

107TH CONGRESS
2D SESSION

S. 1978

To amend title I of the Employee Retirement Income Security Act of 1974 and the Internal Revenue Code of 1986 to promote the provision of retirement investment advice to workers managing their retirement income assets.

IN THE SENATE OF THE UNITED STATES

MARCH 1, 2002

Mr. HUTCHINSON introduced the following bill; which was read twice and referred to the Committee on Health, Education, Labor, and Pensions

A BILL

To amend title I of the Employee Retirement Income Security Act of 1974 and the Internal Revenue Code of 1986 to promote the provision of retirement investment advice to workers managing their retirement income assets.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Retirement Security
5 Advice Act of 2002”.

1 **SEC. 2. PROHIBITED TRANSACTION EXEMPTION FOR THE**
2 **PROVISION OF INVESTMENT ADVICE.**

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

5 (1) EXEMPTION FROM PROHIBITED TRANS-
6 ACTIONS.—Section 408(b) of the Employee Retire-
7 ment Income Security Act of 1974 (29 U.S.C.
8 1108(b)) is amended by adding at the end the fol-
9 lowing new paragraph:

10 “(14)(A) Any transaction described in subpara-
11 graph (B) in connection with the provision of invest-
12 ment advice described in section 3(21)(A)(ii), in any
13 case in which—

14 “(i) the investment of assets of the plan is
15 subject to the direction of plan participants or
16 beneficiaries,

17 “(ii) the advice is provided to the plan or
18 a participant or beneficiary of the plan by a fi-
19 duciary adviser in connection with any sale, ac-
20 quisition, or holding of a security or other prop-
21 erty for purposes of investment of plan assets,
22 and

23 “(iii) the requirements of subsection (g)
24 are met in connection with the provision of the
25 advice.

“(B) The transactions described in this subparagraph are the following:

“(i) the provision of the advice to the plan, participant, or beneficiary;

“(ii) the sale, acquisition, or holding of a security or other property (including any lending of money or other extension of credit associated with the sale, acquisition, or holding of a security or other property) pursuant to the advice; and

“(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 a sale, acquisition, or holding of a security or other property pursuant to the advice.”.

(2) REQUIREMENTS.—Section 408 of such Act is amended by adding at the end the following new subsection:

“(g) REQUIREMENTS RELATING TO PROVISION OF INVESTMENT ADVICE BY FIDUCIARY ADVISERS.—

“(1) IN GENERAL.—The requirements of this subsection are met in connection with the provision

1 of investment advice referred to in section
2 3(21)(A)(ii), provided to an employee benefit plan or
3 a participant or beneficiary of an employee benefit
4 plan by a fiduciary adviser with respect to the plan
5 in connection with any sale, acquisition, or holding
6 of a security or other property for purposes of in-
7 vestment of amounts held by the plan, if—

8 “(A) in the case of the initial provision of
9 the advice with regard to the security or other
10 property by the fiduciary adviser to the plan,
11 participant, or beneficiary, the fiduciary adviser
12 provides to the recipient of the advice, at a time
13 reasonably contemporaneous with the initial
14 provision of the advice, a written notification
15 (which may consist of notification by means of
16 electronic communication)—

17 “(i) of all fees or other compensation
18 relating to the advice that the fiduciary ad-
19 viser or any affiliate thereof is to receive
20 (including compensation provided by any
21 third party) in connection with the provi-
22 sion of the advice or in connection with the
23 sale, acquisition, or holding of the security
24 or other property,

1 “(ii) of any material affiliation or con-
2 tractual relationship of the fiduciary ad-
3 viser or affiliates thereof in the security or
4 other property,

5 “(iii) of any limitation placed on the
6 scope of the investment advice to be pro-
7 vided by the fiduciary adviser with respect
8 to any such sale, acquisition, or holding of
9 a security or other property,

10 “(iv) of the types of services provided
11 by the fiduciary adviser in connection with
12 the provision of investment advice by the
13 fiduciary adviser, and

14 “(v) that the adviser is acting as a fi-
15 duciary of the plan in connection with the
16 provision of the advice,

17 “(B) the fiduciary adviser provides appro-
18 priate disclosure, in connection with the sale,
19 acquisition, or holding of the security or other
20 property, in accordance with all applicable secu-
21 rities laws,

22 “(C) the sale, acquisition, or holding oc-
23 curs solely at the direction of the recipient of
24 the advice,

“(D) 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

“(E) 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.

