

116TH CONGRESS  
1ST SESSION

**S.** \_\_\_\_\_

To amend the Internal Revenue Code of 1986 to modify nondiscrimination rules to protect older, longer service participants in retirement plans.

---

IN THE SENATE OF THE UNITED STATES

Mr. CARDIN (for himself and Mr. PORTMAN) introduced the following bill; which was read twice and referred to the Committee on

---

**A BILL**

To amend the Internal Revenue Code of 1986 to modify nondiscrimination rules to protect older, longer service participants in retirement plans.

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 Preservation Act of 2019”.

1 **SEC. 2. MODIFICATION OF NONDISCRIMINATION RULES TO**  
2 **PROTECT OLDER, LONGER SERVICE PARTICI-**  
3 **PANTS.**

4 (a) IN GENERAL.—Section 401 of the Internal Rev-  
5 enue Code of 1986 is amended—

6 (1) by redesignating subsection (o) as sub-  
7 section (p); and

8 (2) by inserting after subsection (n) the fol-  
9 lowing new subsection:

10 “(o) SPECIAL RULES FOR APPLYING NON-  
11 DISCRIMINATION RULES TO PROTECT OLDER, LONGER  
12 SERVICE AND GRANDFATHERED PARTICIPANTS.—

13 “(1) TESTING OF DEFINED BENEFIT PLANS  
14 WITH CLOSED CLASSES OF PARTICIPANTS.—

15 “(A) BENEFITS, RIGHTS, OR FEATURES  
16 PROVIDED TO CLOSED CLASSES.—A defined  
17 benefit plan which provides benefits, rights, or  
18 features to a closed class of participants shall  
19 not fail to satisfy the requirements of sub-  
20 section (a)(4) by reason of the composition of  
21 such closed class or the benefits, rights, or fea-  
22 tures provided to such closed class, if—

23 “(i) for the plan year as of which the  
24 class closes and the 2 succeeding plan  
25 years, such benefits, rights, and features  
26 satisfy the requirements of subsection

1 (a)(4) (without regard to this subpara-  
2 graph but taking into account the rules of  
3 subparagraph (I)),

4 “(ii) after the date as of which the  
5 class was closed, any plan amendment  
6 which modifies the closed class or the ben-  
7 efits, rights, and features provided to such  
8 closed class does not discriminate signifi-  
9 cantly in favor of highly compensated em-  
10 ployees, and

11 “(iii) the class was closed before April  
12 5, 2017, or the plan is described in sub-  
13 paragraph (C).

14 “(B) AGGREGATE TESTING WITH DEFINED  
15 CONTRIBUTION PLANS PERMITTED ON A BENE-  
16 FITS BASIS.—

17 “(i) IN GENERAL.—For purposes of  
18 determining compliance with subsection  
19 (a)(4) and section 410(b), a defined benefit  
20 plan described in clause (iii) may be aggre-  
21 gated and tested on a benefits basis with  
22 1 or more defined contribution plans, in-  
23 cluding with the portion of 1 or more de-  
24 fined contribution plans which—

1                   “(I) provides matching contribu-  
2                   tions (as defined in subsection  
3                   (m)(4)(A)),

4                   “(II) provides annuity contracts  
5                   described in section 403(b) which are  
6                   purchased with matching contribu-  
7                   tions or nonelective contributions, or

8                   “(III) consists of an employee  
9                   stock ownership plan (within the  
10                  meaning of section 4975(e)(7)) or a  
11                  tax credit employee stock ownership  
12                  plan (within the meaning of section  
13                  409(a)).

14                  “(ii) SPECIAL RULES FOR MATCHING  
15                  CONTRIBUTIONS.—For purposes of clause  
16                  (i), if a defined benefit plan is aggregated  
17                  with a portion of a defined contribution  
18                  plan providing matching contributions—

19                  “(I) such defined benefit plan  
20                  must also be aggregated with any por-  
21                  tion of such defined contribution plan  
22                  which provides elective deferrals de-  
23                  scribed in subparagraph (A) or (C) of  
24                  section 402(g)(3), and

1                   “(II) such matching contribu-  
2                   tions shall be treated in the same  
3                   manner as nonelective contributions,  
4                   including for purposes of applying the  
5                   rules of subsection (l).

