

114TH CONGRESS
1ST SESSION

H. R. 3922

To amend the Internal Revenue Code of 1986 and the Employee Retirement Income and Security Act of 1974 to provide for a best interest standard for advice fiduciaries, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

NOVEMBER 4, 2015

Mr. KELLY of Pennsylvania (for himself and Mr. SAM JOHNSON of Texas) introduced the following bill; which was referred to the Committee on Education and the Workforce, and in addition to the Committee on Ways and Means, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

A BILL

To amend the Internal Revenue Code of 1986 and the Employee Retirement Income and Security Act of 1974 to provide for a best interest standard for advice fiduciaries, and for other purposes.

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 Choice
5 Protection Act of 2015”.

1 **SEC. 2. TRANSFER TO SECRETARY OF THE TREASURY OF**
2 **AUTHORITIES REGARDING INDIVIDUAL RE-**
3 **TIREMENT PLANS.**

4 (a) IN GENERAL.—Section 102 of Reorganization
5 Plan No. 4 of 1978 (ratified and affirmed as law by Public
6 Law 98–532 (98 Stat. 2705)) is amended—

7 (1) in subsection (a)—

8 (A) by striking “and” at the end of clause

9 (ii);

10 (B) by striking “and” at the end of clause

11 (iii); and

12 (C) by inserting after clause (iii) the fol-
13 lowing:

14 “(iv) regulations, rulings, opinions,
15 and exemptions relating to individual re-
16 tirement accounts described in section
17 408(a) of the Code and individual retire-
18 ment annuities described in section 408(b)
19 of the Code, including simplified employee
20 pensions under section 408(k) of the Code
21 and simple retirement accounts under sec-
22 tion 408(p) of the Code; and

23 “(v) regulations described in section
24 103(b) of this Plan;” and

25 (2) by adding at the end the following new
26 flush sentence: “The Secretary of the Treasury shall

1 consult with the Securities and Exchange Commis-
2 sion in prescribing regulations, rulings, opinions,
3 and exemptions under subsection (a)(iv) that provide
4 guidance of general application as to the professional
5 standards of care (whether involving fiduciary, suit-
6 ability, or other standards) owed by brokers and in-
7 vestment advisors to owners and account holders of
8 accounts and annuities described in such sub-
9 section.”.

10 (b) JOINT AUTHORITY.—Section 103 of such Plan is
11 amended—

12 (1) by striking “In the case of” and inserting:

13 “(a) In the case of”; and

14 (2) by adding at the end the following:

15 “(b)(1) The Secretary of the Treasury and the Sec-
16 retary of Labor shall have joint authority to issue regula-
17 tions described in this subsection, and any such regula-
18 tions shall be issued jointly by such Secretaries.

19 “(2) A regulation is described in this subsection if
20 (i) the regulation is not described in clause (i), (ii), (iii),
21 or (iv) of section 102(a) of this Plan and (ii) defines or
22 interprets a term or requirement that is included in sec-
23 tion 4975 of the Code or section 406 of ERISA. The de-
24 termination of whether any regulation is described in this
25 subsection shall be made without regard to whether any

1 such term or requirement is also used or defined in any
2 other provision of the Code or ERISA.”.

3 (c) EFFECTIVE DATE.—

4 (1) IN GENERAL.—The amendments made by
5 this section shall apply to regulations, rulings, opin-
6 ions, and exemptions which have not been finalized
7 as of July 8, 2013.

8 (2) TRANSITION.—Any final regulation, ruling,
9 opinion, or exemption described in section 102(a)(iv)
10 or 103(b) of Reorganization Plan No. 4 of 1978 (as
11 added by the amendments made by this section)
12 which was issued by the Secretary of Labor before
13 July 9, 2013, shall apply until such time as such
14 regulation, ruling, opinion, or exemption is revoked
15 or modified pursuant to such amendments.

16 **SEC. 3. BEST INTEREST STANDARD FOR ADVICE FIDU-**
17 **CIARIES.**

18 (a) AMENDMENTS TO THE INTERNAL REVENUE
19 CODE OF 1986.—

20 (1) BEST INTEREST STANDARD FOR ADVICE FI-
21 DUCIARIES REGARDING IRAS AND NON-ERISA
22 PLANS.—Section 4975(c) of the Internal Revenue
23 Code of 1986 is amended by adding the following
24 new paragraph (7):

1 “(7) BEST INTEREST RECOMMENDATION RULE
2 FOR ADVICE FIDUCIARIES TO IRAS AND NON-ERISA
3 PLANS.—

4 “(A) BEST INTEREST PROHIBITED TRANS-
5 ACTION.—For purposes of this section and with
6 respect to plans not subject to section 404 of
7 title I, subtitle B of the Employee Retirement
8 Income Security Act of 1974 (relating to fidu-
9 ciary obligations), the term ‘prohibited trans-
10 action’ includes the receipt of any consideration
11 for his own personal account by any disqualified
12 person who is a fiduciary by reason of providing
13 investment advice (within the meaning of sec-
14 tion 4975(e)(3)(B)) from the plan or any party
15 in connection with a transaction involving the
16 investment of income or assets of the plan re-
17 sulting from the recommendation of such per-
18 son, unless such investment advice constitutes a
19 best interest recommendation. This paragraph
20 shall not apply to any transaction unless such
21 transaction is described in subparagraph (E) or
22 (F) of subsection (c)(1) (without regard to any
23 exemption from the prohibitions of subsection
24 (c)).

