

STRENGTHENING ACCESS TO VALUABLE EDUCATION
AND RETIREMENT SUPPORT ACT OF 2015

APRIL 20, 2016.—Committed to the Committee of the Whole House on the State of
the Union and ordered to be printed

Mr. KLINE, from the Committee on Education and the Workforce,
submitted the following

R E P O R T

together with

MINORITY VIEWS

[To accompany H.R. 4294]

[Including cost estimate of the Congressional Budget Office]

The Committee on Education and the Workforce, to whom was referred the bill (H.R. 4294) to amend the Internal Revenue Code of 1986 to ensure that retirement investors receive advice in their best interests, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment is as follows:

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 distribution 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, including recommendations relating to the management of moneys or other property to be rolled over or otherwise 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 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 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 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 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, 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 compensation to the person providing the recommendation (or any affiliate of such person), but only if 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, 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 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).”.

(4) EXEMPTION RELATING TO INVESTMENT ADVICE WITH RESPECT TO CERTAIN FEE ARRANGEMENTS.—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 advice described in subsection (e)(3)(B) and the advice recipient in connection with such investment advice, if—

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

“(B) in a case in which 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, 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 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 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 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 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 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 amendments if the plan or fiduciary, as the case may be, makes a good faith effort to comply with such requirements.

PURPOSE

H.R. 4294, the *Strengthening Access to Valuable Education and Retirement Support Act of 2015* (SAVERS Act), prohibits the Department of Labor (DOL or department) from implementing its proposed regulation* amending the regulatory definition of “fiduciary”¹ under the *Employee Retirement Income Security Act of 1974* (ERISA)² and the *Internal Revenue Code of 1986* (Code),³ unless Congress affirmatively approves the final rule. Instead, the bill updates current law to ensure that all financial professionals providing personalized advice about investments, distributions, or the use of other fiduciaries are legally required to act in the best interest of their customers. However, unlike the DOL proposed regulation, the SAVERS Act ensures low- and medium-income savers and small businesses have continued access to affordable retirement advice.

COMMITTEE ACTION

112TH CONGRESS

Full Committee Hearing Reviewing Policies and Priorities at the U.S. Department of Labor

On February 16, 2011, the Committee on Education and the Workforce (Committee) held a hearing entitled “Policies and Priorities at the U.S. Department of Labor” to examine, among other things, DOL’s Employee Benefits Security Administration’s (EBSA) October 2010 proposed regulation significantly expanding the definition of “fiduciary” under ERISA and the Code. The Honorable Hilda L. Solis, then-Secretary of the U.S. Department of Labor, was the sole witness. During the hearing, Representatives Judy Biggert (R–IL) and Carolyn McCarthy (D–NY) expressed concerns regarding DOL’s proposed rule, specifically in regard to the department’s lack of coordination with the Securities and Exchange Commission.⁴

Subcommittee hearing assessing the impact of the Labor Department’s Proposal on Workers and Retirees

On July 26, 2011, the Subcommittee on Health, Employment, Labor, and Pensions (HELP) held a hearing entitled “Redefining ‘Fiduciary’: Assessing the Impact of the Labor Department’s Proposal on Workers and Retirees” to examine the consequences of EBSA’s 2010 proposed rule. Witnesses included the Honorable Phyllis Borzi, Assistant Secretary of Labor, Employee Benefits Se-

*The Committee ordered this bill reported to the House of Representatives on February 2, 2016, and this report reflects the Committee’s views on that date. In the intervening time, the Department of Labor has published a final regulatory package that changed certain aspects of the previously proposed rule and exemptions discussed herein. *See, e.g.*, Definition of the Term “Fiduciary”; Conflict of Interest Rule-Retirement Investment Advice, 81 Fed. Reg. 20945 (Apr. 8, 2016). Despite these revisions, the Committee continues to have serious concerns the final regulation will reduce access to affordable retirement advice. Press release, H. Comm. on Educ. and the Workforce, Committee Leaders Respond to Labor Department’s Final Fiduciary Rule (Apr. 6, 2016). <http://edworkforce.house.gov/news/documentsingle.aspx?DocumentID=400576>.

¹Definition of the Term “Fiduciary”; Conflict of Interest Rule-Retirement Investment Advice, 80 Fed. Reg. 21928 (Apr. 20, 2015).

²29 U.S.C. § 1001 *et seq.*

³26 U.S.C. § 1 *et seq.* [hereinafter the Code; All section references herein are to the Code unless otherwise indicated].

⁴*Policies and Priorities at the U.S. Department of Labor: Hearing Before the H. Comm. on Educ. and the Workforce*, 112th Cong. 15, 38 (Feb. 16, 2011).

curity Administration, Washington, D.C.; Mr. Kenneth Bentsen, Executive Vice President, Securities Industry and Financial Markets Association, Washington, D.C.; Mr. Kent Mason, Partner, Davis & Harman LLP, Washington, D.C.; Mr. Donald Myers, Partner, Morgan, Lewis & Bockius LLP, Washington, D.C.; Mr. Norman Stein, Professor, Earle Mack School of Law, Drexel University, Philadelphia, Pennsylvania; and Mr. Jeffrey Tarbell, Director, Houlihan Lokey, San Francisco, California.

Full committee hearing reviewing the President's Fiscal Year 2013 Budget Proposal for the Department of Labor

On March 21, 2012, the Committee held a hearing entitled “Reviewing the President’s Fiscal Year 2013 Budget Proposal for the Department of Labor.” Then-Secretary Solis was the sole witness. During the hearing, Representatives of both parties thanked Secretary Solis for withdrawing the 2010 proposed fiduciary rule and inquired as to what criteria would be considered in a subsequent regulatory proposal.⁵

113TH CONGRESS

Full committee hearing reviewing the President's Fiscal Year 2015 Budget Proposal for the Department of Labor

On March 26, 2014, the Committee held a hearing entitled “Reviewing the President’s Fiscal Year 2015 Budget Proposal for the Department of Labor.” The Honorable Thomas E. Perez, Secretary of the U.S. Department of Labor, was the sole witness. During this hearing, Committee on Education and the Workforce Chairman John Kline reiterated bipartisan concerns regarding DOL’s ongoing fiduciary rulemaking. Addressing the consequences of the department’s proposed rule, Chairman Kline urged Secretary Perez to keep in mind “what the impact will be on important advice that people, particularly low-income people, might need.”⁶

114TH CONGRESS

Full committee hearing reviewing the President's Fiscal Year 2016 Budget Proposal for the Department of Labor

On March 18, 2015, the Committee held a hearing entitled “Reviewing the President’s Fiscal Year 2016 Budget Proposal for the Department of Labor.” Secretary Perez was the sole witness. During the hearing, Representative Frederica Wilson (D–FL) warned that a new proposed fiduciary rule should not “impact the availability of affordable investment advice.”⁷

⁵ *Reviewing the President's Fiscal Year 2013 Budget Proposal for the Department of Labor: Hearing Before the H. Comm. on Educ. and the Workforce*, 112th Cong. (Mar. 21, 2012).

⁶ *Reviewing the President's Fiscal Year 2015 Budget Proposal for the Department of Labor: Hearing Before the H. Comm. on Educ. and the Workforce*, 113th Cong. 86 (Mar. 26, 2014) (closing statement of Rep. John Kline, Chairman, H. Comm. on Educ. and the Workforce).

⁷ *Reviewing the President's Fiscal Year 2016 Budget Proposal for the Department of Labor: Hearing Before the H. Comm. on Educ. and the Workforce*, 114th Cong. (Mar. 18, 2015) (statement of Rep. Frederica S. Wilson, Member, H. Comm. on Educ. and the Workforce).

Subcommittee hearing examining restricting access to Financial Advice: Evaluating the Costs and Consequences for Working Families and Retirees

On June 17, 2015, the HELP Subcommittee held a hearing entitled “Restricting Access to Financial Advice: Evaluating the Costs and Consequences for Working Families and Retirees” to examine the new DOL Notice of Proposed Rulemaking (NPRM) amending the regulatory definition of “fiduciary” under ERISA. Witnesses before the Subcommittee included Secretary Perez; Mr. Jack Haley, Executive Vice President, Fidelity Investments, Boston, Massachusetts; Mr. Dean Harman, CFP, Managing Director, Harman Wealth Management, The Woodlands, Texas; Mr. Dennis Kelleher, President and CEO, Better Markets, Washington, D.C.; Mr. Kent Mason, Partner, Davis & Harman LLP, Washington, D.C.; and Dr. Brian Reid, Ph.D., Chief Economist, Investment Company Institute, Washington, D.C. During the hearing, Dr. Reid testified opposing DOL’s repropoed fiduciary rule, saying, “[A]ny policy that impairs retirement savers’ ability to get the help that they need will significantly harm the prospects of millions of workers. Unfortunately, the DOL proposal will do just that.”⁸ Additionally, Jack Haley of Fidelity Investments testified in support of a “best-interest fiduciary standard crafted in a way that allows workers choice and access to the services they need and desire.”⁹

Subcommittee hearing examining the Principles for Ensuring Retirement Advice Serves the Best Interests of Working Families and Retirees

On December 2, 2015, the HELP Subcommittee held a hearing entitled “Principles for Ensuring Retirement Advice Serves the Best Interests of Working Families and Retirees” to further examine the DOL NPRM amending the regulatory definition of “fiduciary” under ERISA. Notably, the Subcommittee considered the potential negative effects of the NPRM on small businesses and low- and middle-income families. Witnesses before the Subcommittee included the Honorable Bradford (Brad) Campbell, Counsel, Drinker Biddle & Reath LLP, Washington, D.C.; Ms. Rachel A. Doba, President, DB Engineering, LLC, Indianapolis, Indiana; Mr. Jules O. Gaudreau, Jr. ChFC, CIC, President, The Gaudreau Group, Inc., Wilbraham, Massachusetts; and Ms. Marilyn Mohrman-Gillis, Esq., Managing Director, Public Policy & Communications, Certified Financial Planner Board of Standards, Washington, D.C. During the hearing,¹⁰ witnesses praised the bipartisan principles outlined by Representatives Phil Roe (R–TN), Richard Neal (D–MA), Peter Roskam (R–IL), and Michelle Lujan Grisham (D–NM) for a legislative solution to help strengthen retirement security.

⁸*Restricting Access to Financial Advice: Evaluating the Costs and Consequences for Working Families and Retirees: Hearing Before the Subcomm. on Health, Employment, Labor, and Pensions of the H. Comm. on Educ. and the Workforce*, 114th Cong. (Jun. 17, 2015) (oral testimony of Dr. Brian Reid, Ph.D., Chief Economist, Investment Company Institute).

