AMENDMENT IN THE NATURE OF A SUBSTITUTE
TO H.R. 4293
OFFERED BY MR. ROE OF TENNESSEE

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.
This Act may be cited as the “Affordable Retirement Advice Protection Act”.

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 406 of the Employee Retirement Income Security Act of 1974, or

(2) breach the best interest standard for the provision of investment advice,

are subject to liability under the Employee Retirement Income Security Act of 1974.

SEC. 3. RULES RELATING TO THE PROVISION OF INVESTMENT ADVICE.
(a) Amendments to the Employee Retirement Income Security Act of 1974.—
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 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

“(ee) 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 of the ob-
ligation of the advisor to comply with section
404 with respect to the provision of such rec-
ommendation; 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 individ-
ualized 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 dis-
claimer of a mutual agreement, arrangement, or under-
standing shall only state the following: ‘This information
is not individualized to you, and you are not intended 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 com-
municated in a clear and prominent manner and an objec-
tive 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), information
shall not be considered to be a recommendation made pur-
suant to a mutual agreement, arrangement, or under-
standing, and such information shall contain the dis-
claimer required by clause (ii), if—

“(I) it is provided in conjunction with full and
fair disclosure in writing to a plan, plan participant,
or beneficiary that the person providing the informa-
tion 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 within and
under the obligations of the best interest standard
as described in this subparagraph;

“(II) the person providing the information is a
counterparty or service provider to the plan in con-
nection with any transaction based on the informa-
tion (including a service arrangement, sale, pur-
chase, 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—

“(aa) the plan is represented, in connection with such transaction, by a plan fiduciary that 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

“(bb) prior to 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 subject to section 404;

“(III) 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) 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 to the plan subject to section 404 and the information consists solely of—

“(aa) making available to the plan, without regard to the individualized needs of the plan, 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

“(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; or

“(BB) providing objective financial data and comparisons with independent benchmarks to the plan;
“(V) the information consists solely of valuation information; or

“(VI) the information 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

“(ee) 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 dif-
ferent 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 may 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) Effective Date.—

(1) Modification of certain rules, and rules and administrative positions promulgated before enactment but not effective on January 1, 2015, prohibited.—The Department of Labor is prohibited from amending any
rules or administrative positions promulgated under, or applicable for purposes of, section 3(21) of the Employee Retirement Income Security Act of 1974 (including Department 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 administrative 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 amendments.—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 respect 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,
or applicable for purposes of, section 3(21) of the Employee Retirement Income Security Act of 1974 that are 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 or a fiduciary shall be treated as meeting the requirements of such amendments if the plan or fiduciary, as the case may be, complies with a reasonable good faith interpretation of such amendments.