

AFFORDABLE RETIREMENT ADVICE FOR SAVERS ACT

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OCTOBER 25, 2017.—Ordered to be printed  
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Ms. FOXX, 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. 2823]

[Including cost estimate of the Congressional Budget Office]

The Committee on Education and the Workforce, to whom was referred the bill (H.R. 2823) to amend the Employee Retirement Income Security Act of 1974 and the Internal Revenue Code of 1986 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 for Savers Act”.

**SEC. 2. REPEAL OF FIDUCIARY DEFINITION RULEMAKING.**

(a) IN GENERAL.—The Fiduciary Definition rulemaking described in subsection (b) is repealed and shall have no force or effect, and the regulations and prohibited transaction exemptions amended or repealed by such rulemaking are restored or revived as if such rulemaking had not been issued.

(b) FIDUCIARY DEFINITION RULEMAKING.—The Fiduciary Definition rulemaking described in this subsection consists of the following:

(1) The final rule of the Department of Labor titled “Definition of the Term ‘Fiduciary’; Conflict of Interest Rule—Retirement Investment Advice” published April 8, 2016 (81 Fed. Reg. 20946).

(2) The “Best Interest Contract Exemption” published April 8, 2016 (81 Fed. Reg. 21002), and the technical correction published July 11, 2016 (81 Fed. Reg. 44773).

(3) The “Class Exemption for Principal Transactions in Certain Assets Between Investment Advice Fiduciaries and Employee Benefit Plans and IRAs”

published April 8, 2016 (81 Fed. Reg. 21089), and the technical correction published July 11, 2016 (81 Fed. Reg. 44784).

(4) The “Amendment to Prohibited Transaction Exemption (PTE) 75–1, Part V, Exemptions From Prohibitions Respecting Certain Classes of Transactions Involving Employee Benefit Plans and Certain Broker-Dealers, Reporting Dealers and Banks” published April 8, 2016 (81 Fed. Reg. 21139).

(5) The “Amendment to and Partial Revocation of Prohibited Transaction Exemption (PTE) 86–128 for Securities Transactions Involving Employee Benefit Plans and Broker-Dealers; Amendment to and Partial Revocation of PTE 75–1, Exemptions From Prohibitions Respecting Certain Classes of Transactions Involving Employee Benefits Plans and Certain Broker-Dealers, Reporting Dealers and Banks” published April 8, 2016 (81 Fed. Reg. 21181).

(6) The “Amendments to Class Exemptions 75–1, 77–4, 80–83 and 83–1” published April 8, 2016 (81 Fed. Reg. 21208).

(7) The “Amendment to and Partial Revocation of Prohibited Transaction Exemption (PTE) 84–24 for Certain Transactions Involving Insurance Agents and Brokers, Pension Consultants, Insurance Companies, and Investment Company Principal Underwriters” published April 8, 2016 (81 Fed. Reg. 21147).

**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 communicated electronically, on paper, or orally 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, provided electronically or on paper, 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 state only the following: ‘This communication is not individualized to you, and you are not intended to rely materially on this communication 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), a communication shall not be considered to be a recommendation made pursuant to a mutual agreement, arrangement, or understanding, if such communication contains the disclaimer required by clause (ii), and—

“(I) it is provided in conjunction with clear and prominent disclosure in writing to a plan, plan participant, or beneficiary that the person providing the communication is doing so in its marketing or sales capacity, including any communication regarding the terms and conditions of the engagement of the person providing the communication, and 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;

“(II) the person providing the communication is a current or potential counterparty or service provider to the plan in connection with any transaction based on the communication, 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 communication, and, except in the case of a 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))), independent of the plan sponsor; and

“(bb) prior to such transaction, the independent plan fiduciary represents in writing to the person providing the communication 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 communication is an employee of any sponsoring employer or affiliate or employee organization who provides the communication to the plan for no fee or other compensation other than the employee’s normal compensation;

“(IV) the person providing the communication 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 communication consists solely of—

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

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

“(CC) identifying a sample set of investment alternatives based on the plan’s stated criteria in response to an inquiry from a plan fiduciary;

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

“(VI) the communication 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 are reasonably expected to 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) AMENDMENTS TO THE INTERNAL REVENUE CODE OF 1986.—

(1) EXEMPTION FOR INVESTMENT ADVICE WHICH IS BEST INTEREST RECOMMENDATION.—Section 4975(d) of the Internal Revenue Code of 1986 is amended by striking “or” at the end of paragraph (22), by striking the period at the end of paragraph (23) and inserting “, or”, and by inserting after paragraph (23) the following:

“(24) provision of investment advice by a fiduciary to a plan, plan participant, or beneficiary with respect to the plan, which is a best interest recommendation or a transaction connected to such advice.”

(2) INVESTMENT ADVICE; BEST INTEREST RECOMMENDATION.—Section 4975(e) of such Code is amended by adding at the end the following:

“(10) INVESTMENT ADVICE.—

“(A) IN GENERAL.—For purposes of this section, the term ‘investment advice’ means a recommendation, communicated electronically, on paper, or orally, that—

“(i) relates to—

“(I) 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;

“(II) 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

“(III) 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—

“(I) a written acknowledgment, provided electronically or on paper, that the person is a fiduciary with respect to the provision of such recommendation; or

“(II) 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, plan participant, or beneficiary that such recommendation is individualized to the plan, plan participant, or beneficiary and such plan, plan participant, or beneficiary intends to materially rely on such recommendation in making investment or management decisions with respect to any moneys or other property of such plan.

“(B) DISCLAIMER OF A MUTUAL AGREEMENT, ARRANGEMENT, OR UNDERSTANDING.—For purposes of subparagraph (A)(ii)(II), any disclaimer of a mutual agreement, arrangement, or understanding shall state only the following: ‘This communication is not individualized to you, and you are not intended to rely materially on this communication 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.

“(C) WHEN RECOMMENDATION TREATED AS MADE PURSUANT TO A MUTUAL AGREEMENT, ARRANGEMENT, OR UNDERSTANDING.—For purposes of subparagraph (A)(ii)(II), a communication shall not be treated as a recommendation made pursuant to a mutual agreement, arrangement, or understanding, if such communication contains the disclaimer required by subparagraph (B), and—

“(i) SELLER’S EXCEPTION.—The communication is provided in conjunction with clear and prominent disclosure in writing to a plan, plan participant, or beneficiary that the person providing the communication is doing so in its marketing or sales capacity, including any communication regarding the terms and conditions of the engagement of the person providing the communication, and 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 or under the obligations of a best interest recommendation.

“(ii) CERTAIN COUNTERPARTIES OR SERVICE PROVIDERS.—The person providing the communication is a current or potential counterparty or service provider to the plan in connection with any transaction based on the communication, but only if—

“(I) the plan is represented, in connection with such transaction, by a plan fiduciary that is independent of the person providing the communication, and, except in the case of a 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))), independent of the plan sponsor; and

“(II) prior to entering into such transaction, the independent plan fiduciary represents in writing to the person providing the communication 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, plan participants, or plan beneficiaries.

“(iii) EMPLOYEES OF A PLAN SPONSOR.—The person providing the communication is an employee of any sponsoring employer or affiliate or employee organization who provides the communication to the plan for no fee or other compensation other than the employee’s normal compensation.

“(iv) PLATFORM PROVIDERS SELECTION AND MONITORING ASSISTANCE.—The person providing the communication discloses in writing to the plan fiduciary that the person is not undertaking to provide investment advice as a fiduciary (within the meaning of this paragraph) or under

the obligations of a best interest recommendation and the communication consists solely of—

“(I) making available to the plan, plan participants, or plan beneficiaries, without regard to the individualized needs of the plan, plan participants, or plan beneficiaries, securities or other property or investment products through a platform or similar mechanism from which a plan fiduciary may select or monitor investment alternatives; or

“(II) in connection with a platform or similar mechanism described in subclause (I)—

“(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;

“(bb) providing objective financial data and comparisons with independent benchmarks to the plan; or

“(cc) identifying a sample set of investment alternatives based on the plan’s stated criteria in response to an inquiry from a plan fiduciary.

“(v) VALUATION.—The communication consists solely of valuation information.

“(vi) FINANCIAL EDUCATION.—The communication consists solely of—

“(I) 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;

“(II) information provided to participants or beneficiaries regarding the factors to consider in deciding whether to elect to receive a distribution from a plan and whether to roll over such distribution to a plan, so long as any examples of different distribution alternatives are accompanied by all material facts and assumptions on which the examples are based; or

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

“(11) BEST INTEREST RECOMMENDATION.—For purposes of this subsection—

“(A) IN GENERAL.—The term ‘best interest recommendation’ means a recommendation—

“(i) for which no more than reasonable compensation is paid (as determined under subsection (d)(2));

“(ii) provided by a person acting with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person would exercise based on—

“(I) the information obtained through the reasonable diligence of the person regarding factors such as the advice recipient’s age; and

“(II) any other information that the advice recipient discloses to the person in connection with receiving such recommendation; and

“(iii) where the person places the interests of the plan or advice recipient above its own.

“(B) INVESTMENT OPTIONS; VARIABLE COMPENSATION.—A best interest recommendation may include a recommendation that—

“(i) is based on a limited range of investment options (which may consist, in whole or in part, of proprietary products), but only if any 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.’; or

“(ii) may result in variable compensation to the person providing the recommendation (or any affiliate of such person), but only if the receipt of such compensation shall be clearly disclosed to the advice recipient prior to any transaction based on the investment advice.

“(C) CLEAR DISCLOSURE OF VARIABLE COMPENSATION.—For purposes of this paragraph, 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 clause 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 are reasonably expected to 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).

“(D) DEFINITION OF AFFILIATE.—For purposes of this paragraph, the term ‘affiliate’ has the meaning given in subsection (f)(8)(J)(ii).

“(E) CORRECTION OF CERTAIN ERRORS AND OMISSIONS.—A recommendation shall not fail to be a best interest recommendation solely because a person who, acting in good faith and with reasonable diligence, makes an error or omission in disclosing the information specified in subparagraph (B), 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 such error or omission.

“(F) SPECIAL RULE.—Any notice provided pursuant to a requirement under subparagraph (B)(i) or subparagraph (C)(i) 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.”.

(3) FAILURES RELATING TO BEST INTEREST RECOMMENDATION.—

(A) CORRECTION.—Section 4975(f)(5) of such Code is amended—  
(i) by striking “(5) CORRECTION.—The terms” and inserting:

“(5) CORRECTION.—

“(A) IN GENERAL.—Except as provided in subparagraph (B), the terms”,  
and

(ii) by adding at the end the following:

“(B) DETERMINATION OF ‘CORRECTION’ AND ‘CORRECT’ WITH RESPECT TO BEST INTEREST ADVICE RECOMMENDATIONS.—In the case of a prohibited transaction arising by the failure of investment advice to be a best interest recommendation, the terms ‘correction’ and ‘correct’ mean the payment to, or reimbursement of, actual damages of the plan, plan participants, or plan beneficiaries resulting directly from the plan’s, plan participant’s, or plan beneficiary’s reliance on such investment advice, if any, that have not otherwise been paid or reimbursed to the plan, plan participants, or plan beneficiaries, including payments and reimbursements made pursuant to subparagraph (A) if such amount is greater than the amount determined under subparagraph (A).”.

(B) AMOUNT INVOLVED FOR PURPOSES OF EXCISE TAX.—The first sentence of section 4975(f)(4) of such Code is amended by striking “excess compensation.” and inserting “excess compensation, and in the case of a prohibited transaction arising by the failure of investment advice to be a best interest recommendation, the amount involved shall be the amount paid to the person providing the advice (or its affiliate, as defined in paragraph (8)(J)(ii)) that has not been paid or reimbursed to the plan, plan participants, or plan beneficiaries, including payments and reimbursements made pursuant to paragraph (5).”.

(c) EFFECTIVE DATE.—The amendments made by subsections (a) and (b) shall take effect on the date of the enactment of this Act and shall apply with respect to communications provided or recommendations made on or after 2 years after such date.

(d) GRANDFATHERED TRANSACTIONS AND SERVICES.—The amendments made by subsections (a) and (b) 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 become effective under subsection (c).

(e) TRANSITION.—Until such time as regulations or other guidance are issued to carry out the amendments made by subsections (a) and (b), a plan or a fiduciary shall be treated as meeting the requirements of such amendments if the plan or fi-

duciary, as the case may be, complies with a reasonable good faith interpretation of such amendments.

#### PURPOSE

H.R. 2823, the *Affordable Retirement Advice for Savers Act*, protects access to affordable retirement advice by overturning the Department of Labor’s (DOL) flawed regulation that amended the regulatory definition of “fiduciary”<sup>1</sup> under the *Employee Retirement Income Security Act of 1974* (ERISA)<sup>2</sup> and the *Internal Revenue Code of 1986* (tax code).<sup>3</sup> Additionally, H.R. 2823 ensures 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.

#### COMMITTEE ACTION

##### 112TH CONGRESS

##### *Full committee hearing on policies and priorities at DOL*

On February 16, 2011, the Committee on Education and the Workforce (Committee) held a hearing titled “Policies and Priorities at the U.S. Department of Labor” to examine, among other issues, DOL’s Employee Benefits Security Administration’s (EBSA) October 2010 proposed regulation that significantly expanded the definition of “fiduciary” under ERISA and the tax code. The Honorable Hilda L. Solis, then-Secretary of the U.S. Department of Labor, was the sole witness. During the hearing, Reps. 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.<sup>4</sup>

##### *Subcommittee hearing on the impact of DOL’s proposal on workers and retirees*

On July 26, 2011, the Subcommittee on Health, Employment, Labor, and Pensions (HELP) held a hearing titled “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, then-Assistant Secretary of Labor, EBSA, 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.

<sup>1</sup>Definition of the Term “Fiduciary”; Conflict of Interest Rule—Retirement Investment Advice, 81 Fed. Reg. 20946 (Apr. 8, 2016). [hereinafter Final Rule].

<sup>2</sup>29 U.S.C. § 1001 *et seq.* ERISA section citations will be used throughout.

<sup>3</sup>26 U.S.C. § 1 *et seq.* [hereinafter the tax code].

<sup>4</sup>*Policies and Priorities at the U.S. Department of Labor: Hearing Before the H. Comm. on Educ. and the Workforce*, 112th Cong. 15, 38 (Feb. 16, 2011).