⁹*Restricting Access to Financial Advice: Evaluating the Costs and Consequences for Working Families and Retirees: Hearing Before the Subcomm. on Health, Employment, Labor, and Pensions of the H. Comm. on Educ. and the Workforce*, 114th Cong. (Jun. 17, 2015) (oral testimony of Mr. Jack Haley, Executive Vice President, Fidelity Investments).

¹⁰*Principles for Ensuring Retirement Advice Serves the Best Interests of Working Families and Retirees: Hearing Before the Subcomm. on Health, Employment, Labor, and Pensions of the H. Comm. on Educ. and the Workforce*, 114th Cong. (Dec. 2, 2015).

H.R. 4294, Strengthening Access to Valuable Education and Retirement Support Act of 2015, introduced

On December 18, 2015, Representative Peter Roskam (R-IL), along with Representatives Phil Roe (R-TN), Richard Neal (D-MA), John Larson (D-CT), Tom Reed (R-NY), and Michelle Lujan Grisham (D-NM), introduced the *Strengthening Access to Valuable Education and Retirement Support Act of 2015* (H.R. 4294).¹¹ Recognizing the threat of DOL’s proposed “fiduciary” rule, the bipartisan bill was introduced to protect consumers and preserve access to affordable financial advice for low- and middle-income families. The legislation amends the Internal Revenue Code to require retirement advisors to act in their clients’ best interest, and prohibits DOL from implementing its flawed proposal unless Congress affirmatively approves the final rule.

Committee passes H.R.4294, Strengthening Access to Valuable Education and Retirement Support Act of 2015

On February 2, 2016, the Committee on Education and the Workforce considered H.R. 4294, the *Strengthening Access to Valuable Education and Retirement Support Act of 2015*.¹² Representative Earl L. “Buddy” Carter (R-GA) offered an amendment in the nature of a substitute, making technical changes to the introduced bill. The Committee voted to adopt the amendment in the nature of a substitute by voice vote. One additional amendment was offered and subsequently withdrawn. The Committee favorably reported H.R. 4294, as amended, to the House of Representatives by a vote of 22–14.

BACKGROUND

PRESENT LAW

Tax-favored savings arrangements

Tax-favored retirement savings

The Code provides two general vehicles for tax-favored retirement savings: employer-sponsored retirement plans and individual retirement arrangements (IRAs).¹³ Various requirements must be met for tax-favored treatment to apply. Retirement plans of private employers are also generally subject to the ERISA, over which the Secretary of Labor has jurisdiction.

The most common type of tax-favored employer-sponsored plan is a qualified retirement plan, which may be a defined contribution plan or a defined benefit plan.¹⁴ Under a defined contribution plan, benefits are based on a separate account for each participant, to which are allocated contributions, earnings and losses.¹⁵ Defined

¹¹ H.R. 4294, 114th Cong. (2015).

¹² *H.R. 4294, Strengthening Access to Valuable Education and Retirement Support Act of 2015: Markup Before the H. Comm. on Educ. and the Workforce*, 114th Cong. (Feb. 2, 2016).

¹³ Sections 219, 408 and 408A provide rules for IRAs.

¹⁴ § 401(a). A qualified annuity plan under section 403(a) is similar to a qualified retirement plan (and subject to similar requirements) except that plan assets consist of annuity contracts, rather than investments held in a trust or custodial account. References herein to a qualified retirement plan include a qualified annuity plan. Simplified employee pension (SEP) plans under section 408(k) and SIMPLE IRA plans under section 408(p) are employer-sponsored plans funded through contributions by the employer to an IRA established for each employee.

¹⁵ Defined contribution plan is defined at section 414(i).

contribution plans commonly allow participants to direct the investment of their accounts, usually by choosing among investment options offered under the plan. Under a defined benefit plan, benefits are determined under a plan formula, and benefits under a defined benefit plan are funded by the general assets of the trust established under the plan, which are invested by plan fiduciaries; individual accounts are not maintained for employees participating in the plan.¹⁶

A distribution from an employer-sponsored retirement plan or IRA is includible in income except to the extent it consists of a return of basis or an excludible distribution from a Roth arrangement.¹⁷ In most cases, however, a distribution may be rolled over on a nontaxable basis to another such plan or an IRA, either by a direct rollover or by contributing the distribution to the other plan or IRA within 60 days of receiving the distribution.¹⁸

Health Savings Accounts and Archer MSAs

An individual with a high deductible health plan (and, subject to exceptions, no other health plan) generally may make contributions to a health savings account (HSA).¹⁹ In some cases, such an individual may contribute to an Archer MSA.²⁰ Subject to limits, an individual's HSA and Archer MSA contributions are deductible in determining adjusted gross income and are excludable from an employee's income and wages if made by an employer. HSA and Archer MSA distributions used for qualified medical expenses are not includible in gross income. Distributions may also be rolled over to another HSA or Archer MSA.

Coverdell Education Savings Accounts

A Coverdell education savings account (Coverdell ESA) is an account created exclusively for the purpose of paying qualified education expenses of a designated beneficiary.²¹ Subject to income limits, annual after-tax contributions up to \$2,000 may be made until a designated beneficiary reaches age 18. Earnings on contributions to a Coverdell ESA generally are includible in income when withdrawn; however, distributions are excludable from income up to the beneficiary's qualified education expenses for the year. Amounts in a Coverdell ESA may be rolled over to another Coverdell ESA for the same beneficiary or certain family members. In general, the balance in a Coverdell ESA is deemed distributed within 30 days after the date that the beneficiary reaches age 30.

Prohibited transaction rules

The Code prohibits certain transactions (prohibited transaction) between a qualified retirement plan and a disqualified person.²²

¹⁶ As defined in section 414(j), a defined benefit plan is any plan that is not a defined contribution plan.

¹⁷ Sections 402A and 408A provide rules for Roth arrangements.

¹⁸ §§ 402(c), 403(a)(4), 403(b)(8), 408(d)(3), 408A(e), and 457(e)(16).

¹⁹ Section 223 provides rules for HSAs.

²⁰ Section 220 provides rules for Archer MSAs.

²¹ Section 530 provides rules for Coverdell ESAs.

²² § 4975. Under section 4975 of the Internal Revenue Code of 1986 (the Code), similar rules apply to qualified retirement plans under Code sec. 401(a) and qualified annuities under Code sec. 403(a) of private employers, as well as individual retirement arrangements (IRAs) under Code section 408, health savings accounts (HSAs) under Code section 223, Archer MSAs under Code section 220, and Coverdell education savings accounts (Coverdell ESAs) under Code section 530. The prohibited transaction rules under the Code generally do not apply to governmental

The prohibited transaction rules under the Code apply also to IRAs, Archer MSAs, HSAs, and Coverdell ESAs.²³

Prohibited transactions include the following transactions, whether direct or indirect, between a plan and a disqualified person: (1) the sale or exchange or leasing of property, (2) the lending of money or other extension of credit, (3) the furnishing of goods, services or facilities, (4) the transfer to, or use by or for the benefit of, the income or assets of the plan, (5) in the case of a fiduciary, an act dealing with the plan's income or assets in the fiduciary's own interest or for the fiduciary's own account, and (6) the receipt by a fiduciary of any consideration for the fiduciary's own personal account from any party dealing with the plan in connection with a transaction involving the income or assets of the plan.²⁴

Disqualified persons include a fiduciary of the plan; a person providing services to the plan; an employer with employees covered by the plan; an employee organization any of whose members are covered by the plan; and certain owners, officers, directors, highly compensated employees, family members, and related entities.²⁵ A fiduciary includes any person who (1) exercises any discretionary authority or discretionary control respecting management of the plan or exercises any authority or control respecting management or disposition of the plan's assets, (2) renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of the plan, or has any authority or responsibility to do so, or (3) has any discretionary authority or discretionary responsibility in the administration of the plan.²⁶

Certain transactions are statutorily exempt from prohibited transaction treatment, for example, certain loans to plan participants and arrangements with a disqualified person for legal, accounting or other services necessary for the establishment or operation of a plan if no more than reasonable compensation is paid for the services.²⁷ In addition, an administrative exemption may be granted, on either an individual or class basis, subject to a finding that the exemption is administratively feasible, in the interests of the plan and of its participants and beneficiaries, and protective of the rights of participants and beneficiaries of the plan.²⁸ Before an administrative exemption is granted, notice must be provided to interested persons, notice must be published in the Federal Register of the pendency of the exemption, and interested persons must be given an opportunity to provide comments.

Excise tax on prohibited transactions

If a prohibited transaction occurs, the disqualified person who participated in the transaction is generally subject to a two-tiered excise tax.²⁹ The first tier tax is 15 percent of the amount involved

plans or church plans. However, under section 503, the trust holding assets of a governmental or church plan may lose its tax-exempt status in the case of a prohibited transaction listed in section 503(b).

²³ These are included in the definition of "plan" under section 4975(e)(1).

²⁴ § 4975(c)(1).

²⁵ § 4975(e)(2).

²⁶ § 4975(e)(3). Fiduciary also includes any named fiduciary under ERISA section 405(c)(1)(B).

²⁷ § 4975(d)(1) and (d)(2).

²⁸ § 4975(c)(2).

²⁹ In the case of an IRA, HSA, Archer MSA or Coverdell ESA, the sanction for some prohibited transactions is the loss of tax-favored status, rather than an excise tax. See section 408(e)(2), also cross-referenced in sections 220(e)(2), 223(e)(2) and 530(e).

in the transaction. The second tier tax, imposed if the prohibited transaction is not corrected within a certain period, is 100 percent of the amount involved.

For purposes of the excise tax, the amount involved with respect to a prohibited transaction is generally the greater of (1) the amount of money and the fair market value of the other property given or (2) the amount of money and the fair market value of the other property received.³⁰ For purposes of the excise tax, “correction” and “correct” mean, with respect to a prohibited transaction, undoing the transaction to the extent possible, but in any case placing the plan in a financial position not worse than that in which it would be if the disqualified person were acting under the highest fiduciary standards.

Jurisdiction over the prohibited transaction rules

Jurisdiction over the Code provisions governing qualified retirement plans and similar ERISA provisions is divided between the Department of the Treasury (Treasury) and the DOL by Executive Order, referred to as Reorganization Plan No. 4 of 1978 (Reorganization Plan).³¹ As part of this division, with certain exceptions, Treasury authority was transferred to DOL with respect to regulations, rulings, opinions, and exemptions under the prohibited transaction provisions of the Code.³² As a result, DOL regulations and other guidance relating to prohibited transactions applies for Code purposes, as well as for ERISA purposes, and DOL has the authority to grant individual and class exemptions applicable under the Code, including with respect to IRAs, HSAs, Archer MSAs, and Coverdell ESAs.

