary that breaches any of the fiduciary responsibilities, obligations, or duties imposed by ERISA (including the prohibited transaction rules discussed below) is personally liable to make good to the plan any losses to the plan resulting from such breach and to restore to the plan any profits the fiduciary has

---

[13] *H.R. 4293, Affordable Retirement Advice Protection Act: Markup Before the H. Comm. on Educ. and the Workforce*, 114th Cong. (Feb. 2, 2016).

[14] ERISA applies also to employee welfare benefit plans. ERISA generally does not apply to church plans or plans of governmental employers.

[15] Defined contribution plan (or individual account plan) is defined at ERISA section 3(34).

[16] As defined in ERISA section 3(35), a defined benefit plan generally is any plan that is not a defined contribution plan.

[17] ERISA §404(a)(1). ERISA section 402(a)(1) requires a plan to be established pursuant to a written instrument that provides for one or more named fiduciaries who jointly or severally have authority to control and manage the operation and administration of the plan. For this purpose, the term "named fiduciary" means a fiduciary who is named in the plan instrument, or who, pursuant to a procedure specified in the plan, is identified as a fiduciary by a person who is an employer or employee organization with respect to the plan or by an employer and an employee organization acting jointly.

made through the use of plan assets.[18] A plan fiduciary may be liable also for a breach of responsibility by another fiduciary (a "co-fiduciary") in certain circumstances, for example, if the fiduciary's failure to fulfill his own fiduciary duties enabled the co-fiduciary to commit the breach.[19] Certain fiduciary violations may result in the imposition of civil penalties.[20]

ERISA provides a special rule in the case of a defined contribution plan that permits participants to exercise control over the assets in their individual accounts (often referred to as "participant-directed investments").[21] Under the special rule, if a participant exercises control over the assets in his or her account, the participant is not deemed to be a fiduciary by reason of such exercise, and no person who is otherwise a fiduciary is liable for any loss, or by reason of any breach, that results from the participant's exercise of control.

General prohibited transaction rules

ERISA prohibits a plan fiduciary from causing the plan to engage in any of certain transactions ("prohibited transactions") between the plan and a party in interest if the fiduciary knows or should know that the transaction is a prohibited transaction.[22] Prohibited transactions include the following, whether direct or indirect, between a plan and a party in interest: (1) the sale or exchange or leasing of property, (2) the lending of money or other extension of credit, (3) the furnishing of goods, services, or facilities, (4) the transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan, or (5) an acquisition, on behalf of the plan, of any employer security or employer real property in violation of ERISA restrictions.[23] In addition, these rules prohibit a fiduciary that has authority or discretion to control or manage the assets of a plan to permit the plan to hold any employer security or employer real property if the fiduciary knows or should know that holding the security or real property violates ERISA restrictions. These rules also provide that a fiduciary with respect to a plan must not (1) deal with the assets of the plan in his own interest or for his own account, (2) in his individual or in any other capacity, act in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries, or (3) receive any consideration for his own personal account from any party dealing with the plan in connection with a transaction involving the assets of the plan.

For purposes of ERISA, a party in interest includes any fiduciary (including, but not limited to, any administrator, officer, trustee, or custodian), counsel, or employee of the plan; a person providing services to the plan; an employer, any of whose employees are covered by the plan; an employee organization, any of whose members

---

[18] ERISA § 409. Under ERISA section 502(a)(2), an action for a breach of fiduciary responsibility may be brought by DOL, a plan participant or beneficiary, or another fiduciary.

[19] ERISA § 405.

[20] ERISA § 502(i) and (l).

[21] ERISA § 404(c), implemented by regulations at 29 C.F.R. sec. 2550.404c–1. 29 C.F.R. sec. 2550.404c–5 provides rules for qualified default investment alternatives (QDIAs) if a participant does not select any investment options.

[22] ERISA § 406.

[23] ERISA sec. 407 restricts the acquisition or holding of employer securities and employer real property by a plan.

are covered by the plan; and certain owners, relatives, employees, officers, directors, and related entities.[24] In general, a person is a fiduciary with respect to a plan to the extent he (1) exercises any discretionary authority or discretionary control respecting management of the plan or exercises any authority or control respecting management or disposition of plan assets, (2) renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (3) has any discretionary authority or discretionary responsibility in the administration of the plan.[25]

Certain transactions are statutorily exempt from prohibited transaction treatment, for example, certain loans to plan participants and arrangements with a party in interest for legal, accounting or other services necessary for the establishment or operation of a plan if no more than reasonable compensation is paid for the services.[26] In addition, an administrative exemption may be granted, on either an individual or class basis, subject to a finding that the exemption is administratively feasible, in the interests of the plan and of its participants and beneficiaries, and protective of the rights of participants and beneficiaries of the plan.[27]

Rules relating to investment advice

Fiduciary status

As described above, a fiduciary includes a person who renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of the plan, or has any authority or responsibility to do so.

Existing DOL regulations, issued in 1975, provide that a person is deemed to be rendering "investment advice" to an employee benefit plan for this purpose only if he—

- renders advice to the plan as to the value of securities or other property or makes recommendation as to the advisability of investing in, purchasing, or selling securities or other property; and
- either directly or indirectly (for example, through or together with any affiliate) (1) has discretionary authority or control, whether or not pursuant to agreement, arrangement, or understanding, with respect to purchasing or selling securities or other property for the plan, or (2) renders any advice as described above on a regular basis to the plan pursuant to a mutual agreement, arrangement, or understanding, written or otherwise, between the person and the plan or a fiduciary with respect to the plan, that the person's services will serve as a primary basis for investment decisions with respect to plan assets, and that the person will render individualized investment advice to the plan based on the particular needs of the plan regarding matters such as, among other things, investment poli-

[24] ERISA § 3(14).
[25] ERISA § 3(21). Fiduciary also includes a person designated by a named fiduciary to carry out fiduciary responsibilities (other than trustee responsibilities) under the plan.
[26] ERISA § 408(b).
[27] ERISA § 408(a).

cies or strategy, overall portfolio composition, or diversification of plan investments.[28]

The regulations further provide that a person who is a fiduciary with respect to a plan by reason of rendering investment advice (as described above) for a fee or other compensation, direct or indirect, with respect to any moneys or other property of the plan, or having any authority or responsibility to do so, is not deemed to be a fiduciary regarding any assets of the plan with respect to which the person does not have any discretionary authority, discretionary control, or discretionary responsibility, does not exercise any authority or control, does not render investment advice (as described above) for a fee or other compensation, and does not have any authority or responsibility to render such investment advice. However, this rule does not exempt the person from ERISA liability attributable to a breach of responsibility by a co-fiduciary or exclude the person from the definition of the term "party in interest" based on providing services to the plan with respect to any assets of the plan.

In addition to the regulations, other guidance issued by DOL in 1996 (Interpretive Bulletin 96–1) provides that the furnishing of mere investment education to a participant or beneficiary in a participant-directed individual account plan does not constitute the rendering of investment advice.[29] For this purpose, investment education includes the following categories of information and materials: plan information, general financial and investment information, asset allocation models, and interactive investment materials. Interpretive Bulletin 96–1 more fully describes these categories and notes that the information and materials merely represent examples of the type that may be furnished to participants and beneficiaries without such information and materials constituting investment advice, and that there may be many other examples of information, materials, and educational services, which if furnished to participants and beneficiaries, would not constitute investment advice. Accordingly, Interpretive Bulletin 96–1 provides that no inferences should be drawn from the description of the four categories with respect to whether the furnishing of any information, materials, or educational services not described therein may constitute investment advice.

Statutory exemptions relating to investment advice

If certain requirements are met, specific transactions relating to investment advice are exempt from prohibited transaction treatment if the advice is provided by a fiduciary advisor through an eli-

[28] 29 C.F.R. § 2510.3–21(c). Under Sec. 102 of Reorganization Plan No. 4 of 1978, 43 Fed. Reg. 47713 (Oct. 17, 1978), with certain exceptions, the Secretary of the Treasury's authority with respect to regulations, rulings, opinions, and exemptions under the prohibited transaction provisions of the Code was transferred to the Secretary of Labor. As a result, DOL regulations and other guidance relating to prohibited transactions, including the grant of exemptions, apply for Code purposes, as well as for ERISA purposes.

[29] 29 C.F.R. § 2905.96–1. This treatment applies irrespective of who provides the information (for example, the plan sponsor, fiduciary or service provider), the frequency with which the information is shared, the form in which the information and materials are provided (for example, on an individual or group basis, in writing or orally, or via video or computer software), or whether an identified category of information and materials is furnished alone or in combination with other identified categories of information and materials.

gible investment advice arrangement.[30] The exemptions apply to (1) the provision of investment advice to a plan participant or beneficiary with respect to a security or other property available as an investment under the plan, (2) an investment transaction (that is, a sale, acquisition, or holding of a security or other property) pursuant to the advice, and (3) the direct or indirect receipt of fees or other compensation in connection with the provision of the advice or an investment transaction pursuant to the advice.

For purposes of the exemptions, an eligible investment advice arrangement is generally an arrangement that either (1) provides that any fees (including any commission or compensation) received by the fiduciary advisor for investment advice or with respect to an investment transaction with respect to plan assets do not vary depending on the basis of any investment option selected (sometimes referred to as "fee-leveling"), or (2) uses a computer model under an investment advice program that meets specified requirements in connection with the provision of investment advice to a participant or beneficiary.[31] The arrangement must be expressly authorized by a plan fiduciary other than (1) the person offering the investment advice program, (2) any person providing investment options under the plan, or (3) any affiliate of (1) or (2).[32] In addition, the fiduciary advisor must provide disclosures applicable under securities laws; any investment transaction must occur solely at the direction of the investment advice recipient; the compensation received by the fiduciary advisor and affiliates in connection with the investment transaction must be reasonable; and the terms of the investment transaction must be at least as favorable to the plan as an arm's length transaction would be.

DOL'S 2015 PROPOSED REGULATIONS AND "BIC" EXEMPTION

On April 20, 2015, DOL proposed regulations that would replace the current regulations relating to investment advice with a new standard as to whether a person is a fiduciary based on rendering investment advice, generally to be applicable eight months after final regulations are published.[33] Under the proposed regulations, a person is a fiduciary based on rendering investment advice if the person—

- provides to a plan, a plan fiduciary, an IRA,[34] or an IRA owner certain types of recommendations or statements (as described below) that constitute investment advice with respect to plan or IRA assets in exchange for a fee or other compensation, and

---

[30] ERISA § 408(b)(14) and (g), enacted by section 601 of the Pension Protection Act of 2006, Pub. L. No. 109–280.

[31] Various requirements with respect to notices and disclosure, recordkeeping and audits must also be met.

[32] Affiliate for this purpose means an affiliated person as defined under section 2(a)(3) of the Investment Company Act of 1940, 15 U.S.C. § 80a–2(a)(3).

[33] Definition of the Term "Fiduciary," 80 Fed. Reg. at 21928. The proposed regulations would apply for purposes of ERISA and the prohibited transaction rules of the Code. DOL had previously proposed a regulation similarly expanding fiduciary liability. Definition of the Term "Fiduciary," 75 Fed. Reg. 65263 (Oct. 15, 2010) [hereinafter 2010 Proposal]. That proposal was withdrawn due to bipartisan opposition.

[34] IRA is defined in the proposed guidance to include HSAs, Archer MSAs, and Coverdell ESAs, as well as IRAs. In Part IV.E of the preamble to the proposed regulations, DOL requests comments as to whether it is appropriate to cover individual accounts other than IRAs and treat them in a manner similar to IRAs. Definition of the Term "Fiduciary," 80 Fed. Reg. at 21947.

- either directly or indirectly (such as through an affiliate) (1) represents or acknowledges that it is acting as a fiduciary with respect to the investment advice or (2) renders the advice pursuant to a written or verbal agreement, arrangement, or understanding that the advice is individualized to, or that the advice is specifically directed to, the advice recipient for consideration in making investment or management decisions with respect to securities or other property of the plan or IRA.

Under the proposed regulations, investment advice includes—

- a recommendation as to the advisability of acquiring, holding, disposing of, or exchanging securities or other property, including a recommendation to take a distribution of benefits or a recommendation as to the investment of securities or other property to be rolled over or otherwise distributed from the plan or IRA;[35]
- a recommendation as to the management of securities or other property, including recommendations as to the management of securities or other property to be rolled over or otherwise distributed from the plan or IRA;
- an appraisal, fairness opinion, or similar statement, whether verbal or written, concerning the value of securities or other property if provided in connection with a specific transaction or transactions involving the acquisition, disposition, or exchange of such securities or other property by the plan or IRA; and
- a recommendation of a person who is also going to receive a fee or other compensation for providing any of the types of advice described above.

Subject to specified requirements for each exception, the proposed regulations provide exceptions (referred to as "carve outs"') for (1) certain counterparties in transactions with an employee benefit plan (referred to as the "seller's carve out"); (2) swap and security-based swap transactions with an employee benefit plan; (3) employees of an employee benefit plan sponsor; (4) platform providers to employee benefit plans; (5) persons providing selection and monitoring assistance to employee benefit plans; (6) financial reports and valuations (including to an IRA or IRA owner); and (7) investment education (including to an IRA or IRA owner), under standards somewhat different from the standards in the existing DOL guidance. However, an exception does not apply if the person represents or acknowledges that it is acting as a fiduciary with respect to the advice. In conjunction with the proposed regulations, DOL proposed new prohibited transaction class exemptions, including a

[35] DOL Advisory Opinion 2005–23A (Dec. 7, 2005) addresses the question of whether a recommendation that a participant in a pension plan roll over his or her account balance to an IRA to take advantage of investment options not available under the plan constitutes investment advice with respect to plan assets. The advisory opinion expresses the view that, with respect to a person who is not otherwise a plan fiduciary, merely advising a plan participant to take an otherwise permissible plan distribution, even when the advice is combined with a recommendation as to how the distribution should be invested, does not constitute investment advice within the meaning of the existing DOL investment advice regulations defining when a person is a fiduciary by virtue of providing investment advice with respect to employee benefit plan assets. The advisory opinion provides that DOL does not view a recommendation to take a distribution as advice or a recommendation concerning a particular investment (that is, purchasing or selling securities or other property) as contemplated by the regulations and that any investment recommendation regarding the proceeds of a distribution would be advice with respect to funds that are no longer plan assets. Part IV.A(1) of the preamble to the proposed regulations notes that the proposed regulations, if finalized, would supersede Advisory Opinion 2005–23A. Definition of the Term "Fiduciary," 80 Fed. Reg. at 21939.

"best interest contract" (or BIC) exemption,[36] as well as proposing changes to various existing class exemptions.

The proposed BIC class exemption generally applies to compensation received by an investment advisor or related party in connection with a transaction (that is, a purchase, sale, or holding of assets) resulting from investment advice provided to "retirement investors," meaning plan participants or beneficiaries who direct the investment of the assets in their accounts, IRA owners who make investment decisions with respect to their IRAs, and a plan sponsor (or employee, officer, or director thereof) of a plan with fewer than 100 participants where the plan does not provide for participant-directed investments and the plan sponsor acts as a fiduciary who has authority to make plan investment decisions. Only advice in the best interest of the saver under the proposed regulation qualifies for the exemption.[37]

Assets subject to the proposed BIC class exemption include the following: bank deposits; certificates of deposit (CDs); shares or interests in mutual funds; bank collective funds; insurance company separate accounts; exchange-traded REITs (Real Estate Investment Trusts); exchange-traded funds; corporate bonds offered pursuant to a registration statement under the *Securities Act of 1933*; agency debt securities and U.S. Treasury Securities; insurance and annuity contracts; guaranteed investment contracts; and exchange-traded equity securities.

The proposed BIC class exemption requires that, before making any recommendations on investment transactions, the advisor and financial institution enter into a written contract with the retirement investor as follows:

- The contract affirmatively states that the advisor and financial institution are fiduciaries under ERISA, the Code, or both, with respect to any investment recommendation to the retirement investor;
- Under the contract, the advisor and financial institution specifically agree to adhere to certain impartial conduct standards, which include providing investment advice that is in the best interest of the retirement investor, not recommending investment in an asset if they (or affiliates) will receive more than reasonable compensation in relation to the total services they provide to the retirement investor with respect to the investment, and not providing any statements about an asset, fees, material conflict of interest, and any other matter related to the retirement investor's investment decision that are misleading;
- Under the contract, the advisor and financial institution provide certain warranties and make certain disclosures related to fees and conflicts of interest; and
- The contract must not have exculpatory provisions disclaiming or otherwise limiting liability of the advisor or financial institution for a violation of the contract's terms, or a pro-

[36] Proposed Best Interest Contract Exemption, 80 Fed. Reg. 21960 (Apr. 20, 2015). This class exemption is proposed to become applicable at the same time as the 2015 proposed fiduciary regulations, eight months after publication of final regulations.

[37] The preamble to the proposed exemption states, "Under this standard, the Adviser and Financial Institution must put the interests of the Retirement Investor ahead of the financial interests of the Adviser, Financial Institution or their Affiliates, Related Entities or any other party." Proposed Best Interest Contract Exemption, 80 Fed. Reg. at 21970.

vision under which a plan, IRA, or retirement investor waives or qualifies its right to bring or participate in a class action or other representative action in court in a dispute with the advisor or financial institution.[38]

SUMMARY OF H.R. 4293

The bill specifies that its purpose is to provide that advisors who (1) provide advice that is impermissible under the prohibited transaction provisions of ERISA or (2) breach the best interest standard for the provision of investment advice are subject to liability under ERISA.

