

112TH CONGRESS
1ST SESSION

H. R. 3045

To amend the Employee Retirement Income Security Act of 1974, the Commodity Exchange Act, and the Securities Exchange Act of 1934 to ensure that pension plans can use swaps to hedge risks, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

SEPTEMBER 23, 2011

Mr. CANSECO (for himself and Mr. GARRETT) introduced the following bill; which was referred to the Committee on Agriculture, and in addition to the Committees on Education and the Workforce and Financial Services, 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 Employee Retirement Income Security Act of 1974, the Commodity Exchange Act, and the Securities Exchange Act of 1934 to ensure that pension plans can use swaps to hedge risks, 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 Income
5 Protection Act of 2011”.

1 **SEC. 2. CLARIFICATION OF THE DEFINITION OF FIDU-**
2 **CIARY.**

3 Section 3(21) of the Employee Retirement Income
4 Security Act of 1974 (29 U.S.C. 1002(21)) is amended—

5 (1) in subparagraph (A), by striking “subpara-
6 graph (B)” and inserting “subparagraphs (B) and
7 (C)”;

8 (2) by adding at the end the following subpara-
9 graph:

10 “(C) No person shall be a fiduciary with respect
11 to a plan by reason of any service, act, or duty that
12 such person is required to perform with respect to
13 such plan by reason of section 4s(h) of the Com-
14modity Exchange Act, section 15F(h) of the Securi-
15ties Exchange Act of 1934, any rule, regulation, or
16standard prescribed pursuant to such sections, or
17any other Federal law, rule, or regulation.”.

18 **SEC. 3. CLARIFICATION OF THE DEFINITION OF SPECIAL**
19 **ENTITY AND REMOVAL OF ERISA PLANS.**

20 (a) AMENDMENT TO THE CEA.—Section 4s(h)(2)(C)
21 of the Commodity Exchange Act (7 U.S.C. 6s(h)(2)(C))
22 is amended—

23 (1) by striking “For purposes” and inserting
24 “(i) For purposes”;

1 (2) by striking clause (iii) and redesignating
 2 clauses (i), (ii), (iv), and (v) as subclauses (I), (II),
 3 (III) and (IV), respectively; and

4 (3) by adding at the end the following:

5 “(ii) Such term shall not include any col-
 6 lective investment vehicle in which one or more
 7 special entities invest.”.

8 (b) AMENDMENT TO THE 1934 ACT.—Section
 9 15F(h)(2)(C) of the Securities Exchange Act of 1934 (15
 10 U.S.C. 78o–10(h)(2)(C)) is amended—

11 (1) by striking “For purposes” and inserting
 12 “(i) For purposes”;

13 (2) by striking clause (iii) and redesignating
 14 clauses (i), (ii), (iv), and (v) as subclauses (I), (II),
 15 (III) and (IV), respectively; and

16 (3) by adding at the end the following:

17 “(ii) Such term shall not include any col-
 18 lective investment vehicle in which one or more
 19 special entities invest.”.

20 **SEC. 4. CONFORMING AMENDMENTS TO COUNTERPARTY**
 21 **REQUIREMENTS.**

22 (a) AMENDMENT TO THE CEA.—Section
 23 4s(h)(5)(A)(i) of the Commodity Exchange Act (7 U.S.C.
 24 6s(h)(5)(A)(i)) is amended—

1 (1) by inserting “and” after the semicolon in
2 subclause (V); and

3 (2) by striking subclause (VII).

4 (b) AMENDMENT TO THE 1934 ACT.—Section
5 15F(h)(5)(A)(i) of the Securities Exchange Act of 1934
6 (15 U.S.C. 78o–10(h)(5)(A)(i)) is amended—

7 (1) by inserting “and” after the semicolon in
8 subclause (V); and

9 (2) by striking subclause (VII).

10 **SEC. 5. CLARIFICATION OF THE DEFINITION OF ADVISOR.**

11 (a) AMENDMENT TO THE CEA.—Section 4s(h)(4) of
12 the Commodity Exchange Act (7 U.S.C. 6s(h)(4)) is
13 amended—

14 (1) in subparagraph (B), by adding at the end
15 the following: “The duty of a swap dealer to act in
16 the best interests of a Special Entity shall not be
17 construed to be a fiduciary standard under Federal
18 or State Law.”; and

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

20 “(D) RULE OF CONSTRUCTION.—A swap
21 dealer will not be treated as an advisor to a
22 Special Entity if—

23 “(i) the Special Entity represents in
24 writing that—

1 “(I) the Special Entity will not
2 rely on recommendations provided by
3 the swap dealer; and

4 “(II) the Special Entity will rely
5 on advice from an independent rep-
6 resentative as described in paragraph
7 (5); and

8 “(ii) the swap dealer discloses to the
9 Special Entity that it is not undertaking to
10 act in the best interests of the Special En-
11 tity, as otherwise required by this para-
12 graph.

13 No swap dealer shall be considered to act as an
14 advisor to a Special Entity solely by reason of
15 providing information to an independent rep-
16 resentative described in paragraph (5)(D) of a
17 Special Entity.”.

