

115TH CONGRESS
1ST SESSION

S. 852

To amend the Internal Revenue Code of 1986 to protect older, longer service and grandfathered participants in defined benefit plans.

IN THE SENATE OF THE UNITED STATES

APRIL 5 (legislative day, APRIL 4), 2017

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

A BILL

To amend the Internal Revenue Code of 1986 to protect older, longer service and grandfathered participants in defined benefit 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 2017”.

6 **SEC. 2. MODIFICATION OF NONDISCRIMINATION RULES TO**
7 **PROTECT OLDER, LONGER SERVICE PARTICI-**
8 **PANTS.**

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

1 (1) by redesignating subsection (o) as sub-
2 section (p), and

3 (2) by inserting after subsection (n) the fol-
4 lowing new subsection:

5 “(o) SPECIAL RULES FOR APPLYING NON-
6 DISCRIMINATION RULES TO PROTECT OLDER, LONGER
7 SERVICE AND GRANDFATHERED PARTICIPANTS.—

8 “(1) TESTING OF DEFINED BENEFIT PLANS
9 WITH CLOSED CLASSES OF PARTICIPANTS.—

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

18 “(i) for the plan year as of which the
19 class closes and the 2 succeeding plan
20 years, such benefits, rights, and features
21 satisfy the requirements of subsection
22 (a)(4) (without regard to this subpara-
23 graph but taking into account the rules of
24 subparagraph (I)),

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

9 “(iii) the class was closed before April
10 5, 2017, or the plan is described in sub-
11 paragraph (C).

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

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

23 “(I) provides matching contribu-
24 tions (as defined in subsection
25 (m)(4)(A)),

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

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

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

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

22 “(II) such matching contribu-
23 tions shall be treated in the same
24 manner as nonelective contributions,

1 including for purposes of applying the
2 rules of subsection (l).

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

5 “(I) the plan provides benefits to
6 a closed class of participants,

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

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

23 “(IV) the class was closed before
24 April 5, 2017, or the plan is described
25 in subparagraph (C).

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

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

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

15 “(D) DETERMINATION OF SUBSTANTIAL
16 INCREASE FOR BENEFITS, RIGHTS, AND FEA-
17 TURES.—In applying subparagraph (C)(ii) for
18 purposes of subparagraph (A)(iii), a plan shall
19 be treated as having had a substantial increase
20 in coverage or value of the benefits, rights, or
21 features described in subparagraph (A) during
22 the applicable 5-year period only if, during such
23 period—

24 “(i) the number of participants cov-
25 ered by such benefits, rights, or features

1 on the date such period ends is more than
2 50 percent greater than the number of
3 such participants on the first day of the
4 plan year in which such period began, or

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

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

22 “(i) the number of participants bene-
23 fitting under the plan on the date such pe-
24 riod ends is more than 50 percent greater
25 than the number of such participants on

1 the first day of the plan year in which such
2 period began, or

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

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

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

21 “(ii) who became participants by rea-
22 son of a merger of the plan with another
23 plan which had been in effect for at least
24 5 years as of the date of the merger,

1 shall be disregarded, except that clause (ii)
2 shall apply for purposes of subparagraph (D)
3 only if, under the merger, the benefits, rights,
4 or features under 1 plan are conformed to the
5 benefits, rights, or features of the other plan
6 prospectively.

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

9 “(i) the average benefit provided to
10 participants under the plan will be treated
11 as having remained the same between the
12 2 dates described in subparagraph (E)(ii)
13 if the benefit formula applicable to such
14 participants has not changed between such
15 dates, and

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

22 “(I) the total amount determined
23 under section 430(b)(1)(A)(i) for all
24 participants benefitting under the
25 plan for the plan year in which the 5-

1 year period described in subparagraph
2 (E) ends, exceeds

3 “(II) the total amount deter-
4 mined under section 430(b)(1)(A)(i)
5 for all such participants for such plan
6 year, by using the benefit formula in
7 effect for each such participant for
8 the first plan year in such 5-year pe-
9 riod,

10 by more than 50 percent. In the case of a
11 CSEC plan (as defined in section 414(y)),
12 the normal cost of the plan (as determined
13 under section 433(j)(1)(B)) shall be used
14 in lieu of the amount determined under
15 section 430(b)(1)(A)(i).

16 “(H) TREATMENT AS SINGLE PLAN.—For
17 purposes of subparagraphs (E) and (G), a plan
18 described in section 413(c) shall be treated as
19 a single plan rather than as separate plans
20 maintained by each participating employer.

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

24 “(i) In applying section 410(b)(6)(C),
25 the closing of the class of participants shall

1 not be treated as a significant change in
2 coverage under section 410(b)(6)(C)(i)(II).

3 “(ii) Two or more plans shall not fail
4 to be eligible to be aggregated and treated
5 as a single plan solely by reason of having
6 different plan years.

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

14 “(iv) Aggregation and all other testing
15 methodologies otherwise applicable under
16 subsection (a)(4) and section 410(b) may
17 be taken into account.