The bill amends the statutory definition of fiduciary by adding a definition of investment advice. In addition, subject to specified requirements, the bill adds a new statutory prohibited transaction exemption for any transaction, including a contract for service, between a person providing investment advice and the advice recipient in connection with the investment advice, and any transaction consisting of the provision of the investment advice.

DEFINITION OF INVESTMENT ADVICE

General rule

As defined under the bill, investment advice includes certain recommendations rendered under certain conditions. Specifically, the recommendations that may be investment advice (if rendered under the conditions described below) are those that relate to the following:

- the advisability of acquiring, holding, disposing, or exchanging any moneys or other property of a plan by the plan, plan participants, or plan beneficiaries, including any recommendation whether to take a distribution of benefits from the plan or any recommendation relating to the investment of any moneys or other property of the plan to be distributed from the plan;
- the management of moneys or other property of the plan, including recommendations relating to the management of moneys or other property to be distributed from the plan; or
- the advisability of retaining or ceasing to retain a person who would receive a fee or other compensation for providing any of these types of advice.[39]

In order for a recommendation to be investment advice, it must be rendered pursuant to either of the following:

- a written acknowledgment that the person is a fiduciary with respect to the provision of the recommendation; or
- a mutual agreement, arrangement, or understanding, which may include limitations as to the scope, timing, and responsibility to provide ongoing monitoring or advice services, between the person making the recommendation and the plan

[38] As described in DOL's background discussion of the proposed exemption, the contract terms to which advisors and financial institutions must agree in order to qualify for the proposed BIC class exemption potentially create a cause of action that may be used by retirement investors to enforce these contract terms. Proposed Best Interest Contract Exemption, 80 Fed. Reg. at 21972, 21973.

[39] Because a rollover always occurs in connection with a distribution, recommendations relating to moneys or other property to be distributed from a plan include recommendations relating to rollovers of such moneys or other property.

that the recommendation is individualized to the plan and the plan intends to materially rely on the recommendation in making investment or management decisions with respect to any moneys or other property of the plan.

Disclaimer of a mutual agreement, arrangement, or understanding

Under the bill, any disclaimer of a mutual agreement, arrangement, or understanding with respect to a recommendation must only state the following: "This information is not individualized to you, and you are not intended to materially rely on this information in making investment or management decisions." Further, this disclaimer is not effective unless it is in writing and is communicated in a clear and prominent manner, and an objective person would reasonably conclude that, based on all the facts and circumstances, there was not a mutual agreement, arrangement, or understanding.

Information not treated as investment advice

Under the bill, information provided in the circumstances described below is not treated as a recommendation made pursuant to a mutual agreement, arrangement, or understanding for purposes of the definition of investment advice. The information in these circumstances shall contain the disclaimer described above.

1. The information is provided in conjunction with full and fair disclosure in writing to a plan, plan participant, or beneficiary that the person providing the information is doing so in its marketing or sales capacity, including any information regarding the terms and conditions of the engagement of the person providing the information, and that the person is not intending to provide investment advice (as defined under the bill) or to otherwise act as a fiduciary to the plan or to act under the obligations of the best interest standard.

2. The person providing the information is a counterparty or service provider to the plan in connection with any transaction based on the information (including a service arrangement, sale, purchase, loan, bilateral contract, swap,[40] or security-based swap[41]). In addition, the plan is represented, in connection with the transaction, by a plan fiduciary that is independent of the person providing the information, and, except in the case of a swap or security-based swap, independent of the plan sponsor. Further, prior to the transaction, the independent plan fiduciary represents in writing to the person providing the information that it is aware that the person has a financial interest in the transaction and that it has determined that the person is not intending to provide investment advice (as defined under the bill) or to otherwise act as a fiduciary to the plan.

3. The person providing the information is an employee of any sponsoring employer or employee organization who provides the information to the plan for no fee or other compensation other than the employee's normal compensation.

---

[40] A swap for this purpose is defined in section 1a of the Commodity Exchange Act, 7 U.S.C. § 1a.

[41] A security-based swap for this purpose is defined in section 3(a) of the Securities Exchange Act, 15 U.S.C. § 78c(a).

4. The person providing the information discloses in writing to the plan fiduciary that the person is not undertaking to provide investment advice as a fiduciary. In addition, the information provided consists solely of—

- making available to the plan, without regard to the individualized needs of the plan, securities or other property through a platform or similar mechanism from which a plan fiduciary may select or monitor investment alternatives, including qualified default investment alternatives, into which plan participants or beneficiaries may direct the investment of assets held in, or contributed to, their individual accounts, or
- in connection with a platform or similar mechanism described above, either (1) identifying investment alternatives that meet objective criteria specified by the plan, such as criteria concerning expense ratios, fund sizes, types of asset, or credit quality, or (2) providing objective financial data and comparisons with independent benchmarks to the plan.

5. The information consists solely of valuation information.

6. The information consists solely of the following:

- information described in DOL Interpretive Bulletin 96–1 as in effect on January 1, 2015, regardless of whether the education is provided to a plan or plan fiduciary or a participant or beneficiary,
- information provided to participants or beneficiaries regarding the factors to consider in deciding whether to elect to receive a distribution from a plan or an IRA and whether to roll over the distribution to a plan or an IRA, so long as any examples of different distribution alternatives are accompanied by all material facts and assumptions on which the examples are based, or
- any additional information treated as education by the Secretary.

EXEMPTION

The bill provides a prohibited transaction exemption for any transaction, including a contract for service, between a person (referred to herein as the "investment advisor") providing investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of the plan, and the advice recipient in connection with the investment advice, as well as any transaction consisting of the provision of the investment advice.

The exemption applies if the following conditions are met: [42]

1. No more than reasonable compensation is paid for the investment advice.[43]

2. If the investment advice is based on a limited range of investment options, which may consist, in whole or in part, of proprietary products, the limitations must be clearly disclosed to the advice recipient before any transaction based on the investment advice in the form of a notice that states only the following: "This rec-

[42] Like all fiduciary acts, transactions covered by the exemption are also subject to the general fiduciary standard under ERISA.

[43] Reasonable compensation for this purpose is determined as under the present–law prohibited transaction exemption under ERISA section 408(b)(2) for an arrangement with a disqualified person for services necessary for the establishment or operation of a plan if no more than reasonable compensation is paid therefor.

ommendation is based on a limited range of investment options, and the same or similar investments may be available at a different cost (greater or lesser) from other sources."

3. If the investment advice may result in variable compensation to the investment advisor (or any affiliate[44] thereof), the receipt of the compensation must be clearly disclosed to the advice recipient before any transaction based on the investment advice. For this purpose, clear disclosure of variable compensation, must include, in a manner calculated to be understood by the average individual, each of the following:

- A notice that states only the following: "This recommendation may result in varying amounts of fees or other compensation to the person providing the recommendation (or its affiliate), and the same or similar investments may be available at a different cost (greater or lesser) from other sources."[45]
- A description of any fee or other compensation that is directly or indirectly payable to the investment advisor (or its affiliate) by the advice recipient with respect to the transaction (expressed as an amount, formula, percentage of assets, per capita charge, or estimate or range of the compensation).
- A description of the types and ranges of any compensation that may be directly or indirectly payable to the investment advisor (or its affiliate) by any third party in connection with the transaction (expressed as an amount, formula, percentage of assets, per capita charge, or estimate or range of the compensation).
- On request of the advice recipient, a disclosure of the specific amounts of compensation that the investment advisor will receive in connection with the particular transaction (expressed as an amount, formula, percentage of assets, per capita charge, or estimate of the compensation).

A notice with respect to limitations on the range of investment options on which investment advice is based or with respect to variable compensation shall have no effect on any other notice otherwise required without regard to ERISA and shall be provided in addition to, and not in lieu of, any other such notice.

Under the bill, a recommendation will not fail to satisfy the conditions for the exemption solely because the person, acting in good faith and with reasonable diligence, makes an error or omission in disclosing the information specified above if the person discloses the correct information to the advice recipient as soon as practicable, but not later than 30 days from the date on which the person knows of the error or omission.

EFFECTIVE DATE

The amendments made by the bill generally are effective on the 61st day after the date of enactment of the bill and apply with respect to information provided or recommendations made on or after two years after the date of enactment. However, if, before the 61st day after the date of enactment, a bill or joint resolution is enacted

[44] Under the bill, affiliate is defined as under the present-law exemption relating to investment advice, that is, an affiliated person as defined under section 2(a)(3) of the Investment Company Act of 1940. 15 U.S.C. § 80a–2(a)(3).

[45] Any regulations or other administrative guidance implementing this requirement may not require this notice to be updated more frequently than annually.

that specifically approves any rules or administrative positions that are promulgated under, or applicable for purposes of, the ERISA statutory definition of fiduciary and are not in effect on January 1, 2015, the amendments made by the bill will not take effect. In addition, the amendments made by the bill do not apply to any service or transaction rendered, entered into, or for which a person has been compensated before the date on which the amendments generally become effective.

DOL is prohibited from amending any rules or administrative positions promulgated under, or applicable for purposes of, the ERISA statutory definition of fiduciary (including DOL Interpretive Bulletin 96–1 and Advisory Opinion 2005–23A), and no rule or administrative position promulgated by DOL before the date of enactment of the bill but not effective on January 1, 2015, may become effective unless a bill or joint resolution as described above is enacted not later than 60 days after the date of enactment of the bill. If the amendments made by the bill take effect, nothing in the bill is to be construed to prohibit the issuance of guidance to carry out the amendments so long as the guidance is necessary to implement the amendments. Until the time when regulations or other guidance are issued to carry out the amendments, a plan or a fiduciary will be treated as meeting the requirements of the amendments if the plan or fiduciary, as applicable, complies with a reasonable good faith interpretation of the amendments.

COMMITTEE VIEWS

DOL'S ABANDONED 2010 PROPOSAL

The Obama administration has long argued the regulatory definition of an "investment advice" fiduciary is insufficiently restrictive.[46] To address this concern, in 2010, EBSA issued a complicated proposed regulation expanding the definition of "fiduciary."[47] On September 19, 2011, in the face of bipartisan opposition from the Committee and others in Congress related to access to advice and cost, EBSA withdrew its original proposal and announced it would repropose a revised rulemaking.[48]

CONCERNS WITH DOL'S 2015 PROPOSAL

DOL's April 2015 Notice of Proposed Rulemaking

At a February 2015 speech at AARP, President Obama announced his intention to go forward with this rulemaking.[49] In this speech and subsequent public statements, the administration rebranded the proposed regulation as a consumer protection against "backdoor payments and hidden fees" generated by structural conflicts of interest in the retirement advice industry. After review by the Office of Management and Budget (OMB), DOL released its

---

[46] See Council of Economic Advisors, The Effects of Conflicted Investment Advice on Retirement Saving, (Feb. 2015) *http://www.whitehouse.gov/sites/default/files/docs/cea_coi_report_final.pdf.* [hereinafter CEA Report].

[47] 2010 Proposal, 75 Fed. Reg. at 65263.

[48] See Press Release, Dept. of Labor, U.S. Labor Department's EBSA to re-propose rule on definition of a fiduciary (Sept. 19, 2011), *http://www.dol.gov/ebsa/newsroom/2011/11-1382-NAT.html.*

[49] Press Release, White House Office of the Press Secretary, Remarks by the President at the AARP (Feb. 23, 2015), *http://www.whitehouse.gov/the-press-office/2015/02/23/remarks-president-aarp.*

new notice of proposed rulemaking (the 2015 NPRM) in April 2015.[50] The new proposal was preceded by a Council of Economic Advisors report arguing that "conflicted advice" costs Americans $17 billion annually.[51] This figure assumes that IRA investors were duped into rolling over 401(k) funds into high cost mutual funds by advisors and brokers and, as a result, pay on average 1 percent more annually. These assumptions have come under intense scrutiny from analysts who argue IRA holders actually pay only 0.16 percent more and that these fees are justifiable due to a higher level of service.[52]

Proposed exemptions

In addition to the NPRM itself, DOL's proposed regulatory package also includes six prohibited transaction exemptions—some new and a few revisions of existing exemptions. The most notable is the BIC exemption. DOL claims this exemption will provide a framework permitting newly-minted fiduciaries to continue to receive commissions and other payments that would otherwise be prohibited by ERISA. However, to qualify for the exemption, an investment advisor would need to enter into a contract (before any investment recommendation is made) acknowledging fiduciary status and agree to abide by certain requirements. While advisors should work in the best interest of their clients, this requirement is unworkable because potential clients would be required to sign this contract before the advisory relationship actually begins.[53]

Summary of key concerns

Based on overwhelming testimony from a diverse group of stakeholders, the Committee has concluded the DOL proposal would disrupt advisory relationships, contains a multitude of technical shortcomings, and would bring about a number of unacceptable consequences. There are three general criticisms: (1) if finalized, the proposal would restrict access to affordable financial advice for lower- and middle-income Americans; (2) if finalized, the proposal would make it harder for employers (especially small businesses) to set up retirement plans; and (3) DOL's rushed and uncoordinated process resulted in an unworkable proposal. DOL received comment letters from stakeholders and Congress reflecting these concerns.

Restricted access to advice

The proposed regulation will have the net effect of locking lower- and middle-income investors out of the advice market.[54] Advisors should have a legal duty to act in the "best interests" of their cli-

---

[50] Definition of the Term "Fiduciary," 80 Fed. Reg. 21928.

[51] CEA Report, *supra* note 46, at 2.

[52] Letter from David M. Abbey, Deputy Gen. Counsel, Retirement Policy, Inv. Co. Inst. and Brian Reid, Chief Economist, Investment Company Inst., to the Hon. Howard Shelanski, Admin., Office of Info. and Reg. Aff., OMB (Apr. 7, 2015), *http://www.ici.org/pdf/15_ici_omb_data.pdf*.

[53] *Restricting Access to Financial Advice: Evaluating the Costs and Consequences for Working Families and Retirees: Hearing Before the Subcomm. on Health, Employment, Labor, and Pensions of the H. Comm. on Educ. and the Workforce*, 114th Cong. 8 (Jun. 17, 2015) (written testimony of Jack Haley, Exec. Vice President, Fidelity Invs.).

[54] *Restricting Access to Financial Advice: Evaluating the Costs and Consequences for Working Families and Retirees: Hearing Before the Subcomm. on Health, Employment, Labor, and Pensions of the H. Comm. on Educ. and the Workforce,* 114th Cong. 5 (Jun. 17, 2015) (written testimony of Kent Mason, Partner, Davis & Harman LLP).

ents; however, "fiduciary" status would result in the legal prohibition of most transactions because of how the advisor is compensated.[55] At a HELP Subcommittee hearing in June 2015, Mr. Kent Mason, Partner of Davis and Harman LLP, testified to this effect:

> The framework set up by the DOL could work conceptually, but in its current form, it would, like the original 2010 proposal, cut off the option for low and middle-income individuals and small businesses to receive personalized investment assistance, even if that assistance is in the best interest of the recipient.[56]

DOL claims its goal is not to eliminate commission-based accounts,[57] but it failed to adequately rectify this gaping inadequacy in the proposal. For example, the BIC exemption—the main exemption that would be used—is too complex and ultimately unusable.[58] Specifically, while the BIC exemption permits advisors to continue to receive commissions, there are several onerous disclosure and information-gathering requirements that will increase costs, which will be passed on to investors or make continued advice to small- and mid-size accounts unaffordable and thereby unavailable.[59] At the same hearing, Mr. Dean Harman, CFP, Managing Director at Harman Wealth Management, stated:

> The DOL has created a new exemption, [the BIC exemption or BICE] Unfortunately, BICE has missed the mark and, as currently proposed, would lead to the same unwanted consequence as the 2010 proposalby hugely increasing the burdens on financial advisors and financial institutions.[60]

Even more troubling, an advisor and client would need to have a signed contract prior to any meaningful conversation. At the same hearing, Mr. Jack Haley, Executive Vice President of Fidelity Investments, summarized the consequences of this proposed rule:

> Today, we are able to help these workers by discussing potential product and service offerings with them. The proposed DOL exemption would require a signed contract before a conversation could even occur. And since our customers speak to different phone reps each time they call, the rule would require each of our customers to have a signed contact with each of our phone reps in order to get answers to these basic questions. For Fidelity, requiring nearing 25 million customers to sign contracts before we can continue to service them would be a significant im-

---

[55] *Id.* at 3–4.
[56] *Id.* at 5.
[57] *Restricting Access to Financial Advice: Evaluating the Costs and Consequences for Working Families and Retirees: Hearing Before the Subcomm. on Health, Employment, Labor, and Pensions of the H. Comm. on Educ. and the Workforce*, 114th Cong. 5 (Jun. 17, 2015) (written testimony of The Hon. Thomas E. Perez, U.S. Sec'y, Dept. of Labor).
[58] *Restricting Access to Financial Advice: Evaluating the Costs and Consequences for Working Families and Retirees: Hearing Before the Subcomm. on Health, Employment, Labor, and Pensions of the H. Comm. on Educ. and the Workforce*, 114th Cong. 10 (Jun. 17, 2015) (written testimony of Dean Harman, CFP, Managing Dir., Harman Wealth Management).
[59] *Id.* at 14.
[60] *Id.* at 15.