1 “(B) BEST INTEREST RECOMMENDA-
2 TION.—

3 “(i) For purposes of this paragraph,
4 the term ‘best interest recommendation’
5 means a recommendation provided by a
6 person acting with the care, skill, pru-
7 dence, and diligence under the cir-
8 cumstances then prevailing that a prudent
9 person would exercise based on the infor-
10 mation obtained through the reasonable
11 diligence of the person regarding factors
12 such as the advice recipient’s age, and any
13 other information that the advice recipient
14 discloses to the person in connection with
15 receiving such recommendation, where the
16 person does not subordinate the interests
17 of the plan or advice recipient, as applica-
18 ble, to its own.

19 “(ii) Best interest recommendations
20 may include, without limitation, rec-
21 ommendations that—

22 “(I) are based on a limited range
23 of products, providers or offerings (in-
24 cluding recommendations that include,
25 or are limited only to, proprietary

1 products and providers), where such
2 limits are clearly disclosed to the ad-
3 vice recipient at any time prior to a
4 transaction based on the recommenda-
5 tion, or

6 “(II) may result in variable com-
7 pensation to the person (or its affil-
8 iate), such as transaction, services,
9 placement, or other types of com-
10 pensation that differ by product or
11 service, where the receipt of such com-
12 pensation is clearly disclosed to the
13 advice recipient.

14 “(iii) For purposes of this paragraph,
15 clear disclosure of variable compensation
16 means notification at any time prior to a
17 transaction based on the person’s rec-
18 ommendation, in a manner calculated to be
19 understood by the average individual, of
20 the following information, which can be
21 provided in one or more statements or doc-
22 uments:

23 “(I) The person (or its affiliate)
24 may receive varying amounts of fees
25 or other compensation or consider-

1 ation with respect to recommended
2 transactions.

3 “(II) The amount of any fee or
4 other compensation or consideration
5 that is directly payable to the person
6 (or its affiliate) from the plan or ad-
7 vice recipient with respect to rec-
8 ommended transactions, provided that
9 any such amount may be expressed in
10 terms of a monetary amount, formula,
11 percentage of assets, per capita
12 charge, or estimate or range of such
13 compensation or consideration.

14 “(III) A description of the types
15 and ranges of indirect compensation
16 that may be paid to the person (or its
17 affiliate) by any third party in connec-
18 tion with recommended transactions,
19 provided that any such ranges may be
20 expressed in terms of a monetary
21 amount, formula, percentage of as-
22 sets, per capita charge, or estimate of
23 such compensation or consideration.

24 “(IV) Upon the advice recipient’s
25 request prior to the transaction, a dis-

1 closure of the specific amounts of
2 compensation described in subclause
3 (II) or (III) that the person will re-
4 ceive in connection with the particular
5 transaction, provided that any such
6 amounts may be expressed in terms of
7 a monetary amount, formula, percent-
8 age of assets, per capita charge, or es-
9 timate of such compensation or con-
10 sideration.

11 No recommendation will fail to be a best
12 interest recommendation solely because the
13 person, acting in good faith and with rea-
14 sonable diligence, makes an error or omis-
15 sion in disclosing the information specified
16 in this subparagraph, provided that the
17 person discloses the correct information to
18 the advice recipient as soon as practicable,
19 but not later than 30 days from the date
20 on which the person knows of such error or
21 omission.

22 “(C) CORRECTION.—For purposes of this
23 section and notwithstanding subsection (f)(5) to
24 the contrary, the terms ‘correction’ and ‘cor-
25 rect’ mean, with respect to this prohibited

1 transaction only, the payment to, or reimburse-
2 ment of, actual damages of the plan resulting
3 directly from the plan’s reliance on such invest-
4 ment advice, if any, that have not otherwise
5 been paid or reimbursed to the plan, including
6 payments and reimbursements made pursuant
7 to subsection (f)(5). Any such damages shall be
8 determined in a manner consistent with the
9 damages that would be payable with respect to
10 such prohibited transaction under the Employee
11 Retirement Income Security Act of 1974.

12 “(D) CALCULATION OF AMOUNT IN-
13 VOLVED.—For purposes of this section and not-
14 withstanding subsection (f)(4) to the contrary,
15 the term ‘amount involved’ means, with respect
16 to this prohibited transaction only, the amount
17 of such consideration received by the disquali-
18 fied person with respect to the transaction that
19 has not otherwise been paid or reimbursed to
20 the plan, including payments and reimburse-
21 ments made pursuant to subsection (f)(5).”.