Rules relating to investment advice

Fiduciary status

As described above, a fiduciary includes a person who renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of the plan, or has any authority or responsibility to do so.

Existing DOL regulations, issued in 1975, provide that a person is deemed to be rendering “investment advice” to an employee benefit plan for this purpose only if—

- the person renders advice to the plan as to the value of securities or other property or makes recommendation as to the advisability of investing in, purchasing, or selling securities or other property; and
- the person either directly or indirectly (for example, through or together with any affiliate) (1) has discretionary authority or control, whether or not pursuant to agreement, arrangement, or understanding, with respect to purchasing or selling securities or other property for the plan, or (2) renders any advice as described above on a regular basis to the plan pursuant

³⁰In the case of certain transactions for services for which more than reasonable compensation is paid, the amount involved is only the excess compensation.

³¹Reorganization Plan No. 4 of 1978, 43 Fed. Reg. 47713 (Oct. 17, 1978).

³²§§ 102 and 105 of Reorganization Plan No. 4 of 1978, 43 Fed. Reg. 47713. Rules for coordination concerning certain fiduciary actions are provided under section 103 of the Reorganization Plan. In addition, under section 3003 of ERISA, Treasury and DOL are directed to consult with each other from time to time with respect to the prohibited transaction rules and exemptions.

to a mutual agreement, arrangement, or understanding, written or otherwise, between the person and the plan or a fiduciary with respect to the plan, that the person's services will serve as a primary basis for investment decisions with respect to plan assets, and that the person will render individualized investment advice to the plan based on the particular needs of the plan regarding matters such as, among other things, investment policies or strategy, overall portfolio composition, or diversification of plan investments.³³

The regulations further provide that a person who is a fiduciary with respect to a plan by reason of rendering investment advice (as described above) for a fee or other compensation, direct or indirect, with respect to any moneys or other property of the plan, or having any authority or responsibility to do so, is not deemed to be a fiduciary regarding any assets of the plan with respect to which the person does not have any discretionary authority, discretionary control, or discretionary responsibility, does not exercise any authority or control, does not render investment advice (as described above) for a fee or other compensation, and does not have any authority or responsibility to render such investment advice. However, this rule does not exempt the person from ERISA liability attributable to a breach of responsibility by a co-fiduciary or exclude the person from the definition of the term "party in interest" based on providing services to the plan with respect to any assets of the plan.

In addition to the regulations, other guidance issued by DOL in 1996 (Interpretive Bulletin 96-1) provides that the furnishing of mere investment education to a participant or beneficiary in a participant-directed individual account plan does not constitute the rendering of investment advice.³⁴ For this purpose, investment education includes the following categories of information and materials: plan information, general financial and investment information, asset allocation models, and interactive investment materials. Interpretive Bulletin 96-1 more fully describes these categories and notes that the information and materials merely represent examples of the type that may be furnished to participants and beneficiaries without such information and materials constituting investment advice, and that there may be many other examples of information, materials, and educational services, which if furnished to participants and beneficiaries, would not constitute investment advice. Accordingly, Interpretive Bulletin 96-1 provides that no inferences should be drawn from the description of the four categories with respect to whether the furnishing of any information, materials, or educational services not described therein may constitute investment advice.

³³ 29 C.F.R. § 2510.3-21(c). Under Sec. 102 of Reorganization Plan No. 4 of 1978, 43 Fed. Reg. 47713, with certain exceptions, the Secretary of the Treasury's authority with respect to regulations, rulings, opinions, and exemptions under the prohibited transaction provisions of the Code was transferred to the Secretary of Labor. As a result, DOL regulations and other guidance relating to prohibited transactions, including the grant of exemptions, apply for Code purposes, as well as for ERISA purposes.

³⁴ 29 C.F.R. § 2905.96-1. This treatment applies irrespective of who provides the information (for example, the plan sponsor, fiduciary or service provider), the frequency with which the information is shared, the form in which the information and materials are provided (for example, on an individual or group basis, in writing or orally, or via video or computer software), or whether an identified category of information and materials is furnished alone or in combination with other identified categories of information and materials.

Statutory exemptions relating to investment advice

If certain requirements are met, specific transactions relating to investment advice are exempt from prohibited transaction treatment if the advice is provided by a fiduciary advisor through an eligible investment advice arrangement.³⁵ The exemptions apply to (1) the provision of investment advice to a plan participant or beneficiary with respect to a security or other property available as an investment under the plan, (2) an investment transaction (that is, a sale, acquisition, or holding of a security or other property) pursuant to the advice, and (3) the direct or indirect receipt of fees or other compensation in connection with the provision of the advice or an investment transaction pursuant to the advice.

For purposes of the exemptions, an eligible investment advice arrangement is generally an arrangement that either (1) provides that any fees (including any commission or compensation) received by the fiduciary advisor for investment advice or with respect to an investment transaction with respect to plan assets do not vary depending on the basis of any investment option selected (sometimes referred to as “fee-leveling”), or (2) uses a computer model under an investment advice program that meets specified requirements in connection with the provision of investment advice to a participant or beneficiary.³⁶ The arrangement must be expressly authorized by a plan fiduciary other than (1) the person offering the investment advice program, (2) any person providing investment options under the plan, or (3) any affiliate of (1) or (2).³⁷ In addition, the fiduciary advisor must provide disclosures applicable under securities laws; any investment transaction must occur solely at the direction of the investment advice recipient; the compensation received by the fiduciary advisor and affiliates in connection with the investment transaction must be reasonable; and the terms of the investment transaction must be at least as favorable to the plan as an arm’s length transaction would be.

DOL’S 2015 PROPOSED REGULATIONS AND “BIC” EXEMPTION

On April 20, 2015, DOL proposed regulations that would replace the current regulations relating to investment advice with a new standard as to whether a person is a fiduciary based on rendering investment advice, generally to be applicable eight months after final regulations are published.³⁸ Under the proposed regulations, a person is a fiduciary based on rendering investment advice if the person does the following:

- Provides to a plan, a plan fiduciary, an IRA,³⁹ or an IRA owner certain types of recommendations or statements (as de-

³⁵ ERISA § 408(b)(14) and (g), enacted by section 601 of the Pension Protection Act of 2006, Pub. L. No. 109–280.

³⁶ Various requirements with respect to notices and disclosure, recordkeeping and audits must also be met.

³⁷ Affiliate for this purpose means an affiliated person as defined under section 2(a)(3) of the Investment Company Act of 1940, 15 U.S.C. § 80a–2(a)(3).

³⁸ Definition of the Term “Fiduciary,” 80 Fed. Reg. at 21928. The proposed regulations would apply for purposes of ERISA and the prohibited transaction rules of the Code. DOL had previously proposed a regulation similarly expanding fiduciary liability. Definition of the Term “Fiduciary,” 75 Fed. Reg. 65263 (Oct. 15, 2010) [hereinafter 2010 Proposal]. That proposal was withdrawn due to bipartisan opposition.

³⁹ IRA is defined in the proposed guidance to include HSAs, Archer MSAs, and Coverdell ESAs, as well as IRAs. In Part IV.E of the preamble to the proposed regulations, DOL requests comments as to whether it is appropriate to cover individual accounts other than IRAs and treat them in a manner similar to IRAs. Definition of the Term “Fiduciary,” 80 Fed. Reg. at 21947.

scribed below) that constitute investment advice with respect to plan or IRA assets in exchange for a fee or other compensation; and

- Either directly or indirectly (such as through an affiliate) (1) represents or acknowledges that it is acting as a fiduciary with respect to the investment advice or (2) renders the advice pursuant to a written or verbal agreement, arrangement, or understanding that the advice is individualized to, or that the advice is specifically directed to, the advice recipient for consideration in making investment or management decisions with respect to securities or other property of the plan or IRA.

Under the proposed regulations, investment advice includes the following:

- A recommendation as to the advisability of acquiring, holding, disposing of, or exchanging securities or other property, including a recommendation to take a distribution of benefits or a recommendation as to the investment of securities or other property to be rolled over or otherwise distributed from the plan or IRA;⁴⁰
- A recommendation as to the management of securities or other property, including recommendations as to the management of securities or other property to be rolled over or otherwise distributed from the plan or IRA;
- An appraisal, fairness opinion, or similar statement, whether verbal or written, concerning the value of securities or other property if provided in connection with a specific transaction or transactions involving the acquisition, disposition, or exchange of such securities or other property by the plan or IRA; and
- A recommendation of a person who is also going to receive a fee or other compensation for providing any of the types of advice described above.

Subject to specified requirements for each exception, the proposed regulations provide exceptions (referred to as “carve-outs”) for (1) certain counterparties in transactions with an employee benefit plan (referred to as the “seller’s carve-out”); (2) swap and security-based swap transactions with an employee benefit plan; (3) employees of an employee benefit plan sponsor; (4) platform providers to employee benefit plans; (5) persons providing selection and monitoring assistance to employee benefit plans; (6) financial reports and valuations (including to an IRA or IRA owner); and (7) invest-

⁴⁰ Under the Code, a distribution from an employer-sponsored retirement plan, IRA, HSA, Archer MSA, or Coverdell ESA may be rolled over (often referred to as a “rollover”) to a similar arrangement and continue to receive tax-favored treatment. DOL Advisory Opinion 2005-23A (Dec. 7, 2005) addresses the question of whether a recommendation that a participant in a pension plan roll over his or her account balance to an IRA to take advantage of investment options not available under the plan constitutes investment advice with respect to plan assets. The advisory opinion expresses the view that, with respect to a person who is not otherwise a plan fiduciary, merely advising a plan participant to take an otherwise permissible plan distribution, even when the advice is combined with a recommendation as to how the distribution should be invested, does not constitute investment advice within the meaning of the existing DOL investment advice regulations defining when a person is a fiduciary by virtue of providing investment advice with respect to employee benefit plan assets. The advisory opinion provides that DOL does not view a recommendation to take a distribution as advice or a recommendation concerning a particular investment (that is, purchasing or selling securities or other property) as contemplated by the regulations and that any investment recommendation regarding the proceeds of a distribution would be advice with respect to funds that are no longer plan assets. Part IV.A(1) of the preamble to the proposed regulations notes that the proposed regulations, if finalized, would supersede Advisory Opinion 2005-23A. Definition of the Term “Fiduciary,” 80 Fed. Reg. at 21939.

ment education (including to an IRA or IRA owner), under standards somewhat different from the standards in the existing DOL guidance. However, an exception does not apply if the person represents or acknowledges that it is acting as a fiduciary with respect to the advice. In conjunction with the proposed regulations, DOL proposed new prohibited transaction class exemptions, including a “best interest contract” (or BIC) exemption,⁴¹ as well as proposing changes to various existing class exemptions.