> pediment to ongoing engagement with them, potentially suppressing their savings levels and retirement security.[61]

The exemption imposes burdensome new disclosure and data collection requirements on investment advisors.[62] However, the exemption would only cover recommendations with respect to limited categories of investments; fiduciaries could not recommend real estate, securities futures, or some non-publicly traded securities, limiting investor options.[63] The exemption also requires reporting and prediction of all direct and indirect compensation for recommended investments, costs for competing alternative products, and cost projections at one-, five-, and ten-year intervals.[64]

The Committee has heard extensive witness testimony from advisors and other experts explaining why these requirements are unworkable. For example, at a June 17, 2015, HELP Subcommittee hearing, Dr. Brian Reid, Ph.D. Chief Economist, Investment Company Institute, testified:

> The Best Interest Contact Exemption is prohibitively costly, in addition to being convoluted and unworkable. Brokers subject to the Exemption's many new limitations, burdens, and costs, as well as increased exposure liability, are not likely to work for less compensation, as the DOL presumes.[65]

At the same hearing, Mr. Mason asserted:

> Under the DOL proposal, financial institutions would be prohibited from providing any specific assistance to individuals seeking help with the rollover and distribution process. This is the case in large part because any financial institution providing IRA services would have a conflict of interest with respect to advice regarding the rollover decision, thus creating a prohibited transaction. Most read the BIC exemption in the re-proposal as not covering this type of assistance, thus rendering the assistance categorically prohibited. Others read the BIC exemption as technically applicable to this assistance, but effectively unavailable because of the exemption's unworkable conditions. Either interpretation denies assistance to many in need of help in navigating the retirement savings options that exist after termination of employment. Among many unfortunate consequences, this would cause a drastic curtailment of call center, brokerage, and other assistance to those terminating employment, leading to greatly increased leakage of assets from the retirement system.[66]

---

[61] Haley, *supra* note 53, at 8.

[62] Proposed Best Interest Contract Exemption, 80 Fed. Reg. at 21987.

[63] *Principles for Ensuring Retirement Advice Serves the Best Interests of Working Families and Retirees: Hearing Before the Subcomm. on Health, Employment, Labor, and Pensions of the H. Comm. on Educ. and the Workforce*, 114th Cong. 5 (Dec. 2, 2015) (written testimony of Jules Gaudreau, Jr., ChFC, CIC, President, The Gaudreau Group, Inc.).

[64] Proposed Best Interest Contract Exemption, 80 Fed. Reg. at 21985.

[65] *Restricting Access to Financial Advice: Evaluating the Costs and Consequences for Working Families and Retirees: Hearing Before the Subcomm. on Health, Employment, Labor, and Pensions of the H. Comm. on Educ. and the Workforce*, 114th Cong. 4 (Jun. 17, 2015) (written testimony of Dr. Brian Reid, Ph.D., Chief Economist, Inv. Co. Inst.).

[66] Mason, *supra* note 54, at 8.

Mr. Jules Gaudreau, Jr. ChFC, CIC, President of The Gaudreau Group, Inc., at a December 2, 2015, HELP Subcommittee hearing echoed these concerns:

> It is, therefore, important to make sure that U.S. retirement savings and tax policies encourage individuals to take personal responsibility for the need to save to protect their financial futures. It is also important to be sure that the rules in place to protect these savers and savings do not so burden the mechanisms for saving that the rules themselves become a barrier to achieving the goal of post-retirement financial security.[67]

There is also concern that the disclosure requirements will overwhelm investors with the volume of fine print, resulting in confusion or functional non-disclosure.[68] Cumulatively, these burdensome requirements will serve to discourage savings, ultimately harming low- and middle-income savers. Finally, fiduciaries of employee benefit plans would continue to be subject to the DOL enforcement regime, while aggrieved private parties could sue IRA fiduciaries under state contract law, empowering the plaintiffs' bar.[69]

Fewer employer-provided retirement plans

Small business owners provide nearly half a trillion dollars in retirement savings for 9 million households.[70] Employers are very concerned that the new rule makes it much harder, or perhaps impossible, for small businesses to set up retirement plans and for plan participants to receive advice. During the June 17, 2015, HELP Subcommittee hearing, Dr. Brian Reid, Ph.D., Chief Economist, Investment Company Institute, warned:

> Research shows that investors with access to advice have more diversified portfolios and take on more appropriate levels of risk than those who do not receive advice or information. Indeed, in its justification of an earlier rule change, the DOL said that retirement investors who do not receive investment advice are twice as likely to make poor investment choices as those who do receive that advice. The benefits of advice—and, conversely, the harm of losing access to advice—are significant.[71]

At the same hearing, Mr. Jack Haley, Executive Vice President of Fidelity Investments, concurred:

> Under the DOL proposal, access to affordable financial help will be effectively prohibited—even when it is the in investor's best interest. Small businesses and lower- and middle-income investors will be harmed the most. . . . The

---

[67] Gaudreau, *supra* note 63, at 3.
[68] *Id.* at 4.
[69] Proposed Best Interest Contract Exemption, 80 Fed. Reg. at 21985; *Principles for Ensuring Retirement Advice Serves the Best Interests of Working Families and Retirees: Hearing Before the Subcomm. on Health, Employment, Labor, and Pensions of the H. Comm. on Educ. and the Workforce*, 114th Cong. 7 (Dec. 2, 2015) (written testimony of the Hon. Bradford Campbell, Counsel, Drinker Biddle & Reath LLP).
[70] U.S. Chamber of Commerce, *Locked Out of Retirement: The Threat to Small Business Retirement Savings* (Jun. 9, 2015), *http://www.centerforcapitalmarkets.com/wp-content/uploads/2013/08/US-Chamber-Locked-Out-of-Retirement-White-Paper.pdf.*
[71] Reid, *supra* note 65, at 6.

> proposed DOL rule specifically prohibits service providers from assisting small businesses. The result would have a devastating impact on retirement coverage and savings for millions of workers employed by small businesses across the country.[72]

Additionally, DOL's proposed rule holds large and small businesses to different standards, with greater restrictions and additional burdens placed on small businesses. At a December 2, 2015, HELP Subcommittee hearing, Ms. Rachel Doba, President of DB Engineering, LLC, voiced concerns about the effects of the more stringent rules in DOL's proposal on her small business and employees:

> DOL seems to believe that small business owners, such as me, are not as sophisticated as large businesses, and therefore, need additional protections. The validity of this rationale is based on faulty assumptions, and does not justify discriminatory treatment. When I work with my financial advisor, I am aware that he is providing a service for a fee and selling a product. I would not be able to run a successful business if I were not able to understand when I am involved in a sales discussion—particularly, if it follows a basic disclosure that an advisor is selling a proprietary financial product, that the advisor is paid to see the product, and the advisor is not providing fiduciary advice. . . . The assumption that small plans, participants and IRA owners cannot understand the difference between sales and advice does not match my real world experience. The Department can protect participants, IRA owners, and small plans with the same kind of disclosures that it requires of large plans under the large plan carve out, but without eliminating their right to choose the services and products that best fit their needs.[73]

At the same hearing, the Honorable Brad Campbell, Counsel, Drinker Biddle & Reath LLP, and former U.S. Assistant Secretary of Labor for Employee Benefits, also warned about the potential detrimental effects of DOL's proposal on small businesses, saying, "Small plans and small-account IRA owners may be most in need of basic investment advice, but they would be least likely to be served by the Proposal due to the increased compliance costs and increased legal liability risks it unnecessarily creates."[74]

Because of the complicated new requirements, institutions providing retirement plans would be prohibited from offering assistance to small business plan sponsors in selecting investment options to offer their employees. While public policy should encourage employers to help workers save for retirement, it is counter-

---

[72] Haley, *supra* note 53, at 3, 6.

[73] *Principles for Ensuring Retirement Advice Serves the Best Interests of Working Families and Retirees: Hearing Before the Subcomm. on Health, Employment, Labor, and Pensions of the H. Comm. on Educ. and the Workforce*, 114th Cong. 5 (Dec. 2, 2015) (written testimony of Rachel Doba, President, DB Engineering, LLC).

[74] *Principles for Ensuring Retirement Advice Serves the Best Interests of Working Families and Retirees: Hearing Before the Subcomm. on Health, Employment, Labor, and Pensions of the H. Comm. on Educ. and the Workforce*, 114th Cong. 5 (Dec. 2, 2015) (written testimony of the Hon. Bradford Campbell, Counsel, Drinker Biddle & Reath LLP).

productive for DOL to refuse to provide an exemption for advice provided to small businesses.

Even worse, the DOL proposal actually will drive up costs for small businesses, while shielding larger businesses from the same costs. The proposal requires that advisors to plans with fewer than 100 participants or less than $100 million in plan assets assume fiduciary status, with the attendant burdens and costs passed onto the small business.[75] However, larger plans do not have this requirement. To continue to provide services to small businesses, advisors will either need to increase fees or qualify for an exemption. Ms. Rachel Doba, provided further testimony to this effect at the December 2, 2015, HELP Subcommittee hearing:

> Because advisors to small businesses are not carved out of the fiduciary definition, they must change their fee arrangements, or qualify for a special rule called an "exemption" in order to provide services on the same terms [as] before. . . . There are certain exceptions to these new rules, called "prohibited transaction exemptions," but as DOL has proposed the new rules, the exemptions generally won't help financial advisors who are working with small businesses to set up plans.[76]

However, while these exemptions apply for IRAs, it is not clear that the exemption will apply for other tax-preferred vehicles frequently used by small businesses.[77] Echoing similar concerns, the National Federation of Independent Business sent a letter to DOL noting its concern that advisors will no longer provide advice to small businesses that establish retirement plans because the proposed regulation could prohibit (or make cost-prohibitive) the arrangements currently prevalent.[78] Additionally, the Small Business Administration's Office of Advocacy submitted a comment letter to the Department warning, "the proposed rule would likely increase the [advisors'] costs and burdens associated with serving smaller plans . . . [and] could limit financial advisors' ability to offer savings and investment advice to clients . . . ultimately lead[ing] advisors to stop providing retirement services to small businesses."[79]

Procedural concerns

DOL's process in developing the rule and considering industry comments has been called into question. Through oversight inquiries and a request for an extended comment period, the Committee examined the process that led to the proposal.

The Committee also has procedural concerns with the proposed rule. According to some estimates, the average OMB review for DOL proposals is nearly 120 days.[80] However, the 2015 NPRM was only in the OMB formal review process for less than half the average time (only 50 days). This shorter timeframe indicates the ad-

---

[75] Definition of the Term "Fiduciary," 80 Fed. Reg. at 12957.

[76] Doba, *supra* note 73, at 6.

[77] Sec. 102 of Reorganization Plan No. 4 of 1978, 43 Fed. Reg. 47713.

[78] Letter from Amanda Austin, Vice President, Public Policy, Nat'l Fed'n of Indep. Bus. to the Emp. Benefits Sec. Admin. (May 5, 2015), *http://www.dol.gov/ebsa/pdf/1210-AB32-2-00039.pdf*.

[79] Comment letter from the Small Bus. Admin's Office of Advocacy 5, 6 (Jul. 17, 2015), *http://www.dol.gov/ebsa/pdf/1210-AB32-2-00403.pdf*.

[80] Meagan Leonhardt, DOL Fiduciary Rule Released Publicly (Apr. 13, 2015), *http://wealthmanagement.com/industry/dol-fiduciary-rule-released-publicly*.

ministration has not adequately considered stakeholder concerns. At the HELP Subcommittee's June 17, 2015, hearing, Mr. Kent Mason explained DOL's defective process:

> OMB's 50-day review of the re-proposal was startlingly brief:
>
> • The review period was almost a month shorter than the next shortest review period for any significant retirement regulatory proposal in the last 10 years.
>
> • It was less than half the average review period of other significant retirement regulatory proposals in the last 10 years (which was 109 days).
>
> • Equally startling is that the review period after OMB received significant public input was actually just a few days. For example, a critical meeting to discuss new information was held on April 9, 2015, and the DOL proposal was issued on April 14, 2015, a mere five days later.[81]

Additionally, the proposed rule provided the public less time to review and offer feedback than the department's 2010 proposal (90 days versus 104 days respectively). A number of letters requesting an extension of the comment period were circulated, including a letter from Education and the Workforce Committee Republicans.[82] Finally, the 2015 NPRM provides for an eight-month transition period between final approval and the effective date of the new rules. According to stakeholders, eight months is insufficient to overhaul business operations and data collection systems necessary to comply with the requirements of both the 2015 NPRM and the primary exemption—the BIC exemption.[83]

Congressional comment letters

The 2015 NPRM received thousands of comments, including numerous letters from Members of Congress.[84] Notably, 46 House Democrats signed a letter led by HELP Subcommittee Ranking Member Polis (D–CO) calling for publication of the revised rule prior to finalizing, as well as a supplemental comment period.[85] Another letter, signed by 96 House Democrats, expressed concerns that the current proposal could reduce access to investment advice for both small businesses and low- and middle-income individuals.[86] In all, over half of House Democrats have signed letters questioning the DOL's proposal.

On July 21, 2015, every Republican member of the Committee on Education and the Workforce signed a comment letter calling for

---

[81] Mason, *supra* note 54, at 11.

[82] Letter from the Hon. John Kline, Chairman, H. Comm. on Educ. and the Workforce, *et al* to the Hon. Thomas E. Perez, Sec'y, Dep't of Labor (May 29, 2015), *http://edworkforce.house.gov/uploadedfiles/05-29-15-dol-fiduciary_*comment extension.pdf.; *See also, e.g.*, Letter from the Hon. Frederica S. Wilson, et al to the Hon. Thomas Perez, Sec'y, Dep't of Labor (May 6, 2015), *http://wealthmanagement.com/site-files/wealthmanagement.com/files/uploads/2015/02/Fiduciary%20Rule%20Letter%20to%20Secretary%20Perez.pdf* (Letter from 18 House Democrats.)

[83] Mason, *supra* note 54, at 10.

[84] Comments received through September 24, 2015, are published on EBSA's website, *http://www.dol.gov/ebsa/regs/cmt-1210-AB32-2.html*.

[85] *See, e.g.*, Letter from the Hon. Jared Polis, *et al* to the Hon. Thomas E. Perez, Sec'y, Dep't of Labor (Oct. 30, 2015), *http://df2d4c59ccf47b6bc124-2951e9520e07371e6076e0c8af900fc2.r54.cf5.rackcdn.com/wp-content/uploads/Secretary-Perez-Fiduciary-Comment-Period-Letter-10-30-15.pdf*.

[86] Letter from the Hon. Gwen Moore, *et al* to the Hon. Thomas E. Perez, Sec'y, Dep't of Labor (Sept. 24, 2015) (on file with the Committee).

the proposal to be withdrawn, highlighting testimony from a hearing held by the HELP Subcommittee on June 17, 2015.[87] This comment letter also explained the Committee's longstanding interest in pursuing a responsible best interest standard.

H.R. 4293 AND H.R. 4294: BIPARTISAN BILLS ENHANCING RETIREMENT SECURITY

After the HELP Subcommittee's June 17, 2015, hearing,[88] a number of other committees examined the rule, including the House Committee on Financial Services[89] and the House Committee on Ways and Means.[90] On November 5, 2015, HELP Subcommittee Chairman Roe led a group of bipartisan lawmakers in announcing their intention to introduce a substantive alternative to the DOL's proposed fiduciary regulation.[91] Subsequently, two complementary bills were introduced on December 18, 2015. H.R. 4293 (ARAPA) amends ERISA, while H.R. 4294 (SAVERS Act) adds similar provisions in the Code. The technical provisions of this legislation were described *supra*.

The legislation reflects the sponsors' shared commitment to preserving access to affordable retirement advice for workers, retirees, and small business owners. More specifically, the legislation embodies the following principles:

- Promoting families and individuals saving for a financially-secure retirement is an essential public policy good.
- Retirement advisors must serve in their clients' best interests and must be required to do so.
- Retirement advisors must deliver clear, simple, and relevant disclosure of material conflicts, including compensation received and all investment fees to individuals saving for retirement.
- Public policies must protect access to investment advice and education for low- and middle-income workers and retirees.
- Public policies should never deny individuals the financial information they need to make informed decisions.
- Investor choice and consumer access to all investment services—such as proprietary products, commission-based sales, and guaranteed lifetime income—should be preserved in a way that does not pick winners and losers.
- Small business owners should have access to the financial advice and products they need to establish and maintain retirement plans and help workers save for retirement.

At their core, the bipartisan legislative proposals achieve DOL's stated goal of ensuring that retirement advisors act in their clients' best interests. However, unlike the DOL's proposal, the bills effectively balance this higher standard with the need to protect access

---

[87] Letter from the Hon. John Kline, Chairman, H. Comm. on Educ. and the Workforce, *et al* to the Hon. Thomas E. Perez, Sec'y, Dep't of Labor (July 21, 2015), *http://edworkforce.house.gov/uploadedfiles/7-21-15-dol_*fiduciary_rule.pdf.

[88] *Restricting Access to Financial Advice: Evaluating the Costs and Consequences for Working Families and Retirees: Hearing Before the Subcomm. on Health, Employment, Labor, and Pensions of the H. Comm. on Educ. and the Workforce*, 114th Cong. (Jun. 17, 2015).