22 (2) MODIFICATION OF EXISTING STATUTORY
23 EXEMPTIONS TO APPLY THE BEST INTEREST STAND-
24 ARD TO ADVICE FIDUCIARIES OF IRAS AND NON-
25 ERISA PLANS THROUGH SECTION 4975(e)(7).—Sec-

1 tion 4975(d) of such Code is amended by deleting
2 the language preceding paragraph (1) and replacing
3 it with the following:

4 “(d) EXEMPTIONS.—Except as provided in sub-
5 section (f)(6), the prohibitions provided in subsection
6 (c)(1) shall not apply to—”.

7 (3) DEFINITION OF INVESTMENT ADVICE.—
8 Subparagraph (B) of subsection 4975(e)(3) of such
9 Code is amended to read as follows:

10 “(B) renders investment advice for a fee or
11 other compensation, direct or indirect, with re-
12 spect to moneys or other property of such plan,
13 or has any authority or responsibility to do so.
14 Investment advice means a recommendation—

15 “(i) as to the advisability of acquiring,
16 holding, disposing, or exchanging securities
17 or other investment property, including a
18 recommendation to take a distribution of
19 benefits or a recommendation as to the in-
20 vestment of securities or other property to
21 be rolled over or otherwise distributed from
22 the plan;

23 “(ii) as to the management of securi-
24 ties or other property, including rec-
25 ommendations as to the management of se-

1 securities or other property to be rolled over
2 or otherwise distributed from the plan; or
3 “(iii) of a person who is also going to
4 receive a fee or other compensation for
5 providing any of the types of advice de-
6 scribed in clause (i) or (ii);

7 *Provided that*, such recommendation is rendered
8 pursuant to a mutual agreement, arrangement,
9 or understanding between such person and the
10 plan, plan fiduciary, or advice recipient that
11 such advice is individualized to the plan and
12 such plan, fiduciary, or advice recipient intends
13 to materially rely on such recommendation in
14 making investment or management decisions
15 with respect to moneys, securities, or other in-
16 vestment property of the plan. A person shall
17 not be considered to be providing investment
18 advice if such recommendation is provided in
19 conjunction with full and fair disclosure to the
20 recipient, which can be written or verbal, that
21 the person is providing or making the rec-
22 ommendation of services or property in its mar-
23 keting, sales, or educational capacity, and that
24 the person is not undertaking to provide impar-
25 tial investment advice or to give advice as a fi-

1 duciary (within the meaning of this subpara-
2 graph). In addition, a person shall not be a fi-
3 duciary under this subparagraph with respect to
4 the terms and conditions of engagement of the
5 person, including the scope of the obligation to
6 provide advice, the products or services with re-
7 spect to which advice is provided and the com-
8 pensation payable to the person, provided the
9 recipient has consented to the terms and condi-
10 tions of the engagement after disclosure of all
11 material aspects of such terms and conditions,
12 including fee disclosure that satisfies subclauses
13 (I), (II), and (III) of paragraph (7)(B)(i). Ex-
14 cept as otherwise provided in subparagraph (D)
15 and notwithstanding subparagraph (E), invest-
16 ment advice shall include a recommendation
17 under this subparagraph provided pursuant to a
18 written acknowledgment of fiduciary status with
19 respect to the provision of such recommenda-
20 tion. For purposes of this subparagraph, ‘prop-
21 erty’ means moneys and investment property,
22 and ‘management of securities’ means exer-
23 cising rights or obligations with respect to secu-
24 rities or other property.”.

1 (4) DEFINITION OF INVESTMENT ADVICE.—
2 Section 4975(e)(3) of such Code is amended by
3 striking the period at the end of subparagraph (C)
4 and inserting a comma and by adding the following
5 new subparagraphs (D) and (E):

6 “(D) The extent of a fiduciary’s obliga-
7 tions as such can be defined and limited pursu-
8 ant to a mutual agreement, arrangement, or
9 understanding between the person and the
10 party engaging the person as a fiduciary to the
11 plan. Such limitations can include limits on
12 scope, timing, and responsibility to provide on-
13 going monitoring or advice services.

14 “(E) A person shall not be deemed to be
15 a fiduciary on account of section 4975(e)(3)(B)
16 if such person meets one or more of the fol-
17 lowing:

18 “(i) COUNTERPARTIES AND SERVICES
19 PROVIDERS.—In such person’s capacity as
20 a counterparty, service provider, or rep-
21 resentative thereof, the person provides ad-
22 vice to a plan fiduciary who is independent
23 of such person and who is independent of
24 the plan sponsor, with respect to an arm’s-
25 length service arrangement, sale, purchase,

1 loan, or bilateral contract between the plan
2 and person, each a ‘transaction’ for pur-
3 poses of this subclause, if, prior to entering
4 into the transaction, the plan fiduciary
5 represents that it understands that the
6 person has a financial interest in the mat-
7 ter, and that the person is not undertaking
8 to provide impartial financial advice or to
9 give advice as a fiduciary (within the
10 meaning of this paragraph); provided such
11 person has not acknowledged in writing
12 that it is acting as a fiduciary (within the
13 meaning of this paragraph) with respect to
14 the transaction.

