

115TH CONGRESS
1ST SESSION

S. 1321

To amend the Employee Retirement Income Security Act of 1974 to ensure that retirement investors receive advice in their best interests, and for other purposes.

IN THE SENATE OF THE UNITED STATES

JUNE 8, 2017

Mr. ISAKSON (for himself, Mr. ALEXANDER, Mr. ENZI, Mr. HATCH, Mr. ROBERTS, Mr. SCOTT, and Mr. YOUNG) introduced the following bill; which was read twice and referred to the Committee on Health, Education, Labor, and Pensions

A BILL

To amend the Employee Retirement Income Security Act of 1974 to ensure that retirement investors receive advice in their best interests, and for other purposes.

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 “Affordable Retirement
5 Advice Protection Act”.

6 **SEC. 2. PURPOSE.**

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

1 (1) provide advice that is impermissible under
 2 the prohibited transaction provisions under section
 3 406 of the Employee Retirement Income Security
 4 Act of 1974, or

5 (2) breach the best interest standard for the
 6 provision of investment advice,
 7 are subject to liability under the Employee Retirement In-
 8 come Security Act of 1974.

9 **SEC. 3. RULES RELATING TO THE PROVISION OF INVEST-**
 10 **MENT ADVICE.**

11 (a) IN GENERAL.—

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

16 “(C)(i) For purposes of clause (ii) of subparagraph
 17 (A), the term ‘investment advice’ means a recommenda-
 18 tion that—

19 “(I) relates to—

20 “(aa) the advisability of acquiring, holding,
 21 disposing, or exchanging any moneys or other
 22 property of a plan by the plan, plan partici-
 23 pants, or plan beneficiaries, including any rec-
 24 ommendation whether to take a distribution of
 25 benefits from such plan or any recommendation

1 relating to the investment of any moneys or
2 other property of such plan to be rolled over or
3 otherwise distributed from such plan;

4 “(bb) the management of moneys or other
5 property of such plan, including recommenda-
6 tions relating to the management of moneys or
7 other property to be rolled over or otherwise
8 distributed from such plan; or

9 “(cc) the advisability of retaining or ceas-
10 ing to retain a person who would receive a fee
11 or other compensation for providing any of the
12 types of advice described in this subclause; and
13 “(II) is rendered pursuant to—

14 “(aa) a written acknowledgment of the ob-
15 ligation of the advisor to comply with section
16 404 with respect to the provision of such rec-
17 ommendation; or

18 “(bb) a mutual agreement, arrangement,
19 or understanding, which may include limitations
20 on scope, timing, and responsibility to provide
21 ongoing monitoring or advice services, between
22 the person making such recommendation and
23 the plan that such recommendation is individ-
24 ualized to the plan and such plan intends to
25 materially rely on such recommendation in

1 making investment or management decisions
2 with respect to any moneys or other property of
3 such plan.

4 “(ii) For purposes of clause (i)(II)(bb), any dis-
5 claimer of a mutual agreement, arrangement, or under-
6 standing shall only state the following: ‘This information
7 is not individualized to you, and there is no intent for you
8 to materially rely on this information in making invest-
9 ment or management decisions.’. Such disclaimer shall not
10 be effective unless such disclaimer is in writing and is
11 communicated in a clear and prominent manner and an
12 objective person would reasonably conclude that, based on
13 all the facts and circumstances, there was not a mutual
14 agreement, arrangement, or understanding described in
15 clause (i)(II)(bb).

16 “(iii) For purposes of clause (i)(II)(bb), information
17 shall not be considered to be a recommendation made pur-
18 suant to a mutual agreement, arrangement, or under-
19 standing if such information contains the disclaimer re-
20 quired by clause (ii) and—

21 “(I) it is provided in conjunction with full and
22 fair disclosure in writing to a plan, plan participant,
23 or beneficiary that the person providing the informa-
24 tion is doing so in its marketing or sales capacity,
25 including any information regarding the terms and

1 conditions of the engagement of the person providing
2 the information, and that the person is not intending
3 to provide investment advice within the meaning of
4 this subparagraph or to otherwise act within and
5 under the obligations of the best interest standard
6 as described in this subparagraph;

7 “(II) the person providing the information is a
8 counterparty or service provider to the plan in con-
9 nection with any transaction based on the informa-
10 tion (including a service arrangement, sale, pur-
11 chase, loan, bilateral contract, swap (as defined in
12 section 1a of the Commodity Exchange Act (7
13 U.S.C. 1a)), or security-based swap (as defined in
14 section 3(a) of the Securities Exchange Act (15
15 U.S.C. 78c(a))))), but only if—

16 “(aa) the plan is represented, in connection
17 with such transaction, by a plan fiduciary who
18 is independent of the person providing the in-
19 formation, and, except in the case of a swap or
20 security-based swap, independent of the plan
21 sponsor; and

22 “(bb) prior to such transaction, the inde-
23 pendent plan fiduciary represents in writing to
24 the person providing the information that it is
25 aware that the person has a financial interest

1 in the transaction and that it has determined
2 that the person is not intending to provide in-
3 vestment advice within the meaning of this sub-
4 paragraph or to otherwise act as a fiduciary to
5 the plan subject to section 404;