“(2) STANDARDS FOR PRESENTATION OF INFORMATION.—The notification required to be provided to participants and beneficiaries under paragraph (1)(A) shall be written in a clear and conspicuous manner and in a manner calculated to be understood by the average plan participant and shall be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of the information required to be provided in the notification.

“(3) EXEMPTION CONDITIONED ON CONTINUED AVAILABILITY OF REQUIRED INFORMATION ON REQUEST FOR 1 YEAR.—The requirements of paragraph (1)(A) shall be deemed not to have been met in connection with the initial or any subsequent provision of advice described in paragraph (1) to the plan, participant, or beneficiary if, at any time dur-

1 ing the provision of advisory services to the plan,
 2 participant, or beneficiary, the fiduciary adviser fails
 3 to maintain the information described in clauses (i)
 4 through (iv) of subparagraph (A) in currently accu-
 5 rate form and in the manner described in paragraph
 6 (2) or fails—

7 “(A) to provide, without charge, such cur-
 8 rently accurate information to the recipient of
 9 the advice no less than annually,

10 “(B) to make such currently accurate in-
 11 formation available, upon request and without
 12 charge, to the recipient of the advice, or

13 “(C) in the event of a material change to
 14 the information described in clauses (i) through
 15 (iv) of paragraph (1)(A), to provide, without
 16 charge, such currently accurate information to
 17 the recipient of the advice at a time reasonably
 18 contemporaneous to the material change in in-
 19 formation.

20 “(4) MAINTENANCE FOR 6 YEARS OF EVIDENCE
 21 OF COMPLIANCE.—A fiduciary adviser referred to in
 22 paragraph (1) who has provided advice referred to in
 23 such paragraph shall, for a period of not less than
 24 6 years after the provision of the advice, maintain
 25 any records necessary for determining whether the

1 requirements of the preceding provisions of this sub-
 2 section and of subsection (b)(14) have been met. A
 3 transaction prohibited under section 406 shall not be
 4 considered to have occurred solely because the
 5 records are lost or destroyed prior to the end of the
 6 6-year period due to circumstances beyond the con-
 7 trol of the fiduciary adviser.

8 “(5) EXEMPTION FOR PLAN SPONSOR AND CER-
 9 TAIN OTHER FIDUCIARIES.—

10 “(A) IN GENERAL.—Subject to subpara-
 11 graph (B), a plan sponsor or other person who
 12 is a fiduciary (other than a fiduciary adviser)
 13 shall not be treated as failing to meet the re-
 14 quirements of this part solely by reason of the
 15 provision of investment advice referred to in
 16 section 3(21)(A)(ii) (or solely by reason of con-
 17 tracting for or otherwise arranging for the pro-
 18 vision of the advice), if—

19 “(i) the advice is provided by a fidu-
 20 ciary adviser pursuant to an arrangement
 21 between the plan sponsor or other fidu-
 22 ciary and the fiduciary adviser for the pro-
 23 vision by the fiduciary adviser of invest-
 24 ment advice referred to in such section,

1 “(ii) the terms of the arrangement re-
2 quire compliance by the fiduciary adviser
3 with the requirements of this subsection,
4 and

5 “(iii) the terms of the arrangement
6 include a written acknowledgment by the
7 fiduciary adviser that the fiduciary adviser
8 is a fiduciary of the plan with respect to
9 the provision of the advice.

10 “(B) CONTINUED DUTY OF PRUDENT SE-
11 LECTION OF ADVISER AND PERIODIC REVIEW.—
12 Nothing in subparagraph (A) shall be construed
13 to exempt a plan sponsor or other person who
14 is a fiduciary from any requirement of this part
15 for the prudent selection and periodic review of
16 a fiduciary adviser with whom the plan sponsor
17 or other person enters into an arrangement for
18 the provision of advice referred to in section
19 3(21)(A)(ii). The plan sponsor or other person
20 who is a fiduciary has no duty under this part
21 to monitor the specific investment advice given
22 by the fiduciary adviser to any particular recipi-
23 ent of the advice.