18 (b) AMENDMENT TO THE 1934 ACT.—Section
19 15F(h)(4)(B) of the Securities Exchange Act of 1934 (15
20 U.S.C. 78o–10(h)(4)(B)) is amended—

21 (1) in subparagraph (B), by adding at the end
22 the following: “The duty of a security-based swap
23 dealer to act in the best interests of a Special Entity
24 shall not be construed to be a fiduciary standard
25 under Federal or State Law.”; and

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

2 “(D) RULE OF CONSTRUCTION.—A secu-
3 rity-based swap dealer will not be treated as an
4 advisor to a Special Entity if—

5 “(i) the Special Entity represents in
6 writing that—

7 “(I) the Special Entity will not
8 rely on recommendations provided by
9 the security-based swap dealer; and

10 “(II) the Special Entity will rely
11 on advice from an independent rep-
12 resentative as described in paragraph
13 (5); and

14 “(ii) the security-based swap dealer
15 discloses to the Special Entity that it is
16 not undertaking to act in the best interests
17 of the Special Entity, as otherwise required
18 by this paragraph.

19 No security-based swap dealer shall be consid-
20 ered to act as an advisor to a Special Entity
21 solely by reason of providing information to an
22 independent representative described in para-
23 graph (5)(D) of a Special Entity.”.

1 **SEC. 6. CLARIFICATION OF THE DEFINITION OF INDE-**
2 **PENDENT REPRESENTATIVES.**

3 (a) AMENDMENT TO THE CEA.—Section 4s(h)(5) of
4 the Commodity Exchange Act (7 U.S.C. 6s(h)(5)) is
5 amended—

6 (1) in subparagraph (A)(ii) by striking “; and”
7 and inserting a period;

8 (2) in subparagraph (B), by striking “the Com-
9 mission” and inserting “The Commission”;

10 (3) by adding at the end the following subpara-
11 graphs:

12 “(C) A representative of a Special Entity
13 will be considered to be independent of a swap
14 dealer if—

15 “(i) the representative is not an asso-
16 ciated person of the swap dealer within the
17 meaning of section 1a(4); and

18 “(ii) no more than 10 percent of the
19 gross revenues of the representative are de-
20 rived from the swap dealer.

21 “(D) Each of the requirements of this
22 paragraph shall be considered to be met if the
23 Special Entity represents to the swap dealer
24 that it is represented by—

1 “(i) an entity registered as an invest-
2 ment adviser under the Investment Advis-
3 ers Act of 1940;

4 “(ii) a commodity trading adviser as
5 defined in section 1a(12);

6 “(iii) a municipal advisor as defined
7 in section 15B(e)(4) of the Securities Ex-
8 change Act of 1934; or

9 “(iv) an advisor certified by the Na-
10 tional Futures Association.”.

11 (b) AMENDMENT TO THE 1934 ACT.—Section
12 15F(h)(5) of the Securities Exchange Act of 1934 (15
13 U.S.C. 78o–10(h)(5)) is amended by adding at the end
14 the following subparagraphs:

15 “(C) INDEPENDENCE.—A representative of
16 a Special Entity will be considered to be inde-
17 pendent of a security-based swap dealer if—

18 “(i) the representative is not an asso-
19 ciated person of the security-based swap
20 dealer within the meaning of section 1a(4)
21 of the Commodity Exchange Act; and

22 “(ii) no more than 10 percent of the
23 gross revenues of the representative are de-
24 rived from the security-based swap dealer.

1 “(D) RULE OF CONSTRUCTION.—Each of
2 the requirements of this paragraph shall be con-
3 sidered to be met if the Special Entity rep-
4 resents to the security-based swap dealer that it
5 is represented by—

6 “(i) an entity registered as an invest-
7 ment adviser under the Investment Advis-
8 ers Act of 1940;

9 “(ii) a commodity trading adviser as
10 defined in section 1a(12) of the Com-
11 modity Exchange Act;

12 “(iii) a municipal advisor as defined
13 in section 15B(e)(4); or

14 “(iv) an advisor certified by the Fi-
15 nancial Industry Regulatory Authority.”.

16 **SEC. 7. AMENDMENT TO THE DEFINITION OF COMMODITY**
17 **TRADING ADVISOR.**

18 Section 1a(12)(B)(iii) of the Commodity Exchange
19 Act (7 U.S.C. 1a(12)(B)(iii)) is amended by striking “or
20 futures commission merchant” and inserting “, futures
21 commission merchant, or swap dealer”.

22 **SEC. 8. EFFECTIVE DATE.**

23 (a) IN GENERAL.—The amendments made by sec-
24 tions 3 through 7 to the respective provisions of the Com-
25 modity Exchange Act and the Securities Exchange Act of

1 1934 shall take effect as if included in the sections of the
2 Dodd-Frank Wall Street Reform and Consumer Protec-
3 tion Act that added such respective provisions to such
4 Acts.

5 (b) ERISA AMENDMENTS.—The amendment made
6 by section 2 of this Act shall take effect as if enacted on
7 the date of enactment of the Dodd-Frank Wall Street Re-
8 form and Consumer Protection Act.

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