The proposed BIC class exemption generally applies to compensation received by an investment advisor or related party in connection with a transaction (that is, a purchase, sale, or holding of assets) resulting from investment advice provided to “retirement investors,” meaning plan participants or beneficiaries who direct the investment of the assets in their accounts, IRA owners who make investment decisions with respect to their IRAs, and a plan sponsor (or employee, officer, or director thereof) of a plan with fewer than 100 participants where the plan does not provide for participant-directed investments and the plan sponsor acts as a fiduciary who has authority to make plan investment decisions. Only advice in the best interest of the saver under the proposed regulation qualifies for the exemption.⁴²

Assets subject to the proposed BIC class exemption include the following: bank deposits; certificates of deposit (CDs); shares or interests in mutual funds; bank collective funds; insurance company separate accounts; exchange-traded REITs (Real Estate Investment Trusts); exchange-traded funds; corporate bonds offered pursuant to a registration statement under the *Securities Act of 1933*; agency debt securities and U.S. Treasury Securities; insurance and annuity contracts; guaranteed investment contracts; and exchange-traded equity securities. The proposed BIC class exemption requires that, before making any recommendations on investment transactions, the advisor and financial institution enter into a written contract with the retirement investor as follows:

- The contract affirmatively states that the advisor and financial institution are fiduciaries under ERISA, the Code, or both, with respect to any investment recommendation to the retirement investor;
- Under the contract, the advisor and financial institution specifically agree to adhere to certain impartial conduct standards, which include providing investment advice that is in the best interest of the retirement investor, not recommending investment in an asset if they (or affiliates) will receive more than reasonable compensation in relation to the total services they provide to the retirement investor with respect to the investment, and not providing any statements about an asset, fees, material conflict of interest, and any other matter related to the retirement investor’s investment decision that are misleading;

⁴¹Proposed Best Interest Contract Exemption, 80 Fed. Reg. 21960 (Apr. 20, 2015). This class exemption is proposed to become applicable at the same time as the 2015 proposed fiduciary regulations, eight months after publication of final regulations.

⁴²The preamble to the proposed exemption states, “Under this standard, the Adviser and Financial Institution must put the interests of the Retirement Investor ahead of the financial interests of the Adviser, Financial Institution or their Affiliates, Related Entities or any other party.” Proposed Best Interest Contract Exemption, 80 Fed. Reg. at 21970.

- Under the contract, the advisor and financial institution provide certain warranties and make certain disclosures related to fees and conflicts of interest; and
- The contract must not have exculpatory provisions disclaiming or otherwise limiting liability of the advisor or financial institution for a violation of the contract’s terms, or a provision under which a plan, IRA, or retirement investor waives or qualifies its right to bring or participate in a class action or other representative action in court in a dispute with the advisor or financial institution.⁴³

SUMMARY OF H.R. 4294

The bill⁴⁴ specifies that its purpose is to provide that advisors who (1) provide advice that is impermissible under the prohibited transaction provisions of the Code or (2) breach the best interest standard for the provision of investment advice are subject to liability under the Code.

The bill adds a statutory definition of investment advice to the prohibited transaction provisions of the Code. In addition, subject to specified requirements, the bill adds new statutory exemptions for the provision of investment advice by a fiduciary to a plan, plan participant, or beneficiary with respect to the plan, referred to as a “best interest recommendation,” and any transaction between a person providing investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of the plan.

DEFINITION OF INVESTMENT ADVICE

General rule

The statutory definition of investment advice under the bill applies (as the regulatory definition applies under present law) for purposes of determining if a person is a fiduciary with respect to a plan based on rendering investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of the plan, or having any authority or responsibility to do so, and thus, is a disqualified person with respect to the plan. As defined under the bill, investment advice includes certain recommendations rendered under certain conditions.

Specifically, under the bill, the recommendations that may be investment advice (if rendered under the conditions described below) are those that relate to the following:

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

⁴³ As described in DOL’s background discussion of the proposed exemption, the contract terms to which advisors and financial institutions must agree in order to qualify for the proposed BIC class exemption potentially create a cause of action that may be used by retirement investors to enforce these contract terms. Proposed Best Interest Contract Exemption, 80 Fed. Reg. at 21972, 21973.

⁴⁴ H.R. 4294, 114th Cong. (2015).

- The management of moneys or other property of the plan, including recommendations relating to the management of moneys or other property to be rolled over or otherwise distributed from the plan; or
- The advisability of retaining or ceasing to retain a person who would receive a fee or other compensation for providing any of these types of advice.

In order for a recommendation to be investment advice, it must be rendered pursuant to either of the following:

- A written acknowledgment that the person is a fiduciary with respect to the provision of the recommendation; or
- A mutual agreement, arrangement, or understanding which may include limitations as to the scope, timing, and responsibility to provide ongoing monitoring or advice services, between the person making the recommendation and the plan, plan participant, or beneficiary that (1) the recommendation is individualized to the plan, plan participant, or beneficiary and (2) the plan, plan participant, or beneficiary intends to materially rely on the recommendation in making investment or management decisions with respect to any moneys or other property of the plan.

Disclaimer of a mutual agreement, arrangement, or understanding

Under the bill, any disclaimer of a mutual agreement, arrangement, or understanding with respect to a recommendation must 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.” Further, this disclaimer is not effective unless it 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.

Information not treated as investment advice

Under the bill, information provided in the circumstances described below is not treated as a recommendation made pursuant to a mutual agreement, arrangement, or understanding for purposes of the definition of investment advice. The information in these circumstances shall contain the disclaimer described above.

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 (as defined under the bill) or to otherwise act as a fiduciary to the plan or to act under the obligations of a best interest recommendation (described below).

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,⁴⁵ or security-based swap⁴⁶). In addition, the plan is represented, in connection with the 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. Further, prior to entering into the 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 (as defined under the bill) or to otherwise act as a fiduciary to the plan, plan participants, or plan beneficiaries.

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.

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 or under the obligations of a best interest recommendation. In addition, the information provided consists solely of either of the following:

- 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
- In connection with a platform or similar mechanism described above, either (1) 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 (2) providing objective financial data and comparisons with independent benchmarks to the plan.

Valuation: The information consists solely of valuation information.

Financial education: The information consists solely of the following:

- Information described in DOL Interpretive Bulletin 96-1 as in effect on January 1, 2015, regardless of whether the education is provided to a plan or plan fiduciary or a participant or beneficiary,
- 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 the 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

⁴⁵ A swap for this purpose is defined in section 1a of the Commodity Exchange Act, 7 U.S.C. § 1a.

⁴⁶ A security-based swap for this purpose is defined in section 3(a) of the Securities Exchange Act, 15 U.S.C. § 78c(a).

- Any additional information treated as education by the Secretary.

EXEMPTIONS RELATING TO INVESTMENT ADVICE

Best interest recommendation exemption

The bill includes a prohibited transaction exemption for the provision of investment advice by a fiduciary to a plan, plan participant, or beneficiary with respect to the plan in the case of a “best interest recommendation.”

As defined under the bill, a best interest recommendation is a recommendation:

- For which no more than reasonable compensation is paid (determined as described below),
- Provided by a person (referred to in this description as the “advisor”) acting with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person would exercise based on the information obtained through the advisor’s reasonable diligence regarding factors such as the advice recipient’s age and any other information that the advice recipient discloses to the advisor in connection with receiving the recommendation, and
- Where the advisor places the interests of the plan or advice recipient above its own.

A best interest recommendation may include a recommendation (1) that is based on a limited range of investment options, which may consist, in whole or in part, of proprietary products, but only if any 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 before any transaction based on the recommendation, or (2) that may result in variable compensation to the advisor (or any affiliate⁴⁷ of the advisor), but only if the receipt of the 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) is clearly disclosed to the advice recipient before any transaction based on the recommendation. The notices required under this rule must state only the following: “The same or similar investments may be available at a different cost (greater or lesser) from other sources.”

In addition, for purposes of the required disclosure of variable compensation, variable compensation is considered clearly disclosed if notification is provided at any time before a transaction based on the advisor’s recommendation, in a manner calculated to be understood by the average individual. The notification must include the following:

- (1) 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 advisor (or its affiliate) may receive varying amounts of fees or other compensation with respect to the transaction,

⁴⁷ Under the bill, affiliate is defined as under the present-law exemption relating to investment advice, that is, an affiliated person as defined under section 2(a)(3) of the Investment Company Act of 1940, 15 U.S.C. § 80a-2(a)(3).

(2) A description of any fee or other compensation that is directly payable to the advisor (or its affiliate) from the advice recipient with respect to the transaction (expressed as an amount, formula, percentage of assets, per capita charge, or estimate or range of the compensation),

(3) A description of the types and ranges of any indirect compensation that may be paid to the advisor (or its affiliate) by any third party in connection with a transaction based on the advisor's recommendation (expressed as an amount, formula, percentage of assets, per capita charge, or estimate of the ranges of compensation),

(4) On request of the advice recipient, a disclosure of the specific amounts of compensation described in (3) that the advisor will receive in connection with the particular transaction (expressed as an amount, formula, percentage of assets, per capita charge, or estimate of the compensation).

Under the bill, a recommendation will 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 above 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 the error or omission.

The bill also provides special rules relating to the amount involved and correction with respect to a prohibited transaction arising by the failure of investment advice to be a best interest recommendation. In that case, the amount involved is the amount paid to the person providing the advice (or its affiliate) that has not been paid or reimbursed to the plan, plan participants, or plan beneficiaries, including payments and reimbursements made pursuant to a correction (as described in the following sentence). In addition, "correction" and "correct" in this case 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 the 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 the general correction rule under present law (that is, undoing the transaction to the extent possible, but in any case placing the plan in a financial position not worse than that in which it would be if the disqualified person were acting under the highest fiduciary standards).

Exemption for certain fee arrangements

The bill also provides a prohibited transaction exemption for any transaction, including a contract for service, between a person (referred to in this description as the "investment advisor") providing investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of the plan, and the advice recipient in connection with the investment advice.