6                   “(iii) PLANS DESCRIBED.—A defined  
7                   benefit plan is described in this clause if—

8                   “(I) the plan provides benefits to  
9                   a closed class of participants,

10                   “(II) for the plan year as of  
11                   which the class closes and the 2 suc-  
12                   ceeding plan years, the plan satisfies  
13                   the requirements of section 410(b)  
14                   and subsection (a)(4) (without regard  
15                   to this subparagraph but taking into  
16                   account the rules of subparagraph  
17                   (I)),

18                   “(III) after the date as of which  
19                   the class was closed, any plan amend-  
20                   ment which modifies the closed class  
21                   or the benefits provided to such closed  
22                   class does not discriminate signifi-  
23                   cantly in favor of highly compensated  
24                   employees, and

1                   “(IV) the class was closed before  
2                   April 5, 2017, or the plan is described  
3                   in subparagraph (C).

4                   “(C) PLANS DESCRIBED.—A plan is de-  
5                   scribed in this subparagraph if, taking into ac-  
6                   count any predecessor plan—

7                   “(i) such plan has been in effect for  
8                   at least 5 years as of the date the class is  
9                   closed, and

10                  “(ii) during the 5-year period pre-  
11                  ceding the date the class is closed, there  
12                  has not been a substantial increase in the  
13                  coverage or value of the benefits, rights, or  
14                  features described in subparagraph (A) or  
15                  in the coverage or benefits under the plan  
16                  described in subparagraph (B)(iii) (which-  
17                  ever is applicable).

18                  “(D) DETERMINATION OF SUBSTANTIAL  
19                  INCREASE FOR BENEFITS, RIGHTS, AND FEA-  
20                  TURES.—In applying subparagraph (C)(ii) for  
21                  purposes of subparagraph (A)(iii), a plan shall  
22                  be treated as having had a substantial increase  
23                  in coverage or value of the benefits, rights, or  
24                  features described in subparagraph (A) during

1 the applicable 5-year period only if, during such  
2 period—

3 “(i) the number of participants cov-  
4 ered by such benefits, rights, or features  
5 on the date such period ends is more than  
6 50 percent greater than the number of  
7 such participants on the first day of the  
8 plan year in which such period began, or

9 “(ii) such benefits, rights, and fea-  
10 tures have been modified by 1 or more  
11 plan amendments in such a way that, as of  
12 the date the class is closed, the value of  
13 such benefits, rights, and features to the  
14 closed class as a whole is substantially  
15 greater than the value as of the first day  
16 of such 5-year period, solely as a result of  
17 such amendments.

18 “(E) DETERMINATION OF SUBSTANTIAL  
19 INCREASE FOR AGGREGATE TESTING ON BENE-  
20 FITS BASIS.—In applying subparagraph (C)(ii)  
21 for purposes of subparagraph (B)(iii)(IV), a  
22 plan shall be treated as having had a substan-  
23 tial increase in coverage or benefits during the  
24 applicable 5-year period only if, during such pe-  
25 riod—

1                   “(i) the number of participants bene-  
2                   fitting under the plan on the date such pe-  
3                   riod ends is more than 50 percent greater  
4                   than the number of such participants on  
5                   the first day of the plan year in which such  
6                   period began, or

7                   “(ii) the average benefit provided to  
8                   such participants on the date such period  
9                   ends is more than 50 percent greater than  
10                  the average benefit provided on the first  
11                  day of the plan year in which such period  
12                  began.

13                  “(F)       CERTAIN       EMPLOYEES       DIS-  
14                  REGARDED.—For purposes of subparagraphs  
15                  (D) and (E), any increase in coverage or value  
16                  or in coverage or benefits, whichever is applica-  
17                  ble, which is attributable to such coverage and  
18                  value or coverage and benefits provided to em-  
19                  ployees—

20                  “(i) who became participants as a re-  
21                  sult of a merger, acquisition, or similar  
22                  event which occurred during the 7-year pe-  
23                  riod preceding the date the class is closed,  
24                  or



1                   “(ii) who became participants by rea-  
2                   son of a merger of the plan with another  
3                   plan which had been in effect for at least  
4                   5 years as of the date of the merger,  
5                   shall be disregarded, except that clause (ii)  
6                   shall apply for purposes of subparagraph (D)  
7                   only if, under the merger, the benefits, rights,  
8                   or features under 1 plan are conformed to the  
9                   benefits, rights, or features of the other plan  
10                  prospectively.

