To amend the Employee Retirement Income Security Act of 1974 and the Internal Revenue Code of 1986 to ensure that retirement investors receive advice in their best interests, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

JUNE 8, 2017

Mr. Roe of Tennessee (for himself, Mr. Roskam, Mr. Walberg, and Mr. Wilson of South Carolina) 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 Employee Retirement Income Security Act of 1974 and the Internal Revenue Code of 1986 to ensure that retirement investors receive advice in their best interests, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the “Affordable Retirement Advice for Savers Act”.

1  2  3  4  5
SEC. 2. REPEAL OF FIDUCIARY DEFINITION RULEMAKING.

(a) IN GENERAL.—The Fiduciary Definition rulemaking described in subsection (b) is repealed and shall have no force or effect, and the regulations and prohibited transaction exemptions amended or repealed by such rulemaking are restored or revived as if such rulemaking had not been issued.

(b) FIDUCIARY DEFINITION RULEMAKING.—The Fiduciary Definition rulemaking described in this subsection consists of the following:


(4) The “Amendment to Prohibited Transaction Exemption (PTE) 75–1, Part V, Exemptions From


SEC. 3. RULES RELATING TO THE PROVISION OF INVESTMENT ADVICE.

(a) Amendments to the Employee Retirement Income Security Act of 1974.—

(1) Definition of investment advice.— Section 3(21) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002(21)) is amended by adding at the end the following:

“(C)(i) For purposes of clause (ii) of subparagraph (A), the term ‘investment advice’ means a recommendation communicated electronically, on paper, or orally that—

“(I) relates to—

“(aa) the advisability of acquiring, holding, disposing, or exchanging any moneys or other property of a plan by the plan, plan participants, or plan beneficiaries, including any recommendation whether to take a distribution of benefits from such plan or any recommendation relating to the investment of any moneys or other property of such plan to be distributed from such plan;

“(bb) the management of moneys or other property of such plan, including recommendations relating to the management of moneys or
other property to be distributed from such plan;
or
“(cc) the advisability of retaining or ceasing to retain a person who would receive a fee or other compensation for providing any of the types of advice described in this subclause; and
“(II) is rendered pursuant to—
“(aa) a written acknowledgment, provided electronically or on paper, of the obligation of the advisor to comply with section 404 with respect to the provision of such recommendation; or
“(bb) a mutual agreement, arrangement, or understanding, which may include limitations on scope, timing, and responsibility to provide ongoing monitoring or advice services, between the person making such recommendation and the plan that such recommendation is individualized to the plan and such plan intends to materially rely on such recommendation in making investment or management decisions with respect to any moneys or other property of such plan.
“(ii) For purposes of clause (i)(II)(bb), any disclaimer of a mutual agreement, arrangement, or under-
standing shall state only the following: ‘This communication is not individualized to you, and you are not intended to rely materially on this communication in making investment or management decisions.’. Such disclaimer shall not be effective unless such disclaimer is in writing and is communicated in a clear and prominent manner and an objective person would reasonably conclude that, based on all the facts and circumstances, there was not a mutual agreement, arrangement, or understanding.

“(iii) For purposes of clause (i)(II)(bb), a communication shall not be considered to be a recommendation made pursuant to a mutual agreement, arrangement, or understanding, if such communication contains the disclaimer required by clause (ii), and—

“(I) it is provided in conjunction with clear and prominent disclosure in writing to a plan, plan participant, or beneficiary that the person providing the communication is doing so in its marketing or sales capacity, including any communication regarding the terms and conditions of the engagement of the person providing the communication, and that the person is not intending to provide investment advice within the meaning of this subparagraph or to otherwise act within and under the obligations of the best interest standard as described in this subparagraph;
“(II) the person providing the communication is a current or potential counterparty or service provider to the plan in connection with any transaction based on the communication, but only if—

“(aa) the plan is represented, in connection with such transaction, by a plan fiduciary that is independent of the person providing the communication, and, except in the case of a swap (as defined in section 1a of the Commodity Exchange Act (7 U.S.C. 1a) or security-based swap (as defined in section 3(a) of the Securities Exchange Act (15 U.S.C. 78c(a)))), independent of the plan sponsor; and