[89] *Preserving Retirement Security and Investment Choices for All Americans: Joint Hearing Before the Subcomms. on Oversight and Investigations and Capital Markets and Government Sponsored Enterprises of the H. Comm. on Financial Services*, 114th Cong. (Sept. 10, 2015).

[90] *Hearing on the Department of Labor's Proposed Fiduciary Rule: Hearing Before the Subcomm. on Oversight of the H. Comm. on Ways and Means*, 114th Cong. (Sept. 30, 2015).

[91] Press Release, H. Comm. on Educ. and the Workforce, Bipartisan House Members Outline Legislative Principles to Ensure Retirement Advisors Protect Clients' Best Interests (Nov. 5, 2015), *http://edworkforce.house.gov/news/documentsingle.aspx?DocumentID=399747*.

to affordable retirement advice for low- and middle-income workers and retirees.

CONCLUSION

H.R. 4293, the *Affordable Retirement Advice Protection Act*, enhances retirement security without the pitfalls of the recent DOL proposed regulation amending the regulatory definition of "fiduciary" in ERISA. The bill prohibits DOL from implementing its proposed regulation without affirmative Congressional approval. The bill also updates current law to ensure that all financial professionals providing personalized advice about investments, distributions, or the use of other fiduciaries are legally required to act in the best interest of their customers. However, unlike the DOL proposed regulation, the bill ensures individual and small businesses have continued access to affordable retirement advice.

SECTION-BY-SECTION

The following is a section-by-section analysis of the Amendment in the Nature of a Substitute offered by Rep. Roe and reported favorably by the Committee.

Section 1. Provides the short title is the "Affordable Retirement Advice Protection Act."

Section 2. Describes the purpose of the Act to provide that financial advisors that violate the prohibited transaction rules under the *Employee Retirement Income Security Act of 1974* ERISA or breach the best interest standard for the provision of investment advice are subject to liability under ERISA.

Section 3. Amends the definition of "investment advice" under ERISA; exempts certain transactions from ERISA prohibitions; prescribes effective dates and transition rules.

EXPLANATION OF AMENDMENTS

The amendments, including the amendment in the nature of a substitute, are explained in the body of this report.

APPLICATION OF LAW TO THE LEGISLATIVE BRANCH

Section 102(b)(3) of Public Law 104–1 requires a description of the application of this bill to the legislative branch. H.R. 4293, the *Affordable Retirement Advice Protection Act* (ARAPA), prohibits the Department of Labor (DOL or department) from implementing its proposed regulation amending the regulatory definition of "fiduciary" under the *Employee Retirement Income Security Act of 1974* (ERISA) and the *Internal Revenue Code of 1986* (Code), unless Congress affirmatively approves the final rule. Instead, the bill updates current law to ensure that all financial professionals providing personalized advice about investments, distributions, or the use of other fiduciaries are legally required to act in the best interest of their customers. However, unlike the DOL proposed regulation, ARAPA ensures low- and medium-income savers and small businesses have continued access to affordable retirement advice.

UNFUNDED MANDATE STATEMENT

Section 423 of the Congressional Budget and Impoundment Control Act (as amended by Section 101(a)(2) of the Unfunded Mandates Reform Act, P.L. 104–4) requires a statement of whether the provisions of the reported bill include unfunded mandates. This issue is addressed in the CBO letter.

EARMARK STATEMENT

H.R. 4293 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9 of House Rule XXI.

ROLL CALL VOTES

Clause 3(b) of rule XIII of the Rules of the House of Representatives requires the Committee Report to include for each record vote on a motion to report the measure or matter and on any amendments offered to the measure or matter the total number of votes for and against and the names of the Members voting for and against.

Date: February 2, 2016

COMMITTEE ON EDUCATION AND THE WORKFORCE RECORD OF COMMITTEE VOTE

Roll Call: 1 Bill: H.R. 4293 Amendment Number:

Disposition: Ordered favorably reported to the House, as amended, by a vote of 22 yeas and 14 nays.

Sponsor/Amendment: Mr. Roe - motion to report the bill to the House with an amendment and with the recommendation that the amendment be agreed to, and the bill as amended do pass.

Name & State	Aye	No	Not Voting	Name & State	Aye	No	Not Voting
Mr. KLINE (MN) (Chairman)	X			Mr. SCOTT (VA) (Ranking)		X	
Mr. WILSON (SC)	X			Mr. HINOJOSA (TX)		X	
Mrs. FOXX (NC)	X			Mrs. DAVIS (CA)		X	
Mr. HUNTER (CA)	X			Mr. GRIJALVA (AZ)		X	
Mr. ROE (TN)	X			Mr. COURTNEY (CT)		X	
Mr. THOMPSON (PA)	X			Ms. FUDGE (OH)		X	
Mr. WALBERG (MI)	X			Mr. POLIS (CO)		X	
Mr. SALMON (AZ)	X			Mr. SABLAN (MP)			X
Mr. GUTHRIE (KY)	X			Ms. WILSON (FL)		X	
Mr. ROKITA (IN)	X			Ms. BONAMICI (OR)		X	
Mr. BARLETTA (PA)	X			Mr. POCAN (WI)		X	
Mr. HECK (NV)	X			Mr. TAKANO (CA)		X	
Mr. MESSER (IN)	X			Mr. JEFFRIES (NY)			X
Mr. BYRNE (AL)	X			Ms. CLARK (MA)		X	
Mr. BRAT (VA)	X			Ms. ADAMS (NC)		X	
Mr. CARTER (GA)	X			Mr. DeSAULNIER (CA)		X	
Mr. BISHOP (MI)	X						
Mr. GROTHMAN (WI)	X						
Mr. RUSSELL (OK)	X						
Mr. CURBELO (FL)	X						
Ms. STEFANIK (NY)	X						
Mr. ALLEN (GA)	X						

TOTALS: Aye: 22 No: 14 Not Voting: 2

Total: 38 / Quorum: 13 / Report: 20

(22 R - 16 D)

STATEMENT OF GENERAL PERFORMANCE GOALS AND OBJECTIVES

In accordance with clause (3)(c) of House Rule XIII, the goals of H.R. 4293 are to reduce the federal footprint and restore local control of education, while empowering parents and education leaders to hold schools accountable for effectively teaching students.

DUPLICATION OF FEDERAL PROGRAMS

No provision of H.R. 4293 establishes or reauthorizes a program of the Federal Government known to be duplicative of another Federal program, a program that was included in any report from the Government Accountability Office to Congress pursuant to section 21 of Public Law 111–139, or a program related to a program identified in the most recent Catalog of Federal Domestic Assistance.

DISCLOSURE OF DIRECTED RULE MAKINGS

The committee estimates that enacting H.R. 4293 does not specifically direct the completion of any specific rule makings within the meaning of 5 U.S.C. 551.

STATEMENT OF OVERSIGHT FINDINGS AND RECOMMENDATIONS OF THE COMMITTEE

In compliance with clause 3(c)(1) of rule XIII and clause 2(b)(1) of rule X of the Rules of the House of Representatives, the committee's oversight findings and recommendations are reflected in the body of this report.

NEW BUDGET AUTHORITY AND CBO COST ESTIMATE

With respect to the requirements of clause 3(c)(2) of rule XIII of the Rules of the House of Representatives and section 308(a) of the Congressional Budget Act of 1974 and with respect to requirements of clause 3(c)(3) of rule XIII of the Rules of the House of Representatives and section 402 of the Congressional Budget Act of 1974, the committee has received the following estimate for H.R. 4293 from the Director of the Congressional Budget Office:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, April 20, 2016.

Hon. JOHN KLINE,
Chairman, Committee on Education and the Workforce,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 4293, the Affordable Retirement Advice Protection Act.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Noah Meyerson.

Sincerely,

KEITH HALL.

Enclosure.

H.R. 4293—Affordable Retirement Advice Protection Act

H.R. 4293, the Affordable Retirement Advice Protection Act, would amend portions of the Employee Retirement Income Security Act of 1974 (ERISA) that prohibit self-dealing transactions by fiduciaries of employer-sponsored retirement plans. The bill would add a definition of investment advice to ERISA. The bill also would add a new statutory exemption related to investment advice that a fiduciary can provide to those plans, plan participants, or beneficiaries. Among other provisions, H.R. 4293 would change requirements regarding disclosure of potential compensation accruing to the fiduciary or an affiliate.

On April 6, 2016, the Department of Labor issued new regulations relating to investment advice within pension and retirement plans; those regulations are sometimes referred to as the "fiduciary rule." H.R. 4293 would prevent those or any similar regulations from becoming effective unless a bill or joint resolution approving them was passed within 60 days of enactment of H.R. 4293.

CBO and the staff of the Joint Committee on Taxation (JCT) estimate that the bill would have a negligible effect on revenues over the 2017–2026 period. Enacting the bill would not affect direct spending. Because enacting H.R. 4293 would affect revenues, pay-as-you-go procedures apply.

CBO and JCT estimate that enacting H.R. 4293 would not increase net direct spending or on-budget deficits in any of the four consecutive 10-year periods beginning in 2027.

H.R. 4293 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would impose no costs on state, local, or tribal governments.

On February 10, 2016, CBO transmitted a cost estimate of H.R. 4294, the Strengthening Access to Valuable Education and Retirement Support Act of 2015, as ordered reported by the House Committee on Ways and Means on February 3, 2016. On April 20, 2016, CBO transmitted a cost estimate of H.R. 4294, the Strengthening Access to Valuable Education and Retirement Support Act of 2015, as ordered reported by the House Committee on Education and the Workforce on February 2, 2016. Both versions of H.R. 4294 would amend the Internal Revenue Code in a manner consistent with the way that H.R. 4293 would amend ERISA. All three versions of the legislation would have a negligible effect on revenues.

The CBO staff contact for this estimate is Noah Meyerson. The estimate was approved by H. Samuel Papenfuss, Deputy Assistant Director for Budget Analysis.

COMMITTEE COST ESTIMATE

Clause 3(d)(1) of rule XIII of the Rules of the House of Representatives requires an estimate and a comparison of the costs that would be incurred in carrying out H.R. 4293. However, clause 3(d)(2)(B) of that rule provides that this requirement does not apply when the committee has included in its report a timely submitted cost estimate of the bill prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (new matter is printed in italic and existing law in which no change is proposed is shown in roman):

EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974

* * * * * * *

TITLE I—PROTECTION OF EMPLOYEE BENEFIT RIGHTS

SUBTITLE A—GENERAL PROVISIONS

* * * * * * *

DEFINITIONS

SEC. 3. For purposes of this title:

(1) The terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 302(c) of the Labor Management Relations Act, 1947 (other than pensions on retirement or death, and insurance to provide such pensions).

(2)(A) Except as provided in subparagraph (B), the terms "employee pension benefit plan" and "pension plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program—

(i) provides retirement income to employees, or

(ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond,

regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan or the method of distributing benefits from the plan. A distribution from a plan, fund, or program shall not be treated as made in a form other than retirement income or as a distribution prior to termination of covered employment solely because such distribution is made to an employee who has attained age 62 and who is not separated from employment at the time of such distribution.

(B) The Secretary may by regulation prescribe rules consistent with the standards and purposes of this Act providing one or more exempt categories under which—

(i) severance pay arrangements, and

(ii) supplemental retirement income payments, under which the pension benefits of retirees or their beneficiaries are supplemented to take into account some portion or all of the increases in the cost of living (as determined by the Secretary of Labor) since retirement,

shall, for purposes of this title, be treated as welfare plans rather than pension plans. In the case of any arrangement or payment a principal effect of which is the evasion of the standards or purposes of this Act applicable to pension plans, such arrangement or payment shall be treated as a pension plan. An applicable voluntary early retirement incentive plan (as defined in section 457(e)(11)(D)(ii) of the Internal Revenue Code of 1986) making payments or supplements described in section 457(e)(11)(D)(i) of such Code, and an applicable employment retention plan (as defined in section 457(f)(4)(C) of such Code) making payments of benefits described in section 457(f)(4)(A) of such Code, shall, for purposes of this title, be treated as a welfare plan (and not a pension plan) with respect to such payments and supplements.

(3) The term "employee benefit plan" or "plan" means an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan.

(4) The term "employee organization" means any labor union or any organization of any kind, or any agency or employee representation committee, association, group, or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning an employee benefit plan, or other matters incidental to employment relationships; or any employees' beneficiary association organized for the purpose in whole or in part, of establishing such a plan.

(5) The term "employer" means any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity.

(6) The term "employee" means any individual employed by an employer.

(7) The term "participant" means any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit.

(8) The term "beneficiary" means a person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder.

(9) The term "person" means an individual, partnership, joint venture, corporation, mutual company, joint-stock company, trust, estate, unincorporated organization, association, or employee organization.

(10) The term "State" includes any State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, and the Canal Zone. The term "United States" when used in the geographic sense means the States and the Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act (43 U.S.C. 1331–1343).

(11) The term "commerce" means trade, traffic, commerce, transportation, or communication between any State and any place outside thereof.

(12) The term "industry or activity affecting commerce" means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce, and includes any activity or industry "affecting commerce" within the meaning of the Labor Management Relations Act, 1947, or the Railway Labor Act.

(13) The term "Secretary" means the Secretary of Labor.

(14) The term "party in interest" means, as to an employee benefit plan—

(A) any fiduciary (including, but not limited to, any administrator, officer, trustee, or custodian), counsel, or employee of such employee benefit plan;

(B) a person providing services to such plan;

(C) an employer any of whose employees are covered by such plan;

(D) an employee organization any of whose members are covered by such plan;

(E) an owner, direct or indirect, of 50 percent or more of—

(i) the combined voting power of all classes of stock entitled to vote or the total value of shares of all classes of stock of a corporation,

(ii) the capital interest or the profits interest of a partnership, or

(iii) the beneficial interest of a trust or unincorporated enterprise,

which is an employer or an employee organization described in subparagraph (C) or (D);

(F) a relative (as defined in paragraph (15)) of any individual described in subparagraph (A), (B), (C), or (E);

(G) a corporation, partnership, or trust or estate of which (or in which) 50 percent or more of—

(i) the combined voting power of all classes of stock entitled to vote or the total value of shares of all classes of stock of such corporation,

(ii) the capital interest or profits interest of such partnership, or

(iii) the beneficial interest of such trust or estate,

is owned directly or indirectly, or held by persons described in subparagraph (A), (B), (C), (D), or (E);

(H) an employee, officer, director (or an individual having powers or responsibilities similar to those of officers or directors), or a 10 percent or more shareholder directly or indirectly, of a person described in subparagraph (B), (C), (D), (E), or (G), or of the employee benefit plan; or

(I) a 10 percent or more (directly or indirectly in capital or profits) partner or joint venturer of a person described in subparagraph (B), (C), (D), (E), or (G).

The Secretary, after consultation and coordination with the Secretary of the Treasury, may by regulation prescribe a percentage lower than 50 percent for subparagraph (E) and (G) and lower than 10 percent for subparagraph (H) or (I). The Secretary may prescribe regulations for determining the ownership (direct or indirect)

of profits and beneficial interests, and the manner in which indirect stockholdings are taken into account. Any person who is a party in interest with respect to a plan to which a trust described in section 501(c)(22) of the Internal Revenue Code of 1986 is permitted to make payments under section 4223 shall be treated as a party in interest with respect to such trust.

(15) The term "relative" means a spouse, ancestor, lineal descendant, or spouse of a lineal descendant.

(16)(A) The term "administrator" means—

(i) the person specifically so designated by the terms of the instrument under which the plan is operated;

(ii) if an administrator is not so designated, the plan sponsor; or

(iii) in the case of a plan for which an administrator is not designated and a plan sponsor cannot be identified, such other person as the Secretary may by regulation prescribe.

(B) The term "plan sponsor" means (i) the employer in the case of an employee benefit plan established or maintained by a single employer, (ii) the employee organization in the case of a plan established or maintained by an employee organization, or (iii) in the case of a plan established or maintained by two or more employers or jointly by one or more employers and one or more employee organizations, the association, committee, joint board of trustees, or other similar group of representatives of the parties who establish or maintain the plan.

(17) The term "separate account" means an account established or maintained by an insurance company under which income, gains, and losses, whether or not realized, from assets allocated to such account, are, in accordance with the applicable contract, credited to or charged against such account without regard to other income, gains, or losses of the insurance company.

(18) The term "adequate consideration" when used in part 4 of subtitle B means (A) in the case of a security for which there is a generally recognized market, either (i) the price of the security prevailing on a national securities exchange which is registered under section 6 of the Securities Exchange Act of 1934, or (ii) if the security is not traded on such a national securities exchange, a price not less favorable to the plan than the offering price for the security as established by the current bid and asked prices quoted by persons independent of the issuer and of any party in interest; and (B) in the case of an asset other than a security for which there is a generally recognized market, the fair market value of the asset as determined in good faith by the trustee or named fiduciary pursuant to the terms of the plan and in accordance with regulations promulgated by the Secretary.

(19) The term "nonforfeitable" when used with respect to a pension benefit or right means a claim obtained by a participant or his beneficiary to that part of an immediate or deferred benefit under a pension plan which arises from the participant's service, which is unconditional, and which is legally enforceable against the plan. For purposes of this paragraph, a right to an accrued benefit derived from employer contributions shall not be treated as forfeitable merely because the plan contains a provision described in section 203(a)(3).

(20) The term "security" has the same meaning as such term has under section 2(1) of the Securities Act of 1933 (15 U.S.C. 77b(1)).