6 “(III) the person providing the information is
7 an employee of any sponsoring employer or employee
8 organization who provides the information to the
9 plan for no fee or other compensation other than the
10 employee’s normal compensation;

11 “(IV) the person providing the information dis-
12 closes in writing to the plan fiduciary that the per-
13 son is not undertaking to provide investment advice
14 as a fiduciary to the plan subject to section 404 and
15 the information consists solely of—

16 “(aa) making available to the plan, without
17 regard to the individualized needs of the plan,
18 securities or other property through a platform
19 or similar mechanism from which a plan fidu-
20 ciary may select or monitor investment alter-
21 natives, including qualified default investment
22 alternatives, into which plan participants or
23 beneficiaries may direct the investment of as-
24 sets held in, or contributed to, their individual
25 accounts; or

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

3 “(AA) identifying investment alter-
4 natives that meet objective criteria speci-
5 fied by the plan, such as criteria con-
6 cerning expense ratios, fund sizes, types of
7 asset, or credit quality; or

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

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

13 “(VI) the information consists solely of—

14 “(aa) information described in Department
15 of Labor Interpretive Bulletin 96–1 (29 C.F.R.
16 2509.96–1, as in effect on January 1, 2015),
17 regardless of whether such education is pro-
18 vided to a plan or plan fiduciary or a partici-
19 pant or beneficiary;

20 “(bb) information provided to participants
21 or beneficiaries regarding the factors to con-
22 sider in deciding whether to elect to receive a
23 distribution from a plan or an individual retire-
24 ment plan (as defined in section 7701(a)(37) of
25 the Internal Revenue Code of 1986) and wheth-

er 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 and rollover 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 paragraph (2)) for such investment advice.

“(ii) If the investment advice is based on a limited range of investment options (which

1 may consist, in whole or in part, of proprietary
2 products), such limitations, including a clearly
3 stated notice that the same or similar invest-
4 ments may be available at a different cost
5 (greater or lesser) from other sources, shall be
6 clearly disclosed to the advice recipient prior to
7 any transaction based on the investment advice.
8 The notice shall only state the following: ‘The
9 same or similar investments may be available at
10 a different cost (greater or lesser) from other
11 sources.’.

12 “(iii) If the investment advice may result
13 in variable compensation to the person pro-
14 viding the investment advice (or any affiliate of
15 such person), the receipt of such compensation,
16 including a clearly stated notice that the same
17 or similar investments may be available at a
18 different cost (greater or lesser) from other
19 sources, shall be clearly disclosed to the advice
20 recipient. The notice shall only state the fol-
21 lowing: ‘The same or similar investments may
22 be available at a different cost (greater or less-
23 er) from other sources.’. For purposes of this
24 subparagraph, clear disclosure of variable com-
25 pensation means notification prior to any trans-

1 action based on the recommendation, in a man-
2 ner calculated to be understood by the average
3 individual, of the following:

4 “(I) A notice that the person pro-
5 viding the recommendation (or its affiliate)
6 may receive varying amounts of fees or
7 other compensation with respect to such
8 transaction.

9 “(II) A description of any fee or other
10 compensation that is directly payable to
11 the person (or its affiliate) from the advice
12 recipient with respect to such transaction
13 (expressed as an amount, formula, percent-
14 age of assets, per capita charge, or esti-
15 mate or range of such compensation).

16 “(III) A description of the types and
17 ranges of any indirect compensation that
18 may be paid to the person (or its affiliate)
19 by any third party in connection with such
20 transaction (expressed as an amount, for-
21 mula, percentage of assets, per capita
22 charge, or estimate of such ranges of com-
23 pensation).

24 “(IV) Upon request of the advice re-
25 cipient, a disclosure of the specific

1 amounts of compensation described in
2 clause (iii) that the person will receive in
3 connection with the particular transaction
4 (expressed as an amount, formula, percent-
5 age of assets, per capita charge, or esti-
6 mate of such compensation).

7 “(B) No recommendation will fail to satisfy the
8 conditions described in clauses (i) through (iii) of
9 subparagraph (A) solely because the person, acting
10 in good faith and with reasonable diligence, makes
11 an error or omission in disclosing the information
12 specified in such clauses, provided that the person
13 discloses the correct information to the advice recipi-
14 ent as soon as practicable, but not later than 30
15 days from the date on which the person knows of
16 such error or omission.

17 “(C) For purposes of this paragraph, the term
18 ‘affiliate’ has the meaning given in subsection
19 (g)(11)(B).”.

20 (b) EFFECTIVE DATE.—The amendments made by
21 subsection (a) shall take effect on the date of the enact-
22 ment of this Act and shall apply with respect to commu-
23 nications provided or recommendations made on or after
24 2 years after such date.

1 (c) GRANDFATHERED TRANSACTIONS AND SERV-
2 ICES.—The amendments made by subsection (a) shall not
3 apply to any service or transaction rendered, entered into,
4 or for which a person has been compensated prior to the
5 date on which the amendments become effective under
6 subsection (b).

7 (d) TRANSITION.—Until such time as regulations or
8 other guidance are issued to carry out the amendments
9 made by subsection (a), a plan or a fiduciary shall be
10 treated as meeting the requirements of such amendments
11 if the plan or fiduciary, as the case may be, complies with
12 a reasonable good faith interpretation of such amend-
13 ments.

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