*Full committee hearing on the President's Fiscal Year 2013 Budget Proposal for DOL*

On March 21, 2012, the Committee held a hearing titled “Reviewing the President’s Fiscal Year 2013 Budget Proposal for the Department of Labor.” Then-Secretary Solis was the sole witness. During the hearing, members of both parties thanked Secretary Solis for withdrawing the 2010 proposed fiduciary rule and inquired as to what criteria would be considered in a subsequent regulatory proposal.<sup>5</sup>

113TH CONGRESS

*Full committee hearing on the President's Fiscal Year 2015 Budget Proposal for DOL*

On March 26, 2014, the Committee held a hearing titled “Reviewing the President’s Fiscal Year 2015 Budget Proposal for the Department of Labor.” The Honorable Thomas E. Perez, then-Secretary of the U.S. Department of Labor, was the sole witness. During this hearing, then-Committee Chairman John Kline (R–MN) 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.”<sup>6</sup>

114TH CONGRESS

*Full committee hearing on the President's Fiscal Year 2016 Budget Proposal for DOL*

On March 18, 2015, the Committee held a hearing titled “Reviewing the President’s Fiscal Year 2016 Budget Proposal for the Department of Labor.” Then-Secretary Perez was the sole witness. During the hearing, Rep. Frederica Wilson (D–FL) warned that a new proposed fiduciary rule should not “impact the availability of affordable investment advice.”<sup>7</sup>

*Subcommittee hearing on Restricting Access to Financial Advice and Evaluating the Impact on Working Families and Retirees*

On June 17, 2015, the HELP Subcommittee held a hearing titled “Restricting Access to Financial Advice: Evaluating the Costs and Consequences for Working Families and Retirees” to examine the new DOL Notice of Proposed Rulemaking (2015 NPRM) amending the regulatory definition of “fiduciary” under ERISA and the tax code. Witnesses before the Subcommittee included then-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,

<sup>5</sup> *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).

<sup>6</sup> *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).

<sup>7</sup> *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).

Washington, D.C.; and Brian Reid, Ph.D., Chief Economist, Investment Company Institute, Washington, D.C. During the hearing, Dr. Reid testified in opposition to DOL’s revised fiduciary rule, stating, “[A]ny policy that impairs retirement savers’ ability to get the help that they need will significantly harm the prospects of millions of workers. Unfortunately, the DOL proposal will do just that.”<sup>8</sup> Additionally, Mr. Haley 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.”<sup>9</sup>

*Subcommittee hearing on 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 titled “Principles for Ensuring Retirement Advice Serves the Best Interests of Working Families and Retirees” to further examine the 2015 NPRM. Notably, the Subcommittee considered the potential negative effects of the 2015 NPRM on small businesses and low- and middle-income families. Witnesses before the Subcommittee included the Honorable Bradford 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,<sup>10</sup> witnesses praised the bipartisan principles outlined by then-Chairman of the HELP Subcommittee David “Phil” Roe (R-TN), Reps. Richard Neal (D-MA), Peter Roskam (R-IL), and Michelle Lujan Grisham (D-NM) for a legislative solution to help strengthen retirement security.

*Introduction of H.R. 4293, Affordable Retirement Advice Protection Act, and H.R. 4294, Strengthening Access to Valuable Education and Retirement Support Act*

On December 18, 2015, then-HELP Chairman Roe introduced the *Affordable Retirement Advice Protection Act* (H.R. 4293)<sup>11</sup> with five cosponsors.<sup>12</sup> The same day, Rep. Roskam introduced the *Strengthening Access to Valuable Education and Retirement Support Act* (H.R. 4294)<sup>13</sup> with five cosponsors.<sup>14</sup> Recognizing the threat of DOL’s proposed rule, then-HELP Subcommittee Chairman Roe and Rep. Roskam introduced the bipartisan bills to protect consumers

<sup>8</sup>*Restricting Access to Financial Advice: Evaluating the Costs and Consequences for Working Families and Retirees: Hearing Before the Subcomm. on Health, Emp., Lab., 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, Inv. Co. Inst.).

<sup>9</sup>*Restricting Access to Financial Advice: Evaluating the Costs and Consequences for Working Families and Retirees: Hearing Before the Subcomm. on Health, Emp., Lab., 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).

<sup>10</sup>*Principles for Ensuring Retirement Advice Serves the Best Interests of Working Families and Retirees: Hearing Before the Subcomm. on Health, Emp., Lab., and Pensions of the H. Comm. on Educ. and the Workforce*, 114th Cong. (Dec. 2, 2015).

<sup>11</sup>H.R. 4293, 114th Cong. (2015).

<sup>12</sup>Original co-sponsors of H.R. 4293 include Reps. Richard Neal (D-MA), Peter Roskam (R-IL), John Larson (D-CT), Earl L. “Buddy” Carter (R-GA), and David Scott (D-GA).

<sup>13</sup>H.R. 4294, 114th Cong. (2015).

<sup>14</sup>Original co-sponsors of H.R. 4294 include Reps. Phil Roe (R-TN), Richard Neal (D-MA), John Larson (D-CT), Tom Reed (R-NY), and Michelle Lujan Grisham (D-NM).

and preserve access to affordable financial advice for low- and middle-income families. The bills proposed amending ERISA and the tax code, respectively, to require retirement professionals act in their clients' best interest and to prohibit DOL from implementing its flawed proposal unless Congress affirmatively approves the final rule.

*Committee passage of H.R. 4293, Affordable Retirement Advice Protection Act*

On February 2, 2016, the Committee considered H.R. 4293, the *Affordable Retirement Advice Protection Act*.<sup>15</sup> Then-HELP Subcommittee Chairman 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 voted down by voice vote. The Committee favorably reported H.R. 4293, as amended, to the House of Representatives by a vote of 22 to 14.

*Committee passage of H.R. 4294, Strengthening Access to Valuable Education and Retirement Support Act of 2015*

On February 2, 2016, the Committee considered H.R. 4294, the *Strengthening Access to Valuable Education and Retirement Support Act of 2015*.<sup>16</sup> Rep. Earl L. "Buddy" Carter (R-GA) 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 and subsequently withdrawn. The Committee favorably reported H.R. 4294, as amended, to the House of Representatives by a vote of 22 to 14.

*Introduction of H.J. Res. 88, Disapproving the Rule Submitted by the Department of Labor Related to the Definition of the Term "Fiduciary"*

On April 19, 2016, then-HELP Subcommittee Chairman Roe, along with Reps. Charles Boustany (R-LA) and Ann Wagner (R-MO), introduced H.J. Res. 88, *Disapproving the rule submitted by the Department of Labor relating to the definition of the term "Fiduciary," pursuant to the Congressional Review Act*.<sup>17</sup>

*Committee passage of H.J. Res. 88, Disapproving the Rule Submitted by the Department of Labor Related to the Definition of the Term "Fiduciary"*

On April 21, 2016, the Committee considered H.J. Res. 88 and reported the resolution favorably to the House of Representatives by a vote of 22 to 14.

<sup>15</sup> *H.R. 4293, Affordable Retirement Advice Protection Act: Markup Before the H. Comm. on Educ. and the Workforce*, 114th Cong. (Feb. 2, 2016).

<sup>16</sup> *H.R. 4294, Strengthening Access to Valuable Education and Retirement Support Act of 2015: Markup Before the H. Comm. on Educ. and the Workforce*, 114th Cong. (Feb. 2, 2016).

<sup>17</sup> 5 U.S.C. § 801.

*Congressional passage and Presidential veto of H.J. Res. 88, Disapproving the Rule Submitted by the Department of Labor Related to the Definition of the Term “Fiduciary”*

On April 28, 2016, the House of Representatives passed H.J. Res. 88 by a vote of 234 to 183. The Senate subsequently passed the resolution of disapproval on May 24, 2016, by a vote of 56 to 41. On June 7, 2016, President Obama vetoed H.J. Res. 88. On June 22, 2016, the House failed to override the President’s veto by a vote of 239 to 180.

115TH CONGRESS

*Subcommittee hearing on Regulatory Barriers Facing Workers and Families Saving for Retirement*

On May 18, 2017, the HELP Subcommittee, chaired by Rep. Tim Walberg (R–MI) held a hearing titled “Regulatory Barriers Facing Workers and Families Saving for Retirement” to further examine the impact of the DOL’s flawed fiduciary rule on low- and middle-income savers in anticipation of the rule going into effect on June 9, 2017.<sup>18</sup> Witnesses included the Honorable Bradford (Brad) Campbell, Partner, Drinker Biddle & Reath LLP, Washington, D.C.; Jason Furman, Ph.D., Senior Fellow, Peterson Institute for International Economics, Washington, D.C.; Mr. James Kais, Senior Vice President and Managing Director, Retirement Practice Leader, Transamerica, Saint Petersburg, Florida; and, Mr. Erik Sossa, Vice President, Global Benefits and Wellness, PepsiCo, Inc., Purchase, New York. During the hearing, Mr. Campbell warned that costs would increase and access to investment advice and assistance would decrease on June 9, the day the fiduciary regulation was scheduled to go into effect.<sup>19</sup>

*Introduction of H.R. 2823, Affordable Retirement Advice for Savers Act*

On June 8, 2017, Rep. Roe, along with HELP Subcommittee Chairman Walberg, Vice Chairman Joe Wilson (R–SC), and Rep. Roskam introduced H.R. 2823, the *Affordable Retirement Advice for Savers Act*, to overturn DOL’s flawed fiduciary rule and improve policies governing financial advice to enhance protections for retirement savers.<sup>20</sup> The legislation amends ERISA and the tax code to strengthen retirement planning by requiring retirement advisors to serve their clients’ best interests; enhance transparency and accountability through clear, simple, and relevant disclosure requirements; ensure small business owners continue receiving the help they need to provide retirement plans for their employees; and protect access to high-quality, affordable retirement advice so more Americans can retire with dignity and financial security.

<sup>18</sup> *Regulatory Barriers Facing Workers and Families Saving for Retirement: Hearing Before the Subcomm. on Health, Emp., Lab., and Pensions of the H. Comm. on Educ. and the Workforce*, 115th Cong. (May 18, 2017).

<sup>19</sup> *Regulatory Barriers Facing Workers and Families Saving for Retirement: Hearing Before the Subcomm. on Health, Emp., Lab., and Pensions of the H. Comm. on Educ. and the Workforce*, 115th Cong. (May 18, 2017) (written testimony of the Hon. Bradford Campbell, Partner, Drinker Biddle & Reath LLP).

<sup>20</sup> H.R. 2823, 115th Cong. (2017).

*Committee passage of H.R. 2823, Affordable Retirement Advice for Savers Act*

On July 19, 2017, the Committee considered H.R. 2823, the *Affordable Retirement Advice for Savers Act*.<sup>21</sup> Rep. 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. 2823, as amended, to the House of Representatives by a vote of 23 to 17.

TECHNICAL BACKGROUND

*Pension Plans and Fiduciary Requirements under ERISA*

ERISA is generally administered by the Secretary of Labor and establishes various requirements for employee pension benefit plans (pension plans).<sup>22</sup> 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.<sup>23</sup> 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.<sup>24</sup>

In general, under ERISA a person is a fiduciary with respect to a plan to the extent the person: (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.<sup>25</sup>

ERISA requires a fiduciary of a plan to discharge 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

<sup>21</sup> *H.R. 2823, Affordable Retirement Advice for Savers Act: Markup Before the H. Comm. on Educ. and the Workforce*, 115th Cong. (Jul. 19, 2017).

<sup>22</sup> ERISA applies also to employee welfare benefit plans. ERISA generally does not apply to church plans or plans of governmental employers. Under the tax code, qualified retirement plans and annuities described in tax code sections 401(a) and 403(a) (other than, generally, church plans or plans of governmental employers) are subject to many of the same requirements as apply under ERISA. Tax code requirements are administered by the Secretary of the Treasury, through the Internal Revenue Service.

<sup>23</sup> Defined contribution plan (or individual account plan) is defined at ERISA section 3(34).

<sup>24</sup> As defined in ERISA section 3(35), a defined benefit plan generally is any plan that is not a defined contribution plan.

<sup>25</sup> 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.

in the conduct of an enterprise of a like character and with like aims.<sup>26</sup> 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 *infra*) 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 made through the use of plan assets.<sup>27</sup> 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 the fiduciary’s own duties enabled the co-fiduciary to commit the breach.<sup>28</sup> Certain fiduciary violations may result in the imposition of a civil penalty.<sup>29</sup>

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”).<sup>30</sup> 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 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.<sup>31</sup> 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.<sup>32</sup> In addition, these rules prohibit a fiduciary that has au-

<sup>26</sup>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.

<sup>27</sup>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.

<sup>28</sup>ERISA § 405.

<sup>29</sup>ERISA §§ 502(i) and (l).

<sup>30</sup>ERISA § 404(c) (implemented by regulations at 29 C.F.R. § 2550.404c-1). 29 C.F.R. § 2550.404c-5 provides rules for qualified default investment alternatives (QDIAs) if a participant does not select any investment options.)

<sup>31</sup>ERISA § 406. Under tax code section 4975, similar rules apply to qualified retirement plans and annuities of private employers (other than, generally, church plans), as well as individual retirement arrangements (IRAs) under tax code section 408, health savings accounts (HSAs) under tax code section 223, Archer MSAs under tax code section 220, and Coverdell education savings accounts (Coverdell ESAs) under tax code section 530. A violation of the tax code rules may result in the imposition of an excise tax on the violator.

<sup>32</sup>ERISA section 407 restricts the acquisition or holding of employer securities and employer real property by a plan.

thority 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 the fiduciary's own interest or for his own account; (2) in the fiduciary's 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 the fiduciary's 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 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 are covered by the plan; and certain owners, relatives, employees, officers, directors, and related entities.<sup>33</sup>

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.<sup>34</sup> 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.<sup>35</sup>

Under section 102 of the Reorganization Plan No. 4 of 1978,<sup>36</sup> 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 tax 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 tax code purposes, as well as for ERISA purposes.

#### *Rules relating to investment advice*

##### *Fiduciary status and prohibited transaction exemptions*

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. As discussed below, DOL regulations issued in 1975 (1975 regulations) and 2016 (2016 regulations) describe the circumstances in which a person is a fiduciary

<sup>33</sup> ERISA § 3(14).

<sup>34</sup> ERISA § 408(b).

<sup>35</sup> ERISA § 408(a). Before an administrative exemption is granted, notice must be published in the Federal Register of the pendency of the exemption, notice must be provided to interested persons, and interested persons must be given an opportunity to present views. An opportunity for a hearing must be provided and a determination on the record must be made with respect to the required findings described above. In addition, an exception may be granted only after consultation and coordination with the Secretary of the Treasury.

<sup>36</sup> 43 Fed. Reg. 47713 (Oct. 17, 1978).

by reason of rendering investment advice. Additionally, administrative and statutory prohibited transaction exemptions are available with respect to fiduciaries that render investment advice.

*1975 Regulations and investment education*

Under the 1975 regulations and before June 6, 2016, a person was deemed to be rendering “investment advice” to an employee benefit plan for this purpose only if the following occurred:

- The person rendered advice to the plan as to the value of securities or other property or made recommendation as to the advisability of investing in, purchasing, or selling securities or other property; and
- The person either directly or indirectly (for example, through or together with any affiliate) (1) had 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) rendered 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 would serve as a primary basis for investment decisions with respect to plan assets, and that the person would render individualized investment advice to the plan based on the particular needs of the plan regarding matters such as, among other things, investment policies or strategy, overall portfolio composition, or diversification of plan investments.<sup>37</sup>

The regulations further provided 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, was 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 did 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, 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.<sup>38</sup> For this purpose, investment education includes the following cat-

<sup>37</sup> 29 C.F.R. § 2510.3–21(c), as in effect before June 7, 2016. Under 29 C.F.R. § 2510.3–21(j) of the 2016 DOL regulations, discussed below, similar rules apply as of June 7, 2016, and until June 9, 2017.