15 “(ii) SWAP TRANSACTIONS.—The per-
16 son is a counterparty, service provider or
17 representative thereof in connection with a
18 swap or security-based swap, as defined in
19 section 1(a) of the Commodity Exchange
20 Act (7 U.S.C. 1(a)) and section 3(a) of the
21 Securities Exchange Act (15 U.S.C.
22 78c(a)), if: the plan is represented by a fi-
23 duciary independent of the person; the per-
24 son is a swap clearing firm or other service
25 provider in relation to a swap, swap dealer,

1 security-based swap dealer, major swap
2 participant, or major security-based swap
3 participant; the person (if a swap dealer,
4 security-based swap dealer, clearing firm,
5 or other similar service provider) is not
6 acting as an advisor to the plan (within the
7 meaning of section 4s(h) of the Commodity
8 Exchange Act or section 15F(h) of the Se-
9 curities Exchange Act of 1934) in connec-
10 tion with the transaction; and in advance
11 of providing any recommendations with re-
12 spect to the transaction, the person obtains
13 a written representation from the inde-
14 pendent plan fiduciary, that the fiduciary
15 will not rely on recommendations provided
16 by the person.

17 “(iii) EMPLOYEES.—In his or her ca-
18 pacity as an employee of any employer or
19 employee organization sponsoring the plan
20 or an affiliate of such plan sponsor, the
21 person provides the advice (directly or indi-
22 rectly) to the plan, plan fiduciary, partici-
23 pant, or beneficiary, and he or she receives
24 no fee or other compensation, direct or in-
25 direct, in connection with the advice be-

1 yond the employee’s normal compensation
2 for work performed for the employer or
3 employee organization or an affiliate. In
4 such cases, such an employee is not ren-
5 dering investment advice for a fee or other
6 compensation. No inference is intended
7 with respect to whether any other person
8 shall be treated as rendering investment
9 advice for a fee or other compensation.

10 “(iv) PLATFORM PROVIDERS.—The
11 person merely markets and makes available
12 to a plan (including its participants, bene-
13 ficiaries, and fiduciaries (which includes an
14 owner of an individual retirement plan (as
15 defined in section 7701(a)(37))), without
16 regard to the individualized needs of the
17 plan, its participants, or beneficiaries, se-
18 curities or other property through a plat-
19 form or similar mechanism (which may
20 consist of or include one or more annuity
21 contracts) from which a plan fiduciary may
22 select or monitor investment alternatives,
23 including qualified default investment al-
24 ternatives, into which plan participants or
25 beneficiaries may direct the investment of

1 assets held in, or contributed to, their indi-
2 vidual accounts, if the person discloses in
3 writing to the plan fiduciary that the per-
4 son is not undertaking to provide impartial
5 investment advice or to give advice as a fi-
6 duciary (within the meaning of this para-
7 graph) when establishing or maintaining
8 the platform.

9 “(v) SELECTION AND MONITORING AS-
10 SISTANCE.—The person merely identifies
11 investment alternatives that meet objective
12 criteria specified by the plan fiduciary (in-
13 cluding an owner of an individual retire-
14 ment plan (as defined in section
15 7701(a)(37))), participant, or beneficiary
16 (e.g., stated parameters concerning ex-
17 pense ratios, size of fund, type of asset, or
18 credit quality); or merely provides objective
19 financial data and comparisons with inde-
20 pendent benchmarks to the plan fiduciary,
21 participant or beneficiary.

22 “(vi) FINANCIAL REPORTS AND VALU-
23 ATIONS.—The person provides or reports
24 valuation information, but does not rep-
25 resent in writing that it is undertaking to

1 provide such valuation information as a fi-
2 duciary (within the meaning of this sub-
3 section).

4 “(vii) EDUCATION.—The person pro-
5 vides the information—

6 “(I) described in Department of
7 Labor Interpretive Bulletin 96–1 (29
8 C.F.R. 2509.96–1, as in effect on
9 January 1, 2015);

10 “(II) described in Department of
11 Labor Interpretive Bulletin 96–1 (29
12 C.F.R. 2509.96–1, as in effect on
13 January 1, 2015) but for the fact that
14 such education is provided to a plan
15 or plan fiduciary;

16 “(III) described in Department
17 of Labor Interpretive Bulletin 96–1
18 (29 C.F.R. 2509.96–1, as in effect on
19 January 1, 2015) but for the fact that
20 such education is provided to an
21 owner of an individual retirement plan
22 (as defined in section 7701(a)(37));

23 “(IV) to participants and bene-
24 ficiaries regarding the factors to con-
25 sider in deciding whether to elect to

1 receive a distribution from a plan or
2 an individual retirement plan (as de-
3 fined in section 7701(a)(37)) and
4 whether to roll over such distribution
5 to a plan or an individual retirement
6 plan (as defined in section
7 7701(a)(37)); such education can in-
8 clude examples of different distribu-
9 tion and rollover alternatives, so long
10 as all material facts and assumptions
11 on which the examples are based ac-
12 company the examples; or

13 “(V) any additional information
14 treated as education by the Secretary
15 of Labor.”.