(21)(A) Except as otherwise provided in subparagraph (B), a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan. Such term includes any person designated under section 405(c)(1)(B).

(B) If any money or other property of an employee benefit plan is invested in securities issued by an investment company registered under the Investment Company Act of 1940, such investment shall not by itself cause such investment company or such investment company's investment adviser or principal underwriter to be deemed to be a fiduciary or a party in interest as those terms are defined in this title, except insofar as such investment company or its investment adviser or principal underwriter acts in connection with an employee benefit plan covering employees of the investment company, the investment adviser, or its principal underwriter. Nothing contained in this subparagraph shall limit the duties imposed on such investment company, investment adviser, or principal underwriter by any other law.

(C)(i) For purposes of clause (ii) of subparagraph (A), the term "investment advice" means a recommendation that—

(I) relates to—

(aa) the advisability of acquiring, holding, disposing, or exchanging any moneys or other property of a plan by the plan, plan participants, or plan beneficiaries, including any recommendation 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 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 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 materially rely on such recommendation in making investment or manage-

ment decisions with respect to any moneys or other property of such plan.

(ii) For purposes of clause (i)(II)(bb), any disclaimer of a mutual agreement, arrangement, or understanding shall only state the following: "This information is not individualized to you, and you are not intended to materially rely on this information in making investment or management decisions.". Such disclaimer shall not be effective unless such disclaimer is in writing and is communicated in a clear and prominent manner and an objective person would reasonably conclude that, based on all the facts and circumstances, there was not a mutual agreement, arrangement, or understanding.

(iii) For purposes of clause (i)(II)(bb), information shall not be considered to be a recommendation made pursuant to a mutual agreement, arrangement, or understanding, and such information shall contain the disclaimer required by clause (ii), if—

(I) it is provided in conjunction with full and fair disclosure in writing to a plan, plan participant, or beneficiary that the person providing the information is doing so in its marketing or sales capacity, including any information regarding the terms and conditions of the engagement of the person providing the information, and that the person is not intending to provide investment advice within the meaning of this subparagraph or to otherwise act within and under the obligations of the best interest standard as described in this subparagraph;

(II) the person providing the information is a counterparty or service provider to the plan in connection with any transaction based on the information (including a service arrangement, sale, purchase, loan, bilateral contract, swap (as defined in section 1a of the Commodity Exchange Act (7 U.S.C. 1a)), or security-based swap (as defined in section 3(a) of the Securities Exchange Act (15 U.S.C. 78c(a)))), but only if—

(aa) the plan is represented, in connection with such transaction, by a plan fiduciary that is independent of the person providing the information, and, except in the case of a swap or security-based swap, independent of the plan sponsor; and

(bb) prior to such transaction, the independent plan fiduciary represents in writing to the person providing the information that it is aware that the person has a financial interest in the transaction and that it has determined that the person is not intending to provide investment advice within the meaning of this subparagraph or to otherwise act as a fiduciary to the plan subject to section 404;

(III) the person providing the information is an employee of any sponsoring employer or employee organization who provides the information to the plan for no fee or other compensation other than the employee's normal compensation;

(IV) the person providing the information discloses in writing to the plan fiduciary that the person is not undertaking to provide investment advice as a fiduciary to the plan subject to section 404 and the information consists solely of—

(aa) making available to the plan, without regard to the individualized needs of the plan, securities or other property through a platform or similar mechanism from which a plan fiduciary may select or monitor investment alter-

natives, including qualified default investment alternatives, into which plan participants or beneficiaries may direct the investment of assets held in, or contributed to, their individual accounts; or

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

(AA) identifying investment alternatives that meet objective criteria specified by the plan, such as criteria concerning expense ratios, fund sizes, types of asset, or credit quality; or

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

(V) the information consists solely of valuation information; or

(VI) the information consists solely of—

(aa) information described in Department of Labor Interpretive Bulletin 96–1 (29 C.F.R. 2509.96–1, as in effect on January 1, 2015), regardless of whether such education is provided to a plan or plan fiduciary or a participant or beneficiary;

(bb) information provided to participants or beneficiaries regarding the factors to consider in deciding whether to elect to receive a distribution from a plan or an individual retirement plan (as defined in section 7701(a)(37) of the Internal Revenue Code of 1986) and whether 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 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.

(22) The term "normal retirement benefit" means the greater of the early retirement benefit under the plan, or the benefit under the plan commencing at normal retirement age. The normal retirement benefit shall be determined without regard to—

(A) medical benefits, and

(B) disability benefits not in excess of the qualified disability benefit.

For purposes of this paragraph, a qualified disability benefit is a disability benefit provided by a plan which does not exceed the benefit which would be provided for the participant if he separated from the service at normal retirement age. For purposes of this paragraph, the early retirement benefit under a plan shall be determined without regard to any benefit under the plan which the Secretary of the Treasury finds to be a benefit described in section 204(b)(1)(G).

(23) The term "accrued benefit" means—

(A) in the case of a defined benefit plan, the individual's accrued benefit determined under the plan and, except as provided in section 204(c)(3), expressed in the form of an annual benefit commencing at normal retirement age, or

(B) in the case of a plan which is an individual account plan, the balance of the individual's account.

The accrued benefit of an employee shall not be less than the amount determined under section 204(c)(2)(B) with respect to the employee's accumulated contribution.

(24) The term "normal retirement age" means the earlier of—

(A) the time a plan participant attains normal retirement age under the plan, or

(B) the later of—

(i) the time a plan participant attains age 65, or

(ii) the 5th anniversary of the time a plan participant commenced participation in the plan.

(25) The term "vested liabilities" means the present value of the immediate or deferred benefits available at normal retirement age for participants and their beneficiaries which are nonforfeitable.

(26) The term "current value" means fair market value where available and otherwise the fair value as determined in good faith by a trustee or a named fiduciary (as defined in section 402(a)(2)) pursuant to the terms of the plan and in accordance with regulations of the Secretary, assuming an orderly liquidation at the time of such determination.

(27) The term "present value", with respect to a liability, means the value adjusted to reflect anticipated events. Such adjustments shall conform to such regulations as the Secretary of the Treasury may prescribe.

(28) The term "normal service cost" or "normal cost" means the annual cost of future pension benefits and administrative expenses assigned, under an actuarial cost method, to years subsequent to a particular valuation date of a pension plan. The Secretary of the Treasury may prescribe regulations to carry out this paragraph.

(29) The term "accrued liability" means the excess of the present value, as of a particular valuation date of a pension plan, of the projected future benefit costs and administrative expenses for all plan participants and beneficiaries over the present value of future contributions for the normal cost of all applicable plan participants and beneficiaries. The Secretary of the Treasury may prescribe regulations to carry out this paragraph.

(30) The term "unfunded accrued liability" means the excess of the accrued liability, under an actuarial cost method which so provides, over the present value of the assets of a pension plan. The Secretary of the Treasury may prescribe regulations to carry out this paragraph.

(31) The term "advance funding actuarial cost method" or "actuarial cost method" means a recognized actuarial technique utilized for establishing the amount and incidence of the annual actuarial cost of pension plan benefits and expenses. Acceptable actuarial cost methods shall include the accrued benefit cost method (unit credit method), the entry age normal cost method, the individual level premium cost method, the aggregate cost method, the attained age normal cost method, and the frozen initial liability cost method. The terminal funding cost method and the current funding (pay-as-you-go) cost method are not acceptable actuarial cost methods. The Secretary of the Treasury shall issue regulations to further define acceptable actuarial cost methods.

(32) The term "governmental plan" means a plan established or maintained for its employees by the Government of the United States, by the government of any State or political subdivision

thereof, or by any agency or instrumentality of any of the foregoing. The term "governmental plan" also includes any plan to which the Railroad Retirement Act of 1935 or 1937 applies, and which is financed by contributions required under that Act and any plan of an international organization which is exempt from taxation under the provisions of the International Organizations Immunities Act (59 Stat. 669). The term "governmental plan" includes a plan which is established and maintained by an Indian tribal government (as defined in section 7701(a)(40) of the Internal Revenue Code of 1986), a subdivision of an Indian tribal government (determined in accordance with section 7871(d) of such Code), or an agency or instrumentality of either, and all of the participants of which are employees of such entity substantially all of whose services as such an employee are in the performance of essential governmental functions but not in the performance of commercial activities (whether or not an essential government function)

(33)(A) The term "church plan" means a plan established and maintained (to the extent required in clause (ii) of subparagraph (B)) for its employees (or their beneficiaries) by a church or by a convention or association of churches which is exempt from tax under section 501 of the Internal Revenue Code of 1986.

(B) The term "church plan" does not include a plan—

(i) which is established and maintained primarily for the benefit of employees (or their beneficiaries) of such church or convention or association of churches who are employed in connection with one or more unrelated trades or businesses (within the meaning of section 513 of the Internal Revenue Code of 1986), or

(ii) if less than substantially all of the individuals included in the plan are individuals described in subparagraph (A) or in clause (ii) of subparagraph (C) (or their beneficiaries).

(C) For purposes of this paragraph—

(i) A plan established and maintained for its employees (or their beneficiaries) by a church or by a convention or association of churches includes a plan maintained by an organization, whether a civil law corporation or otherwise, the principal purpose or function of which is the administration or funding of a plan or program for the provision of retirement benefits or welfare benefits, or both, for the employees of a church or a convention or association of churches, if such organization is controlled by or associated with a church or a convention or association of churches.

(ii) The term employee of a church or a convention or association of churches includes—

(I) a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry, regardless of the source of his compensation;

(II) an employee of an organization, whether a civil law corporation or otherwise, which is exempt from tax under section 501 of the Internal Revenue Code of 1986 and which is controlled by or associated with a church or a convention or association of churches; and

(III) an individual described in clause (v).

(iii) A church or a convention or association of churches which is exempt from tax under section 501 of the Internal

Revenue Code of 1986 shall be deemed the employer of any individual included as an employee under clause (ii).

(iv) An organization, whether a civil law corporation or otherwise, is associated with a church or a convention or association of churches if it shares common religious bonds and convictions with that church or convention or association of churches.

(v) If an employee who is included in a church plan separates from the service of a church or a convention or association of churches or an organization, whether a civil law corporation or otherwise, which is exempt from tax under section 501 of the Internal Revenue Code of 1986 and which is controlled by or associated with a church or a convention or association of churches, the church plan shall not fail to meet the requirements of this paragraph merely because the plan—

(I) retains the employee's accrued benefit or account for the payment of benefits to the employee or his beneficiaries pursuant to the terms of the plan; or

(II) receives contributions on the employee's behalf after the employee's separation from such service, but only for a period of 5 years after such separation, unless the employee is disabled (within the meaning of the disability provisions of the church plan or, if there are no such provisions in the church plan, within the meaning of section 72(m)(7) of the Internal Revenue Code of 1986) at the time of such separation from service.

(D)(i) If a plan established and maintained for its employees (or their beneficiaries) by a church or by a convention or association of churches which is exempt from tax under section 501 of the Internal Revenue Code of 1986 fails to meet one or more of the requirements of this paragraph and corrects its failure to meet such requirements within the correction period, the plan shall be deemed to meet the requirements of this paragraph for the year in which the correction was made and for all prior years.

(ii) If a correction is not made within the correction period, the plan shall be deemed not to meet the requirements of this paragraph beginning with the date on which the earliest failure to meet one or more of such requirements occurred.

(iii) For purposes of this subparagraph, the term "correction period" means—

(I) the period ending 270 days after the date of mailing by the Secretary of the Treasury of a notice of default with respect to the plan's failure to meet one or more of the requirements of this paragraph; or

(II) any period set by a court of competent jurisdiction after a final determination that the plan fails to meet such requirements, or, if the court does not specify such period, any reasonable period determined by the Secretary of the Treasury on the basis of all the facts and circumstances, but in any event not less than 270 days after the determination has become final; or

(III) any additional period which the Secretary of the Treasury determines is reasonable or necessary for the correction of the default,

whichever has the latest ending date.

(34) The term "individual account plan" or "defined contribution plan" means a pension plan which provides for an individual account for each participant and for benefits based solely upon the amount contributed to the participant's account, and any income, expenses, gains and losses, and any forfeitures of accounts of other participants which may be allocated to such participant's account.

(35) The term "defined benefit plan" means a pension plan other than an individual account plan; except that a pension plan which is not an individual account plan and which provides a benefit derived from employer contributions which is based partly on the balance of the separate account of a participant—

(A) for the purposes of section 202, shall be treated as an individual account plan, and

(B) for the purposes of paragraph (23) of this section and section 204, shall be treated as an individual account plan to the extent benefits are based upon the separate account of a participant and as a defined benefit plan with respect to the remaining portion of benefits under the plan.

(36) The term "excess benefit plan" means a plan maintained by an employer solely for the purpose of providing benefits for certain employees in excess of the limitations on contributions and benefits imposed by section 415 of the Internal Revenue Code of 1986 on plans to which that section applies, without regard to whether the plan is funded. To the extent that a separable part of a plan (as determined by the Secretary of Labor) maintained by an employer is maintained for such purpose, that part shall be treated as a separate plan which is an excess benefit plan.

(37)(A) The term "multiemployer plan" means a plan—

(i) to which more than one employer is required to contribute,

(ii) which is maintained pursuant to one or more collective bargaining agreements between one or more employee organizations and more than one employer, and

(iii) which satisfies such other requirements as the Secretary may prescribe by regulation.

(B) For purposes of this paragraph, all trades or businesses (whether or not incorporated) which are under common control within the meaning of section 4001(b)(1) are considered a single employer.

(C) Notwithstanding subparagraph (A), a plan is a multiemployer plan on and after its termination date if the plan was a multiemployer plan under this paragraph for the plan year preceding its termination date.

(D) For purposes of this title, notwithstanding the preceding provisions of this paragraph, for any plan year which began before the date of the enactment of the Multiemployer Pension Plan Amendments Act of 1980, the term "multiemployer plan" means a plan described in section 3(37) of this Act as in effect immediately before such date.

(E) Within one year after the date of the enactment of the Multiemployer Pension Plan Amendments Act of 1980, a multiemployer plan may irrevocably elect, pursuant to procedures established by the corporation and subject to the provisions of sections 4403(b) and (c), that the plan shall not be treated as a multiemployer plan for all purposes under this Act or the Internal Revenue Code of

1954 if for each of the last 3 plan years ending prior to the effective date of the Multiemployer Pension Plan Amendments Act of 1980—

(i) the plan was not a multiemployer plan because the plan was not a plan described in section 3(37)(A)(iii) of this Act and section 414(f)(1)(C) of the Internal Revenue Code of 1954 (as such provisions were in effect on the day before the date of the enactment of the Multiemployer Pension Plan Amendments Act of 1980); and

(ii) the plan had been identified as a plan that was not a multiemployer plan in substantially all its filings with the corporation, the Secretary of Labor and the Secretary of the Treasury.

(F)(i) For purposes of this title a qualified football coaches plan—

(I) shall be treated as a multiemployer plan to the extent not inconsistent with the purposes of this subparagraph; and

(II) notwithstanding section 401(k)(4)(B) of the Internal Revenue Code of 1986, may include a qualified cash and deferred arrangement.

(ii) For purposes of this subparagraph, the term "qualified football coaches plan" means any defined contribution plan which is established and maintained by an organization—

(I) which is described in section 501(c) of such Code;

(II) the membership of which consists entirely of individuals who primarily coach football as full-time employees of 4-year colleges or universities described in section 170(b)(1)(A)(ii) of such Code; and

(III) which was in existence on September 18, 1986.

(G)(i) Within 1 year after the enactment of the Pension Protection Act of 2006—

(I) an election under subparagraph (E) may be revoked, pursuant to procedures prescribed by the Pension Benefit Guaranty Corporation, if, for each of the 3 plan years prior to the date of the enactment of that Act, the plan would have been a multiemployer plan but for the election under subparagraph (E), and

(II) a plan that meets the criteria in clauses (i) and (ii) of subparagraph (A) of this paragraph or that is described in clause (vi) may, pursuant to procedures prescribed by the Pension Benefit Guaranty Corporation, elect to be a multiemployer plan, if—

(aa) for each of the 3 plan years immediately preceding the first plan year for which the election under this paragraph is effective with respect to the plan, the plan has met those criteria or is so described,

(bb) substantially all of the plan's employer contributions for each of those plan years were made or required to be made by organizations that were exempt from tax under section 501 of the Internal Revenue Code of 1986, and

(cc) the plan was established prior to September 2, 1974.

(ii) An election under this subparagraph shall be effective for all purposes under this Act and under the Internal Revenue Code of 1986, starting with any plan year beginning on or after

January 1, 1999, and ending before January 1, 2008, as designated by the plan in the election made under clause (i)(II).

(iii) Once made, an election under this subparagraph shall be irrevocable, except that a plan described in clause (i)(II) shall cease to be a multiemployer plan as of the plan year beginning immediately after the first plan year for which the majority of its employer contributions were made or required to be made by organizations that were not exempt from tax under section 501 of the Internal Revenue Code of 1986.

(iv) The fact that a plan makes an election under clause (i)(II) does not imply that the plan was not a multiemployer plan prior to the date of the election or would not be a multiemployer plan without regard to the election.

(v)(I) No later than 30 days before an election is made under this subparagraph, the plan administrator shall provide notice of the pending election to each plan participant and beneficiary, each labor organization representing such participants or beneficiaries, and each employer that has an obligation to contribute to the plan, describing the principal differences between the guarantee programs under title IV and the benefit restrictions under this title for single employer and multiemployer plans, along with such other information as the plan administrator chooses to include.