<sup>38</sup> 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.

egories of information and materials (described more fully in Interpretive Bulletin 96–1): plan information, general financial and investment information, asset allocation models, and interactive investment materials. Interpretive Bulletin 96–1 notes that the information and materials described in the four categories merely represent examples of the type of information and materials that may be furnished to participants and beneficiaries without such information and materials constituting investment advice, and 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 eligible investment advice arrangement.<sup>39</sup> 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.<sup>40</sup> 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).<sup>41</sup> 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.

<sup>39</sup> ERISA §§ 408(b)(14) and (g) (enacted by section 601 of the Pension Protection Act of 2006, Pub. L. No. 109–280). Similar exemptions apply under Code section 4975(d)(17) and (f)(8).

<sup>40</sup> Various requirements with respect to notices and disclosure, recordkeeping and audits must also be met.

<sup>41</sup> Affiliate for this purpose means an affiliated person as defined under section 2(a)(3) of the Investment Company Act of 1940.

*2016 regulations and prohibited transaction exemptions*

On April 8, 2016, DOL issued final regulations that replaced the 1975 regulations relating to investment advice with a new standard as to whether a person is a fiduciary based on rendering investment advice, generally applicable June 9, 2017.<sup>42</sup> Under the 2016 regulations, a person is a fiduciary based on rendering investment advice if the following occurs:

- The person provides to a plan, a plan fiduciary, a plan participant or beneficiary, an IRA,<sup>43</sup> or an IRA owner certain types of recommendations (as described below) that constitute investment advice with respect to plan or IRA assets for a fee or other compensation, direct or indirect; and
- With respect to the investment advice described above, the recommendation is made either directly or indirectly (such as through or together with an affiliate) by a person who (1) represents or acknowledges that it is acting as a fiduciary; (2) renders the advice pursuant to a written or verbal agreement, arrangement, or understanding that the advice is based on the particular investment needs of the advice recipient; or, (3) directs the advice to a specific advice recipient or recipients regarding the advisability of a particular investment or management decision with respect to securities or other investment property of the plan or IRA.<sup>44</sup>

Under the regulations, investment advice includes the following:

- A recommendation as to the advisability of acquiring, holding, disposing of, or exchanging, securities or other investment property, or a recommendation as to how securities or other investment property should be invested after the securities or other investment property are rolled over, transferred, or distributed from the plan or IRA; and
- A recommendation as to the management of securities or other investment property, including, among other things, recommendations on investment policies or strategies, portfolio composition, selection of other persons to provide investment advice or investment management services, selection of investment account arrangements (such as brokerage versus advisory), or recommendations with respect to rollovers, transfers, or distributions from a plan or IRA, including whether, in what amount, in what form, and to what destination such a rollover, transfer, or distribution should be made.<sup>45</sup>

<sup>42</sup> Final Rule, 81 Fed. Reg. 20946. The 2016 regulations are effective June 7, 2016, and, when originally issued, were generally applicable as of April 10, 2017. However, the applicability date for some requirements was extended until June 9, 2017. 82 Fed. Reg. 16902 (Apr. 7, 2017). DOL Field Assistance Bulletin 2017-02, issued May 22, 2017, provides a temporary enforcement policy with respect to the 2016 regulations. As of July 19, 2017, the date this bill was ordered reported, all requirements were to become applicable by January 1, 2018.

<sup>43</sup> IRA is defined in the regulations to include HSAs, Archer MSAs, and Coverdell ESAs, as well as IRAs.

<sup>44</sup> 29 C.F.R. §§ 2510.3-21(a)(1) and (2). Under 29 C.F.R. § 2510.3-21(d), similar to the 1975 regulations, status as a fiduciary with respect to a plan by reason of rendering investment advice with respect to certain plan assets does not of itself cause a person to be a fiduciary with respect to other plan assets.

<sup>45</sup> 29 C.F.R. §§ 2510.3-21(a)(1)(i) and (ii). Under the tax code, a distribution from an employer-sponsored retirement plan, IRA, HSA, Archer MSA, or Coverdell ESA may be rolled over (often referred to as a “rollover”) to a similar arrangement and continue to receive tax-favored treatment. At 81 Fed. Reg. at 20964, the preamble to the regulations notes that the regulations supersede DOL Advisory Opinion 2005-23A (December 7, 2005), which 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,

Under the regulations, “recommendation” means a communication that, based on its content, context, and presentation, would reasonably be viewed as a suggestion that the advice recipient engage in or refrain from taking a particular course of action.<sup>46</sup> The determination of whether a recommendation has been made is an objective rather than subjective inquiry. In addition, the more individually tailored the communication is to a specific advice recipient or recipients about (e.g. a security, investment property, or investment strategy), the more likely the communication will be viewed as a recommendation. Providing a selective list of securities to a particular advice recipient as appropriate for that investor would be a recommendation as to the advisability of acquiring securities even if no recommendation is made with respect to any one security. Further, a series of actions, directly or indirectly (such as through or together with an affiliate), that may not constitute a recommendation when viewed individually may amount to a recommendation when considered in the aggregate. It makes no difference whether the communication is initiated by a person or a computer software program.

The 2016 regulations specify that the provision of services or the furnishing or making available of information and materials in conformance with standards described in the regulations with respect to the following situations is not a recommendation: (1) platform providers; (2) selection and monitoring assistance; (3) general communications; and (4) investment education.<sup>47</sup> The 2016 regulations further provide that, except for persons who represent or acknowledge that they are acting as a fiduciary, a person is not deemed to be a fiduciary solely because of the following activities that meet standards described in the regulations: (1) transactions with independent fiduciaries with financial expertise; (2) swap and security-based swap transactions; and, (3) certain employees (such as an employee of the plan sponsor) receiving no additional compensation in connection with the advice.<sup>48</sup>

In conjunction with the 2016 regulations, DOL issued two new prohibited transaction class exemptions with respect to investment advice and related transactions: the Best Interest Contract (BIC) exemption and the Class Exemption for Principal Transactions in Certain Assets Between Investment Advice Fiduciaries and Employee Benefit Plans and IRAs (Principal Transactions Exemp-

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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.

<sup>46</sup> 29 C.F.R. § 2510.3–21(b)(1).

<sup>47</sup> 29 C.F.R. § 2510.3–21(b)(2). Determinations as to whether another activity constitutes a recommendation must be made by reference to the criteria set forth above in the definition of “recommendation.” The regulations withdraw Interpretive Bulletin 96–1, relating to investment education, and revise the standards for plan information, general financial and investment information, asset allocation models, and interactive investment materials.

<sup>48</sup> 29 C.F.R. § 2510.3–21(c). Under 29 C.F.R. § 2510.3–21(e), certain persons are not deemed to be fiduciaries solely because of the execution of securities transactions on behalf of a plan or IRA.

tion).<sup>49</sup> In addition, the following previously issued exemptions were amended (and, in some cases, repealed in part):

- Prohibited Transaction Exemption (PTE) 75–1 (Part V), Exemptions From Prohibitions Respecting Certain Classes of Transactions Involving Employee Benefit Plans and Certain Broker-Dealers, Reporting Dealers and Banks;
- PTE 84–24 for Certain Transactions Involving Insurance Agents and Brokers, Pension Consultants, Insurance Companies, and Investment Company Principal Underwriters;
- PTE 86–128 for Securities Transactions Involving Employee Benefit Plans and Broker-Dealers and PTE 75–1 (Parts I and II); and
- Class Exemptions 75–1 (Parts III and IV), 77–4, 80–83 and 83–1.<sup>50</sup>

The new prohibited transaction exemptions and amendments of previously issued exemptions generally require adherence to specified standards (referred to as “impartial conduct standards”), including that investment advice be in the “best interest” of the plan, participant, IRA, or IRA owner to which it relates (hereinafter, collectively, “investor”). For this purpose, investment advice is in the best interest of an investor when the person or persons providing the advice act with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person 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, based on the investment objectives, risk tolerance, financial circumstances, and needs of the investor, without regard to the financial or other interests of the person or persons providing the advice (or a related party). The exemptions are conditioned also on meeting specified requirements relating to compensation, contract terms, anti-conflict safeguards, notices and disclosures, and record-keeping, as applicable under the particular exemption.

#### SUMMARY OF H.R. 2823

The bill repeals the 2016 regulations, the BIC Exemption, the Principal Transactions Exemption, and the amendments to (and partial repeals of) other previously issued exemptions. The bill provides that the regulations and prohibited transaction exemptions amended or repealed by the Fiduciary Definition rulemaking are restored or revived as if the rulemaking had not been issued.

As described further below, the bill also amends the statutory definition of fiduciary under ERISA and the tax code 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 recipi-

<sup>49</sup> Best Interest Contract Exemption, 81 Fed. Reg. 21002 (Apr. 8, 2016), as corrected at 81 Fed. Reg. 44773 (Jul. 11, 2016), and Class Exemption for Principal Transactions in Certain Assets Between Investment Advice Fiduciaries and Employee Benefit Plans and IRAs, 81 Fed. Reg. 21089 (Apr. 8, 2016), as corrected at 81 Fed. Reg. 44784 (July 11, 2016). When originally issued, these exemptions and the changes to previously issued exemptions were applicable as of April 10, 2017. However, the applicability date was extended to June 9, 2017, with certain aspects applicable January 1, 2018. 82 Fed. Reg. 16902 (Apr. 7, 2017).

<sup>50</sup> 81 Fed. Reg. 21139 (Apr. 8, 2016); 81 Fed. Reg. 21147 (Apr. 8, 2016); 81 Fed. Reg. 21181 (Apr. 8, 2016); 81 Fed. Reg. 21208 (Apr. 8, 2016).

ent 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, a recommendation (if rendered under the conditions described below) communicated electronically, on paper, or orally may be investment advice if it relates to the following:

- The advisability of acquiring, holding, disposing, or exchanging of 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.<sup>51</sup>

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

- A written acknowledgment, provided electronically or on paper, of the obligation of the advisor to comply with the fiduciary standards under ERISA with respect to the provision of the recommendation; or,
- 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 the recommendation and the plan that the recommendation is individualized to the plan and there is an intent 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 state only the following: “This communication is not individualized to you, and you are not intended to rely materially on this communication 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.

<sup>51</sup> 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.

*Communications not treated as investment advice*

Under the bill, a communication provided in the circumstances described below is not considered a recommendation made pursuant to a mutual agreement, arrangement, or understanding for purposes of the definition of investment advice if the communication contains the disclaimer described above.

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

- The person providing the communication is a current or potential counterparty or service provider to the plan in connection with any transaction based on the communication, provided the plan is represented, in connection with the transaction, by a plan fiduciary independent of the person providing the communication, and, except in the case of a swap<sup>52</sup> or security-based swap,<sup>53</sup> independent of the plan sponsor. Further, prior to the transaction, the independent plan fiduciary must represent in writing to the person providing the communication that it is aware the person has a financial interest in the transaction and it has determined the person is not intending to provide investment advice (as defined under the bill) or to otherwise act as a fiduciary to the plan.

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

- The person providing the communication discloses in writing to the plan fiduciary that the person is not undertaking to provide investment advice as a fiduciary. In addition, the communication provided consists solely of the following:

- Making available to the plan without regard to the individualized needs of the plan, securities or other property or investment products through a platform or similar mechanism from which a plan fiduciary may select or monitor investment alternatives; or

- In connection with a platform or similar mechanism described above, (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; (2) providing objective financial data and comparisons with independent benchmarks to the plan; or (3) identifying a sample set of investment alternatives based on the plan's stated criteria in response to an inquiry from a plan fiduciary.

- The communication consists solely of valuation information.
- The communication consists solely of the following:

<sup>52</sup>A swap for this purpose is defined in section 1a of the Commodity Exchange Act (7 U.S.C. § 1a).

<sup>53</sup>A security-based swap for this purpose is defined in section 3(a) of the Securities Exchange Act (15 U.S.C. § 78c(a)).

- 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 of Labor.

## 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.<sup>54</sup>

The exemption applies if the following conditions are met:

- No more than reasonable compensation is paid for the investment advice.<sup>55</sup>
- 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 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.”
- If the investment advice may result in variable compensation to the investment advisor (or any affiliate<sup>56</sup> 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 exactly: “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”;<sup>57</sup>

<sup>54</sup> Like all fiduciary acts, transactions covered by the exemption are also subject to the general fiduciary standard under ERISA.

<sup>55</sup> 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.

<sup>56</sup> 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.

<sup>57</sup> Any regulations or other administrative guidance implementing this requirement may not require this notice to be updated more frequently than annually.

- 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 are reasonably expected to 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); and

- On request of the advice recipient, a disclosure of the specific amounts of compensation described herein 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 investment advisor, acting in good faith and with reasonable diligence, makes an error or omission in disclosing the information specified above if the investment advisor discloses the correct information to the advice recipient as soon as practicable, but not later than 30 days from the date on which the investment advisor knows of the error or omission.

#### EFFECTIVE DATE

The amendments made by the bill generally take effect on the date of enactment and apply with respect to communications provided or recommendations made on or after two years after the date of enactment. However, 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. Until the time when regulations or other guidance is issued to carry out the amendments made by the bill, 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 2016 REGULATION

#### *Background*

##### *A. DOL's abandoned 2010 proposal*

The Obama administration long argued the regulatory definition of an “investment advice” fiduciary is insufficiently restrictive.<sup>58</sup> To

<sup>58</sup> See Council of Econ. 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](http://www.whitehouse.gov/sites/default/files/docs/cea_coi_report_final.pdf). [hereinafter CEA Report].

address this concern, in 2010 EBSA issued a complicated proposed regulation expanding the definition of “fiduciary.”<sup>59</sup> 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 issue a revised rulemaking.<sup>60</sup>

### *B. DOL’s 2015 NPRM*

At a February 2015 speech at AARP, President Obama announced his intention to go forward with this rulemaking.<sup>61</sup> In this speech and subsequent public statements, the administration re-branded 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 2015 NPRM in April.<sup>62</sup> The new proposal was preceded by a Council of Economic Advisors report arguing that “conflicted advice” costs Americans \$17 billion annually.<sup>63</sup> 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, paid on average 1 percent more annually. These assumptions came under intense scrutiny from analysts who argued IRA holders actually paid only 0.16 percent more and that these fees were justifiable due to a higher level of service.<sup>64</sup>

#### *a. DOL’s 2016 regulation & exemptions*

As previously stated, DOL finalized the 2016 regulation on April 8, 2016.<sup>65</sup> The rule effectively eliminated the “regular basis,” “mutual agreement,” and “primary basis” prongs of the five-part test. This makes it much more difficult to offer commission-based retirement accounts, where the advisor receives payment when transactions are executed (as opposed to an “advisory account,” where the advisor receives a flat fee or percentage of assets annually to manage the account). Because non-fiduciary commission-based accounts are a cost-effective way to engage low- and middle-income savers, this regulation risks millions of retirement savers losing access to advice.

In addition to the 2015 NPRM itself, DOL also finalized a number of exemptions from the prohibited transaction rules if the advice provider fulfills a number of conditions. The most consequential of these is the BIC exemption. The centerpiece of this exemption is a requirement that the advisor sign a contract promising to provide advice only in the client’s best interest. Under this exemption and the regulation, advisors must be subject to class action litigation, and certain previously non-fiduciary “education” may

<sup>59</sup> Definition of the Term “Fiduciary,” 75 Fed. Reg. 65263 (Oct. 15, 2010).