11                  “(G) RULES RELATING TO AVERAGE BEN-  
12                  EFIT.—For purposes of subparagraph (E)—

13                         “(i) the average benefit provided to  
14                         participants under the plan will be treated  
15                         as having remained the same between the  
16                         2 dates described in subparagraph (E)(ii)  
17                         if the benefit formula applicable to such  
18                         participants has not changed between such  
19                         dates, and

20                         “(ii) if the benefit formula applicable  
21                         to 1 or more participants under the plan  
22                         has changed between such 2 dates, then  
23                         the average benefit under the plan shall be  
24                         considered to have increased by more than  
25                         50 percent only if—



1           “(I) SPECIAL RULES.—For purposes of  
2 subparagraphs (A)(i) and (B)(iii)(II), the fol-  
3 lowing rules shall apply:

4           “(i) In applying section 410(b)(6)(C),  
5 the closing of the class of participants shall  
6 not be treated as a significant change in  
7 coverage under section 410(b)(6)(C)(i)(II).

8           “(ii) 2 or more plans shall not fail to  
9 be eligible to be aggregated and treated as  
10 a single plan solely by reason of having dif-  
11 ferent plan years.

12           “(iii) Changes in the employee popu-  
13 lation shall be disregarded to the extent at-  
14 tributable to individuals who become em-  
15 ployees or cease to be employees, after the  
16 date the class is closed, by reason of a  
17 merger, acquisition, divestiture, or similar  
18 event.

19           “(iv) Aggregation and all other testing  
20 methodologies otherwise applicable under  
21 subsection (a)(4) and section 410(b) may  
22 be taken into account.

23           The rule of clause (ii) shall also apply for pur-  
24 poses of determining whether plans to which  
25 subparagraph (B)(i) applies may be aggregated

1 and treated as 1 plan for purposes of deter-  
2 mining whether such plans meet the require-  
3 ments of subsection (a)(4) and section 410(b).

4 “(J) SPUN-OFF PLANS.—For purposes of  
5 this paragraph, if a portion of a defined benefit  
6 plan described in subparagraph (A) or (B)(iii)  
7 is spun off to another employer and the spun-  
8 off plan continues to satisfy the requirements  
9 of—

10 “(i) subparagraph (A)(i) or  
11 (B)(iii)(II), whichever is applicable, if the  
12 original plan was still within the 3-year pe-  
13 riod described in such subparagraph at the  
14 time of the spin off, and

15 “(ii) subparagraph (A)(ii) or  
16 (B)(iii)(III), whichever is applicable,  
17 the treatment under subparagraph (A) or (B)  
18 of the spun-off plan shall continue with respect  
19 to such other employer.

20 “(2) TESTING OF DEFINED CONTRIBUTION  
21 PLANS.—

22 “(A) TESTING ON A BENEFITS BASIS.—A  
23 defined contribution plan shall be permitted to  
24 be tested on a benefits basis if—

1           “(i) such defined contribution plan  
2 provides make-whole contributions to a  
3 closed class of participants whose accruals  
4 under a defined benefit plan have been re-  
5 duced or eliminated,

6           “(ii) for the plan year of the defined  
7 contribution plan as of which the class eli-  
8 gible to receive such make-whole contribu-  
9 tions closes and the 2 succeeding plan  
10 years, such closed class of participants sat-  
11 isfies the requirements of section  
12 410(b)(2)(A)(i) (determined by applying  
13 the rules of paragraph (1)(I)),

14           “(iii) after the date as of which the  
15 class was closed, any plan amendment to  
16 the defined contribution plan which modi-  
17 fies the closed class or the allocations, ben-  
18 efits, rights, and features provided to such  
19 closed class does not discriminate signifi-  
20 cantly in favor of highly compensated em-  
21 ployees, and

22           “(iv) the class was closed before April  
23 5, 2017, or the defined benefit plan under  
24 clause (i) is described in paragraph (1)(C)

1 (as applied for purposes of paragraph  
2 (1)(B)(iii)(IV)).