18 The rule of clause (ii) shall also apply for pur-
19 poses of determining whether plans to which
20 subparagraph (B)(i) applies may be aggregated
21 and treated as 1 plan for purposes of deter-
22 mining whether such plans meet the require-
23 ments of subsection (a)(4) and section 410(b).

24 “(J) SPUN-OFF PLANS.—For purposes of
25 this paragraph, if a portion of a defined benefit

1 plan described in subparagraph (A) or (B)(iii)
 2 is spun off to another employer and the spun-
 3 off plan continues to satisfy the requirements
 4 of—

5 “(i) subparagraph (A)(i) or
 6 (B)(iii)(II), whichever is applicable, if the
 7 original plan was still within the 3-year pe-
 8 riod described in such subparagraph at the
 9 time of the spin off, and

10 “(ii) subparagraph (A)(ii) or
 11 (B)(iii)(III), whichever is applicable,

12 the treatment under subparagraph (A) or (B)
 13 of the spun-off plan shall continue with respect
 14 to such other employer.

15 “(2) TESTING OF DEFINED CONTRIBUTION
 16 PLANS.—

17 “(A) TESTING ON A BENEFITS BASIS.—A
 18 defined contribution plan shall be permitted to
 19 be tested on a benefits basis if—

20 “(i) such defined contribution plan
 21 provides make-whole contributions to a
 22 closed class of participants whose accruals
 23 under a defined benefit plan have been re-
 24 duced or eliminated,

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

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

18 “(iv) the class was closed before April
19 5, 2017, or the defined benefit plan under
20 clause (i) is described in paragraph (1)(C)
21 (as applied for purposes of paragraph
22 (1)(B)(iii)(IV)).

23 “(B) AGGREGATION WITH PLANS INCLUD-
24 ING MATCHING CONTRIBUTIONS.—

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

12 “(I) provides matching contribu-
13 tions (as defined in subsection
14 (m)(4)(A)),

15 “(II) provides annuity contracts
16 described in section 403(b) which are
17 purchased with matching contribu-
18 tions or nonelective contributions, or

19 “(III) consists of an employee
20 stock ownership plan (within the
21 meaning of section 4975(e)(7)) or a
22 tax credit employee stock ownership
23 plan (within the meaning of section
24 409(a)).

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

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

23 “(D) SPUN-OFF PLANS.—For purposes of
24 this paragraph, if a portion of a defined con-
25 tribution plan described in subparagraph (A) or

1 (C) is spun off to another employer, the treat-
2 ment under subparagraph (A) or (C) of the
3 spun-off plan shall continue with respect to the
4 other employer if such plan continues to comply
5 with the requirements of clauses (ii) (if the
6 original plan was still within the 3-year period
7 described in such clause at the time of the spin
8 off) and (iii) of subparagraph (A), as deter-
9 mined for purposes of subparagraph (A) or (C),
10 whichever is applicable.

11 “(3) DEFINITIONS.—For purposes of this sub-
12 section—

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

1 shall not be required with respect to employees
2 who were subject to different benefit formulas
3 under the defined benefit plan.

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

13 “(C) HIGHLY COMPENSATED EMPLOYEE.—
14 The term ‘highly compensated employee’ has
15 the meaning given such term in section 414(q).

16 “(D) DISCRIMINATORY AMENDMENTS.—A
17 plan amendment shall be treated as discrimi-
18 nating significantly in favor of highly com-
19 pensated employees only if such amendment, if
20 adopted before the enactment of this sub-
21 section, would have been treated as violating
22 subsection (a)(4).”.

23 (b) PARTICIPATION REQUIREMENTS.—Paragraph
24 (26) of section 401(a) of the Internal Revenue Code of

1 1986 is amended by adding at the end the following new
2 subparagraph:

3 “(I) PROTECTED PARTICIPANTS.—

4 “(i) IN GENERAL.—A plan shall be
5 deemed to satisfy the requirements of sub-
6 paragraph (A) if—

7 “(I) the plan is amended—

8 “(aa) to cease all benefit ac-
9 cruals, or

10 “(bb) to provide future ben-
11 efit accruals only to a closed
12 class of participants,

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

17 “(III) the amendment was adopt-
18 ed before April 5, 2017, or the plan is
19 described in clause (ii).

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

1 class was closed for purposes of subsection
2 (o)(1)(C).

3 “(iii) SPECIAL RULES.—For purposes
4 of clause (i)(II), in applying section
5 410(b)(6)(C), the amendments described in
6 clause (i) shall not be treated as a signifi-
7 cant change in coverage under section
8 410(b)(6)(C)(i)(II).

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

15 (c) EFFECTIVE DATE.—

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

22 (2) SPECIAL RULES.—

23 (A) ELECTION OF EARLIER APPLICA-
24 TION.—At the election of the plan sponsor, the

1 amendments made by this section shall apply to
2 plan years beginning after December 31, 2013.

3 (B) CLOSED CLASSES OF PARTICIPANTS.—

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

13 (C) CERTAIN POST-ENACTMENT PLAN

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

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

1 rights, or features to a closed class of par-
2 ticipants, or

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

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

○