AMENDMENT IN THE NATURE OF A SUBSTITUTE
TO H.R. 4294
OFFERED BY MR. CARTER OF GEORGIA

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.
This Act may be cited as the “Strengthening Access to Valuable Education and Retirement Support Act of 2015” or the “SAVERS Act of 2015”.

SEC. 2. PURPOSE.
The purpose of this Act is to provide that advisors who—
(1) provide advice that is impermissible under the prohibited transaction provisions under section 4975 of the Internal Revenue Code of 1986, or
(2) breach the best interest standard for the provision of investment advice,
are subject to liability under the Internal Revenue Code of 1986.

SEC. 3. RULES RELATING TO THE PROVISION OF INVESTMENT ADVICE.
(a) 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.”.

(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 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 dis-
tribution of benefits from such plan or
any recommendation relating to the
investment of any moneys or other
property of such plan to be rolled over
or otherwise distributed from such
plan;

“(II) the management of moneys
or other property of such plan, includ-
ing recommendations relating to the
management of moneys or other prop-
erty to be rolled over or otherwise dis-
tributed from such plan; or

“(III) the advisability of retain-
ing or ceasing to retain a person who
would receive a fee or other com-
pensation for providing any of the
types of advice described in this sub-
clause; and

“(ii) is rendered pursuant to—

“(I) a written acknowledgment
that the person is a fiduciary with re-
spect to the provision of such rec-
ommendation; or

“(II) a mutual agreement, ar-
angement, 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, plan participant, or beneficiary that such recommendation 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 AGREEMENT, ARRANGEMENT, OR UNDERSTANDING.—For purposes of subparagraph (A)(ii)(II), any disclaimer of a mutual agreement, arrangement, or understanding shall only state the following: ‘This information is not individualized to you, and there is no intent for you to materially rely on this information 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), information shall not be treated as a recommendation made pursuant to a mutual agreement, arrangement, or understanding, and such information shall contain the disclaimer required by subparagraph (B), if—

“(i) SELLER’S EXCEPTION.—The information is provided in conjunction with full and fair disclosure in writing to a plan, plan participant, or beneficiary that the person providing the information is doing so in its marketing or sales capacity, including any information regarding the terms and conditions of the engagement of the person providing the information, 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) Swap and security-based swap transaction.—The person providing the information is a counterparty or service provider to the plan in connection with any transaction based on the information (including a service arrangement, sale, purchase, loan, bilateral contract, 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)))), but only if—

“(I) the plan is represented, in connection with such transaction, by a plan fiduciary who is independent of the person providing the information, and, except in the case of a swap or security-based swap, 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 information 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, plan participants, or plan beneficiaries.

“(iii) Employees of a Plan Sponsor.—The person providing the information is an employee of any sponsoring employer or employee organization who provides the information to the plan for no fee or other compensation other than the employee’s normal compensation.

“(iv) Platform Providers Selection and Monitoring Assistance.—The person providing the information discloses 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 recommenda-
tion and the information consists 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 through a platform or similar mechanism from which a plan fiduciary may select or monitor investment alternatives, including qualified default investment alternatives, into which plan participants or beneficiaries may direct the investment of assets held in, or contributed to, their individual accounts, 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 ex-
pense ratios, fund sizes, types of asset, or credit quality, or

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

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

“(vi) FINANCIAL EDUCATION.—The information 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 and rollover 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 in-
terests of the plan or advice recipient
above its own.
“(B) INVESTMENT OPTIONS; VARIABLE
COMPENSATION.—A best interest recommenda-
tion may include a recommendation that—
“(i) is based on a limited range of in-
vestment options (which may consist, in
whole or in part, of proprietary products),
but only if any such limitations, including
a clearly-stated notice that the same or
similar investments may be available at a
different cost (greater or lesser) from other
sources, are clearly disclosed to the advice
recipient prior to any transaction based on
the recommendation, or
“(ii) may result in variable compensa-
tion to the person providing the rec-
ommendation (or any affiliate of such per-
son), but only if the receipt of such com-
pensation, including a clearly-stated notice
that the same or similar investments may
be available at a different cost (greater or
lesser) from other sources, is clearly disclosed to the advice recipient prior to any transaction based on the recommendation. The notices provided pursuant to clauses (i) and (ii) shall only state the following: ‘The same or similar investments may be available at a different cost (greater or lesser) from other sources.’.