“(bb) prior to such transaction, the independent plan fiduciary represents in writing to the person providing the communication that it is aware that the person has a financial interest in the transaction and that it has determined that the person is not intending to provide investment advice within the meaning of this subparagraph or to otherwise act as a fiduciary to the plan subject to section 404;

“(III) the person providing the communication is an employee of any sponsoring employer or affiliate or employee organization who provides the com-
communication to the plan for no fee or other compensation other than the employee’s normal compensation;

“(IV) the person providing the communication discloses in writing to the plan fiduciary that the person is not undertaking to provide investment advice as a fiduciary to the plan subject to section 404 and the communication consists solely of—

“(aa) making available to the plan, without regard to the individualized needs of the plan, securities or other property or investment products through a platform or similar mechanism from which a plan fiduciary may select or monitor investment alternatives; or

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

“(AA) identifying investment alternatives that meet objective criteria specified by the plan, such as criteria concerning expense ratios, fund sizes, types of asset, or credit quality;

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

“(CC) identifying a sample set of investment alternatives based on the plan’s
stated criteria in response to an inquiry from a plan fiduciary;

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

“(VI) the communication consists solely of—

“(aa) information described in Department of Labor Interpretive Bulletin 96–1 (29 C.F.R. 2509.96–1, as in effect on January 1, 2015), regardless of whether such education is provided to a plan or plan fiduciary or a participant or beneficiary;

“(bb) information provided to participants or beneficiaries regarding the factors to consider in deciding whether to elect to receive a distribution from a plan or an individual retirement plan (as defined in section 7701(a)(37) of the Internal Revenue Code of 1986) and whether 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 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 section 408(b)(2)) for such investment advice.

“(ii) If the investment advice is based on a limited range of investment options (which may consist, in whole or in part, of proprietary products), such limitations shall be clearly disclosed to the advice recipient prior to any transaction based on the investment advice in the form of a notice that only states the following: ‘This recommendation is based on a limited range of investment options, and the same or
similar investments may be available at a different cost (greater or lesser) from other sources.’.

“(iii) If the investment advice may result in variable compensation to the person providing the investment advice (or any affiliate of such person), the receipt of such compensation shall be clearly disclosed to the advice recipient prior to any transaction based on the investment advice. For purposes of this subparagraph, clear disclosure of variable compensation shall include, in a manner calculated to be understood by the average individual, each of the following:

“(I) A notice that states only the following: ‘This recommendation may result in varying amounts of fees or other compensation to the person providing the recommendation (or its affiliate), and the same or similar investments may be available at a different cost (greater or lesser) from other sources.’. Any regulations or administrative guidance implementing this subclause may not require this notice to be updated more than annually.
“(II) A description of any fee or other compensation that is directly or indirectly payable to the person (or its affiliate) by the advice recipient with respect to such transaction (expressed as an amount, formula, percentage of assets, per capita charge, or estimate or range of such compensation).

“(III) A description of the types and ranges of any compensation that are reasonably expected to be directly or indirectly payable to the person (or its affiliate) by any third party in connection with such transaction (expressed as an amount, formula, percentage of assets, per capita charge, or estimate or range of such compensation).

“(IV) Upon request of the advice recipient, a disclosure of the specific amounts of compensation described in clause (iii) that the person will receive in connection with the particular transaction (expressed as an amount, formula, percentage of assets, per capita charge, or estimate of such compensation).
“(B) No recommendation will fail to satisfy the conditions described in clauses (i) through (iii) of subparagraph (A) solely because the person, acting in good faith and with reasonable diligence, makes an error or omission in disclosing the information specified in such clauses, provided that the person discloses the correct information to the advice recipient as soon as practicable, but not later than 30 days from the date on which the person knows of such error or omission.

“(C) Any notice provided pursuant to a requirement under clause (ii) or clause (iii)(I) of subparagraph (A) shall have no effect on any other notice otherwise required without regard to this title, and shall be provided in addition to, and not in lieu of, any other such notice.