The exemption applies if—

- No more than reasonable compensation is paid for the investment advice;⁴⁸
- In a case in which the investment advice is based on a limited range of investment options, which may consist, in whole or in part, of proprietary products, the 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) must be clearly disclosed to the advice recipient before any transaction based on the investment advice;
- In a case in which the investment advice may result in variable compensation to the investment advisor (or any affiliate), the receipt of the 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) must be clearly disclosed to the advice recipient (in accordance with the requirements under the best interest recommendation exemption); and
- In any case in which a person who, acting in good faith and with reasonable diligence, makes an error or omission in disclosing the required information, 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 the error or omission.

EFFECTIVE DATE

The amendments made by the bill generally are effective on the 61st day after the date of enactment of the bill and apply with respect to information provided or recommendations made on or after two years after the date of enactment. However, if, before the 61st day after the date of enactment, a bill or joint resolution is enacted that specifically approves any rules or administrative positions that are promulgated under the Code and ERISA statutory definitions of fiduciary⁴⁹ and are not in effect on January 1, 2015, the amendments made by the bill will not take effect. In addition, the amendments made by the bill do not apply to any service or transaction rendered, entered into, or for which a person has been compensated before the date on which the amendments generally become effective.

DOL is prohibited from amending any rules or administrative positions promulgated under the Code and ERISA statutory definitions of fiduciary (including DOL Interpretive Bulletin 96-1 and Advisory Opinion 2005-23A, discussed in Present Law), and no rule or administrative position promulgated by DOL before the date of enactment of the bill but not effective on January 1, 2015, may become effective unless a bill or joint resolution as described above is enacted not later than 60 days after the date of enactment. If the amendments made by the bill take effect, nothing in the bill is to be construed to prohibit the issuance of guidance to carry out the amendments so long as the guidance is necessary to implement the amendments. Until the time when regulations or

⁴⁸ Reasonable compensation for this purpose is determined as under the present-law prohibited transaction exemption for an arrangement with a disqualified person for services necessary for the establishment or operation of a plan if no more than reasonable compensation is paid therefor, § 4975(d)(2).

⁴⁹ § 4975(e)(3) and ERISA § 3(21).

other guidance is issued to carry out the amendments, a plan and a fiduciary will be treated as meeting the requirements of the amendments if the plan or fiduciary, as applicable, makes a good faith effort to comply with the requirements.

COMMITTEE VIEWS

DOL'S ABANDONED 2010 PROPOSAL

The Obama administration has long argued the regulatory definition of an investment advice fiduciary is insufficiently restrictive.⁵⁰ To address this concern, in 2010, EBSA issued a complicated proposed regulation expanding the definition of fiduciary.⁵¹ On September 19, 2011, in the face of bipartisan opposition from the Committee and others in Congress related to access to advice and cost, EBSA withdrew its original proposal and announced it would repropose a revised rulemaking.⁵²

CONCERNS WITH DOL'S 2015 PROPOSAL

DOL's April 2015 notice of proposed rulemaking

At a February 2015 speech at AARP, President Obama announced his intention to go forward with this rulemaking.⁵³ In this speech and subsequent public statements, the administration re-branded the proposed regulation as a consumer protection against “backdoor payments and hidden fees” generated by structural conflicts of interest in the retirement advice industry. After review by the Office of Management and Budget (OMB), DOL released its new notice of proposed rulemaking (the 2015 NPRM) in April 2015.⁵⁴ The new proposal was preceded by a Council of Economic Advisors report arguing that “conflicted advice” costs Americans \$17 billion annually.⁵⁵ This figure assumes that IRA investors were duped into rolling over 401(k) funds into high cost mutual funds by advisors and brokers and, as a result, pay on average 1 percent more annually. These assumptions have come under intense scrutiny from analysts who argue IRA holders actually pay only 0.16 percent more and that these fees are justifiable due to a higher level of service.⁵⁶

Proposed exemptions

In addition to the NPRM itself, DOL's proposed regulatory package also includes six prohibited transaction exemptions—some new and a few revisions of existing exemptions. The most notable is the BIC exemption. DOL claims this exemption will provide a frame-

⁵⁰ See Council of Economic Advisors, *The Effects of Conflicted Investment Advice on Retirement Saving*, (Feb. 2015) http://www.whitehouse.gov/sites/default/files/docs/cea_coi_report_final.pdf. [hereinafter CEA Report].

⁵¹ 2010 Proposal, 75 Fed. Reg. 65263.

⁵² See Press Release, Dept. of Labor, U.S. Labor Department's EBSA to re-propose rule on definition of a fiduciary (Sept. 19, 2011), <http://www.dol.gov/ebsa/newsroom/2011/11-1382-NAT.html>.

⁵³ Press Release, White House Office of the Press Secretary, Remarks by the President at the AARP (Feb. 23, 2015), <http://www.whitehouse.gov/the-press-office/2015/02/23/remarks-president-aarp>.

⁵⁴ Definition of the Term “Fiduciary,” 80 Fed. Reg. at 21928.

⁵⁵ CEA Report, *supra* note 50, at 2.

⁵⁶ Letter from David M. Abbey, Deputy Gen. Counsel, Retirement Policy, Inv. Co. Inst. and Brian Reid, Chief Economist, Investment Company Inst., to the Hon. Howard Shelanski, Admin., Office of Info. and Reg. Aff., OMB (Apr. 7, 2015), http://www.ici.org/pdf/15_ici_omb_data.pdf.

work permitting newly-minted fiduciaries to continue to receive commissions and other payments that would otherwise be prohibited by ERISA. However, to qualify for the exemption, an investment advisor would need to enter into a contract (before any investment recommendation is made) acknowledging fiduciary status and agree to abide by certain requirements. While advisors should work in the best interest of their clients, this requirement is unworkable because potential clients would be required to sign this contract before the advisory relationship actually begins.⁵⁷

Summary of key concerns

Based on overwhelming testimony from a diverse group of stakeholders, the Committee has concluded the DOL proposal would disrupt advisory relationships, contains a multitude of technical shortcomings, and would bring about a number of unacceptable consequences. There are three general criticisms: (1) if finalized, the proposal would restrict access to affordable financial advice for lower- and middle-income Americans; (2) if finalized, the proposal would make it harder for employers (especially small businesses) to set up retirement plans; and (3) DOL's rushed and uncoordinated process resulted in an unworkable proposal. DOL received comment letters from stakeholders and Congress reflecting these concerns.

Restricted access to advice

The proposed regulation will have the net effect of locking lower- and middle-income investors out of the advice market.⁵⁸ Advisors should have a legal duty to act in the “best interests” of their clients; however, “fiduciary” status would result in the legal prohibition of most transactions because of how the advisor is compensated.⁵⁹ At a HELP Subcommittee hearing in June 2015, Mr. Kent Mason, Partner of Davis and Harman LLP, testified to this effect:

The framework set up by the DOL could work conceptually, but in its current form, it would, like the original 2010 proposal, cut off the option for low and middle-income individuals and small businesses to receive personalized investment assistance, even if that assistance is in the best interest of the recipient.⁶⁰

DOL claims its goal is not to eliminate commission-based accounts,⁶¹ but failed to adequately rectify this gaping inadequacy in the proposal. For example, the BIC exemption—the main exemp-

⁵⁷*Restricting Access to Financial Advice: Evaluating the Costs and Consequences for Working Families and Retirees: Hearing Before the Subcomm. on Health, Employment, Labor, and Pensions of the H. Comm. on Educ. and the Workforce*, 114th Cong. 8 (Jun. 17, 2015) (written testimony of Jack Haley, Exec. Vice President, Fidelity Invs.).

⁵⁸*Restricting Access to Financial Advice: Evaluating the Costs and Consequences for Working Families and Retirees: Hearing Before the Subcomm. on Health, Employment, Labor, and Pensions of the H. Comm. on Educ. and the Workforce*, 114th Cong. 8 (Jun. 17, 2015) (written testimony of Kent Mason, Partner, Davis & Harman LLP).

⁵⁹*Id.* at 3, 4.

⁶⁰*Id.* at 5.

⁶¹*Restricting Access to Financial Advice: Evaluating the Costs and Consequences for Working Families and Retirees: Hearing Before the Subcomm. on Health, Employment, Labor, and Pensions of the H. Comm. on Educ. and the Workforce*, 114th Cong. 5 (Jun. 17, 2015) (written testimony of The Hon. Thomas E. Perez, U.S. Sec'y, Dept. of Labor).

tion that would be used—is too complex and ultimately unusable.⁶² Specifically, while the BIC exemption permits advisors to continue to receive commissions, there are several onerous disclosure and information-gathering requirements that will increase costs, which will be passed on to investors or make continued advice to small- and mid-size accounts unaffordable and thereby unavailable.⁶³ At the same hearing, Mr. Dean Harman, CFP, Managing Director at Harman Wealth Management, stated:

The DOL has created a new exemption, [the BIC exemption or BICE] . . . Unfortunately, BICE has missed the mark and, as currently proposed, would lead to the same unwanted consequence as the 2010 proposal . . . by hugely increasing the burdens on financial advisors and financial institutions.⁶⁴

Even more troubling, an advisor and client would need to have a signed contract prior to any meaningful conversation. At the same hearing, Mr. Jack Haley, Executive Vice President of Fidelity Investments, summarized the consequences of this proposed rule:

Today, we are able to help these workers by discussing potential product and service offerings with them. The proposed DOL exemption would require a signed contract before a conversation could even occur. And since our customers speak to different phone reps each time they call, the rule would require each of our customers to have a signed contact with each of our phone reps in order to get answers to these basic questions. For Fidelity, requiring nearing 25 million customers to sign contracts before we can continue to service them would be a significant impediment to ongoing engagement with them, potentially suppressing their savings levels and retirement security.⁶⁵

The exemption imposes burdensome new disclosure and data collection requirements on investment advisors.⁶⁶ However, the exemption would only cover recommendations with respect to limited categories of investments; fiduciaries could not recommend real estate, securities futures, or some non-publicly traded securities, limiting investor options.⁶⁷ The exemption also requires reporting and prediction of all direct and indirect compensation for recommended investments, costs for competing alternative products, and cost projections at one-, five-, and ten-year intervals.⁶⁸

The Committee has heard extensive witness testimony from advisors and other experts explaining why these requirements are unworkable. For example, at a June 17, 2015, HELP Subcommittee

⁶² *Restricting Access to Financial Advice: Evaluating the Costs and Consequences for Working Families and Retirees: Hearing Before the Subcomm. on Health, Employment, Labor, and Pensions of the H. Comm. on Educ. and the Workforce*, 114th Cong. 10 (Jun. 17, 2015) (written testimony of Dean Harman, CFP, Managing Dir., Harman Wealth Management).

⁶³ *Id.* at 14.

⁶⁴ *Id.* at 15.

⁶⁵ Haley, *supra* note 57, at 8.