16 (5) EXEMPTION TO PRESERVE INVESTOR
17 CHOICE.—Section 4975(d) of such Code is amended
18 by adding at the end thereof the following new para-
19 graph:

20 “(24) with respect to transactions described in
21 section 4975(c)(1) (A)–(F), any transaction or serv-
22 ice in connection with the provision of investment
23 advice described in section 4975(e)(3)(B) if the con-
24 ditions under subparagraphs (A), (B), and (C) are
25 satisfied:

1 “(A) The provision of investment advice
2 with respect to the transaction is subject to
3 subsection (c)(7) or section 404 of title I, sub-
4 title B of the Employee Retirement Income Se-
5 curity Act of 1974 (relating to fiduciary obliga-
6 tions).

7 “(B) The conditions of section 4975(d)(2)
8 are satisfied when otherwise applicable.

9 “(C) With respect to plans subject to sec-
10 tion 404 of title I, subtitle B of the Employee
11 Retirement Income Security Act of 1974, the
12 investment advice may include recommenda-
13 tions that—

14 “(i) are based on a limited range of
15 products, providers, or offerings (including
16 recommendations that include, or are lim-
17 ited only to, proprietary products and pro-
18 viders), where such limits are clearly dis-
19 closed to the advice recipient at any time
20 prior to a transaction based on the rec-
21 ommendation, or

22 “(ii) may result in variable compensa-
23 tion to the person (or its affiliate), such as
24 transaction, services, placement, or other
25 types of compensation that differ by prod-

1 uct or service, where the receipt of such
2 compensation is clearly disclosed to the ad-
3 vice recipient.

4 “(D) For purposes of this paragraph, clear
5 disclosure of variable compensation means noti-
6 fication at any time prior to a transaction based
7 on the person’s recommendation, in a manner
8 calculated to be understood by the average indi-
9 vidual, of the following information, which can
10 be provided in one or more statements or docu-
11 ments:

12 “(i) The person (or its affiliate) may
13 receive varying amounts of fees or other
14 compensation or consideration with respect
15 to recommended transactions.

16 “(ii) The amount of any fee or other
17 compensation or consideration that is di-
18 rectly payable to the person (or its affil-
19 iate) from the plan or advice recipient with
20 respect to recommended transactions, pro-
21 vided that any such amount may be ex-
22 pressed in terms of a monetary amount,
23 formula, percentage of assets, per capita
24 charge, or estimate or range of such com-
25 pensation or consideration.

1 “(iii) A description of the types and
2 ranges of indirect compensation that may
3 be paid to the person (or its affiliate) by
4 any third party in connection with the rec-
5 ommended transaction, provided that any
6 such range may be expressed in terms of
7 a monetary amount, formula, percentage of
8 assets, per capita charge or estimate of
9 such compensation or consideration.

10 “(iv) Upon the advice recipient’s re-
11 quest prior to the transaction, a disclosure
12 of the specific amounts of compensation
13 described in clause (ii) or (iii) that the per-
14 son will receive in connection with the par-
15 ticular transaction, provided that any such
16 amounts may be expressed in terms of a
17 monetary amount, formula, percentage of
18 assets, per capita charge, or estimate of
19 such compensation or consideration.

20 The disclosure requirements described in this
21 subparagraph will not fail to be met solely be-
22 cause the person, acting in good faith and with
23 reasonable diligence, makes an error or omis-
24 sion in disclosing the information specified in
25 this subsection, provided that the person dis-

1 closes the correct information to the advice re-
2 cipient as soon as practicable, but not later
3 than 30 days from the date on which the person
4 knows of such error or omission.”.

5 (6) EFFECTIVE DATE.—The amendments made
6 by this subsection shall apply on or after the 1st day
7 of the 36th month after the date of the enactment
8 of this Act, but the exemption added under section
9 4975(d)(24) of such Code shall be available imme-
10 diately upon enactment of this Act for persons meet-
11 ing its conditions (including the conditions of a best
12 interest recommendation which may not be effective
13 at such time). The Secretary of Labor is prohibited
14 from amending any rules or administrative positions
15 promulgated under section 3(21) of ERISA or sec-
16 tion 4975(e)(3) of such Code (including Department
17 of Labor Interpretive Bulletin 96–1 (29 C.F.R.
18 2509.96–1) and Department of Labor Advisory
19 Opinion 2005–23A) prior to the effective date of this
20 Act, and no such rules or positions promulgated by
21 the Secretary of Labor prior to the date of the en-
22 actment of this Act, but not yet effective or applica-
23 ble, may become effective prior to the effective date
24 of this Act.