<sup>60</sup> See Press Release, Dept. of Lab. 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>.

<sup>61</sup> 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>.

<sup>62</sup> Definition of the Term “Fiduciary,” 80 Fed. Reg. 21928.

<sup>63</sup> CEA Report, *supra* note 58, at 2.

<sup>64</sup> Letter from David M. Abbey, Deputy Gen. Counsel, Retirement Policy, Inv. Co. Inst. and Brian Reid, Chief Economist, Inv. Co. 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](http://www.ici.org/pdf/15_ici_omb_data.pdf).

<sup>65</sup> Final Rule, 81 Fed. Reg. 20946 (Apr. 8, 2016).

trigger fiduciary liability. Finally, advisory firms are no longer able to market to small businesses without triggering fiduciary liability, which may have significant effects on the market. In sum, the final rule has jeopardized Americans' access to affordable advice.

*b. Congressional response*

Because of its primary jurisdiction over this regulation, the Committee has exhaustively reviewed the consequences of this Obama-era regulation. The 2015 NPRM received thousands of comments, including numerous letters from members.<sup>66</sup> On July 21, 2015, every Republican member of the Committee signed a comment letter calling for the proposal to be withdrawn, highlighting testimony from the hearing held by the HELP Subcommittee on June 17, 2015.<sup>67</sup> This comment letter also explained the Committee's long-standing interest in pursuing a responsible best interest standard.

Additionally, 46 House Democrats notably signed a letter led by then-HELP Subcommittee Ranking Member Polis (D-CO) calling for publication of the revised rule prior to finalizing, as well as a supplemental comment period.<sup>68</sup> 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.<sup>69</sup> In all, over half of House Democrats signed letters questioning DOL's proposal.

On December 18, 2015, then-HELP Subcommittee Chairman Roe, along with a bipartisan group of lawmakers, introduced two bills that established a legislative alternative to DOL's proposed fiduciary regulation. The Committee favorably reported both bills in February 2016. However, the bills were not considered by the House.

After DOL finalized its 2016 regulations, both houses of Congress approved a joint resolution of disapproval under the *Congressional Review Act* (H.J. Res. 88). However, due to President Obama's veto of that legislation, the rule remained in place, to become applicable on April 10, 2017, and certain BIC requirements were to be applicable January 1, 2018.

*c. Trump administration's response*

On February 3, 2017, President Trump declared a priority of his administration is "to empower Americans to make their own financial decisions, to facilitate their ability to save for retirement and build the individual wealth necessary to afford typical lifetime expenses. . . ." <sup>70</sup> Recognizing the Obama administration's regulation "may not be consistent" with this policy, the President directed DOL to analyze a number of questions regarding the regulation's likely consequences. Subsequently, DOL requested public com-

<sup>66</sup> Comments received through September 24, 2015, are published on EBSA's website, <http://www.dol.gov/ebsa/regs/cmt-1210-AB32-2.html>.

<sup>67</sup> 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](http://edworkforce.house.gov/uploadedfiles/7-21-15-dol_fiduciary_rule.pdf).

<sup>68</sup> See, e.g., Letter from the Hon. Jared Polis, member of Congress, *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>.

<sup>69</sup> Letter from the Hon. Gwen Moore, member of Congress, *et al.* to the Hon. Thomas E. Perez, Sec'y, Dep't of Labor (Sept. 24, 2015) (on file with the Committee).

<sup>70</sup> Presidential Memorandum on Fiduciary Duty Rule (Feb. 3, 2017), <https://www.whitehouse.gov/the-press-office/2017/02/03/presidential-memorandum-fiduciary-duty-rule>.

ments on the questions posed by the President.<sup>71</sup> In two separate letters signed by every Committee Republican, the Committee urged the Trump administration to delay the applicability of the rule until the conclusion of the analysis directed by the President.<sup>72</sup> However, in announcing a 60-day delay, DOL advised stakeholders to “plan on and prepare for compliance.”<sup>73</sup>

On May 22, 2017, Secretary of Labor Alexander Acosta published an op-ed in the Wall Street Journal announcing the final rule would not be delayed beyond the 60-day period.<sup>74</sup> As such, parts of the rule originally scheduled to go into effect on April 10, 2017, went into effect on June 9, 2017, with the full rule scheduled to go into effect on January 1, 2018. Additionally, DOL published a request for information (RFI) on July 5, 2017, seeking public comments “that could form the basis of new exemptions or changes/revisions to the rule and PTEs” as well as comment to delay the January 1, 2018, applicability date.<sup>75</sup>

#### CONCERNS WITH DOL’S 2016 REGULATION

DOL’s regulation significantly disrupted the retirement services marketplace. Based on overwhelming testimony from a diverse group of stakeholders, the final rule will restrict access to affordable financial advice for lower- and middle-income Americans, and make it harder for small businesses to set up retirement plans. For these reasons, the rule should be repealed and replaced with the substance of H.R. 2823.

#### *Restricted access to advice*

The 2016 regulations will have the net effect of locking lower- and middle-income investors out of the advice market.<sup>76</sup> According

<sup>71</sup>Definition of the Term “Fiduciary”; Conflict of Interest Rule—Retirement Investment Advice; Best Interest Contract Exemption (Prohibited Transaction Exemption 2016–01); Class Exemption for Principal Transactions in Certain Assets Between Investment Advice Fiduciaries and Employee Benefit Plans and IRAs (Prohibited Transaction Exemption 2016–02); Prohibited Transaction Exemptions 75–1, 77–4, 80–83, 83–1, 84–24 and 86–128, 82 Fed. Reg. 12319 (Mar. 2, 2017) (proposing to extend the applicability date of the fiduciary regulation by 60 days and asking detailed questions regarding the consequences of the fiduciary regulation).

<sup>72</sup>Letter from the Hon. Virginia Foxx, Chairwoman, H. Comm. on Educ. and the Workforce, *et al.* to Mr. Edward Hugler, Acting Sec’y, Dept of Labor (Mar. 17, 2017), <https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-0AB79/00817.pdf>; Letter from the Hon. Virginia Foxx, Chairwoman, H. Comm. on Educ. and the Workforce, *et al.* to Mr. Edward Hugler, Acting Sec’y, Dept of Labor (Apr. 17, 2017), <https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB79/01298.pdf>.

<sup>73</sup>Definition of the Term “Fiduciary”; Conflict of Interest Rule—Retirement Investment Advice; Best Interest Contract Exemption (Prohibited Transaction Exemption 2016–01); Class Exemption for Principal Transactions in Certain Assets Between Investment Advice Fiduciaries and Employee Benefit Plans and IRAs (Prohibited Transaction Exemption 2016–02); Prohibited Transaction Exemptions 75–1, 77–4, 80–83, 83–1, 84–24 and 86–128, 82 Fed. Reg. 16902, 16907 (Apr. 7, 2017).

<sup>74</sup>Alexander Acosta, *Deregulators Must Follow the Law, So Regulators Will Too: As the Labor Department acts to revise the Fiduciary Rule and others, the process requires patience*, THE WALL STREET JOURNAL (May 22, 2017, 7:00 PM), <https://www.wsj.com/articles/deregulators-must-follow-the-law-so-regulators-will-too-1495494029>.

<sup>75</sup>Request for Information Regarding the Fiduciary Rule and Prohibited Transaction Exemptions, 82 Fed. Reg. 31278 (Jul. 6, 2017). The Securities and Exchange Commission requested public comment on the standard of conduct for broker-dealers, which could affect retirement savers. See SEC. & EXCHANGE COMMISSION, PUBLIC COMMENTS FROM RETAIL INVESTORS AND OTHER INTERESTED PARTIES ON STANDARDS OF CONDUCT FOR INVESTMENT ADVISERS AND BROKER-DEALERS (2017), <https://www.sec.gov/news/public-statement/statement-chairman-clayton-2017-05-31>.

<sup>76</sup>*Restricting Access to Financial Advice: Evaluating the Costs and Consequences for Working Families and Retirees: Hearing Before the Subcomm. on Health, Emp., Lab., and Pensions of the*

to recent studies, account minimums and prices are expected to rise in connection with this regulation, increasing the advice gap for low-balance savers.<sup>77</sup> The consequences are dire, with one study estimating that as many as 28 million Americans could be forced out of managed retirement accounts.<sup>78</sup> Advisors should have a legal duty to act in the “best interests” of their clients; however, “fiduciary” status under the 2016 regulations would result in the legal prohibition of most transactions because of how the advisor is compensated.<sup>79</sup> At a HELP Subcommittee hearing in June 2015, Mr. Kent Mason, a partner at Davis and Harman LLP, testified to this effect about the proposed rule:

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.<sup>80</sup>

DOL claims its goal is not to eliminate commission-based accounts,<sup>81</sup> but it failed to adequately rectify this gaping inadequacy in the 2016 regulations. For example, while the BIC exemption permits advisors to continue to receive commissions under certain circumstances, there are several onerous requirements that will increase the cost of advice, which will inevitably be passed on to investors. In fact, one survey found 90 percent of financial professionals believe consumers will pay more for professional advice services as a result of the rule.<sup>82</sup> Those costs will make continued advice to small and mid-size accounts unaffordable or unavailable.<sup>83</sup>

Even worse, while the BIC exemption allows for commissions under certain circumstances, the type of advice offered may be limited in a way that could not be in the client’s best interest, solely because of the advisor’s means of compensation.<sup>84</sup> Additionally, the BIC exemption envisions class action litigation under state law. The Investment Company Institute voiced concern that this litigation tool will not protect investors from bad advice but will effectively price small-balance savers out of the market:<sup>85</sup>

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*H. Comm. on Educ. and the Workforce*, 114th Cong. 5 (Jun. 17, 2015) (written testimony of Kent Mason, Partner, Davis & Harman LLP).

<sup>77</sup>U.S. Chamber of Commerce, *The Data is in: The Fiduciary Rule will Harm Small Retirement Savers*, 5 (Spring 2017), [https://www.uschamber.com/sites/default/files/cmcc\\_fiduciaryrule\\_harms\\_smallbusiness.pdf](https://www.uschamber.com/sites/default/files/cmcc_fiduciaryrule_harms_smallbusiness.pdf).

<sup>78</sup>Meghan Milloy, *The Consequences of the fiduciary Rule for Consumers*, American Action Forum, (Apr. 10, 2017) <https://www.americanactionforum.org/research/consequences-fiduciary-rule-consumers/> (assuming a minimum account balance requirement of \$30,000).

<sup>79</sup>Mason, *supra* note 76, at 3, 4.

<sup>80</sup>*Id.* at 5.

<sup>81</sup>*Restricting Access to Financial Advice: Evaluating the Costs and Consequences for Working Families and Retirees: Hearing Before the Subcomm. on Health, Emp., Lab., 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, Dep’t of Labor).

<sup>82</sup>U.S. Chamber of Commerce, *supra* note 77, at 5.

<sup>83</sup>*Restricting Access to Financial Advice: Evaluating the Costs and Consequences for Working Families and Retirees: Hearing Before the Subcomm. on Health, Emp., Lab., 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).

<sup>84</sup>Campbell, *supra* note 19, at 2.

<sup>85</sup>Letter from Paul Schott Stevens, President & CEO, Inv. Co. Inst. to the Hon. Phil Roe, member of Congress (July 18, 2017) (on file with the Committee).

As we have noted in numerous commentary, the fiduciary rulemaking by the Department is excessively convoluted and—without significant revisions—will harm the very individuals it was designed to protect. Retirement savers with smaller balances are in particular jeopardy of losing access to retirement advice or products given the sheer compliance burden and litigation risk facing advisors under the Department’s fiduciary duty rule. Promoting litigation as an enforcement strategy—as the Department has done—brings significant risk, expense and uncertainty.<sup>86</sup>

In fact, this new requirement could impose between \$70 and \$150 million in legal costs each year.<sup>87</sup> Clearly, the costs associated with this litigation will drive costs up for those least able to bear it—low- and middle-income retirement savers.

Even worse, the rule reduces the educational material that can be provided. For example, if an IRA provider notes a sample asset allocation, it cannot mention examples of funds in those asset classes without triggering fiduciary duties. Therefore, IRA owners will likely be deprived of that information. During the June 17, 2015, HELP Subcommittee hearing, Brian Reid, Ph.D., gave the following warning:

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.<sup>88</sup>

Mr. Jules Gaudreau, testifying 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.<sup>89</sup>

The Honorable Brad Campbell concurred with these sentiments at the May 18, 2017, HELP Subcommittee hearing stating, “working with a professional is about more than picking investments—it is about a relationship that includes education and other financial assistance, no matter how the professional is paid.”<sup>90</sup>

<sup>86</sup> *Id.*

<sup>87</sup> U.S. Chamber of Commerce, *supra* note 77, at 5.

<sup>88</sup> Reid, *supra* note 8, at 6.

<sup>89</sup> *Principles for Ensuring Retirement Advice Serves the Best Interests of Working Families and Retirees: Hearing Before the Subcomm. on Health, Emp., Lab., and Pensions of the H. Comm. on Educ. and the Workforce*, 114th Cong. 3 (Dec. 2, 2015) (written testimony of Mr. Jules O. Gaudreau, Jr. ChFC, CIC, President, The Gaudreau Group, Inc.).

<sup>90</sup> Campbell, *supra* note 19, at 4.

*Fewer employer-provided retirement plans*

Small business owners provide nearly half a trillion dollars in retirement savings for 9 million households.<sup>91</sup> It was already difficult for employers to offer retirement plans, and unfortunately, DOL's 2016 regulations only added more impediments. According to Mr. Campbell witness testimony:

The cumulative effect of decades of regulation and legislation has increased the burden on employers sponsoring retirement plans, making it more difficult—especially for small employers—to offer retirement plans to their workers. While well-intentioned, the growth of rules and requirements over time has increased significantly the complexity of administering retirement plans. Though some simplified plan designs are available to small employers that reduce the administrative complexity, they also come with real restrictions, such as reduced limits on the amount workers and employers can contribute to the plan.<sup>92</sup>

In a letter in support of H.R. 2823, the National Association for the Self-Employed voiced concerns about the DOL's 2016 regulations' effect on small businesses, arguing that a one-size-fits-all regulation "results in increased costs for our smallest businesses. To have a strong and healthy workforce, we need a small business community that can flourish and strengthen our economy. Superfluous rules like these are simply a barrier to economic growth."<sup>93</sup>

DOL's 2016 regulations hold large and small businesses to different standards, with greater restrictions and additional burdens placed on small businesses. Under most circumstances, merely selling advice services is not fiduciary "investment advice."<sup>94</sup> In one counterproductive exception, however, retirement advisors would trigger fiduciary duties if they sell to an employer-sponsored plan managing under \$50 million in assets, such as a small business's plan.<sup>95</sup> Because of the complicated new requirements, institutions providing retirement plans are prohibited from offering assistance to small business plan sponsors in selecting investment options to offer their employees. However, those selling to larger plans do not have this requirement.