3 “(B) AGGREGATION WITH PLANS INCLUD-  
4 ING MATCHING CONTRIBUTIONS.—

5 “(i) IN GENERAL.—With respect to 1  
6 or more defined contribution plans de-  
7 scribed in subparagraph (A), for purposes  
8 of determining compliance with subsection  
9 (a)(4) and section 410(b), the portion of  
10 such plans which provides make-whole con-  
11 tributions or other nonelective contribu-  
12 tions may be aggregated and tested on a  
13 benefits basis with the portion of 1 or  
14 more other defined contribution plans  
15 which—

16 “(I) provides matching contribu-  
17 tions (as defined in subsection  
18 (m)(4)(A)),

19 “(II) provides annuity contracts  
20 described in section 403(b) which are  
21 purchased with matching contribu-  
22 tions or nonelective contributions, or

23 “(III) consists of an employee  
24 stock ownership plan (within the  
25 meaning of section 4975(e)(7)) or a

1 tax credit employee stock ownership  
2 plan (within the meaning of section  
3 409(a)).

4 “(ii) SPECIAL RULES FOR MATCHING  
5 CONTRIBUTIONS.—Rules similar to the  
6 rules of paragraph (1)(B)(ii) shall apply  
7 for purposes of clause (i).

8 “(C) SPECIAL RULES FOR TESTING DE-  
9 FINED CONTRIBUTION PLAN FEATURES PRO-  
10 VIDING MATCHING CONTRIBUTIONS TO CERTAIN  
11 OLDER, LONGER SERVICE PARTICIPANTS.—In  
12 the case of a defined contribution plan which  
13 provides benefits, rights, or features to a closed  
14 class of participants whose accruals under a de-  
15 fined benefit plan have been reduced or elimi-  
16 nated, the plan shall not fail to satisfy the re-  
17 quirements of subsection (a)(4) solely by reason  
18 of the composition of the closed class or the  
19 benefits, rights, or features provided to such  
20 closed class if the defined contribution plan and  
21 defined benefit plan otherwise meet the require-  
22 ments of subparagraph (A) but for the fact that  
23 the make-whole contributions under the defined  
24 contribution plan are made in whole or in part  
25 through matching contributions.

1           “(D) SPUN-OFF PLANS.—For purposes of  
2 this paragraph, if a portion of a defined con-  
3 tribution plan described in subparagraph (A) or  
4 (C) is spun off to another employer, the treat-  
5 ment under subparagraph (A) or (C) of the  
6 spun-off plan shall continue with respect to the  
7 other employer if such plan continues to comply  
8 with the requirements of clauses (ii) (if the  
9 original plan was still within the 3-year period  
10 described in such clause at the time of the spin  
11 off) and (iii) of subparagraph (A), as deter-  
12 mined for purposes of subparagraph (A) or (C),  
13 whichever is applicable.

14           “(3) DEFINITIONS AND SPECIAL RULE.—For  
15 purposes of this subsection—

16           “(A) MAKE-WHOLE CONTRIBUTIONS.—Ex-  
17 cept as otherwise provided in paragraph (2)(C),  
18 the term ‘make-whole contributions’ means non-  
19 elective allocations for each employee in the  
20 class which are reasonably calculated, in a con-  
21 sistent manner, to replace some or all of the re-  
22 tirement benefits which the employee would  
23 have received under the defined benefit plan  
24 and any other plan or qualified cash or deferred  
25 arrangement under subsection (k)(2) if no



1 change had been made to such defined benefit  
2 plan and such other plan or arrangement. For  
3 purposes of the preceding sentence, consistency  
4 shall not be required with respect to employees  
5 who were subject to different benefit formulas  
6 under the defined benefit plan.

7 “(B) REFERENCES TO CLOSED CLASS OF  
8 PARTICIPANTS.—References to a closed class of  
9 participants and similar references to a closed  
10 class shall include arrangements under which 1  
11 or more classes of participants are closed, ex-  
12 cept that 1 or more classes of participants  
13 closed on different dates shall not be aggre-  
14 gated for purposes of determining the date any  
15 such class was closed.

16 “(C) HIGHLY COMPENSATED EMPLOYEE.—  
17 The term ‘highly compensated employee’ has  
18 the meaning given such term in section  
19 414(q).”.