1 (7) GRANDFATHERED TRANSACTIONS AND
2 SERVICES.—The amendments made to section
3 4975(e)(3)(B) of such Code by this Act shall not
4 apply to any services if such services—

5 (A) were rendered prior to the effective
6 date of this Act,

7 (B) relate to a transaction entered into
8 prior to the effective date of this Act,

9 (C) were paid for prior to the effective date
10 of this Act, or

11 (D) are not described in subparagraph (A),
12 (B), or (C) but the person performing the serv-
13 ices does not receive more compensation (either
14 as a fixed dollar amount or as a percentage of
15 assets) as a result of the services than the per-
16 son is contractually eligible to receive for such
17 services prior to the effective date of this Act.

18 (b) AMENDMENTS TO THE EMPLOYEE RETIREMENT
19 INCOME SECURITY ACT OF 1974.—

20 (1) DEFINITION OF INVESTMENT ADVICE.—

21 Subparagraph (A) of section 3(21) of the Employee
22 Retirement Security Act of 1974 is amended by
23 amending clause (ii) to read as follows:

24 “(ii) renders investment advice for a
25 fee or other compensation, direct or indi-

1 rect, with respect to moneys or other prop-
2 erty of such plan, or has any authority or
3 responsibility to do so. Investment advice
4 means a recommendation—

5 “(I) as to the advisability of ac-
6 quiring, holding, disposing, or ex-
7 changing securities or other invest-
8 ment property, including a rec-
9 ommendation to take a distribution of
10 benefits or a recommendation as to
11 the investment of securities or other
12 property to be rolled over or otherwise
13 distributed from the plan;

14 “(II) as to the management of
15 securities or other property, including
16 recommendations as to the manage-
17 ment of securities or other property to
18 be rolled over or otherwise distributed
19 from the plan; or

20 “(III) of a person who is also
21 going to receive a fee or other com-
22 pensation for providing any of the
23 types of advice described in subclause
24 (I) or (II);

1 *Provided that*, such recommendation is ren-
2 dered pursuant to a mutual agreement, ar-
3 rangement, or understanding between such
4 person and the plan, plan fiduciary, or ad-
5 vice recipient that such advice is individ-
6 ualized to the plan and such plan, fidu-
7 ciary, or advice recipient intends to materi-
8 ally rely on such recommendation in mak-
9 ing investment or management decisions
10 with respect to moneys, securities, or other
11 investment property of the plan. A person
12 shall not be considered to be providing in-
13 vestment advice if such recommendation is
14 provided in conjunction with full and fair
15 disclosure to the recipient, which can be
16 written or verbal, that the person is pro-
17 viding or making the recommendation of
18 services or property in its marketing, sales,
19 or educational capacity, and that the per-
20 son is not undertaking to provide impartial
21 investment advice or to give advice as a fi-
22 duciary (within the meaning of this sub-
23 paragraph). In addition, a person shall not
24 be a fiduciary under this subparagraph
25 with respect to the terms and conditions of

1 engagement of the person, including the
2 scope of the obligation to provide advice,
3 the products or services with respect to
4 which advice is provided and the com-
5 pensation payable to the person, provided
6 the recipient has consented to the terms
7 and conditions of the engagement after
8 disclosure of all material aspects of such
9 terms and conditions, including fee disclo-
10 sure that satisfies clauses (i), (ii), and (iii)
11 of section 408(b)(21)(C). Except as other-
12 wise provided in subparagraph (C) and
13 notwithstanding subparagraph (D), invest-
14 ment advice shall include a recommenda-
15 tion under this subparagraph provided pur-
16 suant to a written acknowledgment of fidu-
17 ciary status with respect to the provision
18 of such recommendation. For purposes of
19 this clause, ‘property’ means moneys and
20 investment property, and ‘management of
21 securities’ means exercising rights or obli-
22 gations with respect to securities or other
23 property.”.

1 (2) DEFINITION OF INVESTMENT ADVICE.—
2 Subsection 3(21) of such Act is amended by adding
3 the following new subparagraphs (C) and (D):

4 “(C) The extent of a fiduciary’s obligations
5 as such can be defined and limited pursuant to
6 a mutual agreement, arrangement, or under-
7 standing between the person and the party en-
8 gaging the person as a fiduciary to the plan.
9 Such limitations can include limits on scope,
10 timing, and responsibility to provide ongoing
11 monitoring or advice services.

12 “(D) A person shall not be deemed to be
13 a fiduciary on account of subparagraph (A)(ii)
14 if such person meets one or more of the fol-
15 lowing:

16 “(i) COUNTERPARTIES AND SERVICES
17 PROVIDERS.—In such person’s capacity as
18 a counterparty, service provider, or rep-
19 resentative thereof, the person provides ad-
20 vice to a plan fiduciary who is independent
21 of such person and who is independent of
22 the plan sponsor, with respect to an arm’s-
23 length service arrangement, sale, purchase,
24 loan, or bilateral contract between the plan
25 and person, each a ‘transaction’ for pur-

1 poses of this clause if, prior to entering
2 into the transaction, the plan fiduciary
3 represents that it understands that the
4 person has a financial interest in the mat-
5 ter, and that the person is not undertaking
6 to provide impartial financial advice or to
7 give advice as a fiduciary (within the
8 meaning of this subsection); provided such
9 person has not acknowledged in writing
10 that it is acting as a fiduciary (within the
11 meaning of this subsection) with respect to
12 the transaction.