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

(b) Amendments to the Internal Revenue Code of 1986.—

(1) Exemption for Investment Advice Which Is Best Interest Recommendation.—Section 4975(d) of the Internal Revenue Code of 1986 is amended by striking “or” at the end of paragraph
(22), by striking the period at the end of paragraph (23) and inserting “, or”, and by inserting after paragraph (23) the following:

“(24) provision of investment advice by a fiduciary to a plan, plan participant, or beneficiary with respect to the plan, which is a best interest recommendation or a transaction connected to such advice.”.

(2) INVESTMENT ADVICE; BEST INTEREST RECOMMENDATION.—Section 4975(e) of such Code is amended by adding at the end the following:

“(10) INVESTMENT ADVICE.—

“(A) IN GENERAL.—For purposes of this section, the term ‘investment advice’ means a recommendation, communicated electronically, on paper, or orally, that—

“(i) relates to—

“(I) the advisability of acquiring, holding, disposing, or exchanging any moneys or other property of a plan by the plan, plan participants, or plan beneficiaries, including any recommendation whether to take a distribution of benefits from such plan or any recommendation relating to the
investment of any moneys or other property of such plan to be distributed from such plan;

“(II) the management of moneys or other property of such plan, including recommendations relating to the management of moneys or other property to be distributed from such plan; or

“(III) the advisability of retaining or ceasing to retain a person who would receive a fee or other compensation for providing any of the types of advice described in this subclause; and

“(ii) is rendered pursuant to—

“(I) a written acknowledgment, provided electronically or on paper, that the person is a fiduciary with respect to the provision of such recommendation; or

“(II) a mutual agreement, arrangement, or understanding which may include limitations on scope, timing, and responsibility to provide on-
going monitoring or advice services, between the person making such recom-
ommendation and the plan, plan par-
ticipant, or beneficiary that such recom-
ommendation is individualized to the plan, plan participant, or beneficiary
and such plan, plan participant, or beneficiary intends to materially rely on such recommendation in making investment or management decisions with respect to any moneys or other property of such plan.

“(B) DISCLAIMER OF A MUTUAL AGREE-
MENT, ARRANGEMENT, OR UNDERSTANDING.—
For purposes of subparagraph (A)(ii)(II), any disclaimer of a mutual agreement, arrangement, or understanding shall state only the following: ‘This communication is not individualized to you, and you are not intended to rely materially on this communication in making investment or management decisions.’. Such disclaimer shall not be effective unless such disclaimer is in writing and is communicated in a clear and prominent manner and an objective person would reasonably conclude that, based on all
the facts and circumstances, there was not a mutual agreement, arrangement, or understanding.

“(C) WHEN RECOMMENDATION TREATED AS MADE PURSUANT TO A MUTUAL AGREEMENT, ARRANGEMENT, OR UNDERSTANDING.— For purposes of subparagraph (A)(ii)(II), a communication shall not be treated as a recommendation made pursuant to a mutual agreement, arrangement, or understanding, if such communication contains the disclaimer required by subparagraph (B), and—

“(i) SELLER’S EXCEPTION.—The communication is provided in conjunction with clear and prominent disclosure in writing to a plan, plan participant, or beneficiary that the person providing the communication is doing so in its marketing or sales capacity, including any communication regarding the terms and conditions of the engagement of the person providing the communication, and that the person is not intending to provide investment advice within the meaning of this subparagraph or to otherwise act as a fiduciary to the
plan or under the obligations of a best interest recommendation.

“(ii) Certain counterparties or service providers.—The person providing the communication is a current or potential counterparty or service provider to the plan in connection with any transaction based on the communication, but only if—

“(I) the plan is represented, in connection with such transaction, by a plan fiduciary that is independent of the person providing the communication, and, except in the case of a swap (as defined in section 1a of the Commodity Exchange Act (7 U.S.C. 1a) or security-based swap (as defined in section 3(a) of the Securities Exchange Act (15 U.S.C. 78c(a)))), independent of the plan sponsor; and

“(II) prior to entering into such transaction, the independent plan fiduciary represents in writing to the person providing the communication that it is aware that the person has a
financial interest in the transaction
and that it has determined that the
person is not intending to provide in-
vestment advice within the meaning of
this subparagraph or to otherwise act
as a fiduciary to the plan, plan par-
ticipants, or plan beneficiaries.