24 “(C) AVAILABILITY OF PLAN ASSETS FOR
25 PAYMENT FOR ADVICE.—Nothing in this part

1 shall be construed to preclude the use of plan
 2 assets to pay for reasonable expenses in pro-
 3 viding investment advice referred to in section
 4 3(21)(A)(ii).

5 “(6) DEFINITIONS.—For purposes of this sub-
 6 section and subsection (b)(14)—

7 “(A) FIDUCIARY ADVISER.—The term ‘fi-
 8 duciary adviser’ means, with respect to a plan,
 9 a person who is a fiduciary of the plan by rea-
 10 son of the provision of investment advice by the
 11 person to the plan or to a participant or bene-
 12 ficiary and who is—

13 “(i) registered as an investment ad-
 14 viser under the Investment Advisers Act of
 15 1940 (15 U.S.C. 80b–1 et seq.) or under
 16 the laws of the State in which the fiduciary
 17 maintains its principal office and place of
 18 business,

19 “(ii) a bank or similar financial insti-
 20 tution referred to in section 408(b)(4),

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

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

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

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

9 “(B) AFFILIATE.—The term ‘affiliate’ of
10 another entity means an affiliated person of the
11 entity (as defined in section 2(a)(3) of the In-
12 vestment Company Act of 1940 (15 U.S.C.
13 80a–2(a)(3))).

14 “(C) REGISTERED REPRESENTATIVE.—
15 The term ‘registered representative’ of another
16 entity means a person described in section
17 3(a)(18) of the Securities Exchange Act of
18 1934 (15 U.S.C. 78c(a)(18)) (substituting the
19 entity for the broker or dealer referred to in
20 such section) or a person described in section
21 202(a)(17) of the Investment Advisers Act of
22 1940 (15 U.S.C. 80b–2(a)(17)) (substituting
23 the entity for the investment adviser referred to
24 in such section).”.

1 (b) AMENDMENTS TO THE INTERNAL REVENUE
2 CODE OF 1986.—

3 (1) EXEMPTION FROM PROHIBITED TRANS-
4 ACTIONS.—Subsection (d) of section 4975 of the In-
5 ternal Revenue Code of 1986 (relating to exemptions
6 from tax on prohibited transactions) is amended—

7 (A) in paragraph (14), by striking “or” at
8 the end;

9 (B) in paragraph (15), by striking the pe-
10 riod at the end and inserting “; or”; and

11 (C) by adding at the end the following new
12 paragraph:

13 “(16) any transaction described in subsection
14 (f)(7)(A) in connection with the provision of invest-
15 ment advice described in subsection (e)(3)(B), in
16 any case in which—

17 “(A) the investment of assets of the plan
18 is subject to the direction of plan participants
19 or beneficiaries,

20 “(B) the advice is provided to the plan or
21 a participant or beneficiary of the plan by a fi-
22 duciary adviser in connection with any sale, ac-
23 quisition, or holding of a security or other prop-
24 erty for purposes of investment of plan assets,
25 and

1 “(C) the requirements of subsection
2 (f)(7)(B) are met in connection with the provi-
3 sion of the advice.”.

4 (2) ALLOWED TRANSACTIONS AND REQUIRE-
5 MENTS.—Subsection (f) of such section 4975 (relat-
6 ing to other definitions and special rules) is amended
7 by adding at the end the following new paragraph:

8 “(7) PROVISIONS RELATING TO INVESTMENT
9 ADVICE PROVIDED BY FIDUCIARY ADVISERS.—

10 “(A) TRANSACTIONS ALLOWABLE IN CON-
11 NECTION WITH INVESTMENT ADVICE PROVIDED
12 BY FIDUCIARY ADVISERS.—The transactions re-
13 ferred to in subsection (d)(16), in connection
14 with the provision of investment advice by a fi-
15 ducuary adviser, are the following:

16 “(i) the provision of the advice to the
17 plan, participant, or beneficiary;

18 “(ii) the sale, acquisition, or holding
19 of a security or other property (including
20 any lending of money or other extension of
21 credit associated with the sale, acquisition,
22 or holding of a security or other property)
23 pursuant to the advice; and

24 “(iii) the direct or indirect receipt of
25 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 a sale, acquisition, or holding of a security or other property pursuant to the advice.