⁶⁶ Proposed Best Interest Contract Exemption, 80 Fed. Reg. at 21987.

⁶⁷ *Principles for Ensuring Retirement Advice Serves the Best Interests of Working Families and Retirees: Hearing Before the Subcomm. on Health, Employment, Labor, and Pensions of the H. Comm. on Educ. and the Workforce*, 114th Cong. 5 (Dec. 2, 2015) (written testimony of Jules Gaudreau, Jr., ChFC, CIC, President, The Gaudreau Group, Inc.).

⁶⁸ Proposed Best Interest Contract Exemption, 80 Fed. Reg. at 21985.

hearing, Dr. Brian Reid, Ph.D. Chief Economist, Investment Company Institute, testified:

The Best Interest Contact Exemption is prohibitively costly, in addition to being convoluted and unworkable. Brokers subject to the Exemption's many new limitations, burdens, and costs, as well as increased exposure liability, are not likely to work for less compensation, as the DOL presumes.⁶⁹

At the same hearing, Mr. Mason asserted:

Under the DOL proposal, financial institutions would be prohibited from providing any specific assistance to individuals seeking help with the rollover and distribution process. This is the case in large part because any financial institution providing IRA services would have a conflict of interest with respect to advice regarding the rollover decision, thus creating a prohibited transaction. Most read the BIC exemption in the re-proposal as not covering this type of assistance, thus rendering the assistance categorically prohibited. Others read the BIC exemption as technically applicable to this assistance, but effectively unavailable because of the exemption's unworkable conditions. Either interpretation denies assistance to many in need of help in navigating the retirement savings options that exist after termination of employment. Among many unfortunate consequences, this would cause a drastic curtailment of call center, brokerage, and other assistance to those terminating employment, leading to greatly increased leakage of assets from the retirement system.⁷⁰

Mr. Jules Gaudreau, Jr. ChFC, CIC, President of The Gaudreau Group, Inc., at a December 2, 2015, HELP Subcommittee hearing echoed these concerns:

It is, therefore, important to make sure that U.S. retirement savings and tax policies encourage individuals to take personal responsibility for the need to save to protect their financial futures. It is also important to be sure that the rules in place to protect these savers and savings do not so burden the mechanisms for saving that the rules themselves become a barrier to achieving the goal of post-retirement financial security.⁷¹

There is also concern that the disclosure requirements will overwhelm investors with the volume of fine print, resulting in confusion or functional non-disclosure.⁷² Cumulatively, these burdensome requirements will serve to discourage savings, ultimately harming low- and middle-income savers. Finally, fiduciaries of employee benefit plans would continue to be subject to the DOL enforcement regime, while aggrieved private parties could sue IRA fi-

⁶⁹*Restricting Access to Financial Advice: Evaluating the Costs and Consequences for Working Families and Retirees: Hearing Before the Subcomm. on Health, Employment, Labor, and Pensions of the H. Comm. on Educ. and the Workforce*, 114th Cong. 4 (Jun. 17, 2015) (written testimony of Dr. Brian Reid, Ph.D., Chief Economist, Inv. Co. Inst.).

⁷⁰Mason, *supra* note 58, at 8.

⁷¹Gaudreau, *supra* note 67, at 3.

⁷²*Id.* at 4.

duciaries under state contract law, empowering the plaintiffs' bar.⁷³

Fewer employer-provided retirement plans

Small business owners provide nearly half a trillion dollars in retirement savings for 9 million households.⁷⁴ Employers are very concerned that the new rule makes it much harder, or perhaps impossible, for small businesses to set up retirement plans and for plan participants to receive advice. During the June 17, 2015, HELP Subcommittee hearing, Dr. Brian Reid, Ph.D., Chief Economist, Investment Company Institute, warned:

Research shows that investors with access to advice have more diversified portfolios and take on more appropriate levels of risk than those who do not receive advice or information. Indeed, in its justification of an earlier rule change, the DOL said that retirement investors who do not receive investment advice are twice as likely to make poor investment choices as those who do receive that advice. The benefits of advice—and, conversely, the harm of losing access to advice—are significant.⁷⁵

At the same hearing, Mr. Jack Haley, Executive Vice President of Fidelity Investments, concurred:

Under the DOL proposal, access to affordable financial help will be effectively prohibited—even when it is the investor's best interest. Small businesses and lower- and middle-income investors will be harmed the most. . . . The proposed DOL rule specifically prohibits service providers from assisting small businesses. The result would have a devastating impact on retirement coverage and savings for millions of workers employed by small businesses across the country.⁷⁶

Additionally, DOL's proposed rule holds large and small businesses to different standards, with greater restrictions and additional burdens placed on small businesses. At a December 2, 2015, HELP Subcommittee hearing, Ms. Rachel Doba, President of DB Engineering, LLC, voiced concerns about the effects of the more stringent rules in DOL's proposal on her small business and employees:

DOL seems to believe that small business owners, such as me, are not as sophisticated as large businesses, and therefore, need additional protections. The validity of this rationale is based on faulty assumptions, and does not justify discriminatory treatment. When I work with my financial advisor, I am aware that he is providing a service for a fee and selling a product. I would not be able to run a

⁷³ Proposed Best Interest Contract Exemption, 80 Fed. Reg. at 21985; *Principles for Ensuring Retirement Advice Serves the Best Interests of Working Families and Retirees: Hearing Before the Subcomm. on Health, Employment, Labor, and Pensions of the H. Comm. on Educ. and the Workforce*, 114th Cong. 7 (Dec. 2, 2015) (written testimony of the Hon. Bradford Campbell, Counsel, Drinker Biddle & Reath LLP).

⁷⁴ U.S. Chamber of Commerce, *Locked Out of Retirement: The Threat to Small Business Retirement Savings* (Jun. 9, 2015), <http://www.centerforcapitalmarkets.com/wp-content/uploads/2013/08/US-Chamber-Locked-Out-of-Retirement-White-Paper.pdf>.

⁷⁵ Reid, *supra* note 69, at 6.

⁷⁶ Haley, *supra* note 57, at 3, 6.

successful business if I were not able to understand when I am involved in a sales discussion—particularly, if it follows a basic disclosure that an advisor is selling a proprietary financial product, that the advisor is paid to see the product, and the advisor is not providing fiduciary advice. . . . The assumption that small plans, participants and IRA owners cannot understand the difference between sales and advice does not match my real world experience. The Department can protect participants, IRA owners, and small plans with the same kind of disclosures that it requires of large plans under the large plan carve out, but without eliminating their right to choose the services and products that best fit their needs.⁷⁷

At the same hearing, the Honorable Brad Campbell, Counsel, Drinker Biddle & Reath LLP, and former U.S. Assistant Secretary of Labor for Employee Benefits, also warned about the potential detrimental effects of DOL’s proposal on small businesses, saying, “Small plans and small-account IRA owners may be most in need of basic investment advice, but they would be least likely to be served by the Proposal due to the increased compliance costs and increased legal liability risks it unnecessarily creates.”⁷⁸

Because of the complicated new requirements, institutions providing retirement plans would be prohibited from offering assistance to small business plan sponsors in selecting investment options to offer their employees. While public policy should encourage employers to help workers save for retirement, it is counter-productive for DOL to refuse to provide an exemption for advice provided to small businesses.

Even worse, the DOL proposal actually will drive up costs for small businesses, while shielding larger businesses from the same costs. The proposal requires that advisors to plans with fewer than 100 participants or less than \$100 million in plan assets assume fiduciary status, with the attendant burdens and costs passed onto the small business.⁷⁹ However, larger plans do not have this requirement. To continue to provide services to small businesses, advisors will either need to increase fees or qualify for an exemption. Ms. Rachel Doba, provided further testimony to this effect at the December 2, 2015, HELP Subcommittee hearing:

Because advisors to small businesses are not carved out of the fiduciary definition, they must change their fee arrangements, or qualify for a special rule called an “exemption” in order to provide services on the same terms [as] before. . . . There are certain exceptions to these new rules, called “prohibited transaction exemptions,” but as DOL has proposed the new rules, the exemptions generally

⁷⁷ *Principles for Ensuring Retirement Advice Serves the Best Interests of Working Families and Retirees: Hearing Before the Subcomm. on Health, Employment, Labor, and Pensions of the H. Comm. on Educ. and the Workforce*, 114th Cong. 5 (Dec. 2, 2015) (written testimony of Rachel Doba, President, DB Engineering, LLC).

⁷⁸ *Principles for Ensuring Retirement Advice Serves the Best Interests of Working Families and Retirees: Hearing Before the Subcomm. on Health, Employment, Labor, and Pensions of the H. Comm. on Educ. and the Workforce*, 114th Cong. 5 (Dec. 2, 2015) (written testimony of the Hon. Bradford Campbell, Counsel, Drinker Biddle & Reath LLP).

⁷⁹ Definition of the Term “Fiduciary,” 80 Fed. Reg. at 12957.

won't help financial advisors who are working with small businesses to set up plans.⁸⁰

However, while these exemptions apply for IRAs, it is not clear that the exemption will apply for other tax-preferred vehicles frequently used by small businesses.⁸¹ Echoing similar concerns, the National Federation of Independent Business sent a letter to DOL noting its concern that advisors will no longer provide advice to small businesses that establish retirement plans because the proposed regulation could prohibit (or make cost-prohibitive) the arrangements currently prevalent.⁸² Additionally, the Small Business Administration's Office of Advocacy submitted a comment letter to the Department warning, "the proposed rule would likely increase the [advisors'] costs and burdens associated with serving smaller plans . . . [and] could limit financial advisors' ability to offer savings and investment advice to clients . . . ultimately lead[ing] advisors to stop providing retirement services to small businesses."⁸³

Procedural concerns

DOL's process in developing the rule and considering industry comments has been called into question. Through oversight inquiries and a request for an extended comment period, the Committee examined the process that led to the proposal.

The Committee also has procedural concerns with the proposed rule. According to some estimates, the average OMB review for DOL proposals is nearly 120 days.⁸⁴ However, the 2015 NPRM was only in the OMB formal review process for less than half the average time (only 50 days). This shorter timeframe indicates the administration has not adequately considered stakeholder concerns. At the HELP Subcommittee's June 17, 2015, hearing, Mr. Kent Mason explained DOL's defective process:

OMB's 50-day review of the re-proposal was startlingly brief:

- The review period was almost a month shorter than the next shortest review period for any significant retirement regulatory proposal in the last 10 years.
- It was less than half the average review period of other significant retirement regulatory proposals in the last 10 years (which was 109 days).
- Equally startling is that the review period after OMB received significant public input was actually just a few days. For example, a critical meeting to discuss new information was held on April 9, 2015, and the DOL proposal was issued on April 14, 2015, a mere five days later.⁸⁵

Additionally, the proposed rule provided the public less time to review and offer feedback than the department's 2010 proposal (90 days versus 104 days respectively). A number of letters requesting

⁸⁰ Doba, *supra* note 77, at 6.