At a December 2, 2015, HELP Subcommittee hearing, Ms. Rachel Doba criticized the proposed rule's concept that small businesses should be treated differently:

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 finan-

<sup>91</sup> 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>.

<sup>92</sup> Campbell, *supra* note 19, at 3.

<sup>93</sup> Letter from Katie Vlietstra, Vice President of Gov't Rel. & Pub. Aff., Nat'l. Ass'n for the Self-Employed to the Hon. Phil Roe, member of Congress (June 12, 2017), <https://www.nase.org/sf-docs/default-source/advocacy-documents/20170612-fidicury-legislation-letter-of-support.pdf?sfvrsn=0>.

<sup>94</sup> Final Rule, 81 Fed. Reg. at 20997–98.

<sup>95</sup> Final Rule, 81 Fed. Reg. at 20999.

cial 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 sell 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.<sup>96</sup>

Because of the complicated new requirements, institutions providing retirement plans are effectively 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 counterproductive for DOL to refuse to provide an exemption for advice provided to small businesses.

To continue providing services to small businesses, advisors may either need to increase fees or qualify for an exemption. Amplifying these concerns, the National Federation of Independent Business (NFIB) sent a comment letter to DOL, addressing questions in President Trump’s memorandum and criticizing the regulation because advisors will no longer provide advice to small businesses that establish retirement plans in an affordable manner.<sup>97</sup> According to NFIB, “employees of these small businesses—the very individuals the Rule purports to benefit—stand to lose access to retirement benefits.”<sup>98</sup>

#### LEGISLATION TO ENHANCE RETIREMENT SECURITY

On June 8, 2017, Rep. Roe introduced the *Affordable Retirement Advice for Savers Act* (H.R. 2823) to repeal the Obama administration’s fiduciary rule and protect access to affordable retirement advice for low- and middle-income savers.<sup>99</sup> The bill amends both ERISA and the tax code to establish a statutory definition of “investment advice” and ensures that all financial professionals providing personalized advice about retirement investments, distributions, or the use of other advisors are legally required to act in the best interest of their clients. 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 while maintaining important protec-

<sup>96</sup> *Principles for Ensuring Retirement Advice Serves the Best Interests of Working Families and Retirees: Hearing Before the Subcomm. on Health, Emp., Lab., 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).

<sup>97</sup> Letter from Daniel Bosch, Senior Manager, Reg. Pol’y, Nat’l Fed’n of Indep. Bus. to the Emp. Benefits Sec. Admin. (Mar. 16, 2017), <https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB79/00975.pdf>.

<sup>98</sup> *Id.* at 5.

<sup>99</sup> H.R. 2823, 115th Cong. (2017).

tions under ERISA and the tax code. Generally, the bill broadens the definition of “investment advice” such that a fiduciary relationship occurs any time an advisor provides one of a broad array of recommendations relating to retirement accounts. The relationship occurs when there is an acknowledgement of fiduciary status or a mutual agreement that the advice is personalized and that the advice recipient intends to materially rely on the recommendation when making decisions about plan assets.

Further, the bill provides greater protections for savers by prohibiting an advisor from disclaiming a mutual agreement unless the advisor makes certain explicit disclosures and an objective person would reasonably conclude there was no mutual agreement. The bill also exempts advice from the prohibited transaction rules so long as only reasonable compensation is paid and certain disclosure requirements are met. Additionally, the bill amends the tax code to provide an exemption from the prohibited transaction rules if, among other requirements, an advisor places the interest of the client above the advisor’s own.

More specifically, the legislation does the following:

- Repeals the Obama-era 2016 regulation;
- Ensures personalized retirement advice about investments, distributions, or hiring other advisors triggers fiduciary obligations;
- Requires financial professionals who advise IRAs to act in their clients’ best interests;
- Adds a provision to the tax code requiring, as a condition of an exemption, that the advisor act with “care, skill, prudence, and diligence” based on the situation and must place the interest of the client above the advisor’s own;
- Preserves the ability of retirement savers to receive financial education, such as examples of investment alternatives that fit within asset classes;
- Encourages the creation of small-business retirement plans by permitting advisors to provide information to small businesses without immediately incurring fiduciary liability;
- Enables personalized advice for low-balance accounts by rejecting the Obama administration’s rules requiring commission-based advisors to comply with impractical reporting requirements; and
- Permits advice regarding 401(k) distributions (including rollovers), so long as the advice is in the participant’s best interest, and provides advisors two years to comply with the new requirements.

#### CONCLUSION

H.R. 2823, the *Affordable Retirement Advice for Savers Act*, protects access to affordable retirement advice for low- and middle-income individuals by overturning the DOL’s flawed 2016 regulations that amended the regulatory definition of “fiduciary” under ERISA and the tax code. Additionally, H.R. 2823 strengthens 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 interests of their clients.

## 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 for Savers Act.”

Section 2. Repeals the DOL’s fiduciary definition rulemaking and regulations and prohibited transaction exemptions amended or repealed by such rulemaking.

Section 3. Amends the definition of “investment advice” under the *Employee Retirement Income Security Act of 1974* and the *Internal Revenue Code*; exempts certain transactions related to investment advice; and prescribes effective dates, grandfathered transactions and services, 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. 2823 protects access to affordable retirement advice by overturning DOL’s flawed regulation that amended the regulatory definition of “fiduciary” under ERISA and the tax code.

## 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. 2823 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: July 19, 2017

**COMMITTEE ON EDUCATION AND THE WORKFORCE RECORD OF COMMITTEE VOTE**

Roll Call: 1 Bill: H.R. 2823 Amendment Number: \_\_\_\_\_

Disposition: Adopted by a vote of 23 yeas and 17 nays

Sponsor/Amendment: Mr. Wilson - 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
Mrs. FOXX (NC) (Chairwoman)	X			Mr. SCOTT (VA) (Ranking)		X	
Mr. WILSON (SC)	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. GUTHRIE (KY)	X			Mr. SABLAN (MP)		X	
Mr. ROKITA (IN)	X			Ms. WILSON (FL)		X	
Mr. BARLETTA (PA)	X			Ms. BONAMICI (OR)		X	
Mr. MESSER (IN)	X			Mr. TAKANO (CA)		X	
Mr. BYRNE (AL)	X			Ms. ADAMS (NC)		X	
Mr. BRAT (VA)	X			Mr. DeSAULNIER (CA)		X	
Mr. GROTHMAN (WI)	X			Mr. NORCROSS (NJ)		X	
Ms. STEFANIK (NY)	X			Ms. BLUNT ROCHESTER (DE)		X	
Mr. ALLEN (GA)	X			Mr. KRISHNAMOORTHY (IL)		X	
Mr. LEWIS (MN)	X			Ms. SHEA-PORTER (NH)		X	
Mr. ROONEY (FL)	X			Mr. ESPAILLAT (NY)		X	
Mr. MITCHELL (MI)	X						
Mr. GARRETT (VA)	X						
Mr. SMUCKER (PA)	X						
Mr. FERGUSON (GA)	X						
Mr. ESTES (KS)	X						
Mrs. HANDEL (GA)	X						

TOTALS: Aye: 23 No: 17 Not Voting: 0

Total: 40 / Quorum: 14 / Report: 21

(23 R - 17 D)

## STATEMENT OF GENERAL PERFORMANCE GOALS AND OBJECTIVES

In accordance with clause (3)(c) of House Rule XIII, the goal of H.R. 2823 is to ensure 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. Additionally, the bill protects access to affordable retirement advice by overturning the DOL regulation amending the regulatory definition of “fiduciary” under ERISA and the tax code.

## DUPLICATION OF FEDERAL PROGRAMS

No provision of H.R. 2823 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. 2823 does not specifically direct the completion of any specific rulemakings 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. 2823 from the Director of the Congressional Budget Office:

U.S. CONGRESS,  
CONGRESSIONAL BUDGET OFFICE,  
*Washington, DC, September 18, 2017.*

Hon. VIRGINIA FOXX,  
*Chairwoman, Committee on Education and the Workforce,  
House of Representatives, Washington, DC.*

DEAR MADAM CHAIRWOMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 2823, the Affordable Retirement Advice for Savers 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,  
*Director.*

Enclosure.

*H.R. 2823—Affordable Retirement Advice for Savers Act*

H.R. 2823 would repeal regulations that are commonly referred to as the “fiduciary rule.” Those regulations broaden the types of financial advice about pension and retirement plans that impose a fiduciary obligation on the advisor, which means that the advice must be in the sole interest of plan participants. The Department of Labor issued that rule on April 8, 2016. Parts of the rule became effective on June 9, 2017, and under current law, the rule takes full effect on January 1, 2018. H.R. 2823 would reinstate the previously existing regulations.

In addition, the bill would amend the prohibited transaction (or “self-dealing”) rules applicable under the Internal Revenue Code and the Employee Retirement Income Security Act of 1974 to fiduciaries of employer-sponsored pension and retirement plans, individual retirement accounts, and health savings accounts. The bill would add a definition of investment advice that would be used to determine when a fiduciary relationship exists. The bill also would add a new statutory exemption related to investment advice that a fiduciary can provide to those tax-favored plans and accounts, plan participants, or beneficiaries. Among other provisions, H.R. 2823 would change requirements regarding disclosure of potential compensation accruing to the fiduciary or an affiliate.

The staff of the Joint Committee on Taxation (JCT) estimates that the bill would have a negligible effect on revenues for the period between 2017 and 2027. Because enacting H.R. 2823 would affect revenues, pay-as-you-go procedures apply. Enacting the bill would not affect direct spending.

CBO and JCT estimate that enacting H.R. 2823 would not increase net direct spending or on-budget deficits by more than \$5 billion in any of the four consecutive 10-year periods beginning in 2028.

CBO and JCT have determined that the bill contains no inter-governmental or private-sector mandates as defined in the Unfunded Mandates Reform Act.

The CBO staff contact for this estimate is Noah Meyerson. The estimate was approved by Theresa Gullo, 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. 2823. 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):

## 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 (existing law proposed to be omitted is enclosed in black brackets, 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 communicated electronically, on paper, or orally 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, provided electronically or on paper, 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 state only the following: "This communication is not individualized to you, and you are not intended to rely materially on this communication 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), a communication shall not be considered to be a recommendation made pursuant to a mutual agreement, arrangement, or understanding, if such communication contains the disclaimer required by clause (ii), and—*

*(I) it is provided in conjunction with clear and prominent disclosure in writing to a plan, plan participant, or beneficiary that the person providing the communication is doing so in its marketing or sales capacity, including any communication regarding the terms and conditions of the engagement of the person providing the communication, and 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;*

*(II) the person providing the communication is a current or potential counterparty or service provider to the plan in connection with any transaction based on the communication, 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 communication, and, except in the case of a 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))), independent of the plan sponsor; and*

*(bb) prior to such transaction, the independent plan fiduciary represents in writing to the person providing the communication 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 communication is an employee of any sponsoring employer or affiliate or employee organization who provides the communication to the plan for no fee or other compensation other than the employee's normal compensation;*

*(IV) the person providing the communication 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 communication consists solely of—*

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

*mechanism from which a plan fiduciary may select or monitor investment alternatives; 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;*

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

*(CC) identifying a sample set of investment alternatives based on the plan's stated criteria in response to an inquiry from a plan fiduciary;*

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

*(VI) the communication 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.

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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 are reasonably expected to 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).*

(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).

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### INTERNAL REVENUE CODE OF 1986

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## Subtitle D—Miscellaneous Excise Taxes

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### CHAPTER 43—QUALIFIED PENSION, ETC., PLANS

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#### SEC. 4975. TAX ON PROHIBITED TRANSACTIONS.

(a) INITIAL TAXES ON DISQUALIFIED PERSON.—There is hereby imposed a tax on each prohibited transaction. The rate of tax shall be equal to 15 percent of the amount involved with respect to the prohibited transaction for each year (or part thereof) in the taxable period. The tax imposed by this subsection shall be paid by any disqualified person who participates in the prohibited transaction (other than a fiduciary acting only as such).

(b) ADDITIONAL TAXES ON DISQUALIFIED PERSON.—In any case in which an initial tax is imposed by subsection (a) on a prohibited transaction and the transaction is not corrected within the taxable period, there is hereby imposed a tax equal to 100 percent of the amount involved. The tax imposed by this subsection shall be paid by any disqualified person who participated in the prohibited transaction (other than a fiduciary acting only as such).

(c) PROHIBITED TRANSACTION.—

(1) GENERAL RULE.—For purposes of this section, the term “prohibited transaction” means any direct or indirect—

(A) sale or exchange, or leasing, of any property between a plan and a disqualified person;

(B) lending of money or other extension of credit between a plan and a disqualified person;

(C) furnishing of goods, services, or facilities between a plan and a disqualified person;

(D) transfer to, or use by or for the benefit of, a disqualified person of the income or assets of a plan;

(E) act by a disqualified person who is a fiduciary whereby he deals with the income or assets of a plan in his own interests or for his own account; or

(F) receipt of any consideration for his own personal account by any disqualified person who is a fiduciary from

any party dealing with the plan in connection with a transaction involving the income or assets of the plan.

(2) SPECIAL EXEMPTION.—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 disqualified person or transaction, orders of disqualified persons or transactions, from all or part of the restrictions imposed by paragraph (1) of this subsection. Action under this subparagraph may be taken only after consultation and coordination with the Secretary of Labor. The Secretary may not grant an exemption under this paragraph unless he finds that such exemption is—

(A) administratively feasible,

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

(C) protective of the rights of participants and beneficiaries of the plan.

Before granting an exemption under this paragraph, the Secretary shall require adequate notice to be given to interested persons and shall publish notice in the Federal Register of the pendency of such exemption and shall afford interested persons an opportunity to present views. No exemption may be granted under this paragraph with respect to a transaction described in subparagraph (E) or (F) of paragraph (1) unless the Secretary affords an opportunity for a hearing and makes a determination on the record with respect to the findings required under subparagraphs (A), (B), and (C) of this paragraph, except that in lieu of such hearing the Secretary may accept any record made by the Secretary of Labor with respect to an application for exemption under section 408(a) of title I of the Employee Retirement Income Security Act of 1974.

(3) SPECIAL RULE FOR INDIVIDUAL RETIREMENT ACCOUNTS.—An individual for whose benefit an individual retirement account is established and his beneficiaries shall be exempt from the tax imposed by this section with respect to any transaction concerning such account (which would otherwise be taxable under this section) if, with respect to such transaction, the account ceases to be an individual retirement account by reason of the application of section 408(e)(2)(A) or if section 408(e)(4) applies to such account.

(4) SPECIAL RULE FOR ARCHER MSAs.—An individual for whose benefit an Archer MSA (within the meaning of section 220(d)) is established shall be exempt from the tax imposed by this section with respect to any transaction concerning such account (which would otherwise be taxable under this section) if section 220(e)(2) applies to such transaction.

(5) SPECIAL RULE FOR COVERDELL EDUCATION SAVINGS ACCOUNTS.—An individual for whose benefit a Coverdell education savings account is established and any contributor to such account shall be exempt from the tax imposed by this section with respect to any transaction concerning such account (which would otherwise be taxable under this section) if section 530(d) applies with respect to such transaction.