“(B) REQUIREMENTS RELATING TO PROVISION OF INVESTMENT ADVICE BY FIDUCIARY ADVISERS.—The requirements of this subparagraph (referred to in subsection (d)(16)(C)) are met in connection with the provision of investment advice referred to in subsection (e)(3)(B), provided to a plan or a participant or beneficiary of a plan by a fiduciary adviser with respect to the plan in connection with any sale, acquisition, or holding of a security or other property for purposes of investment of amounts held by the plan, if—

“(i) in the case of the initial provision of the advice with regard to the security or other property by the fiduciary adviser to the plan, participant, or beneficiary, the fiduciary adviser provides to the recipient of the advice, at a time reasonably contem-

1 poraneous with the initial provision of the
2 advice, a written notification (which may
3 consist of notification by means of elec-
4 tronic communication)—

5 “(I) of all fees or other com-
6 pensation relating to the advice that
7 the fiduciary adviser or any affiliate
8 thereof is to receive (including com-
9 pensation provided by any third
10 party) in connection with the provi-
11 sion of the advice or in connection
12 with the sale, acquisition, or holding
13 of the security or other property,

14 “(II) of any material affiliation
15 or contractual relationship of the fidu-
16 ciary adviser or affiliates thereof in
17 the security or other property,

18 “(III) of any limitation placed on
19 the scope of the investment advice to
20 be provided by the fiduciary adviser
21 with respect to any such sale, acquisi-
22 tion, or holding of a security or other
23 property,

24 “(IV) of the types of services
25 provided by the fiduciary adviser in

1 connection with the provision of in-
2 vestment advice by the fiduciary ad-
3 viser, and

4 “(V) that the adviser is acting as
5 a fiduciary of the plan in connection
6 with the provision of the advice,

7 “(ii) the fiduciary adviser provides ap-
8 propriate disclosure, in connection with the
9 sale, acquisition, or holding of the security
10 or other property, in accordance with all
11 applicable securities laws,

12 “(iii) the sale, acquisition, or holding
13 occurs solely at the direction of the recipi-
14 ent of the advice,

15 “(iv) the compensation received by the
16 fiduciary adviser and affiliates thereof in
17 connection with the sale, acquisition, or
18 holding of the security or other property is
19 reasonable, and

20 “(v) the terms of the sale, acquisition,
21 or holding of the security or other property
22 are at least as favorable to the plan as an
23 arm’s length transaction would be.

24 “(C) STANDARDS FOR PRESENTATION OF
25 INFORMATION.—The notification required to be

1 provided to participants and beneficiaries under
2 subparagraph (B)(i) shall be written in a clear
3 and conspicuous manner and in a manner cal-
4 culated to be understood by the average plan
5 participant and shall be sufficiently accurate
6 and comprehensive to reasonably apprise such
7 participants and beneficiaries of the information
8 required to be provided in the notification.

9 “(D) EXEMPTION CONDITIONED ON MAK-
10 ING REQUIRED INFORMATION AVAILABLE ANNU-
11 ALLY, ON REQUEST, AND IN THE EVENT OF MA-
12 TERIAL CHANGE.—The requirements of sub-
13 paragraph (B)(i) shall be deemed not to have
14 been met in connection with the initial or any
15 subsequent provision of advice described in sub-
16 paragraph (B) to the plan, participant, or bene-
17 ficiary if, at any time during the provision of
18 advisory services to the plan, participant, or
19 beneficiary, the fiduciary adviser fails to main-
20 tain the information described in subclauses (I)
21 through (IV) of subparagraph (B)(i) in cur-
22 rently accurate form and in the manner re-
23 quired by subparagraph (C), or fails—

1 “(i) to provide, without charge, such
 2 currently accurate information to the re-
 3 cipient of the advice no less than annually,

4 “(ii) to make such currently accurate
 5 information available, upon request and
 6 without charge, to the recipient of the ad-
 7 vice, or

8 “(iii) in the event of a material
 9 change to the information described in
 10 subclauses (I) through (IV) of subpara-
 11 graph (B)(i), to provide, without charge,
 12 such currently accurate information to the
 13 recipient of the advice at a time reasonably
 14 contemporaneous to the material change in
 15 information.