“(iii) Employees of a Plan Spon-
sor.—The person providing the commu-
nication is an employee of any sponsoring
employer or affiliate or employee organiza-
tion who provides the communication to
the plan for no fee or other compensation
other than the employee’s normal com-
pensation.

“(iv) Platform Providers Selection and Monitoring Assistance.—The
person providing the communication dis-
closes in writing to the plan fiduciary that
the person is not undertaking to provide
investment advice as a fiduciary (within
the meaning of this paragraph) or under
the obligations of a best interest rec-
ommendation and the communication con-
sists solely of—
“(I) making available to the plan, plan participants, or plan beneficiaries, without regard to the individualized needs of the plan, plan participants, or plan beneficiaries, securities or other property or investment products through a platform or similar mechanism from which a plan fiduciary may select or monitor investment alternatives; or

“(II) in connection with a platform or similar mechanism described in subclause (I)—

“(aa) identifying investment alternatives that meet objective criteria specified by the plan, such as criteria concerning expense ratios, fund sizes, types of asset, or credit quality;

“(bb) providing objective financial data and comparisons with independent benchmarks to the plan; or

“(cc) identifying a sample set of investment alternatives
based on the plan’s stated criteria in response to an inquiry from a plan fiduciary.

“(v) VALUATION.—The communication consists solely of valuation information.

“(vi) FINANCIAL EDUCATION.—The communication consists solely of—

“(I) information described in Department of Labor Interpretive Bulletin 96–1 (29 C.F.R. 2509.96–1, as in effect on January 1, 2015), regardless of whether such education is provided to a plan or plan fiduciary or a participant or beneficiary;

“(II) information provided to participants or beneficiaries regarding the factors to consider in deciding whether to elect to receive a distribution from a plan and whether to roll over such distribution to a plan, so long as any examples of different distribution alternatives are accompanied by all material facts and assumptions on which the examples are based; or
“(III) any additional information treated as education by the Secretary.

“(11) BEST INTEREST RECOMMENDATION.—

For purposes of this subsection—

“(A) IN GENERAL.—The term ‘best interest recommendation’ means a recommendation—

“(i) for which no more than reasonable compensation is paid (as determined under subsection (d)(2));

“(ii) provided by a person acting with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person would exercise based on—

“(I) the information obtained through the reasonable diligence of the person regarding factors such as the advice recipient’s age; and

“(II) any other information that the advice recipient discloses to the person in connection with receiving such recommendation; and
“(iii) where the person places the interests of the plan or advice recipient above its own.

“(B) INVESTMENT OPTIONS; VARIABLE COMPENSATION.—A best interest recommendation may include a recommendation that—

“(i) is based on a limited range of investment options (which may consist, in whole or in part, of proprietary products), but only if any such limitations shall be clearly disclosed to the advice recipient prior to any transaction based on the investment advice in the form of a notice that only states the following: ‘This recommendation is based on a limited range of investment options, and the same or similar investments may be available at a different cost (greater or lesser) from other sources.’; or

“(ii) may result in variable compensation to the person providing the recommendation (or any affiliate of such person), but only if the receipt of such compensation shall be clearly disclosed to the
advice recipient prior to any transaction based on the investment advice.

“(C) CLEAR DISCLOSURE OF VARIABLE COMPENSATION.—For purposes of this paragraph, clear disclosure of variable compensation shall include, in a manner calculated to be understood by the average individual, each of the following:

“(i) A notice that states only the following: ‘This recommendation may result in varying amounts of fees or other compensation to the person providing the recommendation (or its affiliate), and the same or similar investments may be available at a different cost (greater or lesser) from other sources.’. Any regulations or administrative guidance implementing this clause may not require this notice to be updated more than annually.