“(C) CLEAR DISCLOSURE OF VARIABLE COMPENSATION.—For purposes of subparagraph (B)(ii), variable compensation is clearly disclosed if notification is provided at any time prior to a transaction based on the person’s recommendation, in a manner calculated to be understood by the average individual, of the following:

“(i) A notice in writing, including a clearly-stated notice that the same or similar investments may be available at a different cost (greater or lesser) from other sources, that the person providing the recommendation (or its affiliate) may receive varying amounts of fees or other compensation with respect to such transaction.
“(ii) A description of any fee or other compensation that is directly payable to the person (or its affiliate) from 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 indirect compensation that may be paid 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 of such ranges of 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.”.

(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 advice 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).”.

(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 affil-
iate, as defined in paragraph (8)(J)(ii)) that
has not been paid or reimbursed to the plan,
plan participants, or plan beneficiaries, includ-
ing payments and reimbursements made pursu-
ant to paragraph (5).”.

(4) EXEMPTION RELATING TO INVESTMENT AD-
VICE WITH RESPECT TO CERTAIN FEE ARRANGE-
MENTS.—Section 4975(d) of such Code (as amended
by paragraph (1)) is amended by striking “or” at
the end of paragraph (23), by striking the period at
the end of paragraph (24) and inserting “, or”, and
by adding after paragraph (24) the following:

“(25) any transaction, including a contract for
service, between a person providing investment ad-
vice described in subsection (e)(3)(B) and the advice
recipient in connection with such investment advice,
if—

“(A) no more than reasonable compensa-
tion is paid (as determined under section
4975(d)(2)) for such investment advice,

“(B) in a case in which the investment ad-
vice is based on a limited range of investment
options (which may consist, in whole or in part,
of proprietary products), such limitations, in-
cluding a clearly-stated notice that the same or
similar investments may be available at a different cost (greater or lesser) from other sources), shall be clearly disclosed to the advice recipient prior to any transaction based on the investment advice,

“(C) in a case in which 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, including a clearly-stated notice that the same or similar investments may be available at a different cost (greater or lesser) from other sources, shall be clearly disclosed to the advice recipient (within the meaning of subsection (e)(11)(C)), and

“(D) in any case in which a person who, acting in good faith and with reasonable diligence, makes an error or omission in disclosing the information specified in subparagraphs (B) or (C), 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.”.

(b) Effective Date.—
(1) Modification of certain rules, and rules and administrative positions promul-
gated before enactment but not effective on January 1, 2015, prohibited.—The Depart-
ment of Labor is prohibited from amending any rules or administrative positions promulgated under section 3(21) of the Employee Retirement Income Security Act of 1974 and section 4975(e)(3) of the Internal Revenue Code of 1986 (including Depart-
ment of Labor Interpretive Bulletin 96–1 (29 C.F.R. 2509.96–1) and Department of Labor Advisory Opinion 2005–23A), and no such rule or administra-
tive position promulgated by the Department of Labor prior to the date of the enactment of this Act but not effective on January 1, 2015, may become effective unless a bill or joint resolution referred to in paragraph (3) is enacted as described in such paragraph not later than 60 days after the date of the enactment of this Act.

(2) General effective date of amend-
ments.—Except as provided in paragraph (3), the amendments made by subsection (a) of this section shall take effect on the 61st day after the date of the enactment of this Act and shall apply with re-
spect to information provided or recommendations
made on or after 2 years after the date of the enactment of this Act.

(3) EXCEPTION.—If a bill or joint resolution is enacted prior to the 61st day after the date of the enactment of this Act that specifically approves any rules or administrative positions promulgated under section 3(21) of the Employee Retirement Security Act of 1974 and section 4975(e)(3) of the Internal Revenue Code of 1986 that is not in effect on January 1, 2015, the amendments made by subsection (a) of this section shall not take effect.

(c) GRANDFATHERED TRANSACTIONS AND SERVICES.—The amendments made by subsection (a) 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 made by subsection (a) of this Act become effective under subsection (b)(2).

(d) TRANSITION.—If the amendments made by subsection (a) of this section take effect, then nothing in this section shall be construed to prohibit the issuance of guidance to carry out such amendments so long as such guidance is necessary to implement such amendments. Until such time as regulations or other guidance are issued to carry out such amendments, a plan and a fiduciary shall be treated as meeting the requirements of such amend-
ments if the plan or fiduciary, as the case may be, makes
a good faith effort to comply with such requirements.