AMENDMENT IN THE NATURE OF A SUBSTITUTE
TO H.R. 4294
OFFERED BY MR. BRADY OF TEXAS

Strike all after the enacting clause and insert the following:

1 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”.

5 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.

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

17 (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 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 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 rec-
ommendation 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 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 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 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 communicated in a clear and prominent
manner and an objective person would reason-
ably conclude that, based on all the facts and
circumstances, there was not a mutual agree-
ment, arrangement, or understanding.

“(C) WHEN RECOMMENDATION TREATED
AS MADE PURSUANT TO A MUTUAL AGREE-
MENT, ARRANGEMENT, OR UNDERSTANDING.—
For purposes of subparagraph (A)(ii)(II), infor-
mation shall not be treated as a recommenda-
tion made pursuant to a mutual agreement, ar-
rangement, or understanding, and such infor-
mation shall contain the disclaimer required by
subparagraph (B), if—

“(i) SELLER’S EXCEPTION.—The in-
formation 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, in-
cluding 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. 78e(a))))), 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 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 recommendation 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 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) 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 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 com-

“(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 con-
nection 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 re-
cipient, 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, percent-
age of assets, per capita charge, or esti-
mate of such compensation).

“(D) DEFINITION OF AFFILIATE.—For
purposes of this paragraph, the term ‘affiliate’
has the meaning given in subsection

“(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 affili-
ate, 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).’’.

(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 Security
Act of 1974 and section 4975(e)(3) of the Internal
Revenue Code of 1986 (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 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 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 section 3(21) of the Employee Retirement Income 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 sub-
section (a) of this section take effect, then nothing in this
section shall be construed to prohibit the issuance of guid-
ance to carry out such amendments so long as such guid-
ance is necessary to implement such amendments. Until
such time as regulations or other guidance is issued to
carry out such amendments, a plan or a fiduciary shall
be treated as meeting the requirements of such amend-
ments if the plan or fiduciary, as the case may be, com-
plies with a reasonable good faith interpretation of such
amendments.