To amend the Employee Retirement Income Security Act of 1974, the Commodity Exchange Act, and the Securities Exchange Act of 1934 to ensure that pension plans can use swaps to hedge risks, and for other purposes.

A BILL

To amend the Employee Retirement Income Security Act of 1974, the Commodity Exchange Act, and the Securities Exchange Act of 1934 to ensure that pension plans can use swaps to hedge risks, 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 “Retirement Income Protection Act of 2011”.

IN THE HOUSE OF REPRESENTATIVES

SEPTEMBER 23, 2011

Mr. CANSECO (for himself and Mr. GARRETT) introduced the following bill; which was referred to the Committee on Agriculture, and in addition to the Committees on Education and the Workforce and Financial Services, 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.
SEC. 2. CLARIFICATION OF THE DEFINITION OF FIDUCIARY.

Section 3(21) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002(21)) is amended—

(1) in subparagraph (A), by striking “subparagraph (B)” and inserting “subparagraphs (B) and (C)”;

(2) by adding at the end the following subparagraph:

“(C) No person shall be a fiduciary with respect to a plan by reason of any service, act, or duty that such person is required to perform with respect to such plan by reason of section 4s(h) of the Commodity Exchange Act, section 15F(h) of the Securities Exchange Act of 1934, any rule, regulation, or standard prescribed pursuant to such sections, or any other Federal law, rule, or regulation.”.

SEC. 3. CLARIFICATION OF THE DEFINITION OF SPECIAL ENTITY AND REMOVAL OF ERISA PLANS.

(a) Amendment to the CEA.—Section 4s(h)(2)(C) of the Commodity Exchange Act (7 U.S.C. 6s(h)(2)(C)) is amended—

(1) by striking “For purposes” and inserting “(i) For purposes”;
(2) by striking clause (iii) and redesignating clauses (i), (ii), (iv), and (v) as subclauses (I), (II), (III) and (IV), respectively; and

(3) by adding at the end the following:

“(ii) Such term shall not include any collective investment vehicle in which one or more special entities invest.”.

(b) Amendment to the 1934 Act.—Section 15F(h)(2)(C) of the Securities Exchange Act of 1934 (15 U.S.C. 78o–10(h)(2)(C)) is amended—

(1) by striking “For purposes” and inserting “(i) For purposes”;

(2) by striking clause (iii) and redesignating clauses (i), (ii), (iv), and (v) as subclauses (I), (II), (III) and (IV), respectively; and

(3) by adding at the end the following:

“(ii) Such term shall not include any collective investment vehicle in which one or more special entities invest.”.

SEC. 4. CONFORMING AMENDMENTS TO COUNTERPARTY REQUIREMENTS.

(a) Amendment to the CEA.—Section 4s(h)(5)(A)(i) of the Commodity Exchange Act (7 U.S.C. 6s(h)(5)(A)(i)) is amended—
(1) by inserting “and” after the semicolon in subclause (V); and
(2) by striking subclause (VII).

(1) by inserting “and” after the semicolon in subclause (V); and
(2) by striking subclause (VII).

SEC. 5. CLARIFICATION OF THE DEFINITION OF ADVISOR.

(a) Amendment to the CEA.—Section 4s(h)(4) of the Commodity Exchange Act (7 U.S.C. 6s(h)(4)) is amended—
(1) in subparagraph (B), by adding at the end the following: “The duty of a swap dealer to act in the best interests of a Special Entity shall not be construed to be a fiduciary standard under Federal or State Law.”; and
(2) by adding at the end the following:
“(D) Rule of construction.—A swap dealer will not be treated as an advisor to a Special Entity if—
“(i) the Special Entity represents in writing that—
“(I) the Special Entity will not rely on recommendations provided by the swap dealer; and

“(II) the Special Entity will rely on advice from an independent representative as described in paragraph (5); and

“(ii) the swap dealer discloses to the Special Entity that it is not undertaking to act in the best interests of the Special Entity, as otherwise required by this paragraph.

No swap dealer shall be considered to act as an advisor to a Special Entity solely by reason of providing information to an independent representative described in paragraph (5)(D) of a Special Entity.”.