20 (b) PARTICIPATION REQUIREMENTS.—Paragraph  
21 (26) of section 401(a) of the Internal Revenue Code of  
22 1986 is amended by adding at the end the following new  
23 subparagraph:

24 “(I) PROTECTED PARTICIPANTS.—

1                   “(i) IN GENERAL.—A plan shall be  
2 deemed to satisfy the requirements of sub-  
3 paragraph (A) if—

4                   “(I) the plan is amended—

5                   “(aa) to cease all benefit ac-  
6 cruals, or

7                   “(bb) to provide future ben-  
8 efit accruals only to a closed  
9 class of participants,

10                   “(II) the plan satisfies subpara-  
11 graph (A) (without regard to this sub-  
12 paragraph) as of the effective date of  
13 the amendment, and

14                   “(III) the amendment was adopt-  
15 ed before April 5, 2017, or the plan is  
16 described in clause (ii).

17                   “(ii) PLANS DESCRIBED.—A plan is  
18 described in this clause if the plan would  
19 be described in subsection (o)(1)(C), as ap-  
20 plied for purposes of subsection  
21 (o)(1)(B)(iii)(IV) and by treating the effec-  
22 tive date of the amendment as the date the  
23 class was closed for purposes of subsection  
24 (o)(1)(C).

1           “(iii) SPECIAL RULES.—For purposes  
2           of clause (i)(II), in applying section  
3           410(b)(6)(C), the amendments described in  
4           clause (i) shall not be treated as a signifi-  
5           cant change in coverage under section  
6           410(b)(6)(C)(i)(II).

7           “(iv) SPUN-OFF PLANS.—For pur-  
8           poses of this subparagraph, if a portion of  
9           a plan described in clause (i) is spun off to  
10          another employer, the treatment under  
11          clause (i) of the spun-off plan shall con-  
12          tinue with respect to the other employer.”.

13          (c) EFFECTIVE DATE.—

14               (1) IN GENERAL.—Except as provided in para-  
15               graph (2), the amendments made by this section  
16               shall take effect on the date of the enactment of this  
17               Act, without regard to whether any plan modifica-  
18               tions referred to in such amendments are adopted or  
19               effective before, on, or after such date of enactment.

20               (2) SPECIAL RULES.—

21                       (A) ELECTION OF EARLIER APPLICA-  
22                       TION.—At the election of the plan sponsor, the  
23                       amendments made by this section shall apply to  
24                       plan years beginning after December 31, 2013.

1 (B) CLOSED CLASSES OF PARTICIPANTS.—  
2 For purposes of paragraphs (1)(A)(iii),  
3 (1)(B)(iii)(IV), and (2)(A)(iv) of section 401(o)  
4 of the Internal Revenue Code of 1986 (as added  
5 by this section), a closed class of participants  
6 shall be treated as being closed before April 5,  
7 2017, if the plan sponsor's intention to create  
8 such closed class is reflected in formal written  
9 documents and communicated to participants  
10 before such date.

11 (C) CERTAIN POST-ENACTMENT PLAN  
12 AMENDMENTS.—A plan shall not be treated as  
13 failing to be eligible for the application of sec-  
14 tion 401(o)(1)(A), 401(o)(1)(B)(iii), or  
15 401(a)(26) of such Code (as added by this sec-  
16 tion) to such plan solely because in the case  
17 of—

18 (i) such section 401(o)(1)(A), the plan  
19 was amended before the date of the enact-  
20 ment of this Act to eliminate 1 or more  
21 benefits, rights, or features, and is further  
22 amended after such date of enactment to  
23 provide such previously eliminated benefits,  
24 rights, or features to a closed class of par-  
25 ticipants, or

1                   (ii) such section 401(o)(1)(B)(iii) or  
2                   section 401(a)(26), the plan was amended  
3                   before the date of the enactment of this  
4                   Act to cease all benefit accruals, and is  
5                   further amended after such date of enact-  
6                   ment to provide benefit accruals to a closed  
7                   class of participants.

8                   Any such section shall only apply if the plan  
9                   otherwise meets the requirements of such sec-  
10                  tion and in applying such section, the date the  
11                  class of participants is closed shall be the effec-  
12                  tive date of the later amendment.