(6) SPECIAL RULE FOR HEALTH SAVINGS ACCOUNTS.—An individual for whose benefit a health savings account (within the

meaning of section 223(d)) is established shall be exempt from the tax imposed by this section with respect to any transaction concerning such account (which would otherwise be taxable under this section) if, with respect to such transaction, the account ceases to be a health savings account by reason of the application of section 223(e)(2) to such account.

(d) EXEMPTIONS.—Except as provided in subsection (f)(6), the prohibitions provided in subsection (c) shall not apply to—

(1) any loan made by the plan to a disqualified person who is a participant or beneficiary of the plan if such loan—

(A) is available to all such participants or beneficiaries on a reasonably equivalent basis,

(B) is not made available to highly compensated employees (within the meaning of section 414(q)) in an amount greater than the amount made available to other employees,

(C) is made in accordance with specific provisions regarding such loans set forth in the plan,

(D) bears a reasonable rate of interest, and

(E) is adequately secured;

(2) any contract, or reasonable arrangement, made with a disqualified person 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) any loan to an leveraged employee stock ownership plan (as defined in subsection (e)(7)), if—

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

(B) such loan is at a reasonable rate of interest, and any collateral which is given to a disqualified person by the plan consists only of qualifying employer securities (as defined in subsection (e)(8));

(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 affiliates 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 disqualified person which is wholly owned (directly or indirectly) by the employer establishing the plan, or by any person which is a disqualified person with respect to the plan, but only if the total premiums and annuity con-

- siderations written by such insurers for life insurance, health insurance, or annuities for all plans (and their employers) with respect to which such insurers are disqualified persons (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 provision of any ancillary service by a bank or similar financial institution supervised by the United States or a State, if such service is provided at not more than reasonable compensation, 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 provision 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 under such guidelines the bank or similar financial institution does not provide 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;
- (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 a common or collective trust fund or pooled investment fund maintained by a disqualified person which is a bank or trust company supervised by a State or Federal agency or between a plan and 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 a 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) receipt by a disqualified person of 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;

(10) receipt by a disqualified person of 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, but 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 fund, except for reimbursement of expenses properly and actually incurred;

(11) service by a disqualified person as a fiduciary in addition to being an officer, employee, agent, or other representative of a disqualified person;

(12) the making by a fiduciary of a distribution of the assets of the trust in accordance with the terms of the plan if such assets are distributed in the same manner as provided under section 4044 of title IV of the Employee Retirement Income Security Act of 1974 (relating to allocation of assets);

(13) any transaction which is exempt from section 406 of such Act by reason of section 408(e) of such Act (or which would be so exempt if such section 406 applied to such transaction) or which is exempt from section 406 of such Act by reason of section 408(b)(12) of such Act;

(14) any transaction required or permitted under part 1 of subtitle E of title IV or section 4223 of the Employee Retirement Income Security Act of 1974, but this paragraph shall not apply with respect to the application of subsection (c)(1) (E) or (F);

(15) 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 of such Act, but this paragraph shall not apply with respect to the application of subsection (c)(1) (E) or (F);

(16) a sale of stock held by a trust which constitutes an individual retirement account under section 408(a) to the individual for whose benefit such account is established if—

(A) such stock is in a bank (as defined in section 581) or a depository institution holding company (as defined in section 3(w)(1) of the Federal Deposit Insurance Act (12 U.S.C. 1813(w)(1)),

(B) such stock is held by such trust as of the date of the enactment of this paragraph,

(C) such sale is pursuant to an election under section 1362(a) by such bank or company,

(D) such sale is for fair market value at the time of sale (as established by an independent appraiser) and the terms of the sale are otherwise at least as favorable to such trust as the terms that would apply on a sale to an unrelated party,

(E) such trust does not pay any commissions, costs, or other expenses in connection with the sale, and

(F) the stock is sold in a single transaction for cash not later than 120 days after the S corporation election is made;

(17) Any transaction in connection with the provision of investment advice described in subsection (e)(3)(B) to a participant or beneficiary in a plan that permits such participant or beneficiary to direct the investment of plan assets in an 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 (f)(8) are met,

(18) any transaction involving the purchase or sale of securities, or other property (as determined by the Secretary of Labor), between a plan and a disqualified person (other than a fiduciary described in subsection (e)(3)) with respect to a plan if—

(A) the transaction involves a block trade,

(B) 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,

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

(D) 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,

(19) any transaction involving the purchase or sale of securities, or other property (as determined by the Secretary of Labor), between a plan and a disqualified person 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 of Labor 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 disqualified person 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,

(20) transactions described in subparagraphs (A), (B), and (D) of subsection (c)(1) between a plan and a person that is a disqualified person 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 subsection (e)(3)(B)) 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 subsection (e)(2), or both, but only if in connection with such transaction the plan receives no less, nor pays no more, than adequate consideration,

(21) any foreign exchange transactions, between a bank or broker-dealer (or any affiliate of either) and a plan (as defined in this section) with respect to which such bank or broker-dealer (or affiliate) is a trustee, custodian, fiduciary, or other disqualified person, 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,
- (22) any transaction described in subsection (c)(1)(A) 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) of the Employee Retirement Income Security Act of 1974), 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 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, **[or]**

(23) except as provided in subsection (f)(11), a transaction described in subparagraph (A), (B), (C), or (D) of subsection (c)(1) 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~~...~~, **or**

(24) *provision of investment advice by a fiduciary to a plan, plan participant, or beneficiary with respect to the plan, which is a best interest recommendation or a transaction connected to such advice.*

(e) DEFINITIONS.—

(1) PLAN.—For purposes of this section, the term “plan” means—

(A) a trust described in section 401(a) which forms a part of a plan, or a plan described in section 403(a), which trust or plan is exempt from tax under section 501(a),

(B) an individual retirement account described in section 408(a),

(C) an individual retirement annuity described in section 408(b),

(D) an Archer MSA described in section 220(d),

(E) a health savings account described in section 223(d),

(F) a Coverdell education savings account described in section 530, or

(G) a trust, plan, account, or annuity which, at any time, has been determined by the Secretary to be described in any preceding subparagraph of this paragraph.

(2) DISQUALIFIED PERSON.—For purposes of this section, the term “disqualified person” means a person who is—

(A) a fiduciary;

(B) a person providing services to the plan;

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

(D) an employee organization any of whose members are covered by the 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 member of the family (as defined in paragraph (6)) 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 officer, director (or an individual having powers or responsibilities similar to those of officers or directors), a 10 percent or more shareholder, or a highly compensated employee (earning 10 percent or more of the yearly wages of an employer) of a person described in subparagraph (C), (D), (E), or (G); or

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

The Secretary, after consultation and coordination with the Secretary of Labor or his delegate, may by regulation prescribe a percentage lower than 50 percent for subparagraphs (E) and (G) and lower than 10 percent for subparagraphs (H) and (I).

(3) FIDUCIARY.—For purposes of this section, the term “fiduciary” means any person who—

(A) 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,

(B) 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

(C) 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) of the Employee Retirement Income Security Act of 1974.

(4) STOCKHOLDINGS.—For purposes of paragraphs (2)(E)(i) and (G)(i) there shall be taken into account indirect stockholdings which would be taken into account under section 267(c), except that, for purposes of this paragraph, section 267(c)(4) shall be treated as providing that the members of the

family of an individual are the members within the meaning of paragraph (6).

(5) PARTNERSHIPS; TRUSTS.—For purposes of paragraphs (2)(E)(ii) and (iii), (G)(ii) and (iii), and (I) the ownership of profits or beneficial interests shall be determined in accordance with the rules for constructive ownership of stock provided in section 267(c) (other than paragraph (3) thereof), except that section 267(c)(4) shall be treated as providing that the members of the family of an individual are the members within the meaning of paragraph (6).

(6) MEMBER OF FAMILY.—For purposes of paragraph (2)(F), the family of any individual shall include his spouse, ancestor, lineal descendant, and any spouse of a lineal descendant.

(7) EMPLOYEE STOCK OWNERSHIP PLAN.—The term “employee stock ownership plan” means a defined contribution plan—

(A) which is a stock bonus plan which is qualified, or a stock bonus and a money purchase plan both of which are qualified under section 401(a), and which are designed to invest primarily in qualifying employer securities; and

(B) which is otherwise defined in regulations prescribed by the Secretary.

A plan shall not be treated as an employee stock ownership plan unless it meets the requirements of section 409(h), section 409(o), and, if applicable, section 409(n), section 409(p), and section 664(g) and, if the employer has a registration-type class of securities (as defined in section 409(e)(4)), it meets the requirements of section 409(e).

(8) QUALIFYING EMPLOYER SECURITY.—The term “qualifying employer security” means any employer security within the meaning of section 409(l). If any moneys or other property of a plan are invested in shares of an investment company registered under the Investment Company Act of 1940, the investment shall not cause that investment company or that investment company’s investment adviser or principal underwriter to be treated as a fiduciary or a disqualified person for purposes of this section, except when an investment company or its investment adviser or principal underwriter acts in connection with a plan covering employees of the investment company, its investment adviser, or its principal underwriter.

(9) SECTION MADE APPLICABLE TO WITHDRAWAL LIABILITY PAYMENT FUNDS.—For purposes of this section—

(A) IN GENERAL.—The term “plan” includes a trust described in section 501(c)(22).

(B) DISQUALIFIED PERSON.—In the case of any trust to which this section applies by reason of subparagraph (A), the term “disqualified person” includes any person who is a disqualified person with respect to any plan to which such trust is permitted to make payments under section 4223 of the Employee Retirement Income Security Act of 1974.

(10) INVESTMENT ADVICE.—

(A) IN GENERAL.—For purposes of this section, the term “investment advice” means a recommendation, communicated electronically, on paper, or orally, that—

(i) relates to—

(I) 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;

(II) 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

(III) 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—

(I) a written acknowledgment, provided electronically or on paper, that the person is a fiduciary with respect to the provision of such recommendation; or

(II) 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, plan participant, or beneficiary that such recommendation is individualized to the plan, plan participant, or beneficiary and such plan, plan participant, or beneficiary intends to materially rely on such recommendation in making investment or management decisions with respect to any moneys or other property of such plan.

(B) **DISCLAIMER OF A MUTUAL AGREEMENT, ARRANGEMENT, OR UNDERSTANDING.**—For purposes of subparagraph (A)(ii)(II), any disclaimer of a mutual agreement, arrangement, or understanding shall state only the following: “This communication is not individualized to you, and you are not intended to rely materially on this communication 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.

(C) **WHEN RECOMMENDATION TREATED AS MADE PURSUANT TO A MUTUAL AGREEMENT, ARRANGEMENT, OR UNDERSTANDING.**—For purposes of subparagraph (A)(ii)(II), a communication shall not be treated as a recommendation made pursuant to a mutual agreement, arrangement, or understanding, if such communication contains the disclaimer required by subparagraph (B), and—

(i) **SELLER’S EXCEPTION.**—The communication is provided in conjunction with clear and prominent disclosure in writing to a plan, plan participant, or bene-

*fiary that the person providing the communication is doing so in its marketing or sales capacity, including any communication regarding the terms and conditions of the engagement of the person providing the communication, and 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 or under the obligations of a best interest recommendation.*

(ii) **CERTAIN COUNTERPARTIES OR SERVICE PROVIDERS.**—*The person providing the communication is a current or potential counterparty or service provider to the plan in connection with any transaction based on the communication, but only if—*

(I) *the plan is represented, in connection with such transaction, by a plan fiduciary that is independent of the person providing the communication, and, except in the case of a 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))), independent of the plan sponsor; and*

(II) *prior to entering into such transaction, the independent plan fiduciary represents in writing to the person providing the communication 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, plan participants, or plan beneficiaries.*

(iii) **EMPLOYEES OF A PLAN SPONSOR.**—*The person providing the communication is an employee of any sponsoring employer or affiliate or employee organization who provides the communication to the plan for no fee or other compensation other than the employee's normal compensation.*

(iv) **PLATFORM PROVIDERS SELECTION AND MONITORING ASSISTANCE.**—*The person providing the communication discloses in writing to the plan fiduciary that the person is not undertaking to provide investment advice as a fiduciary (within the meaning of this paragraph) or under the obligations of a best interest recommendation and the communication consists solely of—*

(I) *making available to the plan, plan participants, or plan beneficiaries, without regard to the individualized needs of the plan, plan participants, or plan beneficiaries, securities or other property or investment products through a platform or similar mechanism from which a plan fiduciary may select or monitor investment alternatives; or*

(II) *in connection with a platform or similar mechanism described in subclause (I)—*

(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;*

(bb) *providing objective financial data and comparisons with independent benchmarks to the plan; or*

(cc) *identifying a sample set of investment alternatives based on the plan's stated criteria in response to an inquiry from a plan fiduciary.*

(v) **VALUATION.**—*The communication consists solely of valuation information.*

(vi) **FINANCIAL EDUCATION.**—*The communication consists solely of—*

(I) *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;*

(II) *information provided to participants or beneficiaries regarding the factors to consider in deciding whether to elect to receive a distribution from a plan and whether to roll over such distribution to a plan, so long as any examples of different distribution alternatives are accompanied by all material facts and assumptions on which the examples are based; or*

(III) *any additional information treated as education by the Secretary.*

(11) **BEST INTEREST RECOMMENDATION.**—*For purposes of this subsection—*

(A) **IN GENERAL.**—*The term “best interest recommendation” means a recommendation—*

(i) *for which no more than reasonable compensation is paid (as determined under subsection (d)(2));*

(ii) *provided by a person acting with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person would exercise based on—*

(I) *the information obtained through the reasonable diligence of the person regarding factors such as the advice recipient's age; and*

(II) *any other information that the advice recipient discloses to the person in connection with receiving such recommendation; and*

(iii) *where the person places the interests of the plan or advice recipient above its own.*

(B) **INVESTMENT OPTIONS; VARIABLE COMPENSATION.**—*A best interest recommendation may include a recommendation that—*

(i) is based on a limited range of investment options (which may consist, in whole or in part, of proprietary products), but only if any 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.”; or

(ii) may result in variable compensation to the person providing the recommendation (or any affiliate of such person), but only if the receipt of such compensation shall be clearly disclosed to the advice recipient prior to any transaction based on the investment advice.

(C) CLEAR DISCLOSURE OF VARIABLE COMPENSATION.—For purposes of this paragraph, 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 clause 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 are reasonably expected to 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).

(D) DEFINITION OF AFFILIATE.—For purposes of this paragraph, the term “affiliate” has the meaning given in subsection (f)(8)(J)(ii).

(E) CORRECTION OF CERTAIN ERRORS AND OMISSIONS.—A recommendation shall not fail to be a best interest recommendation solely because a person who, acting in good faith and with reasonable diligence, makes an error or

*omission in disclosing the information specified in subparagraph (B), 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 such error or omission.*

*(F) SPECIAL RULE.—Any notice provided pursuant to a requirement under subparagraph (B)(i) or subparagraph (C)(i) 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.*

(f) OTHER DEFINITIONS AND SPECIAL RULES.—For purposes of this section—

(1) JOINT AND SEVERAL LIABILITY.—If more than one person is liable under subsection (a) or (b) with respect to any one prohibited transaction, all such persons shall be jointly and severally liable under such subsection with respect to such transaction.