(II) Within 180 days after the date of enactment of the Pension Protection Act of 2006, the Secretary shall prescribe a model notice under this clause.

(III) A plan administrator's failure to provide the notice required under this subparagraph shall be treated for purposes of section 502(c)(2) as a failure or refusal by the plan administrator to file the annual report required to be filed with the Secretary under section 101(b)(1).

(vi) A plan is described in this clause if it is a plan sponsored by an organization which is described in section 501(c)(5) of the Internal Revenue Code of 1986 and exempt from tax under section 501(a) of such Code and which was established in Chicago, Illinois, on August 12, 1881.

(vii) For purposes of this Act and the Internal Revenue Code of 1986, a plan making an election under this subparagraph shall be treated as maintained pursuant to a collective bargaining agreement if a collective bargaining agreement, expressly or otherwise, provides for or permits employer contributions to the plan by one or more employers that are signatory to such agreement, or participation in the plan by one or more employees of an employer that is signatory to such agreement, regardless of whether the plan was created, established, or maintained for such employees by virtue of another document that is not a collective bargaining agreement.

(38) The term "investment manager" means any fiduciary (other than a trustee or named fiduciary, as defined in section 402(a)(2))—

(A) who has the power to manage, acquire, or dispose of any asset of a plan;

(B) who (i) is registered as an investment adviser under the Investment Advisers Act of 1940; (ii) is not registered as an investment adviser under such Act by reason of paragraph (1) of section 203A(a) of such Act, is registered as an investment ad-

viser under the laws of the State (referred to in such paragraph (1)) in which it maintains its principal office and place of business, and, at the time the fiduciary last filed the registration form most recently filed by the fiduciary with such State in order to maintain the fiduciary's registration under the laws of such State, also filed a copy of such form with the Secretary; (iii) is a bank, as defined in that Act; or (iv) is an insurance company qualified to perform services described in subparagraph (A) under the laws of more than one State; and

(C) has acknowledged in writing that he is a fiduciary with respect to the plan.

(39) The terms "plan year" and "fiscal year of the plan" mean, with respect to a plan, the calendar, policy, or fiscal year on which the records of the plan are kept.

(40)(A) The term "multiple employer welfare arrangement" means an employee welfare benefit plan, or any other arrangement (other than an employee welfare benefit plan), which is established or maintained for the purpose of offering or providing any benefit described in paragraph (1) to the employees of two or more employers (including one or more self-employed individuals), or to their beneficiaries, except that such term does not include any such plan or other arrangement which is established or maintained—

(i) under or pursuant to one or more agreements which the Secretary finds to be collective bargaining agreements,

(ii) by a rural electric cooperative, or

(iii) by a rural telephone cooperative association.

(B) For purposes of this paragraph—

(i) two or more trades or businesses, whether or not incorporated, shall be deemed a single employer if such trades or businesses are within the same control group,

(ii) the term "control group" means a group of trades or businesses under common control,

(iii) the determination of whether a trade or business is under "common control" with another trade or business shall be determined under regulations of the Secretary applying principles similar to the principles applied in determining whether employees of two or more trades or businesses are treated as employed by a single employer under section 4001(b), except that, for purposes of this paragraph, common control shall not be based on an interest of less than 25 percent,

(iv) the term "rural electric cooperative" means—

(I) any organization which is exempt from tax under section 501(a) of the Internal Revenue Code of 1986 and which is engaged primarily in providing electric service on a mutual or cooperative basis, and

(II) any organization described in paragraph (4) or (6) of section 501(c) of the Internal Revenue Code of 1986 which is exempt from tax under section 501(a) of such Code and at least 80 percent of the members of which are organizations described in subclause (I), and

(v) the term "rural telephone cooperative association" means an organization described in paragraph (4) or (6) of section 501(c) of the Internal Revenue Code of 1986 which is exempt from tax under section 501(a) of such Code and at least 80 per-

cent of the members of which are organizations engaged primarily in providing telephone service to rural areas of the United States on a mutual, cooperative, or other basis.

(41) SINGLE-EMPLOYER PLAN.—The term "single-employer plan" means an employee benefit plan other than a multiemployer plan.

(41) The term "single-employer plan" means a plan which is not a multiemployer plan.

(42) the term "plan assets" means plan assets as defined by such regulations as the Secretary may prescribe, except that under such regulations the assets of any entity shall not be treated as plan assets if, immediately after the most recent acquisition of any equity interest in the entity, less than 25 percent of the total value of each class of equity interest in the entity is held by benefit plan investors. For purposes of determinations pursuant to this paragraph, the value of any equity interest held by a person (other than such a benefit plan investor) who has discretionary authority or control with respect to the assets of the entity or any person who provides investment advice for a fee (direct or indirect) with respect to such assets, or any affiliate of such a person, shall be disregarded for purposes of calculating the 25 percent threshold. An entity shall be considered to hold plan assets only to the extent of the percentage of the equity interest held by benefit plan investors. For purposes of this paragraph, the term "benefit plan investor" means an employee benefit plan subject to part 4, any plan to which section 4975 of the Internal Revenue Code of 1986 applies, and any entity whose underlying assets include plan assets by reason of a plan's investment in such entity.

* * * * * * *

SUBTITLE B—REGULATORY PROVISIONS

* * * * * * *

PART 4—FIDUCIARY RESPONSIBILITY

* * * * * * *

EXEMPTIONS FROM PROHIBITED TRANSACTIONS

SEC. 408. (a) The Secretary shall establish an exemption procedure for purposes of this subsection. Pursuant to such procedure, he may grant a conditional or unconditional exemption of any fiduciary or transaction, or class of fiduciaries or transactions, from all or part of the restrictions imposed by sections 406 and 407(a). Action under this subsection may be taken only after consultation and coordination with the Secretary of the Treasury. An exemption granted under this section shall not relieve a fiduciary from any other applicable provision of this Act. The Secretary may not grant an exemption under this subsection unless he finds that such exemption is—

(1) administratively feasible,

(2) in the interests of the plan and of its participants and beneficiaries, and

(3) protective of the rights of participants and beneficiaries of such plan.

Before granting an exemption under this subsection from section 406(a) or 407(a), the Secretary shall publish notice in the Federal

Register of the pendency of the exemption, shall require that adequate notice be given to interested persons, and shall afford interested persons opportunity to present views. The Secretary may not grant an exemption under this subsection from section 406(b) unless he affords an opportunity for a hearing and makes a determination on the record with respect to the findings required by paragraphs (1), (2), and (3) of this subsection.

(b) The prohibitions provided in section 406 shall not apply to any of the following transactions:

(1) Any loans made by the plan to parties in interest who are participants or beneficiaries of the plan if such loans (A) are available to all such participants and beneficiaries on a reasonably equivalent basis, (B) are not made available to highly compensated employees (within the meaning of section 414(q) of the Internal Revenue Code of 1986) in an amount greater than the amount made available to other employees, (C) are made in accordance with specific provisions regarding such loans set forth in the plan, (D) bear a reasonable rate of interest, and (E) are adequately secured. A loan made by a plan shall not fail to meet the requirements of the preceding sentence by reason of a loan repayment suspension described under section 414(u)(4) of the Internal Revenue Code of 1986.

(2) Contracting or making reasonable arrangements with a party in interest for office space, or legal, accounting, or other services necessary for the establishment or operation of the plan, if no more than reasonable compensation is paid therefor.

(3) A loan to an employee stock ownership plan (as defined in section 407(d)(6)), if—

(A) such loan is primarily for the benefit of participants and beneficiaries of the plan, and

(B) such loan is at an interest rate which is not in excess of a reasonable rate.

If the plan gives collateral to a party in interest for such loan, such collateral may consist only of qualifying employer securities (as defined in section 407(d)(5)).

(4) The investment of all or part of a plan's assets in deposits which bear a reasonable interest rate in a bank or similar financial institution supervised by the United States or a State, if such bank or other institution is a fiduciary of such plan and if—

(A) the plan covers only employees of such bank or other institution and employees of affiliates of such bank or other institution, or

(B) such investment is expressly authorized by a provision of the plan or by a fiduciary (other than such bank or institution or affiliate thereof) who is expressly empowered by the plan to so instruct the trustee with respect to such investment.

(5) Any contract for life insurance, health insurance, or annuities with one or more insurers which are qualified to do business in a State, if the plan pays no more than adequate consideration, and if each such insurer or insurers is—

(A) the employer maintaining the plan, or

(B) a party in interest which is wholly owned (directly or indirectly) by the employer maintaining the plan, or by

any person which is a party in interest with respect to the plan, but only if the total premiums and annuity considerations written by such insurers for life insurance, health insurance, or annuities for all plans (and their employers) with respect to which such insurers are parties in interest (not including premiums or annuity considerations written by the employer maintaining the plan) do not exceed 5 percent of the total premiums and annuity considerations written for all lines of insurance in that year by such insurers (not including premiums or annuity considerations written by the employer maintaining the plan).

(6) The providing of any ancillary service by a bank or similar financial institution supervised by the United States or a State, if such bank or other institution is a fiduciary of such plan, and if—

(A) such bank or similar financial institution has adopted adequate internal safeguards which assure that the providing of such ancillary service is consistent with sound banking and financial practice, as determined by Federal or State supervisory authority, and

(B) the extent to which such ancillary service is provided is subject to specific guidelines issued by such bank or similar financial institution (as determined by the Secretary after consultation with Federal and State supervisory authority), and adherence to such guidelines would reasonably preclude such bank or similar financial institution from providing such ancillary service (i) in an excessive or unreasonable manner, and (ii) in a manner that would be inconsistent with the best interests of participants and beneficiaries of employee benefit plans.

Such ancillary services shall not be provided at more than reasonable compensation.

(7) The exercise of a privilege to convert securities, to the extent provided in regulations of the Secretary, but only if the plan receives no less than adequate consideration pursuant to such conversion.

(8) Any transaction between a plan and (i) a common or collective trust fund or pooled investment fund maintained by a party in interest which is a bank or trust company supervised by a State or Federal agency or (ii) a pooled investment fund of an insurance company qualified to do business in a State, if—

(A) the transaction is a sale or purchase of an interest in the fund,

(B) the bank, trust company, or insurance company receives not more than reasonable compensation, and

(C) such transaction is expressly permitted by the instrument under which the plan is maintained, or by a fiduciary (other than the bank, trust company, or insurance company, or an affiliate thereof) who has authority to manage and control the assets of the plan.

(9) The making by a fiduciary of a distribution of the assets of the plan in accordance with the terms of the plan if such assets are distributed in the same manner as provided under section 4044 of this Act (relating to allocation of assets).

(10) Any transaction required or permitted under part 1 of subtitle E of title IV.

(11) A merger of multiemployer plans, or the transfer of assets or liabilities between multiemployer plans, determined by the Pension Benefit Guaranty Corporation to meet the requirements of section 4231.

(12) The sale by a plan to a party in interest on or after December 18, 1987, of any stock, if—

(A) the requirements of paragraphs (1) and (2) of subsection (e) are met with respect to such stock,

(B) on the later of the date on which the stock was acquired by the plan, or January 1, 1975, such stock constituted a qualifying employer security (as defined in section 407(d)(5) as then in effect), and

(C) such stock does not constitute a qualifying employer security (as defined in section 407(d)(5) as in effect at the time of the sale).

(13) Any transfer made before January 1, 2026, of excess pension assets from a defined benefit plan to a retiree health account in a qualified transfer permitted under section 420 of the Internal Revenue Code of 1986 (as in effect on the date of the enactment of the Surface Transportation and Veterans Health Care Choice Improvement Act of 2015).

(14) Any transaction in connection with the provision of investment advice described in section 3(21)(A)(ii) to a participant or beneficiary of an individual account plan that permits such participant or beneficiary to direct the investment of assets in their individual account, if—

(A) the transaction is—

(i) the provision of the investment advice to the participant or beneficiary of the plan with respect to a security or other property available as an investment under the plan,

(ii) the acquisition, holding, or sale of a security or other property available as an investment under the plan pursuant to the investment advice, or

(iii) the direct or indirect receipt of fees or other compensation by the fiduciary adviser or an affiliate thereof (or any employee, agent, or registered representative of the fiduciary adviser or affiliate) in connection with the provision of the advice or in connection with an acquisition, holding, or sale of a security or other property available as an investment under the plan pursuant to the investment advice; and

(B) the requirements of subsection (g) are met.

(15)(A) Any transaction involving the purchase or sale of securities, or other property (as determined by the Secretary), between a plan and a party in interest (other than a fiduciary described in section 3(21)(A)) with respect to a plan if—

(i) the transaction involves a block trade,

(ii) at the time of the transaction, the interest of the plan (together with the interests of any other plans maintained by the same plan sponsor), does not exceed 10 percent of the aggregate size of the block trade,

(iii) the terms of the transaction, including the price, are at least as favorable to the plan as an arm's length transaction, and

(iv) the compensation associated with the purchase and sale is not greater than the compensation associated with an arm's length transaction with an unrelated party.

(B) For purposes of this paragraph, the term "block trade" means any trade of at least 10,000 shares or with a market value of at least $200,000 which will be allocated across two or more unrelated client accounts of a fiduciary.

(16) Any transaction involving the purchase or sale of securities, or other property (as determined by the Secretary), between a plan and a party in interest if—

(A) the transaction is executed through an electronic communication network, alternative trading system, or similar execution system or trading venue subject to regulation and oversight by—

(i) the applicable Federal regulating entity, or

(ii) such foreign regulatory entity as the Secretary may determine by regulation,

(B) either—

(i) the transaction is effected pursuant to rules designed to match purchases and sales at the best price available through the execution system in accordance with applicable rules of the Securities and Exchange Commission or other relevant governmental authority, or

(ii) neither the execution system nor the parties to the transaction take into account the identity of the parties in the execution of trades,

(C) the price and compensation associated with the purchase and sale are not greater than the price and compensation associated with an arm's length transaction with an unrelated party,

(D) if the party in interest has an ownership interest in the system or venue described in subparagraph (A), the system or venue has been authorized by the plan sponsor or other independent fiduciary for transactions described in this paragraph, and

(E) not less than 30 days prior to the initial transaction described in this paragraph executed through any system or venue described in subparagraph (A), a plan fiduciary is provided written or electronic notice of the execution of such transaction through such system or venue.

(17)(A) Transactions described in subparagraphs (A), (B), and (D) of section 406(a)(1) between a plan and a person that is a party in interest other than a fiduciary (or an affiliate) who has or exercises any discretionary authority or control with respect to the investment of the plan assets involved in the transaction or renders investment advice (within the meaning of section 3(21)(A)(ii)) with respect to those assets, solely by reason of providing services to the plan or solely by reason of a relationship to such a service provider described in subparagraph (F), (G), (H), or (I) of section 3(14), or both, but only

if in connection with such transaction the plan receives no less, nor pays no more, than adequate consideration.

(B) For purposes of this paragraph, the term "adequate consideration" means—

(i) in the case of a security for which there is a generally recognized market—

(I) the price of the security prevailing on a national securities exchange which is registered under section 6 of the Securities Exchange Act of 1934, taking into account factors such as the size of the transaction and marketability of the security, or

(II) if the security is not traded on such a national securities exchange, a price not less favorable to the plan than the offering price for the security as established by the current bid and asked prices quoted by persons independent of the issuer and of the party in interest, taking into account factors such as the size of the transaction and marketability of the security, and

(ii) in the case of an asset other than a security for which there is a generally recognized market, the fair market value of the asset as determined in good faith by a fiduciary or fiduciaries in accordance with regulations prescribed by the Secretary.

(18) FOREIGN EXCHANGE TRANSACTIONS.—Any foreign exchange transactions, between a bank or broker-dealer (or any affiliate of either), and a plan (as defined in section 3(3)) with respect to which such bank or broker-dealer (or affiliate) is a trustee, custodian, fiduciary, or other party in interest, if—

(A) the transaction is in connection with the purchase, holding, or sale of securities or other investment assets (other than a foreign exchange transaction unrelated to any other investment in securities or other investment assets),

(B) at the time the foreign exchange transaction is entered into, the terms of the transaction are not less favorable to the plan than the terms generally available in comparable arm's length foreign exchange transactions between unrelated parties, or the terms afforded by the bank or broker-dealer (or any affiliate of either) in comparable arm's-length foreign exchange transactions involving unrelated parties,

(C) the exchange rate used by such bank or broker-dealer (or affiliate) for a particular foreign exchange transaction does not deviate by more than 3 percent from the interbank bid and asked rates for transactions of comparable size and maturity at the time of the transaction as displayed on an independent service that reports rates of exchange in the foreign currency market for such currency, and

(D) the bank or broker-dealer (or any affiliate of either) does not have investment discretion, or provide investment advice, with respect to the transaction.