13 “(ii) SWAP TRANSACTIONS.—The per-
14 son is a counterparty, service provider or
15 representative thereof in connection with a
16 swap or security-based swap, as defined in
17 section 1(a) of the Commodity Exchange
18 Act (7 U.S.C. 1(a)) and section 3(a) of the
19 Securities Exchange Act (15 U.S.C.
20 78c(a)), if: the plan is represented by a fi-
21 duciary independent of the person; the per-
22 son is a swap clearing firm or other service
23 provider in relation to a swap, swap dealer,
24 security-based swap dealer, major swap
25 participant, or major security-based swap

1 participant; the person (if a swap dealer,
2 security-based swap dealer, clearing firm,
3 or other similar service provider) is not
4 acting as an advisor to the plan (within the
5 meaning of section 4s(h) of the Commodity
6 Exchange Act or section 15F(h) of the Se-
7 curities Exchange Act of 1934) in connec-
8 tion with the transaction; and in advance
9 of providing any recommendations with re-
10 spect to the transaction, the person obtains
11 a written representation from the inde-
12 pendent plan fiduciary, that the fiduciary
13 will not rely on recommendations provided
14 by the person.

15 “(iii) EMPLOYEES.—In his or her ca-
16 pacity as an employee of any employer or
17 employee organization sponsoring the plan
18 or an affiliate of such plan sponsor, the
19 person provides the advice (directly or indi-
20 rectly) to the plan, plan fiduciary, partici-
21 pant, or beneficiary, and he or she receives
22 no fee or other compensation, direct or in-
23 direct, in connection with the advice be-
24 yond the employee’s normal compensation
25 for work performed for the employer or

1 employee organization or an affiliate. In
2 such cases, such an employee is not ren-
3 dering investment advice for a fee or other
4 compensation. No inference is intended
5 with respect to whether any other person
6 shall be treated as rendering investment
7 advice for a fee or other compensation.

8 “(iv) PLATFORM PROVIDERS.—The
9 person merely markets and makes available
10 to a plan (including its participants, bene-
11 ficiaries, and fiduciaries), without regard
12 to the individualized needs of the plan, its
13 participants, or beneficiaries, securities or
14 other property through a platform or simi-
15 lar mechanism (which may consist of or in-
16 clude one or more annuity contracts) from
17 which a plan fiduciary may select or mon-
18 itor investment alternatives, including
19 qualified default investment alternatives,
20 into which plan participants or bene-
21 ficiaries may direct the investment of as-
22 sets held in, or contributed to, their indi-
23 vidual accounts, if the person discloses in
24 writing to the plan fiduciary that the per-
25 son is not undertaking to provide impartial

1 investment advice or to give advice as a fi-
2 duciary (within the meaning of this sub-
3 section) when establishing or maintaining
4 the platform.

5 “(v) SELECTION AND MONITORING AS-
6 SISTANCE.—The person merely identifies
7 investment alternatives that meet objective
8 criteria specified by the plan fiduciary,
9 participant, or beneficiary (e.g., stated pa-
10 rameters concerning expense ratios, size of
11 fund, type of asset, or credit quality); or
12 merely provides objective financial data
13 and comparisons with independent bench-
14 marks to the plan fiduciary, participant or
15 beneficiary.

16 “(vi) FINANCIAL REPORTS AND VALU-
17 ATIONS.—The person provides or reports
18 valuation information, but does not rep-
19 resent in writing that it is undertaking to
20 provide such valuation information as a fi-
21 duciary (within the meaning of this sub-
22 section).

23 “(vii) EDUCATION.—The person pro-
24 vides the information—

1 “(I) described in Department of
2 Labor Interpretive Bulletin 96–1 (29
3 C.F.R. 2509.96–1, as in effect on
4 January 1, 2015);

5 “(II) described in Department of
6 Labor Interpretive Bulletin 96–1 (29
7 C.F.R. 2509.96–1, as in effect on
8 January 1, 2015) but for the fact that
9 such education is provided to a plan
10 or plan fiduciary;

11 “(III) to participants and bene-
12 ficiaries regarding the factors to con-
13 sider in deciding whether to elect to
14 receive a distribution from a plan or
15 an individual retirement plan (as de-
16 fined in section 7701(a)(37) of the In-
17 ternal Revenue Code of 1986) and
18 whether to roll over such distribution
19 to a plan or an individual retirement
20 plan (as defined in section
21 7701(a)(37) of the Internal Revenue
22 Code of 1986); such education can in-
23 clude examples of different distribu-
24 tion and rollover alternatives, so long
25 as all material facts and assumptions

1 on which the examples are based ac-
2 company the examples; or

3 “(IV) any additional information
4 treated as education by the Sec-
5 retary.”.