(1) in subparagraph (B), by adding at the end the following: “The duty of a security-based swap dealer to act in the best interests of a Special Entity shall not be construed to be a fiduciary standard under Federal or State Law.”; and
(2) by adding at the end the following:

“(D) RULE OF CONSTRUCTION.—A security-based swap dealer will not be treated as an advisor to a Special Entity if—

“(i) the Special Entity represents in writing that—

“(I) the Special Entity will not rely on recommendations provided by the security-based swap dealer; and

“(II) the Special Entity will rely on advice from an independent representative as described in paragraph (5); and

“(ii) the security-based swap dealer discloses to the Special Entity that it is not undertaking to act in the best interests of the Special Entity, as otherwise required by this paragraph.

No security-based swap dealer shall be considered to act as an advisor to a Special Entity solely by reason of providing information to an independent representative described in paragraph (5)(D) of a Special Entity.”.
SEC. 6. CLARIFICATION OF THE DEFINITION OF INDEPENDENT REPRESENTATIVES.

(a) Amendment to the CEA.—Section 4s(h)(5) of the Commodity Exchange Act (7 U.S.C. 6s(h)(5)) is amended—

(1) in subparagraph (A)(ii) by striking ‘’; and’’ and inserting a period;

(2) in subparagraph (B), by striking ‘’the Commission’’ and inserting ‘’The Commission’’;

(3) by adding at the end the following sub paragraphs:

‘’(C) A representative of a Special Entity will be considered to be independent of a swap dealer if—

‘’(i) the representative is not an associated person of the swap dealer within the meaning of section 1a(4); and

‘’(ii) no more than 10 percent of the gross revenues of the representative are derived from the swap dealer.

‘’(D) Each of the requirements of this paragraph shall be considered to be met if the Special Entity represents to the swap dealer that it is represented by—
“(i) an entity registered as an investment adviser under the Investment Advisers Act of 1940;
“(ii) a commodity trading adviser as defined in section 1a(12);
“(iii) a municipal advisor as defined in section 15B(c)(4) of the Securities Exchange Act of 1934; or
“(iv) an advisor certified by the National Futures Association.”.

(b) Amendment to the 1934 Act.—Section 15F(h)(5) of the Securities Exchange Act of 1934 (15 U.S.C. 78o–10(h)(5)) is amended by adding at the end the following subparagraphs:

“(C) INDEPENDENCE.—A representative of a Special Entity will be considered to be independent of a security-based swap dealer if—
“(i) the representative is not an associated person of the security-based swap dealer within the meaning of section 1a(4) of the Commodity Exchange Act; and
“(ii) no more than 10 percent of the gross revenues of the representative are derived from the security-based swap dealer.
“(D) Rule of construction.—Each of
the requirements of this paragraph shall be con-
sidered to be met if the Special Entity rep-
resents to the security-based swap dealer that it
is represented by—

“(i) an entity registered as an invest-
ment adviser under the Investment Advis-
ers Act of 1940;

“(ii) a commodity trading adviser as
defined in section 1a(12) of the Com-
modity Exchange Act;

“(iii) a municipal advisor as defined
in section 15B(e)(4); or

“(iv) an advisor certified by the Fi-
nancial Industry Regulatory Authority.”.

SEC. 7. AMENDMENT TO THE DEFINITION OF COMMODITY
TRADING ADVISOR.

Section 1a(12)(B)(iii) of the Commodity Exchange
Act (7 U.S.C. 1a(12)(B)(iii)) is amended by striking “or
futures commission merchant” and inserting “, futures
commission merchant, or swap dealer”.

SEC. 8. EFFECTIVE DATE.

(a) In General.—The amendments made by sec-
tions 3 through 7 to the respective provisions of the Com-
modity Exchange Act and the Securities Exchange Act of
1934 shall take effect as if included in the sections of the Dodd-Frank Wall Street Reform and Consumer Protection Act that added such respective provisions to such Acts.

(b) ERISA AMENDMENTS.—The amendment made by section 2 of this Act shall take effect as if enacted on the date of enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act.