⁸¹ § 102 of Reorganization Plan No. 4 of 1978, 43 Fed. Reg. at 47713.

⁸² Letter from Amanda Austin, Vice President, Public Policy, Nat'l Fed'n of Indep. Bus. to the Emp. Benefits Sec. Admin. (May 5, 2015), <http://www.dol.gov/ebsa/pdf/1210-AB32-2-00039.pdf>.

⁸³ Comment letter from the Small Bus. Admin's Office of Advocacy 5, 6 (Jul. 17, 2015), <http://www.dol.gov/ebsa/pdf/1210-AB32-2-00403.pdf>.

⁸⁴ Meagan Leonhardt, DOL Fiduciary Rule Released Publicly (Apr. 13, 2015), <http://wealthmanagement.com/industry/dol-fiduciary-rule-released-publicly>.

⁸⁵ Mason, *supra* note 58, at 11.

an extension of the comment period were circulated, including a letter from Education and the Workforce Committee Republicans.⁸⁶ Finally, the 2015 NPRM provides for an eight-month transition period between final approval and the effective date of the new rules. According to stakeholders, eight months is insufficient to overhaul business operations and data collection systems necessary to comply with the requirements of both the 2015 NPRM and the primary exemption—the BIC exemption.⁸⁷

Congressional comment letters

The 2015 NPRM received thousands of comments, including numerous letters from Members of Congress.⁸⁸ Notably, 46 House Democrats signed a letter led by HELP Subcommittee Ranking Member Polis (D-CO) calling for publication of the revised rule prior to finalizing, as well as a supplemental comment period.⁸⁹ A number of other Democratic letters have expressed concerns that the current proposal could reduce access to investment advice for both small businesses and low- and middle-income individuals.⁹⁰ In all, over half of House Democrats have signed letters questioning the DOL's proposal.

On July 21, 2015, every Republican member of the Committee on Education and the Workforce signed a comment letter calling for the proposal to be withdrawn, highlighting testimony from a hearing held by the HELP Subcommittee on June 17, 2015.⁹¹ This comment letter also explained the Committee's longstanding interest in pursuing a responsible best interest standard.

H.R. 4293 AND H.R. 4294: BIPARTISAN BILLS ENHANCING RETIREMENT SECURITY

After the HELP Subcommittee's June 17, 2015, hearing,⁹² a number of other committees examined the rule, including the House Committee on Financial Services⁹³ and the House Committee on Ways and Means.⁹⁴ On November 5, 2015, HELP Subcommittee Chairman Roe led a group of bipartisan lawmakers in announcing their intention to introduce a substantive alternative to

⁸⁶ Letter from the Hon. John Kline, Chairman, H. Comm. on Educ. and the Workforce, et al to the Hon. Thomas E. Perez, Sec'y, Dep't of Labor (May 29, 2015), <http://edworkforce.house.gov/uploadedfiles/05-29-15-dol-fiduciary-comment-extension.pdf>; See also, e.g., Letter from the Hon. Frederica S. Wilson, et al to the Hon. Thomas Perez, Sec'y, Dep't of Labor (May 6, 2015), <http://wealthmanagement.com/site-files/wealthmanagement.com/files/uploads/2015/02/Fiduciary%20Rule%20Letter%20to%20Secretary%20Perez.pdf> (Letter from 18 House Democrats).

⁸⁷ Mason, *supra* note 58, at 10.

⁸⁸ Comments received through September 24, 2015, are published on EBSA's website, <http://www.dol.gov/ebsa/regs/cmt-1210-AB32-2.html>.

⁸⁹ See, e.g., Letter from the Hon. Jared Polis, et al to the Hon. Thomas E. Perez, Sec'y, Dep't of Labor (Oct. 30, 2015), <http://df2d4c59ccf47b6bc124-2951e9520e07371e6076e0c8af900fc2.r54.cf5.rackcdn.com/wp-content/uploads/Secretary-Perez-Fiduciary-Comment-Period-Letter-10-30-15.pdf>.

⁹⁰ Letter from the Hon. Gwen Moore, et al to the Hon. Thomas E. Perez, Sec'y, Dep't of Labor (Sept. 24, 2015) (on file with the Committee).

⁹¹ Letter from the Hon. John Kline, Chairman, H. Comm. on Educ. and the Workforce, et al to the Hon. Thomas E. Perez, Sec'y, Dep't of Labor (Jul. 21, 2015), <http://edworkforce.house.gov/uploadedfiles/7-21-15-dol-fiduciary-rule.pdf>.

⁹² *Restricting Access to Financial Advice: Evaluating the Costs and Consequences for Working Families and Retirees: Hearing Before the Subcomm. on Health, Employment, Labor, and Pensions of the H. Comm. on Educ. and the Workforce*, 114th Cong. (Jun. 17, 2015).

⁹³ *Preserving Retirement Security and Investment Choices for All Americans: Joint Hearing Before the Subcomm. on Oversight and Investigations and Capital Markets and Government Sponsored Enterprises of the H. Comm. on Financial Services*, 114th Cong. (Sept. 10, 2015).

⁹⁴ *Hearing on the Department of Labor's Proposed Fiduciary Rule: Hearing Before the Subcomm. on Oversight of the H. Comm. on Ways and Means*, 114th Cong. (Sept. 30, 2015).

the DOL's proposed fiduciary regulation.⁹⁵ Subsequently, two complementary bills were introduced on December 18, 2015. H.R. 4293 (ARAPA) amends ERISA, while H.R. 4294 (SAVERS Act) adds similar provisions in the Code. The technical provisions of this legislation were described supra.

The legislation reflects the sponsors shared commitment to preserving access to affordable retirement advice for workers, retirees, and small business owners. More specifically, the legislation embodies the following principles:

- Promoting families and individuals saving for a financially-secure retirement is an essential public policy good.
- Retirement advisors must serve in their clients' best interests and must be required to do so.
- Retirement advisors must deliver clear, simple, and relevant disclosure of material conflicts, including compensation received and all investment fees to individuals saving for retirement.
- Public policies must protect access to investment advice and education for low- and middle-income workers and retirees.
- Public policies should never deny individuals the financial information they need to make informed decisions.
- Investor choice and consumer access to all investment services—such as proprietary products, commission-based sales, and guaranteed lifetime income—should be preserved in a way that does not pick winners and losers.
- Small business owners should have access to the financial advice and products they need to establish and maintain retirement plans and help workers save for retirement.

At their core, the bipartisan legislative proposals achieve DOL's stated goal of ensuring that retirement advisors act in their clients' best interests. However, unlike the DOL's proposal, the bills effectively balance this higher standard with the need to protect access to affordable retirement advice for low- and middle-income workers and retirees.

CONCLUSION

H.R. 4294, the *Strengthening Access to Valuable Education and Retirement Support Act of 2015*, enhances retirement security without the pitfalls of the recent DOL proposed regulation amending the regulatory definition of "fiduciary" in ERISA. The bill prohibits DOL from implementing its proposed regulation without affirmative Congressional approval. The bill also updates current law to ensure that all financial professionals providing personalized advice about investments, distributions, or the use of other fiduciaries are legally required to act in the best interest of their customers. However, unlike the DOL proposed regulation, the bill ensures individual and small businesses have continued access to affordable retirement advice.

⁹⁵ Press Release, H. Comm. on Educ. and the Workforce, Bipartisan House Members Outline Legislative Principles to Ensure Retirement Advisors Protect Clients' Best Interests (Nov. 5, 2015), <http://edworkforce.house.gov/news/documentsingle.aspx?DocumentID=399747>.

SECTION-BY-SECTION

The following is a section-by-section analysis of the Amendment in the Nature of a Substitute offered by Rep. Carter and reported favorably by the Committee.

Section 1. Provides the short title is the “Strengthening Access to Valuable Education and Retirement Support Act of 2015.”

Section 2. Describes the purpose of the Act to provide that financial advisors that violate the prohibited transaction rules under the *Internal Revenue Code of 1986* or breach the best interest standard for the provision of investment advice are subject to liability under the Code.

Section 3. Amends the definition of “investment advice” under the tax code; exempts certain transactions from tax code prohibitions; prescribes effective dates and transition rules.

EXPLANATION OF AMENDMENTS

The amendments, including the amendment in the nature of a substitute, are explained in the body of this report.

APPLICATION OF LAW TO THE LEGISLATIVE BRANCH

Section 102(b)(3) of Public Law 104–1 requires a description of the application of this bill to the legislative branch. H.R. 4294, the *Strengthening Access to Valuable Education and Retirement Support Act of 2015* (SAVERS Act), prohibits the Department of Labor (DOL or department) from implementing its proposed regulation amending the regulatory definition of “fiduciary” under the *Employee Retirement Income Security Act of 1974* (ERISA) and the Internal Revenue Code of 1986 (Code), unless Congress affirmatively approves the final rule. Instead, the bill updates current law to ensure that all financial professionals providing personalized advice about investments, distributions, or the use of other fiduciaries are legally required to act in the best interest of their customers. However, unlike the DOL proposed regulation, the SAVERS Act ensures low- and medium-income savers and small businesses have continued access to affordable retirement advice.

UNFUNDED MANDATE STATEMENT

Section 423 of the Congressional Budget and Impoundment Control Act (as amended by Section 101(a)(2) of the Unfunded Mandates Reform Act, P.L. 104–4) requires a statement of whether the provisions of the reported bill include unfunded mandates. This issue is addressed in the CBO letter.

EARMARK STATEMENT

H.R. 4294 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9 of House Rule XXI.

ROLL CALL VOTES

Clause 3(b) of rule XIII of the Rules of the House of Representatives requires the Committee Report to include for each record vote on a motion to report the measure or matter and on any amend-

ments offered to the measure or matter the total number of votes for and against and the names of the Members voting for and against.

Date: February 2, 2016

COMMITTEE ON EDUCATION AND THE WORKFORCE RECORD OF COMMITTEE VOTERoll Call: 1 Bill: H.R. 4294 Amendment Number: _____Disposition: Ordered favorably reported to the House, as amended, by a vote of 22 yeas and 14 nays.Sponsor/Amendment: Mr. Roe - motion to report the bill to the House with an amendment and with the recommendation that the amendment be agreed to, and the bill as amended do pass.