6 (3) EXEMPTION TO PRESERVE INVESTOR
7 CHOICE.—Section 408(b) of such Act is amended by
8 adding at the end thereof the following new para-
9 graph:

10 “(21) with respect to transactions described in
11 sections 406(a) and 406(b), any transaction or serv-
12 ice in connection with the provision of investment
13 advice described in section 3(21)(A)(ii) if the condi-
14 tions under subparagraphs (A), (B), and (C) are
15 satisfied:

16 “(A) The provision of investment advice
17 with respect to the transaction is subject to sec-
18 tion 404.

19 “(B) The conditions of section 408(b)(2)
20 are satisfied when otherwise applicable.

21 “(C) The investment advice may include
22 recommendations that—

23 “(i) are based on a limited range of
24 products, providers, or offerings (including
25 recommendations that include, or are lim-

1 ited only to, proprietary products and pro-
2 viders), where such limits are clearly dis-
3 closed to the advice recipient at any time
4 prior to a transaction based on the rec-
5 ommendation, or

6 “(ii) may result in variable compensa-
7 tion to the person (or its affiliate), such as
8 transaction, services, placement, or other
9 types of compensation that differ by prod-
10 uct or service, where the receipt of such
11 compensation is clearly disclosed to the ad-
12 vice recipient.

13 “(D) For purposes of this paragraph, clear
14 disclosure of variable compensation means noti-
15 fication at any time prior to a transaction based
16 on the person’s recommendation, in a manner
17 calculated to be understood by the average indi-
18 vidual, of the following information, which can
19 be provided in one or more statements or docu-
20 ments:

21 “(i) The person (or its affiliate) may
22 receive varying amounts of fees or other
23 compensation or consideration with respect
24 to recommended transactions.

1 “(ii) The amount of any fee or other
2 compensation or consideration that is di-
3 rectly payable to the person (or its affil-
4 iate) from the plan or advice recipient with
5 respect to recommended transactions, pro-
6 vided that any such amount may be ex-
7 pressed in terms of a monetary amount,
8 formula, percentage of assets, per capita
9 charge, or estimate or range of such com-
10 pensation or consideration.

11 “(iii) A description of the types and
12 ranges of indirect compensation that may
13 be paid to the person (or its affiliate) by
14 any third party in connection with the rec-
15 ommended transaction, provided that any
16 such ranges may be expressed in terms of
17 a monetary amount, formula, percentage of
18 assets, per capita charge or estimate of
19 such compensation or consideration.

20 “(iv) Upon the advice recipient’s re-
21 quest prior to the transaction, a disclosure
22 of the specific amounts of compensation
23 described in clauses (ii) and (iii) that the
24 person will receive in connection with the
25 particular transaction, provided that any

1 such amounts may be expressed in terms
2 of a monetary amount, formula, percentage
3 of assets, per capita charge, or estimate of
4 such compensation or consideration.

5 The disclosure requirements described in this
6 paragraph will not fail to be met solely because
7 the person, acting in good faith and with rea-
8 sonable diligence, makes an error or omission in
9 disclosing the information specified in this sub-
10 section, provided that the person discloses the
11 correct information to the advice recipient as
12 soon as practicable, but not later than 30 days
13 from the date on which the person knows of
14 such error or omission.”.

15 (4) EFFECTIVE DATE.—The amendments made
16 by this subsection shall apply on or after the 1st day
17 of the 36th month after the date of the enactment
18 of this Act, but the exemption added under section
19 408(b)(21) of the Employee Retirement Security Act
20 of 1974 shall be available immediately upon enact-
21 ment of this Act for persons meeting its conditions
22 (including the conditions of a best interest rec-
23 ommendation which may not be effective at such
24 time). The Secretary of Labor is prohibited from
25 amending any rules or administrative positions pro-

1 mulgated under section 3(21) of ERISA or section
2 4975(e)(3) of the Internal Revenue Code of 1986
3 (including Department of Labor Interpretive Bul-
4 letin 96-1 (29 C.F.R. 2509.96-1) and Department
5 of Labor Advisory Opinion 2005-23A) prior to the
6 effective date of this Act, and no such rules or posi-
7 tions promulgated by the Secretary of Labor prior to
8 the date of the enactment of this Act, but not yet
9 effective or applicable, may become effective prior to
10 the effective date of this Act.

11 (5) GRANDFATHERED TRANSACTIONS AND
12 SERVICES.—The amendments made to section
13 3(21)(A)(ii) by this Act shall not apply to any serv-
14 ices if such services—

15 (A) were rendered prior to the effective
16 date of this Act,

17 (B) relate to a transaction entered into
18 prior to the effective date of this Act,

19 (C) were paid for prior to the effective date
20 of this Act, or

21 (D) are not described in subparagraph (A),
22 (B), or (C) but the person performing the serv-
23 ices does not receive more compensation (either
24 as a fixed dollar amount or as a percentage of
25 assets) as a result of the services than the per-

1 son is contractually eligible to receive for such
2 services prior to the effective date of this Act.

3 **SEC. 4. REGULATIONS.**

4 The Secretary of the Treasury and the Secretary of
5 Labor shall make rules, in accordance with subchapter II
6 of chapter 5 of title 5, United States Code, to carry out
7 this Act and the amendments made by this Act.

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