16 “(E) MAINTENANCE FOR 6 YEARS OF EVI-
 17 DENCE OF COMPLIANCE.—A fiduciary adviser
 18 referred to in subparagraph (B) who has pro-
 19 vided advice referred to in such subparagraph
 20 shall, for a period of not less than 6 years after
 21 the provision of the advice, maintain any
 22 records necessary for determining whether the
 23 requirements of the preceding provisions of this
 24 paragraph and of subsection (d)(16) have been
 25 met. A transaction prohibited under subsection

1 (c)(1) shall not be considered to have occurred
2 solely because the records are lost or destroyed
3 prior to the end of the 6-year period due to cir-
4 cumstances beyond the control of the fiduciary
5 adviser.

6 “(F) EXEMPTION FOR PLAN SPONSOR AND
7 CERTAIN OTHER FIDUCIARIES.—A plan sponsor
8 or other person who is a fiduciary (other than
9 a fiduciary adviser) shall not be treated as fail-
10 ing to meet the requirements of this section
11 solely by reason of the provision of investment
12 advice referred to in subsection (e)(3)(B) (or
13 solely by reason of contracting for or otherwise
14 arranging for the provision of the advice), if—

15 “(i) the advice is provided by a fidu-
16 ciary adviser pursuant to an arrangement
17 between the plan sponsor or other fidu-
18 ciary and the fiduciary adviser for the pro-
19 vision by the fiduciary adviser of invest-
20 ment advice referred to in such section,

21 “(ii) the terms of the arrangement re-
22 quire compliance by the fiduciary adviser
23 with the requirements of this paragraph,

24 “(iii) the terms of the arrangement
25 include a written acknowledgment by the

1 fiduciary adviser that the fiduciary adviser
 2 is a fiduciary of the plan with respect to
 3 the provision of the advice, and

4 “(iv) the requirements of part 4 of
 5 subtitle B of title I of the Employee Re-
 6 tirement Income Security Act of 1974 are
 7 met in connection with the provision of
 8 such advice.

9 “(G) DEFINITIONS.—For purposes of this
 10 paragraph and subsection (d)(16)—

11 “(i) FIDUCIARY ADVISER.—The term
 12 ‘fiduciary adviser’ means, with respect to a
 13 plan, a person who is a fiduciary of the
 14 plan by reason of the provision of invest-
 15 ment advice by the person to the plan or
 16 to a participant or beneficiary and who
 17 is—

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

1 “(II) a bank or similar financial
2 institution referred to in subsection
3 (d)(4),

4 “(III) an insurance company
5 qualified to do business under the
6 laws of a State,

7 “(IV) a person registered as a
8 broker or dealer under the Securities
9 Exchange Act of 1934 (15 U.S.C. 78a
10 et seq.),

11 “(V) an affiliate of a person de-
12 scribed in any of subclauses (I)
13 through (IV), or

14 “(VI) an employee, agent, or reg-
15 istered representative of a person de-
16 scribed in any of subclauses (I)
17 through (V) who satisfies the require-
18 ments of applicable insurance, bank-
19 ing, and securities laws relating to the
20 provision of the advice.

21 “(ii) AFFILIATE.—The term ‘affiliate’
22 of another entity means an affiliated per-
23 son of the entity (as defined in section
24 2(a)(3) of the Investment Company Act of
25 1940 (15 U.S.C. 80a-2(a)(3))).

1 “(iii) REGISTERED REPRESENTA-
2 TIVE.—The term ‘registered representa-
3 tive’ of another entity means a person de-
4 scribed in section 3(a)(18) of the Securi-
5 ties Exchange Act of 1934 (15 U.S.C.
6 78c(a)(18)) (substituting the entity for the
7 broker or dealer referred to in such sec-
8 tion) or a person described in section
9 202(a)(17) of the Investment Advisers Act
10 of 1940 (15 U.S.C. 80b-2(a)(17)) (sub-
11 stituting the entity for the investment ad-
12 viser referred to in such section).”

○