(19) CROSS TRADING.—Any transaction described in sections 406(a)(1)(A) and 406(b)(2) involving the purchase and sale of a

security between a plan and any other account managed by the same investment manager, if—

(A) the transaction is a purchase or sale, for no consideration other than cash payment against prompt delivery of a security for which market quotations are readily available,

(B) the transaction is effected at the independent current market price of the security (within the meaning of section 270.17a–7(b) of title 17, Code of Federal Regulations),

(C) no brokerage commission, fee (except for customary transfer fees, the fact of which is disclosed pursuant to subparagraph (D)), or other remuneration is paid in connection with the transaction,

(D) a fiduciary (other than the investment manager engaging in the cross-trades or any affiliate) for each plan participating in the transaction authorizes in advance of any cross-trades (in a document that is separate from any other written agreement of the parties) the investment manager to engage in cross trades at the investment manager's discretion, after such fiduciary has received disclosure regarding the conditions under which cross trades may take place (but only if such disclosure is separate from any other agreement or disclosure involving the asset management relationship), including the written policies and procedures of the investment manager described in subparagraph (H),

(E) each plan participating in the transaction has assets of at least $100,000,000, except that if the assets of a plan are invested in a master trust containing the assets of plans maintained by employers in the same controlled group (as defined in section 407(d)(7)), the master trust has assets of at least $100,000,000,

(F) the investment manager provides to the plan fiduciary who authorized cross trading under subparagraph (D) a quarterly report detailing all cross trades executed by the investment manager in which the plan participated during such quarter, including the following information, as applicable: (i) the identity of each security bought or sold; (ii) the number of shares or units traded; (iii) the parties involved in the cross-trade; and (iv) trade price and the method used to establish the trade price,

(G) the investment manager does not base its fee schedule on the plan's consent to cross trading, and no other service (other than the investment opportunities and cost savings available through a cross trade) is conditioned on the plan's consent to cross trading,

(H) the investment manager has adopted, and cross-trades are effected in accordance with, written cross-trading policies and procedures that are fair and equitable to all accounts participating in the cross-trading program, and that include a description of the manager's pricing policies and procedures, and the manager's policies and procedures for allocating cross trades in an objective manner among accounts participating in the cross-trading program, and

(I) the investment manager has designated an individual responsible for periodically reviewing such purchases and sales to ensure compliance with the written policies and procedures described in subparagraph (H), and following such review, the individual shall issue an annual written report no later than 90 days following the period to which it relates signed under penalty of perjury to the plan fiduciary who authorized cross trading under subparagraph (D) describing the steps performed during the course of the review, the level of compliance, and any specific instances of non-compliance.

The written report under subparagraph (I) shall also notify the plan fiduciary of the plan's right to terminate participation in the investment manager's cross-trading program at any time.

(20)(A) Except as provided in subparagraphs (B) and (C), a transaction described in section 406(a) in connection with the acquisition, holding, or disposition of any security or commodity, if the transaction is corrected before the end of the correction period.

(B) Subparagraph (A) does not apply to any transaction between a plan and a plan sponsor or its affiliates that involves the acquisition or sale of an employer security (as defined in section 407(d)(1)) or the acquisition, sale, or lease of employer real property (as defined in section 407(d)(2)).

(C) In the case of any fiduciary or other party in interest (or any other person knowingly participating in such transaction), subparagraph (A) does not apply to any transaction if, at the time the transaction occurs, such fiduciary or party in interest (or other person) knew (or reasonably should have known) that the transaction would (without regard to this paragraph) constitute a violation of section 406(a).

(D) For purposes of this paragraph, the term "correction period" means, in connection with a fiduciary or party in interest (or other person knowingly participating in the transaction), the 14-day period beginning on the date on which such fiduciary or party in interest (or other person) discovers, or reasonably should have discovered, that the transaction would (without regard to this paragraph) constitute a violation of section 406(a).

(E) For purposes of this paragraph—

(i) The term "security" has the meaning given such term by section 475(c)(2) of the Internal Revenue Code of 1986 (without regard to subparagraph (F)(iii) and the last sentence thereof).

(ii) The term "commodity" has the meaning given such term by section 475(e)(2) of such Code (without regard to subparagraph (D)(iii) thereof).

(iii) The term "correct" means, with respect to a transaction—

(I) to undo the transaction to the extent possible and in any case to make good to the plan or affected account any losses resulting from the transaction, and

(II) to restore to the plan or affected account any profits made through the use of assets of the plan.

(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 may consist, in whole or in part, of proprietary products), such limitations shall be clearly disclosed to the advice recipient prior to any transaction based on the investment advice in the form of a notice that only states the following: "This recommendation is based on a limited range of investment options, and the same or similar investments may be available at a different cost (greater or lesser) from other sources.".

(iii) If the investment advice may result in variable compensation to the person providing the investment advice (or any affiliate of such person), the receipt of such compensation shall be clearly disclosed to the advice recipient prior to any transaction based on the investment advice. For purposes of this subparagraph, clear disclosure of variable compensation shall include, in a manner calculated to be understood by the average individual, each of the following:

(I) A notice that states only the following: "This recommendation may result in varying amounts of fees or other compensation to the person providing the recommendation (or its affiliate), and the same or similar investments may be available at a different cost (greater or lesser) from other sources.". Any regulations or administrative guidance implementing this subclause may not require this notice to be updated more than annually.

(II) A description of any fee or other compensation that is directly or indirectly payable to the person (or its affiliate) by the advice recipient with respect to such transaction (expressed as an amount, formula, percentage of assets, per capita charge, or estimate or range of such compensation).

(III) A description of the types and ranges of any compensation that may be directly or indirectly payable to the person (or its affiliate) by any third party in connection with such transaction (expressed as an amount, formula, percentage of assets, per capita charge, or estimate or range of such compensation).

(IV) Upon request of the advice recipient, a disclosure of the specific amounts of compensation described in clause (iii) that the person will receive in connection with the particular transaction (expressed as an amount, formula, percentage of assets, per capita charge, or estimate of such compensation).

(B) No recommendation will fail to satisfy the conditions described in clauses (i) through (iii) of subparagraph (A) solely be-

cause the person, acting in good faith and with reasonable diligence, makes an error or omission in disclosing the information specified in such clauses, provided that the person discloses the correct information to the advice recipient as soon as practicable, but not later than 30 days from the date on which the person knows of such error or omission.

(C) Any notice provided pursuant to a requirement under clause (ii) or clause (iii)(I) of subparagraph (A) shall have no effect on any other notice otherwise required without regard to this title, and shall be provided in addition to, and not in lieu of, any other such notice.

(D) For purposes of this paragraph, the term "affiliate" has the meaning given in subsection (g)(11)(B).

(c) Nothing in section 406 shall be construed to prohibit any fiduciary from—

(1) receiving any benefit to which he may be entitled as a participant or beneficiary in the plan, so long as the benefit is computed and paid on a basis which is consistent with the terms of the plan as applied to all other participants and beneficiaries;

(2) receiving any reasonable compensation for services rendered, or for the reimbursement of expenses properly and actually incurred, in the performance of his duties with the plan; except that no person so serving who already receives full time pay from an employer or an association of employers, whose employees are participants in the plan, or from an employee organization whose members are participants in such plan shall receive compensation from such plan, except for reimbursement of expenses properly and actually incurred; or

(3) serving as a fiduciary in addition to being an officer, employee, agent, or other representative of a party in interest.

(d)(1) Section 407(b) and subsections (b), (c), and (e) of this section shall not apply to a transaction in which a plan directly or indirectly—

(A) lends any part of the corpus or income of the plan to,

(B) pays any compensation for personal services rendered to the plan to, or

(C) acquires for the plan any property from, or sells any property to,

any person who is with respect to the plan an owner-employee (as defined in section 401(c)(3) of the Internal Revenue Code of 1986), a member of the family (as defined in section 267(c)(4) of such Code) of any such owner-employee, or any corporation in which any such owner-employee owns, directly or indirectly, 50 percent or more of the total combined voting power of all classes of stock entitled to vote or 50 percent or more of the total value of shares of all classes of stock of the corporation.

(2)(A) For purposes of paragraph (1), the following shall be treated as owner-employees:

(i) A shareholder-employee.

(ii) A participant or beneficiary of an individual retirement plan (as defined in section 7701(a)(37) of the Internal Revenue Code of 1986).

(iii) An employer or association of employees which establishes such an individual retirement plan under section 408(c) of such Code.

(B) Paragraph (1)(C) shall not apply to a transaction which consists of a sale of employer securities to an employee stock ownership plan (as defined in section 407(d)(6)) by a shareholder-employee, a member of the family (as defined in section 267(c)(4) of such Code) of any such owner-employee, or a corporation in which such a shareholder-employee owns stock representing a 50 percent or greater interest described in paragraph (1).

(C) For purposes of paragraph (1)(A), the term "owner-employee" shall only include a person described in clause (ii) or (iii) of subparagraph (A).

(3) For purposes of paragraph (2), the term "shareholder-employee" means an employee or officer of an S corporation (as defined in section 1361(a)(1) of such Code) who owns (or is considered as owning within the meaning of section 318(a)(1) of such Code) more than 5 percent of the outstanding stock of the corporation on any day during the taxable year of such corporation.

(e) Sections 406 and 407 shall not apply to the acquisition or sale by a plan of qualifying employer securities (as defined in section 407(d)(5)) or acquisition, sale or lease by a plan of qualifying employer real property (as defined in section 407(d)(4))—

(1) if such acquisition, sale, or lease is for adequate consideration (or in the case of a marketable obligation, at a price not less favorable to the plan than the price determined under section 407(e)(1)),

(2) if no commission is charged with respect thereto, and

(3) if—

(A) the plan is an eligible individual account plan (as defined in section 407(d)(3)), or

(B) in the case of an acquisition or lease of qualifying employer real property by a plan which is not an eligible individual account plan, or of an acquisition of qualifying employer securities by such a plan, the lease or acquisition is not prohibited by section 407(a).

(f) Section 406(b)(2) shall not apply to any merger or transfer described in subsection (b)(11).

(g) PROVISION OF INVESTMENT ADVICE TO PARTICIPANT AND BENEFICIARIES.—

(1) IN GENERAL.—The prohibitions provided in section 406 shall not apply to transactions described in subsection (b)(14) if the investment advice provided by a fiduciary adviser is provided under an eligible investment advice arrangement.

(2) ELIGIBLE INVESTMENT ADVICE ARRANGEMENT.—For purposes of this subsection, the term "eligible investment advice arrangement" means an arrangement—

(A) which either—

(i) provides that any fees (including any commission or other compensation) received by the fiduciary adviser for investment advice or with respect to the sale, holding, or acquisition of any security or other property for purposes of investment of plan assets do not vary depending on the basis of any investment option selected, or

(ii) uses a computer model under an investment advice program meeting the requirements of paragraph (3) in connection with the provision of investment advice by a fiduciary adviser to a participant or beneficiary, and

(B) with respect to which the requirements of paragraph (4), (5), (6), (7), (8), and (9) are met.

(3) INVESTMENT ADVICE PROGRAM USING COMPUTER MODEL.—

(A) IN GENERAL.—An investment advice program meets the requirements of this paragraph if the requirements of subparagraphs (B), (C), and (D) are met.

(B) COMPUTER MODEL.—The requirements of this subparagraph are met if the investment advice provided under the investment advice program is provided pursuant to a computer model that—

(i) applies generally accepted investment theories that take into account the historic returns of different asset classes over defined periods of time,

(ii) utilizes relevant information about the participant, which may include age, life expectancy, retirement age, risk tolerance, other assets or sources of income, and preferences as to certain types of investments,

(iii) utilizes prescribed objective criteria to provide asset allocation portfolios comprised of investment options available under the plan,

(iv) operates in a manner that is not biased in favor of investments offered by the fiduciary adviser or a person with a material affiliation or contractual relationship with the fiduciary adviser, and

(v) takes into account all investment options under the plan in specifying how a participant's account balance should be invested and is not inappropriately weighted with respect to any investment option.

(C) CERTIFICATION.—

(i) IN GENERAL.—The requirements of this subparagraph are met with respect to any investment advice program if an eligible investment expert certifies, prior to the utilization of the computer model and in accordance with rules prescribed by the Secretary, that the computer model meets the requirements of subparagraph (B).

(ii) RENEWAL OF CERTIFICATIONS.—If, as determined under regulations prescribed by the Secretary, there are material modifications to a computer model, the requirements of this subparagraph are met only if a certification described in clause (i) is obtained with respect to the computer model as so modified.

(iii) ELIGIBLE INVESTMENT EXPERT.—The term "eligible investment expert" means any person—

(I) which meets such requirements as the Secretary may provide, and

(II) does not bear any material affiliation or contractual relationship with any investment adviser or a related person thereof (or any employee,

agent, or registered representative of the investment adviser or related person).

(D) EXCLUSIVITY OF RECOMMENDATION.—The requirements of this subparagraph are met with respect to any investment advice program if—

(i) the only investment advice provided under the program is the advice generated by the computer model described in subparagraph (B), and

(ii) any transaction described in subsection (b)(14)(A)(ii) occurs solely at the direction of the participant or beneficiary.

Nothing in the preceding sentence shall preclude the participant or beneficiary from requesting investment advice other than that described in subparagraph (A), but only if such request has not been solicited by any person connected with carrying out the arrangement.

(4) EXPRESS AUTHORIZATION BY SEPARATE FIDUCIARY.—The requirements of this paragraph are met with respect to an arrangement if the arrangement is expressly authorized by a plan fiduciary other than the person offering the investment advice program, any person providing investment options under the plan, or any affiliate of either.

(5) ANNUAL AUDIT.—The requirements of this paragraph are met if an independent auditor, who has appropriate technical training or experience and proficiency and so represents in writing—

(A) conducts an annual audit of the arrangement for compliance with the requirements of this subsection, and

(B) following completion of the annual audit, issues a written report to the fiduciary who authorized use of the arrangement which presents its specific findings regarding compliance of the arrangement with the requirements of this subsection.

For purposes of this paragraph, an auditor is considered independent if it is not related to the person offering the arrangement to the plan and is not related to any person providing investment options under the plan.

(6) DISCLOSURE.—The requirements of this paragraph are met if—

(A) the fiduciary adviser provides to a participant or a beneficiary before the initial provision of the investment advice with regard to any security or other property offered as an investment option, a written notification (which may consist of notification by means of electronic communication)—

(i) of the role of any party that has a material affiliation or contractual relationship with the fiduciary adviser in the development of the investment advice program and in the selection of investment options available under the plan,

(ii) of the past performance and historical rates of return of the investment options available under the plan,

(iii) of all fees or other compensation relating to the advice that the fiduciary adviser or any affiliate there-

of is to receive (including compensation provided by any third party) in connection with the provision of the advice or in connection with the sale, acquisition, or holding of the security or other property,

(iv) of any material affiliation or contractual relationship of the fiduciary adviser or affiliates thereof in the security or other property,

(v) the manner, and under what circumstances, any participant or beneficiary information provided under the arrangement will be used or disclosed,

(vi) of the types of services provided by the fiduciary adviser in connection with the provision of investment advice by the fiduciary adviser,

(vii) that the adviser is acting as a fiduciary of the plan in connection with the provision of the advice, and

(viii) that a recipient of the advice may separately arrange for the provision of advice by another adviser, that could have no material affiliation with and receive no fees or other compensation in connection with the security or other property, and

(B) at all times during the provision of advisory services to the participant or beneficiary, the fiduciary adviser—

(i) maintains the information described in subparagraph (A) in accurate form and in the manner described in paragraph (8),

(ii) provides, without charge, accurate information to the recipient of the advice no less frequently than annually,

(iii) provides, without charge, accurate information to the recipient of the advice upon request of the recipient, and

(iv) provides, without charge, accurate information to the recipient of the advice concerning any material change to the information required to be provided to the recipient of the advice at a time reasonably contemporaneous to the change in information.

(7) OTHER CONDITIONS.—The requirements of this paragraph are met if—

(A) the fiduciary adviser provides appropriate disclosure, in connection with the sale, acquisition, or holding of the security or other property, in accordance with all applicable securities laws,

(B) the sale, acquisition, or holding occurs solely at the direction of the recipient of the advice,

(C) the compensation received by the fiduciary adviser and affiliates thereof in connection with the sale, acquisition, or holding of the security or other property is reasonable, and

(D) the terms of the sale, acquisition, or holding of the security or other property are at least as favorable to the plan as an arm's length transaction would be.

(8) STANDARDS FOR PRESENTATION OF INFORMATION.—

(A) IN GENERAL.—The requirements of this paragraph are met if the notification required to be provided to par-

ticipants and beneficiaries under paragraph (6)(A) is written in a clear and conspicuous manner and in a manner calculated to be understood by the average plan participant and is sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of the information required to be provided in the notification.

(B) MODEL FORM FOR DISCLOSURE OF FEES AND OTHER COMPENSATION.—The Secretary shall issue a model form for the disclosure of fees and other compensation required in paragraph (6)(A)(iii) which meets the requirements of subparagraph (A).

(9) MAINTENANCE FOR 6 YEARS OF EVIDENCE OF COMPLIANCE.—The requirements of this paragraph are met if a fiduciary adviser who has provided advice referred to in paragraph (1) maintains, for a period of not less than 6 years after the provision of the advice, any records necessary for determining whether the requirements of the preceding provisions of this subsection and of subsection (b)(14) have been met. A transaction prohibited under section 406 shall not be considered to have occurred solely because the records are lost or destroyed prior to the end of the 6-year period due to circumstances beyond the control of the fiduciary adviser.