(2) TAXABLE PERIOD.—The term “taxable period” means, with respect to any prohibited transaction, the period beginning with the date on which the prohibited transaction occurs and ending on the earliest of—

(A) the date of mailing a notice of deficiency with respect to the tax imposed by subsection (a) under section 6212,

(B) the date on which the tax imposed by subsection (a) is assessed, or

(C) the date on which correction of the prohibited transaction is completed.

(3) SALE OR EXCHANGE; ENCUMBERED PROPERTY.—A transfer or real or personal property by a disqualified person to a plan shall be treated as a sale or exchange if the property is subject to a mortgage or similar lien which the plan assumes or if it is subject to a mortgage or similar lien which a disqualified person placed on the property within the 10-year period ending on the date of the transfer.

(4) AMOUNT INVOLVED.—The term “amount involved” means, with respect to a prohibited transaction, the greater of the amount of money and the fair market value of the other property given or the amount of money and the fair market value of the other property received; except that, in the case of services described in paragraphs (2) and (10) of subsection (d) the amount involved shall be only the **[excess compensation.]** *excess compensation, and in the case of a prohibited transaction arising by the failure of investment advice to be a best interest recommendation, the amount involved shall be the amount paid to the person providing the advice (or its affiliate, as defined in paragraph (8)(J)(ii)) that has not been paid or reimbursed to the plan, plan participants, or plan beneficiaries, including payments and reimbursements made pursuant to paragraph (5).* For purposes of the preceding sentence, the fair market value—

(A) in the case of the tax imposed by subsection (a), shall be determined as of the date on which the prohibited transaction occurs; and

(B) in the case of the tax imposed by subsection (b), shall be the highest fair market value during the taxable period.

## (5) CORRECTION.—

(A) *IN GENERAL.*—[The terms] *Except as provided in subparagraph (B), the terms “correction” and “correct” mean, with respect to a prohibited transaction, undoing the transaction to the extent possible, but in any case placing the plan in a financial position not worse than that in which it would be if the disqualified person were acting under the highest fiduciary standards.*

(B) *DETERMINATION OF “CORRECTION” AND “CORRECT” WITH RESPECT TO BEST INTEREST ADVICE RECOMMENDATIONS.*—*In the case of a prohibited transaction arising by the failure of investment advice to be a best interest recommendation, the terms “correction” and “correct” mean the payment to, or reimbursement of, actual damages of the plan, plan participants, or plan beneficiaries resulting directly from the plan’s, plan participant’s, or plan beneficiary’s reliance on such investment advice, if any, that have not otherwise been paid or reimbursed to the plan, plan participants, or plan beneficiaries, including payments and reimbursements made pursuant to subparagraph (A) if such amount is greater than the amount determined under subparagraph (A).*

## (6) EXEMPTIONS NOT TO APPLY TO CERTAIN TRANSACTIONS.—

(A) *IN GENERAL.*—In the case of a trust described in section 401(a) which is part of a plan providing contributions or benefits for employees some or all of whom are owner-employees (as defined in section 401(c)(3)), the exemptions provided by subsection (d) (other than paragraphs (9) and (12)) shall not apply to a transaction in which the plan directly or indirectly—

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

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

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

any such owner-employee, a member of the family (as defined in section 267(c)(4)) 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.

(B) *Special rules for shareholder-employees, etc.*

(i) *IN GENERAL.*—For purposes of subparagraph (A), 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)).

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

(ii) *EXCEPTION FOR CERTAIN TRANSACTIONS INVOLVING SHAREHOLDER-EMPLOYEES.*—Subparagraph (A)(iii) shall not apply to a transaction which consists of a

sale of employer securities to an employee stock ownership plan (as defined in subsection (e)(7)) by a shareholder-employee, a member of the family (as defined in section 267(c)(4)) of such shareholder-employee, or a corporation in which such a shareholder-employee owns stock representing a 50 percent or greater interest described in subparagraph (A).

(iii) LOAN EXCEPTION.—For purposes of subparagraph (A)(i), the term “owner-employee” shall only include a person described in subclause (II) or (III) of clause (i).

(C) SHAREHOLDER-EMPLOYEE.—For purposes of subparagraph (B), the term “shareholder-employee” means an employee or officer of an S corporation who owns (or is considered as owning within the meaning of section 318(a)(1)) more than 5 percent of the outstanding stock of the corporation on any day during the taxable year of such corporation.

(7) S CORPORATION REPAYMENT OF LOANS FOR QUALIFYING EMPLOYER SECURITIES.—A plan shall not be treated as violating the requirements of section 401 or 409 or subsection (e)(7), or as engaging in a prohibited transaction for purposes of subsection (d)(3), merely by reason of any distribution (as described in section 1368(a)) with respect to S corporation stock that constitutes qualifying employer securities, which in accordance with the plan provisions is used to make payments on a loan described in subsection (d)(3) the proceeds of which were used to acquire such qualifying employer securities (whether or not allocated to participants). The preceding sentence shall not apply in the case of a distribution which is paid with respect to any employer security which is allocated to a participant unless the plan provides that employer securities with a fair market value of not less than the amount of such distribution are allocated to such participant for the year which (but for the preceding sentence) such distribution would have been allocated to such participant.

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

(A) IN GENERAL.—The prohibitions provided in subsection (c) shall not apply to transactions described in subsection (d)(17) if the investment advice provided by a fiduciary adviser is provided under an eligible investment advice arrangement.

(B) ELIGIBLE INVESTMENT ADVICE ARRANGEMENT.—For purposes of this paragraph, the term “eligible investment advice arrangement” means an arrangement—

(i) 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 subparagraph (C) in connection with the provision of investment advice by a fiduciary adviser to a participant or beneficiary, and

(ii) with respect to which the requirements of subparagraphs (D), (E), (F), (G), (H), and (I) are met.

(C) INVESTMENT ADVICE PROGRAM USING COMPUTER MODEL.—

(i) IN GENERAL.—An investment advice program meets the requirements of this subparagraph if the requirements of clauses (ii), (iii), and (iv) are met.

(ii) COMPUTER MODEL.—The requirements of this clause 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.

(iii) CERTIFICATION.—

(I) IN GENERAL.—The requirements of this clause 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 of Labor, that the computer model meets the requirements of clause (ii).

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

(III) ELIGIBLE INVESTMENT EXPERT.—The term “eligible investment expert” means any person

which meets such requirements as the Secretary of Labor may provide and which 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).

(iv) EXCLUSIVITY OF RECOMMENDATION.—The requirements of this clause 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 clause (ii), and

(II) any transaction described in subsection (d)(17)(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 clause (i), but only if such request has not been solicited by any person connected with carrying out the arrangement.

(D) EXPRESS AUTHORIZATION BY SEPARATE FIDUCIARY.—The requirements of this subparagraph 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.

(E) AUDITS.—

(i) IN GENERAL.—The requirements of this subparagraph are met if an independent auditor, who has appropriate technical training or experience and proficiency and so represents in writing—

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

(II) 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 paragraph.

(ii) SPECIAL RULE FOR INDIVIDUAL RETIREMENT AND SIMILAR PLANS.—In the case of a plan described in subparagraphs (B) through (F) (and so much of subparagraph (G) as relates to such subparagraphs) of subsection (e)(1), in lieu of the requirements of clause (i), audits of the arrangement shall be conducted at such times and in such manner as the Secretary of Labor may prescribe.

(iii) INDEPENDENT AUDITOR.—For purposes of this subparagraph, 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.

(F) DISCLOSURE.—The requirements of this subparagraph are met if—

(i) 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 thereof 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

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

(I) maintains the information described in clause (i) in accurate form and in the manner described in subparagraph (H),

(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.

(G) OTHER CONDITIONS.—The requirements of this subparagraph are met if—

(i) 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,

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

(iii) 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

(iv) 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.

(H) STANDARDS FOR PRESENTATION OF INFORMATION.—

(i) IN GENERAL.—The requirements of this subparagraph are met if the notification required to be provided to participants and beneficiaries under subparagraph (F)(i) 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.

(ii) MODEL FORM FOR DISCLOSURE OF FEES AND OTHER COMPENSATION.—The Secretary of Labor shall issue a model form for the disclosure of fees and other compensation required in subparagraph (F)(i)(III) which meets the requirements of clause (i).

(I) MAINTENANCE FOR 6 YEARS OF EVIDENCE OF COMPLIANCE.—The requirements of this subparagraph are met if a fiduciary adviser who has provided advice referred to in subparagraph (A) 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 paragraph and of subsection (d)(17) have been met. A transaction prohibited under subsection (c) 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.

(J) DEFINITIONS.—For purposes of this paragraph and subsection (d)(17)—

(i) 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 subsection (e)(3)(B) 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 (d)(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 subclauses (I) through (IV), or

(VI) an employee, agent, or registered representative of a person described in subclauses (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 title, a person who develops the computer model described in subparagraph (C)(ii) 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 subsection (e)(3)(B) to a participant or beneficiary and shall be treated as a fiduciary adviser for purposes of this paragraph and subsection (d)(17), except that the Secretary of Labor may prescribe rules under which only 1 fiduciary adviser may elect to be treated as a fiduciary with respect to the plan.

(ii) **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))).

(iii) **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).

(9) **BLOCK TRADE.**—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.

(10) ADEQUATE CONSIDERATION.—The term “adequate consideration” means—

(A) 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

(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 a fiduciary or fiduciaries in accordance with regulations prescribed by the Secretary of Labor.

(11) CORRECTION PERIOD.—

(A) IN GENERAL.—For purposes of subsection (d)(23), the term “correction period” means the 14-day period beginning on the date on which the disqualified person discovers, or reasonably should have discovered, that the transaction would (without regard to this paragraph and subsection (d)(23)) constitute a prohibited transaction.

(B) EXCEPTIONS.—

(i) EMPLOYER SECURITIES.—Subsection (d)(23) 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) of the Employee Retirement Income Security Act of 1974) or the acquisition, sale, or lease of employer real property (as defined in section 407(d)(2) of such Act).

(ii) KNOWING PROHIBITED TRANSACTION.—In the case of any disqualified person, subsection (d)(23) does not apply to a transaction if, at the time the transaction is entered into, the disqualified person knew (or reasonably should have known) that the transaction would (without regard to this paragraph) constitute a prohibited transaction.

(C) ABATEMENT OF TAX WHERE THERE IS A CORRECTION.—If a transaction is not treated as a prohibited transaction by reason of subsection (d)(23), then no tax under subsections (a) and (b) shall be assessed with respect to such transaction, and if assessed the assessment shall be abated, and if collected shall be credited or refunded as an overpayment.

(D) DEFINITIONS.—For purposes of this paragraph and subsection (d)(23)—

(i) SECURITY.—The term “security” has the meaning given such term by section 475(c)(2) (without regard to subparagraph (F)(iii) and the last sentence thereof).

(ii) COMMODITY.—The term “commodity” has the meaning given such term by section 475(e)(2) (without regard to subparagraph (D)(iii) thereof).

(iii) CORRECT.—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.

(g) APPLICATION OF SECTION.—This section shall not apply—

(1) in the case of a plan to which a guaranteed benefit policy (as defined in section 401(b)(2)(B) of the Employee Retirement Income Security Act of 1974) is issued, to any assets of the insurance company, insurance service, or insurance organization merely because of its issuance of such policy;

(2) to a governmental plan (within the meaning of section 414(d)); or

(3) to a church plan (within the meaning of section 414(e)) with respect to which the election provided by section 410(d) has not been made.

In the case of a plan which invests in any security issued by an investment company registered under the Investment Company Act of 1940, the assets of such plan shall be deemed to include such security but shall not, by reason of such investment, be deemed to include any assets of such company.

(h) NOTIFICATION OF SECRETARY OF LABOR.—Before sending a notice of deficiency with respect to the tax imposed by subsection (a) or (b), the Secretary shall notify the Secretary of Labor and provide him a reasonable opportunity to obtain a correction of the prohibited transaction or to comment on the imposition of such tax.

(i) CROSS REFERENCE.—For provisions concerning coordination procedures between Secretary of Labor and Secretary of the Treasury with respect to application of tax imposed by this section and for authority to waive imposition of the tax imposed by subsection (b), see section 3003 of the Employee Retirement Income Security Act of 1974.

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## MINORITY VIEWS

H.R. 2823, the “Affordable Retirement Advice for Savers Act,” would repeal the Department of Labor’s (DOL’s) “Conflict of Interest” rule (or fiduciary rule) finalized during the Obama Administration, and will also codify loopholes that enable financial professionals to avoid their fiduciary obligations. The bill will dramatically weaken protections for retirement savers and will allow conflicts of interest to once again go unchecked. H.R. 2823 was reported by straight party-line votes of 23 ayes and 17 nays. Committee Democrats unanimously opposed the bill.

### BACKGROUND ON FIDUCIARY RULE AND COMMITTEE REPUBLICANS’ OPPOSITION TO IT

Many Americans seek out and rely on financial advice to help them invest their retirement nest egg. This is one of the biggest financial decisions they will make in their lives. In making it, Americans trust that the financial advice given to them is in their best interests. Unfortunately, that was not always the case. For years, loophole-ridden rules enabled unscrupulous financial advisors to provide what is referred to as “conflicted advice.” This is when the profit motives of financial advisors are prioritized over the best interests of their retirement clients. Conflicted advice most often occurs when workers are about to retire and roll over their employer-based retirement account, such as a 401(k), into an IRA or other financial account. Conflicted advice has been estimated to cost retirement plan participants \$17 billion in losses every year and result in a loss of almost a quarter of an individual’s savings over a 35-year period.<sup>1</sup>

Recognizing the existing rules were harming workers and retirement savers, the Obama Administration’s DOL diligently worked to fix them. The DOL pursued a comprehensive and transparent rule-making process, conducting hundreds of meetings and providing the American public a total of nearly six months to offer comments. In April 2016, the DOL finalized the “Conflict of Interest Rule,” which is commonly referred to as the “fiduciary rule.” The final rule strengthened and updated decades-old regulations and ensured that financial advisors put the interest of their retirement clients first.<sup>2</sup>

<sup>1</sup> Council of Economic Advisors, *The Effects of Conflicted Investment Advice on Retirement Savings* 17–18 (Feb. 2015); available at: [https://permanent.access.gpo.gov/gpo55500/cea\\_coi\\_report\\_final.pdf](https://permanent.access.gpo.gov/gpo55500/cea_coi_report_final.pdf)

<sup>2</sup> 81 Fed. Reg. 20945, Definition of the Term “Fiduciary,” Conflict of Interest Rule—Retirement Investment Advice, (April 8, 2016); available at: <https://www.federalregister.gov/documents/2016/04/08/2016-07924/definition-of-the-term-fiduciary-conflict-of-interest-rule-retirement-investment-advice>

Even before the fiduciary rule was finalized, Committee Republicans opposed it. In February 2016, Committee Republicans advanced two bills that sought to undermine the fiduciary rule.<sup>3</sup>

Then, less than two weeks after the fiduciary rule was finalized and published in the Federal Register, Committee Republicans rushed to judgment and hastily considered a Congressional Review Act (CRA) joint resolution of disapproval nullifying it.<sup>4</sup>

On July 19, 2017, Committee Republicans relentlessly pressed on with their misguided opposition to the fiduciary rule to mark-up H.R. 2823. In fact, the Committee’s consideration of H.R. 2823 was the fifth hearing or markup attacking the fiduciary rule in the past two years alone.<sup>5</sup> As Ranking Member Scott noted in his opening statement during the markup of H.R. 2823, “that is five more hearings or markups than we have had on increasing the minimum wage, five more hearings than we have had on providing paid family or medical leave, five more hearings than we have had protecting older workers from discrimination, five more hearings than we have had on strengthening the OSHA whistleblower protection law, and five more hearings than we have had on protecting coal miners’ pensions.”<sup>6</sup>

Committee Democrats continue to believe the fiduciary rule is a responsible solution to a real problem and strongly oppose efforts, such as H.R. 2823, which undermine key protections for retirement savers. H.R. 2823 is opposed by the following organizations: AARP, AFL–CIO, AFSCME, American Association for Justice, Americans for Financial Reform, Consumer Federation of America, Economic Policy Institute Policy Center, Financial Planning Coalition (which is comprised of the Certified Financial Planner Board of Standards, Financial Planning Association, and the National Association of Personal Financial Advisors), National Employment Law Project, and the Pension Rights Center.