“(ii) A description of any fee or other compensation that is directly or indirectly payable to the person (or its affiliate) by the advice recipient with respect to such transaction (expressed as an amount, formula, percentage of assets, per capita
charge, or estimate or range of such compensation).

“(iii) A description of the types and ranges of any compensation that are reasonably expected to be directly or indirectly payable to the person (or its affiliate) by any third party in connection with such transaction (expressed as an amount, formula, percentage of assets, per capita charge, or estimate or range of such compensation).

“(iv) Upon request of the advice recipient, a disclosure of the specific amounts of compensation described in clause (iii) that the person will receive in connection with the particular transaction (expressed as an amount, formula, percentage of assets, per capita charge, or estimate of such compensation).

“(D) Definition of Affiliate.—For purposes of this paragraph, the term ‘affiliate’ has the meaning given in subsection (f)(8)(J)(ii).

“(E) Correction of Certain Errors and Omissions.—A recommendation shall not
fail to be a best interest recommendation solely because a person who, acting in good faith and with reasonable diligence, makes an error or omission in disclosing the information specified in subparagraph (B), if the person discloses the correct information to the advice recipient as soon as practicable but not later than 30 days from the date on which the person knows of such error or omission.

“(F) SPECIAL RULE.—Any notice provided pursuant to a requirement under subparagraph (B)(i) or subparagraph (C)(i) shall have no effect on any other notice otherwise required without regard to this title, and shall be provided in addition to, and not in lieu of, any other such notice.”.

(3) FAILURES RELATING TO BEST INTEREST RECOMMENDATION.—

(A) CORRECTION.—Section 4975(f)(5) of such Code is amended—

(i) by striking “(5) CORRECTION-
The terms” and inserting:

“(5) CORRECTION.—

“(A) IN GENERAL.—Except as provided in subparagraph (B), the terms”, and
(ii) by adding at the end the following:

“(B) DETERMINATION OF ‘CORRECTION’ AND ‘CORRECT’ WITH RESPECT TO BEST INTEREST ADVICE RECOMMENDATIONS.—In the case of a prohibited transaction arising by the failure of investment advice to be a best interest recommendation, the terms ‘correction’ and ‘correct’ mean the payment to, or reimbursement of, actual damages of the plan, plan participants, or plan beneficiaries resulting directly from the plan’s, plan participant’s, or plan beneficiary’s reliance on such investment advice, if any, that have not otherwise been paid or reimbursed to the plan, plan participants, or plan beneficiaries, including payments and reimbursements made pursuant to subparagraph (A) if such amount is greater than the amount determined under subparagraph (A).”.

(B) AMOUNT INVOLVED FOR PURPOSES OF EXCISE TAX.—The first sentence of section 4975(f)(4) of such Code is amended by striking “excess compensation.” and inserting “excess compensation, and in the case of a prohibited transaction arising by the failure of investment
advice to be a best interest recommendation, the amount involved shall be the amount paid to the person providing the advice (or its affiliate, as defined in paragraph (8)(J)(ii)) that has not been paid or reimbursed to the plan, plan participants, or plan beneficiaries, including payments and reimbursements made pursuant to paragraph (5).”.

(e) EFFECTIVE DATE.—The amendments made by subsections (a) and (b) shall take effect on the date of the enactment of this Act and shall apply with respect to communications provided or recommendations made on or after 2 years after such date.

(d) GRANDFATHERED TRANSACTIONS AND SERVICES.—The amendments made by subsections (a) and (b) shall not apply to any service or transaction rendered, entered into, or for which a person has been compensated prior to the date on which the amendments become effective under subsection (e).

(e) TRANSITION.—Until such time as regulations or other guidance are issued to carry out the amendments made by subsections (a) and (b), a plan or a fiduciary shall be treated as meeting the requirements of such amendments if the plan or fiduciary, as the case may be,
1 complies with a reasonable good faith interpretation of
2 such amendments.