(10) EXEMPTION FOR PLAN SPONSOR AND CERTAIN OTHER FIDUCIARIES.—

(A) IN GENERAL.—Subject to subparagraph (B), a plan sponsor or other person who is a fiduciary (other than a fiduciary adviser) shall not be treated as failing to meet the requirements of this part solely by reason of the provision of investment advice referred to in section 3(21)(A)(ii) (or solely by reason of contracting for or otherwise arranging for the provision of the advice), if—

(i) the advice is provided by a fiduciary adviser pursuant to an eligible investment advice arrangement between the plan sponsor or other fiduciary and the fiduciary adviser for the provision by the fiduciary adviser of investment advice referred to in such section,

(ii) the terms of the eligible investment advice arrangement require compliance by the fiduciary adviser with the requirements of this subsection, and

(iii) the terms of the eligible investment advice arrangement include a written acknowledgment by the fiduciary adviser that the fiduciary adviser is a fiduciary of the plan with respect to the provision of the advice.

(B) CONTINUED DUTY OF PRUDENT SELECTION OF ADVISER AND PERIODIC REVIEW.—Nothing in subparagraph (A) shall be construed to exempt a plan sponsor or other person who is a fiduciary from any requirement of this part for the prudent selection and periodic review of a fiduciary adviser with whom the plan sponsor or other person enters into an eligible investment advice arrangement for the provision of investment advice referred to in section 3(21)(A)(ii). The plan sponsor or other person who is a fiduciary has no duty under this part to monitor the specific investment ad-

vice given by the fiduciary adviser to any particular recipient of the advice.

(C) AVAILABILITY OF PLAN ASSETS FOR PAYMENT FOR ADVICE.—Nothing in this part shall be construed to preclude the use of plan assets to pay for reasonable expenses in providing investment advice referred to in section 3(21)(A)(ii).

(11) DEFINITIONS.—For purposes of this subsection and subsection (b)(14)—

(A) FIDUCIARY ADVISER.—The term "fiduciary adviser" means, with respect to a plan, a person who is a fiduciary of the plan by reason of the provision of investment advice referred to in section 3(21)(A)(ii) by the person to a participant or beneficiary of the plan and who is—

(i) registered as an investment adviser under the Investment Advisers Act of 1940 (15 U.S.C. 80b–1 et seq.) or under the laws of the State in which the fiduciary maintains its principal office and place of business,

(ii) a bank or similar financial institution referred to in subsection (b)(4) or a savings association (as defined in section 3(b)(1) of the Federal Deposit Insurance Act (12 U.S.C. 1813(b)(1)), but only if the advice is provided through a trust department of the bank or similar financial institution or savings association which is subject to periodic examination and review by Federal or State banking authorities,

(iii) an insurance company qualified to do business under the laws of a State,

(iv) a person registered as a broker or dealer under the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.),

(v) an affiliate of a person described in any of clauses (i) through (iv), or

(vi) an employee, agent, or registered representative of a person described in clauses (i) through (v) who satisfies the requirements of applicable insurance, banking, and securities laws relating to the provision of the advice.

For purposes of this part, a person who develops the computer model described in paragraph (3)(B) or markets the investment advice program or computer model shall be treated as a person who is a fiduciary of the plan by reason of the provision of investment advice referred to in section 3(21)(A)(ii) to a participant or beneficiary and shall be treated as a fiduciary adviser for purposes of this subsection and subsection (b)(14), except that the Secretary may prescribe rules under which only 1 fiduciary adviser may elect to be treated as a fiduciary with respect to the plan.

(B) AFFILIATE.—The term "affiliate" of another entity means an affiliated person of the entity (as defined in section 2(a)(3) of the Investment Company Act of 1940 (15 U.S.C. 80a–2(a)(3))).

(C) REGISTERED REPRESENTATIVE.—The term "registered representative" of another entity means a person described in section 3(a)(18) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(18)) (substituting the entity for the broker or dealer referred to in such section) or a person described in section 202(a)(17) of the Investment Advisers Act of 1940 (15 U.S.C. 80b-2(a)(17)) (substituting the entity for the investment adviser referred to in such section).

* * * * * * *

MINORITY VIEWS

After decades of hard work, many middle-class Americans seek out financial advice on how to invest their retirement nest egg. This is one of the biggest financial decisions they will make in their lives. When making it, they often rely on the financial advice they are given and implicitly trust that it is in their best interest. Unfortunately, that's not always the case. Loopholes in a decades-old regulation allow unscrupulous advisors to provide "conflicted advice" and put their financial interests ahead of their retirement clients'. Conflicted advice costs retirement plan participants $17 billion in losses every year and could result in a loss of almost a quarter of an individual's savings over a 35-year period.[1] Rather than taking steps to fix this problem, H.R. 4293 perpetuates this unacceptable status quo.

H.R. 4293 also includes an unnecessary, constitutionally-suspect procedural mechanism that prohibits the Department of Labor's (DOL's) final conflict of interest rule from taking effect unless it is approved by Congress within 60 days. This "affirmative approval" process is similar to the one enumerated in the Regulations from the Executive in Need of Scrutiny (REINS) Act. The REINS Act is a central component of the Republican-led Congress's hyper-partisan, anti-regulatory agenda. The Coalition for Sensible Safeguards (CSS), an alliance of over 150 labor, scientific, research, good government, faith, community, health, environment, and public interest groups, urged opposition to H.R. 4293 and another bill, H.R. 4294, which is nearly identical to H.R. 4293. In crafting a so-called alternative to the DOL's conflict of interest rule, House Republicans decided to advance two companion bills: H.R. 4293 amends the Employee Retirement Income Security Act (ERISA; P.L. 93–406), which governs retirement plans of private employers. H.R. 4294 amends the Internal Revenue Code (IRC), which governs tax-favored retirement savings such as Individual Retirement Accounts (IRAs). The core provisions of both bills are nearly identical, and the Education and Workforce Committee considered H.R. 4293 and H.R. 4294 during the same mark-up.

Many groups, including CSS, registered their opposition to both bills. CSS cited H.R. 4293 and H.R. 4294's procedural requirement as a "threat to our democratic process."[2] In its opposition letter, the CSS said using "a REINS-like mechanism to overturn this particular rule is unprecedented. These bills' passage will only embolden radical members of both chambers to attempt this scheme

---

[1] Council of Economic Advisors, *The Effects of Conflicted Investment Advice on Retirement Savings* 17–18 (Feb. 2015); available at: *https://www.whitehouse.gov/sites/default/files/docs/cea_coi_report_final.pdf*.

[2] Coalition for Sensible Safeguards, "Mark-up on H.R. 4293, the Affordable Retirement Advice Protection Act and H.R. 4294, Strengthening Access to Valuable Education and Retirement Support Act," (Feb. 2016); available at: *http://www.sensiblesafeguards.org/wp-content/uploads/CSS-letter-on-H.R.-4293-4294-.pdf*

to derail other rules, potentially jeopardizing crucial public health and safety and environmental protections."[3]

In addition to the CSS, a diverse stakeholder coalition weighed in against H.R. 4293. That coalition includes: AARP, AFL–CIO, Alliance for Retired Americans, American Federation of State, County, and Municipal Employees (AFSCME), Association of University Centers on Disabilities, Better Markets, Center for Economic Justice, Center for Global Policy Solutions, Center for Responsible Lending, The Committee for the Fiduciary Standard, Consumer Action, Consumer Federation of America, Consumers Union, Demos, Financial Planning Coalition, International Association of Machinists and Aerospace Workers, International Association of Sheet Metal, Air, Rail, and Transportation Workers, International Brotherhood of Electrical Workers, Leadership Conference on Civil and Human Rights, Main Street Alliance, NAACP, National Active and Retired Federal Employees Association (NARFE), National Committee to Preserve Social Security and Medicare, National Consumers League, National Council of La Raza, Pension Rights Center, Public Citizen, Public Investors Arbitration Bar Association, Service Employees International Union (SEIU), and U.S. PIRG.

H.R. 4293 ENABLES UNSCRUPULOUS ADVISORS TO CONTINUE TO EVADE FIDUCIARY OBLIGATIONS AND PUT THEIR FINANCIAL INTERESTS AHEAD OF THEIR CLIENTS'

Enacted in 1974, ERISA describes the circumstances when a person has a fiduciary obligation for rendering investment advice.[4] The DOL issued regulations in 1975 that further defined such circumstances using a five-part test. Under the regulations, to be held to ERISA's fiduciary standard with respect to providing investment advice, an individual must: (1) make recommendations on investing in, purchasing or selling securities or other property, or give advice as to their value (2) on a regular basis (3) pursuant to a mutual understanding that the advice (4) will serve as a primary basis for investment decisions, and (5) will be individualized to the particular needs of the plan.[5] Unless each of the five elements of this test is satisfied for each time advice is given, then an investment advisor is not treated as a fiduciary.

This five-part test has not kept pace with the changed retirement savings and planning landscape, and loopholes have emerged that can be exploited. For instance, an unscrupulous advisor providing individualized investment advice to a retirement client about rolling over assets from an employer-sponsored retirement plan—such as a 401(k)—to an IRA does not have to abide by a fiduciary obligation. Neither does an advisor who provides retirement savings advice on a one-time basis. As a result of this deficient five-part test, certain advisors are able to provide substandard advice and steer retirement clients toward financial products with sky-high fees that are not in their clients' best interest. Such products may enrich the advisor yet insidiously erode the savings of workers and retirees. To get away with this, so-called advisors can insert boilerplate dis-

---

[3] *Id.*

[4] 29 U.S.C. 1002(21).

[5] 29 C.F.R. 2510.3–21(c), 40 Fed. Reg. 50843 (Oct. 1975); available at: *http://www.gpo.gov/fdsys/pkg/CFR-2011-title29-vol9/pdf/CFR-2011-title29-vol9-sec2510-3-21.pdf.*

claimers in the fine print. As Secretary Perez has correctly noted, "the corrosive power of fine print and buried fees can eat away like a chronic illness at a person's savings." [6]

Recognizing that the existing regulation is broken and in desperate need of reform, the DOL undertook a rulemaking effort to revise the definition of who is a fiduciary under the Employee Retirement Income Security Act (ERISA) as a result of giving investment advice. H.R. 4293 represents a deeply flawed response to the DOL's conflict of interest rulemaking effort. Rather than closing loopholes in the existing regulation that enable unscrupulous advisors to offer substandard retirement savings advice to middle-class Americans, the bill codifies them.

Specifically, to qualify as a fiduciary under the provisions of H.R. 4293, investment advice must be rendered for a fee pursuant to 1) "written acknowledgement" of the fiduciary obligation; or 2) "a mutual agreement, arrangement, or understanding" that it is "individualized" to the client and the client "intends to materially rely" on the advice.

However, under H.R. 4293, financial advisors would be able to continue to avoid their fiduciary obligations just by providing a written disclaimer that says the following:

> This information is not individualized to you, and there is no intent for you to materially rely on this information in making investment and management decisions.

This language mirrors the kind of boilerplate disclaimer currently used by certain firms and advisors to avoid fiduciary obligations. While Committee Democrats believe disclosures and disclaimers are no substitute for a meaningful, enforceable fiduciary standard, there is also research to suggest that, on their own, disclosures and disclaimers can be ineffective and even detrimental to clients:

• According to an industry association study, "two-thirds of Americans with defined contribution (DC) plans or IRAs admit to spending less than five minutes examining their retirement plan disclosures—one in five say they rarely or never read the disclosure paperwork at all." [7]

• Disclosures often fail to make clients aware of the nature of their advisors' conflicts, let alone understand the potential implications of such conflicts.[8]

• Disclosure of advisor conflicts can backfire since clients can interpret disclosure of advisor conflicts as a sign of honesty.[9] In this case, disclosure may even be harmful to workers and retirees seeking to invest their savings because they could potentially create an illusion of fiduciary protection.

---

[6] Testimony of Secretary of Labor Thomas E. Perez before the Health, Employment, Labor, and Pensions (HELP) Subcommittee of the Education and Workforce Committee (June 2015); available at: *http://www.dol.gov/newsroom/congress/20150617_*Perez.

[7] Life Insurance Management Research Association (LIMRA), "Many Americans Don't Fully Read Retirement Plan Disclosures; Few Know What Fees they Pay," (August 2012); available at: *http://www.limra.com/Posts/PR/News_Releases/LIMRA_Study_Many_Americans_Don_t_Fully_Read_Retirement_Plan_Disclosures;_Few_Know_What_Fees_They_Pay.aspx.*

[8] Department of Labor, "Fiduciary Investment Advice, Regulatory Impact Analysis," (April 2015); available at: *http://www.dol.gov/ebsa/pdf/conflictsofinterestria.pdf.*

[9] *Id.*

Committee Democrats believe H.R. 4293 includes two other incredibly broad and ill-advised exemptions from fiduciary responsibilities. According to the Financial Planning Coalition, "firms and advisors will be allowed to provide an unlimited amount of advice to their clients, as long as they provide disclosure in writing that they are only providing the advice in a marketing or sales capacity' . . . In addition, the bills allow for advisors to escape fiduciary duty by claiming they made a good-faith' error in their disclosure to their clients." [10]

H.R. 4293 ESTABLISHES AN UNNECESSARY, CONSTITUTIONALLY–SUSPECT PROCESS TO ENABLE THE REPUBLICAN-LED CONGRESS TO ASSERT VETO POWER OVER THE DOL RULE

H.R. 4293 requires that Congress affirmatively approve the DOL's final "conflict of interest" rule within 60 days after the bill's enactment. If a bill or joint resolution is not approved within 60 days, then H.R. 4293's provisions shall take effect. The bill's "affirmative approval" requirement is akin to the one specified in the REINS Act (H.R. 427). In July 2015, the REINS Act was brought to the House floor for a vote. The bill passed on a near party-line vote. Only 2 House Democrats supported it.

Committee Democrats believe the bill's "affirmative approval" mechanism is not necessary. Under the Congressional Review Act (CRA), which was enacted as part of then-Speaker Gingrich and House Republicans' so-called Contract with America, Congress already possesses the authority to review and nullify a rule. According to the Government Accountability Office (GAO), the CRA "gives Congress an opportunity to review most rules before they take effect and to disapprove those found to be too burdensome, excessive, inappropriate, duplicative, or otherwise objectionable." [11]

Additionally, Committee Democrats share the concerns that have been raised about the potential constitutionality of the bill's "affirmative approval" mechanism. After the Immigration and Naturalization Service (INS) suspended a particular deportation, the agency was overruled by the U.S. House of Representatives under certain provisions of the Immigration and Nationality Act. In *INS v. Chadha*, the Supreme Court found this House veto to be unconstitutional because Congress was taking a legislative action, which had to be passed by both houses of Congress and presented to the President for approval in order to satisfy the bicameralism and presentment clauses of the U.S. Constitution.[12]

The "affirmative approval" mechanism in H.R. 4293 may run afoul of the Court's decision in *Chadha*, as either the House or Senate—acting alone—could reject or not act upon the bill or joint resolution. Such an outcome may raise similar "one House legislative

---

[10] Financial Planning Coalition, "H.R. 4293 and H.R. 4294 Would Reduce Protections for Retirement Investors," (Jan. 2016); available at: *https://filemanager.capwiz.com/filemanager/filemgr/cfp/2016_01_29_HR_4294_and_4293_Would_Reduce_Protection_for_Retirement_Investors.pdf.*

[11] United States Government Accountability Office, Testimony Before the Subcommittee on Commercial and Administrative Law, House Committee on Judiciary, "Perspectives of Years of Congressional Review Act Implementation," (March 2006); available at: *http://www.gao.gov/new.items/d06601t.pdf.*

[12] *INS v. Chadha,* 462 U.S. 919 (1983).

veto" concerns that the Court ruled to be unconstitutional in *Chadha*.

DEMOCRATIC MOTION AND AMENDMENT

Ranking Member Scott offered a motion to indefinitely postpone the mark-up, asserting it was premature for the Committee to consider H.R. 4293 and H.R. 4294 prior to the DOL's finalization of the conflict of interest rule. The motion failed on a voice vote.

Congresswoman Bonamici offered a substitute amendment to H.R. 4293 to require the Congressional Budget Office (CBO) to certify to Congress that the bills will prevent investment advisors from putting their financial interests ahead of their clients'. The amendment failed on a voice vote.

ROLL CALL VOTES ON FINAL PASSAGE

H.R. 4293 was reported by straight party-line votes of 22 ayes and 14 nays. No Democratic Committee Members voted in favor of the bills.

CONCLUSION

Committee Democrats remain committed to responsible solutions that help workers earn and collectively bargain for decent wages, achieve a better balance between work and family life, end workplace discrimination, and retire with security and dignity. H.R. 4293 is not among these solutions.

Instead of reserving judgment on the DOL's final conflict of interest rulemaking, the Majority rushed to mark-up these deeply flawed, constitutionally-questionable bills. Committee Democrats believe that we can do better. Workers and retirement savers deserve better. They deserve fiduciary protections when investing their hard-earned retirement savings; and, regrettably, that's not what H.R. 4293 delivers.

For the reasons stated above, among others, Committee Democrats unanimously opposed H.R. 4293 when the Committee on Education and the Workforce considered them on February 2, 2016. We urge the full House of Representatives to do the same.

ROBERT C. "BOBBY" SCOTT,
Ranking Member.
JOE COURTNEY.
FREDERICA S. WILSON.
MARK POCAN.
RAÚL M. GRIJALVA.
MARK DESAULNIER.
SUSAN A. DAVIS.
JARED POLIS.
ALMA S. ADAMS.
MARCIA L. FUDGE.
MARK TAKANO.
HAKEEM S. JEFFRIES.
SUZANNE BONAMICI.
RUBÉN HINOJOSA.

○