H.R. 2823 TURNS BACK THE CLOCK, ENABLING UNSCRUPULOUS ADVISORS TO ONCE AGAIN PUT THEIR FINANCIAL INTERESTS AHEAD OF THEIR RETIREMENT CLIENTS’

Under the Employee Retirement Income Security Act of 1974 (ERISA), the DOL possesses the authority to define who is a fidu-

<sup>3</sup> Committee on Education and the Workforce Markup of H.R. 4293 and H.R. 4294, Committee on Education and the Workforce, House Report 114–511 and 114–512, (February 2, 2016); available at: <https://www.gpo.gov/fdsys/pkg/CRPT-114hrpt511/pdf/CRPT-114hrpt511.pdf> and <https://www.gpo.gov/fdsys/pkg/CRPT-114hrpt512/pdf/CRPT-114hrpt512-pt2.pdf>

<sup>4</sup> Committee on Education and the Workforce Markup of H.J. RES.88, House Report 114–527, (April 21, 2016); available at <https://www.gpo.gov/fdsys/pkg/CRPT-114hrpt527/pdf/CRPT-114hrpt527-pt1.pdf>. On April 28, 2016, the House voted on H.J. RES.88 and it passed on a party-line vote of 234–183. Every House Democrat opposed it. After Senate passage of H.J. RES.88, President Obama vetoed it. On June 22, 2016, the House attempted to override the President’s veto. This effort was unsuccessful, and every House Democrat opposed the veto override.

<sup>5</sup> Restricting Access to Financial Advice: Evaluating the Costs and Consequences for Working Families and Retirees,” HELP Subcommittee, June 17, 2015; “Principles for Ensuring Retirement Advice Serves the Best Interests of Working Families and Retirees,” HELP Subcommittee, December 2, 2015; Markup of H.R. 4293 and H.R. 4294, full Committee, February 2, 2016; Markup of H.J. RES.88, full Committee, April 21, 2016

<sup>6</sup> Opening Statement of Ranking Member Bobby Scott, Committee on Education and Workforce Markup of H.R. 2823, (July 19, 2017); available at: [http://democrats-edworkforce.house.gov/imo/media/doc/RCBS%20OS%20\(Fiduciary%20Markup\)%20071917.pdf](http://democrats-edworkforce.house.gov/imo/media/doc/RCBS%20OS%20(Fiduciary%20Markup)%20071917.pdf)

ciary as a result of providing retirement investment advice.<sup>7</sup> In 1975, the DOL issued regulations specifying that an advisor must meet a five-part test to be a fiduciary. Specifically, the advisor must make recommendations (1) on investing in, purchasing, or selling securities or other property, or give advice as to the value; (2) on a regular basis; (3) pursuant to a mutual understanding that the advice; (4) that serve as a primary basis for investment decisions; and, (5) that are individualized to the particular needs of the plan regarding such matters as, among other things, investment policies or strategy, overall portfolio composition, or diversification of plan investments.

This five-part test did not keep pace with the changed retirement savings and planning landscape, and emerging loopholes were ripe for exploitation. For instance, an unscrupulous advisor, who provides individualized or one-time investment advice to a retirement client about rolling over assets from an employer-sponsored retirement plan (such as a 401(k)) to a high-fee IRA, does not have to abide by a fiduciary obligation because the advisor is not giving advice on a regular basis.

After receiving input from experts and the public, the Obama Administration's DOL scrapped the five-part test in favor of a more inclusive definition, one that covers rollover decisions and IRAs. Under the 2016 fiduciary rule, "the following recommendations constitute investment advice, if they are done for a fee or other compensation: the advisability of buying, selling, holding, or exchanging investments; how investments should be invested after being rolled over, transferred, or distributed from an IRA; the management of investments; or IRAs, including whether, in what form, in what amount, and to what destination rollovers, distributions from IRAs and transfers from IRAs should be made. In addition, the person who makes a recommendation as listed above must (1) represent or acknowledge that the person is acting as a fiduciary, (2) provide a written or verbal understanding that the advice is based on the particular needs of the advice recipient; or (3) direct the advice to a specific recipient."<sup>8</sup>

The 2016 DOL rule also specifies that "certain activities do *not* constitute investment advice. These activities include marketing by platform providers who market without regard to the needs of individual plans or participants; making available general communications, such as general circulation newsletters; providing investment advice; providing advice to independent fiduciaries with financial expertise (as defined in the regulations); and executing securities transactions. In addition, individuals who are employees of a plan sponsor or employee organization and do not receive compensation for the advice beyond their normal compensation are not considered to be providing investment advice."<sup>9</sup>

<sup>7</sup> 29 U.S.C. 1002(21)(a)(ii). Additionally, according to the DOL, the Reorganization Plan of 1978 (5 U.S.C. App. (2000)) gives the DOL the authority to define "fiduciary" under both ERISA and the Internal Revenue Code (IRC).

<sup>8</sup> Congressional Research Service, "DOL's 2016 Fiduciary Rule on Investment Advice," (July 5, 2017); available at: <http://www.crs.gov/reports/pdf/IF10686>

<sup>9</sup> *Id.*

H.R. 2823 repeals the 2016 fiduciary rule and its component parts. In its place, H.R. 2823 establishes a loophole-ridden standard that unscrupulous advisors could easily skirt by simply issuing boilerplate written disclaimers or disclosures.

For financial advisors to be subject to the fiduciary requirement under H.R. 2823, they must render investment advice 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 retirement client and the retirement client ‘intends to materially rely’ on the advice. This framework is similar to the loophole-ridden 1975 regulations that were replaced by the DOL’s 2016 fiduciary rule and would enable financial advisors to easily avoid their fiduciary obligations to their clients. At least with the deficient 1975 regulations, once advisors became fiduciaries they could not disclaim away their fiduciary obligation. That is not the case with H.R. 2823.

- Under H.R. 2823, financial advisors would be able to avoid fiduciary obligations by providing a written disclaimer that states, “[t]his communication is not individualized to you, and you are not intended to rely materially on this communication in making investment or management decisions.” In practice, as the Consumer Federation of America noted in its letter opposing H.R. 2823, “a retirement saver could reasonably believe she was receiving personalized advice (based, for example, on how the services were marketed), rely exclusively on that advice in making her investment decision, and still not be deemed to be in an advisory relationship under the terms of this bill so long as the adviser provided the required boilerplate disclaimer”<sup>10</sup>

- Under H.R. 2823, financial advisors would be able to avoid fiduciary obligations if they indicate and disclose in writing that they are acting in a “marketing or sales capacity.” The concern is that advisors would be able to provide an unlimited amount of advice to their clients as long as they provide a written disclosure that they are only providing advice in a “marketing or sales capacity,” which are terms that are not defined in the bill.

- Under H.R. 2823, financial advisors would be able to avoid fiduciary obligations if they claim to have made a “good faith” error or omission in their disclosure.

According to the Financial Planning Coalition, which is comprised of the Certified Financial Planner Board of Standards, Financial Planning Association, and National Association of Personal Financial Advisors, H.R. 2823 “would weaken, not strengthen, protections for retirement savers; and would re-open loopholes in the definition of investment advice that the DOL closed in the Fiduciary Rule. In addition, the bill would weaken the standard that applies to advice by allowing financial firms and advisors to easily disclose away any fiduciary obligations owed to their clients.”<sup>11</sup>

<sup>10</sup> Consumer Federation of America, Letter to Chairwoman Foxx and Ranking Member Scott Opposing H.R. 2823, July 17, 2017, available at: <http://democrats-edworkforce.house.gov/imo/media/doc/CFA%20of%20opposition-H.R.%202823.pdf>

<sup>11</sup> Financial Planning Coalition, Letter to Chairwoman Foxx, Ranking Member Scott, and Education and Workforce Committee Members Opposing H.R. 2823, July 17, 2017, available at: <http://democrats-edworkforce.house.gov/imo/media/doc/FPCtr%20of%20opposition-H.R.%202823.pdf>

While Committee Democrats believe disclosures and disclaimers are no substitute for a binding and 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.”<sup>12</sup>
- Disclosures often fail to make clients aware of the nature of their advisors’ conflicts, let alone understand the potential implications of such conflicts.<sup>13</sup>
- Disclosure of advisor conflicts can backfire since clients can interpret disclosure of advisor conflicts as a sign of honesty.<sup>14</sup> 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.

H.R. 2823 IGNORES REAL WORLD REALITIES REGARDING FIDUCIARY  
RULE’S IMPLEMENTATION

The fiduciary rule was initially implemented on June 9, 2017, and there exists some preliminary evidence of how it is impacting the financial marketplace and faring in the legal system. Initial reports suggest that the financial services industry is adapting to and capably complying with the rule.

According to the Consumer Federation of America, “since the rule was finalized a little over a year ago, firms of all types and sizes have announced implementation plans that prove that the rule is both workable and working as intended to rein in conflicts, improve investment products, and reduce investor costs, all while preserving access to advice for even the smallest accountholders.”<sup>15</sup>

According to Morningstar, the industry is “adapting in ways that will benefit investors by reducing conflicts of interest and adding transparency.”<sup>16</sup> In fact, one official at Wells Fargo Advisors said she would liken the June 9th initial implementation date of the fiduciary rule to “. . . Y2K. We did a lot of preparation and a lot of work for a day that ended up feeling a lot like any other day.”<sup>17</sup> In short, industry reports contradict the doomsday claims of Committee Republicans’ about the fiduciary rule or their rationale for H.R. 2823.

<sup>12</sup>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](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).

<sup>13</sup>Department of Labor, “Fiduciary Investment Advice, Regulatory Impact Analysis,” (April 2015); available at: <http://www.dol.gov/ebsa/pdf/conflictsofinterestria.pdf>.

<sup>14</sup>*Id.*

<sup>15</sup>Consumer Federation of America, Letter to Chairwoman Foxx and Ranking Member Scott Opposing H.R. 2823, July 17, 2017, available at: [http://democrats-edworkforce.house.gov/imo/media/doc/CFA\\_ltr%20of%20opposition-H.R.%202823.pdf](http://democrats-edworkforce.house.gov/imo/media/doc/CFA_ltr%20of%20opposition-H.R.%202823.pdf)

<sup>16</sup>Morningstar, “Early Evidence on the Department of Labor Conflict of Interest Rule: New Share Classes Should Reduce Conflicted Advice, Likely Improving Outcomes for Investors,” April 2017, available at: <https://corporate1.morningstar.com/ResearchLibrary/article/802119/early-evidence-on-the-department-of-labor-conflict-of-interest-rule/>

<sup>17</sup>St. Louis Post Dispatch, “Despite Complaints, fiduciary rule phase-in is going smoothly,” June 18, 2017, available at: [http://www.stltoday.com/business/columns/david-nicklaus/despite-complaints-fiduciary-rule-phase-in-is-going-smoothly/article\\_d0dfd00a-4706-5d87-b8a9-029a7cfce9da.html](http://www.stltoday.com/business/columns/david-nicklaus/despite-complaints-fiduciary-rule-phase-in-is-going-smoothly/article_d0dfd00a-4706-5d87-b8a9-029a7cfce9da.html)

Additionally, courts in three separate jurisdictions rejected plaintiffs' arguments against the fiduciary rule.<sup>18</sup> Specifically, the courts found that the DOL not only has the statutory duty to promulgate the rule under ERISA, but that its fiduciary rule is a reasonable, workable solution that protects America's retirement savers. According to the holding by one court, any delay of the fiduciary rule through injunction "will produce a public harm that outweighs any harm that plaintiff may sustain from the rule change."<sup>19</sup> Another court held "the DOL adequately weighed the monetary and non-monetary costs on the industry of complying with the rules, against the benefits to consumers [and in] doing so, the DOL conducted reasonable cost-benefit analysis."<sup>20</sup> The plaintiffs in each case have appealed.

#### DEMOCRATIC AMENDMENT

Congresswoman Alma Adams offered a substitute amendment to codify the fiduciary rule into law. The amendment failed on a voice vote.

#### ROLL CALL VOTES ON FINAL PASSAGE

H.R. 2823 was reported by straight party-line votes of 23 ayes and 17 nays. Committee Democrats unanimously opposed the bill.

#### CONCLUSION

Since the fiduciary rule was initially implemented in June, financial advisors are now required to be fiduciaries to their retirement clients. All working Americans are just now beginning to receive retirement investment advice that's in their best interests. H.R. 2823 would abruptly eliminate these protections for workers and replace them with a loophole-ridden framework that would put their retirement savings at risk.

Rather than continuing to undermine retirement savings protections, the Committee should instead focus on addressing real economic challenges confronting working people and their families. Committee Democrats remain committed to advancing 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. Clearly, H.R. 2823 is not among these solutions.

For the reasons stated above, among others, Committee Democrats unanimously opposed H.R. 2823 when the Committee on Education and the Workforce considered it on July 19, 2017. We urge the full House of Representatives to do the same.

ROBERT C. "BOBBY" SCOTT,  
*Ranking Member.*  
 SUSAN A. DAVIS.  
 RAÚL M. GRIJALVA.  
 JOE COURTNEY.

<sup>18</sup>*Mkt. Synergy Grp., Inc. v. U.S. Dep't of Labor*, 16-CV-4083-DDC-KGS (D. Kan. Feb. 17, 2017); *Chamber of Commerce v. Hugler*, No. 3:16-cv-1476-M (N.D. Tex. Feb. 8, 2017); *Nat'l Ass'n for Fixed Annuities v. Perez*, 16-cv-1035, 2016 WL 6573480 (D.D.C. Nov. 4, 2016)

<sup>19</sup>*Mkt. Synergy Grp., Inc. v. U.S. Dep't of Labor*, 16-CV-4083-DDC-KGS at 62, 2016 WL 6948061 (D. Kan. Nov. 28, 2016).

<sup>20</sup>*Chamber of Commerce v. Hugler*, 16-cv-1476-M (N.D. Tex. Feb. 8, 2017).

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