Name & State	Aye	No	Not Voting	Name & State	Aye	No	Not Voting
Mr. KLINE (MN) (Chairman)	X			Mr. SCOTT (VA) (Ranking)		X	
Mr. WILSON (SC)	X			Mr. HINOJOSA (TX)		X	
Mrs. FOXX (NC)	X			Mrs. DAVIS (CA)		X	
Mr. HUNTER (CA)	X			Mr. GRIJALVA (AZ)		X	
Mr. ROE (TN)	X			Mr. COURTNEY (CT)		X	
Mr. THOMPSON (PA)	X			Ms. FUDGE (OH)		X	
Mr. WALBERG (MI)	X			Mr. POLIS (CO)		X	
Mr. SALMON (AZ)	X			Mr. SABLON (MP)			X
Mr. GUTHRIE (KY)	X			Ms. WILSON (FL)		X	
Mr. ROKITA (IN)	X			Ms. BONAMICI (OR)		X	
Mr. BARLETTA (PA)	X			Mr. POCAN (WI)		X	
Mr. HECK (NV)	X			Mr. TAKANO (CA)		X	
Mr. MESSER (IN)	X			Mr. JEFFRIES (NY)			X
Mr. BYRNE (AL)	X			Ms. CLARK (MA)		X	
Mr. BRAT (VA)	X			Ms. ADAMS (NC)		X	
Mr. CARTER (GA)	X			Mr. DeSAULNIER (CA)		X	
Mr. BISHOP (MI)	X						
Mr. GROTHMAN (WI)	X						
Mr. RUSSELL (OK)	X						
Mr. CURBELO (FL)	X						
Ms. STEFANIK (NY)	X						
Mr. ALLEN (GA)	X						

TOTALS: Aye: 22 No: 14 Not Voting: 2

Total: 38 / Quorum: 13 / Report: 20

(22 R - 16 D)

STATEMENT OF GENERAL PERFORMANCE GOALS AND OBJECTIVES

In accordance with clause (3)(c) of House Rule XIII, the goals of H.R. 4294 are to reduce the federal footprint and restore local control of education, while empowering parents and education leaders to hold schools accountable for effectively teaching students.

DUPLICATION OF FEDERAL PROGRAMS

No provision of H.R. 4294 establishes or reauthorizes a program of the Federal Government known to be duplicative of another Federal program, a program that was included in any report from the Government Accountability Office to Congress pursuant to section 21 of Public Law 111-139, or a program related to a program identified in the most recent Catalog of Federal Domestic Assistance.

DISCLOSURE OF DIRECTED RULE MAKINGS

The committee estimates that enacting H.R. 4294 does not specifically direct the completion of any specific rule makings within the meaning of 5 U.S.C. 551.

STATEMENT OF OVERSIGHT FINDINGS AND RECOMMENDATIONS OF THE COMMITTEE

In compliance with clause 3(c)(1) of rule XIII and clause 2(b)(1) of rule X of the Rules of the House of Representatives, the committee's oversight findings and recommendations are reflected in the body of this report.

NEW BUDGET AUTHORITY AND CBO COST ESTIMATE

With respect to the requirements of clause 3(c)(2) of rule XIII of the Rules of the House of Representatives and section 308(a) of the Congressional Budget Act of 1974 and with respect to requirements of clause 3(c)(3) of rule XIII of the Rules of the House of Representatives and section 402 of the Congressional Budget Act of 1974, the committee has received the following estimate for H.R. 4294 from the Director of the Congressional Budget Office:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, April 20, 2016.

Hon. JOHN KLINE,
Chairman, Committee on Education and the Workforce,
Washington, DC.

DEAR MR. CHAIRMAN. The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 4294, the Strengthening Access to Valuable Education and Retirement Support Act of 2015.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Noah Meyerson.

Sincerely,

KEITH HALL.

Enclosure.

H.R. 4294—Strengthening Access to Valuable Education and Retirement Support Act of 2015

H.R. 4294, the Strengthening Access to Valuable Education and Retirement Support Act of 2015, would amend the section of the Internal Revenue Code that prohibits self-dealing transactions by fiduciaries of certain tax-favored plans, including employer-sponsored retirement plans, individual retirement accounts, and health savings accounts. The bill would add a definition of investment advice to that section of the Internal Revenue Code. The bill also would add a new statutory exemption related to investment advice that a fiduciary can provide to those tax-favored plans, plan participants, or beneficiaries. Among other provisions, H.R. 4294 would change requirements regarding disclosure of potential compensation accruing to the fiduciary or an affiliate.

On April 6, 2016, the Department of Labor issued new regulations relating to investment advice within pension and retirement plans; those regulations are sometimes referred to as the “fiduciary rule.” H.R. 4294 would prevent those or any similar regulations from becoming effective unless a bill or joint resolution approving them was passed within 60 days of enactment of H.R. 4294.

The staff of the Joint Committee on Taxation (JCT) estimates that the bill would have a negligible effect on revenues over the 2016–2026 period. Enacting the bill would not affect direct spending. Because enacting H.R. 4294 would affect revenues, pay-as-you-go procedures apply.

CBO and JCT estimate that enacting H.R. 4294 would not increase net direct spending or on-budget deficits in any of the four consecutive 10-year periods beginning in 2027.

JCT has determined that the bill contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act.

COMMITTEE COST ESTIMATE

Clause 3(d)(1) of rule XIII of the Rules of the House of Representatives requires an estimate and a comparison of the costs that would be incurred in carrying out H.R. 4294. However, clause 3(d)(2)(B) of that rule provides that this requirement does not apply when the committee has included in its report a timely submitted cost estimate of the bill prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in *italic*, and existing law in which no change is proposed is shown in roman):

INTERNAL REVENUE CODE OF 1986

* * * * *

Subtitle D—Miscellaneous Excise Taxes

* * * * *

CHAPTER 43—QUALIFIED PENSION, ETC., PLANS

* * * * *

SEC. 4975. TAX ON PROHIBITED TRANSACTIONS.

(a) INITIAL TAXES ON DISQUALIFIED PERSON.—There is hereby imposed a tax on each prohibited transaction. The rate of tax shall be equal to 15 percent of the amount involved with respect to the prohibited transaction for each year (or part thereof) in the taxable period. The tax imposed by this subsection shall be paid by any disqualified person who participates in the prohibited transaction (other than a fiduciary acting only as such).

(b) ADDITIONAL TAXES ON DISQUALIFIED PERSON.—In any case in which an initial tax is imposed by subsection (a) on a prohibited transaction and the transaction is not corrected within the taxable period, there is hereby imposed a tax equal to 100 percent of the amount involved. The tax imposed by this subsection shall be paid by any disqualified person who participated in the prohibited transaction (other than a fiduciary acting only as such).

(c) PROHIBITED TRANSACTION.—

(1) GENERAL RULE.—For purposes of this section, the term “prohibited transaction” means any direct or indirect—

(A) sale or exchange, or leasing, of any property between a plan and a disqualified person;

(B) lending of money or other extension of credit between a plan and a disqualified person;

(C) furnishing of goods, services, or facilities between a plan and a disqualified person;

(D) transfer to, or use by or for the benefit of, a disqualified person of the income or assets of a plan;

(E) act by a disqualified person who is a fiduciary whereby he deals with the income or assets of a plan in his own interests or for his own account; or

(F) receipt of any consideration for his own personal account by any disqualified person who is a fiduciary from any party dealing with the plan in connection with a transaction involving the income or assets of the plan.

(2) SPECIAL EXEMPTION.—The Secretary shall establish an exemption procedure for purposes of this subsection. Pursuant to such procedure, he may grant a conditional or unconditional exemption of any disqualified person or transaction, orders of disqualified persons or transactions, from all or part of the restrictions imposed by paragraph (1) of this subsection. Action under this subparagraph may be taken only after consultation and coordination with the Secretary of Labor. The Secretary may not grant an exemption under this paragraph unless he finds that such exemption is—

(A) administratively feasible,

(B) in the interests of the plan and of its participants and beneficiaries, and

(C) protective of the rights of participants and beneficiaries of the plan.

Before granting an exemption under this paragraph, the Secretary shall require adequate notice to be given to interested persons and shall publish notice in the Federal Register of the pendency of such exemption and shall afford interested persons an opportunity to present views. No exemption may be granted under this paragraph with respect to a transaction described in subparagraph (E) or (F) of paragraph (1) unless the Secretary affords an opportunity for a hearing and makes a determination on the record with respect to the findings required under subparagraphs (A), (B), and (C) of this paragraph, except that in lieu of such hearing the Secretary may accept any record made by the Secretary of Labor with respect to an application for exemption under section 408(a) of title I of the Employee Retirement Income Security Act of 1974.

(3) SPECIAL RULE FOR INDIVIDUAL RETIREMENT ACCOUNTS.—An individual for whose benefit an individual retirement account is established and his beneficiaries shall be exempt from the tax imposed by this section with respect to any transaction concerning such account (which would otherwise be taxable under this section) if, with respect to such transaction, the account ceases to be an individual retirement account by reason of the application of section 408(e)(2)(A) or if section 408(e)(4) applies to such account.

(4) SPECIAL RULE FOR ARCHER MSAs.—An individual for whose benefit an Archer MSA (within the meaning of section 220(d)) is established shall be exempt from the tax imposed by this section with respect to any transaction concerning such account (which would otherwise be taxable under this section) if section 220(e)(2) applies to such transaction.

(5) SPECIAL RULE FOR COVERDELL EDUCATION SAVINGS ACCOUNTS.—An individual for whose benefit a Coverdell education savings account is established and any contributor to such account shall be exempt from the tax imposed by this section with respect to any transaction concerning such account (which would otherwise be taxable under this section) if section 530(d) applies with respect to such transaction.

(6) SPECIAL RULE FOR HEALTH SAVINGS ACCOUNTS.—An individual for whose benefit a health savings account (within the meaning of section 223(d)) is established shall be exempt from the tax imposed by this section with respect to any transaction concerning such account (which would otherwise be taxable under this section) if, with respect to such transaction, the account ceases to be a health savings account by reason of the application of section 223(e)(2) to such account.

(d) EXEMPTIONS.—Except as provided in subsection (f)(6), the prohibitions provided in subsection (c) shall not apply to—

(1) any loan made by the plan to a disqualified person who is a participant or beneficiary of the plan if such loan—

(A) is available to all such participants or beneficiaries on a reasonably equivalent basis,

(B) is not made available to highly compensated employees (within the meaning of section 414(q)) in an amount

- greater than the amount made available to other employees,
- (C) is made in accordance with specific provisions regarding such loans set forth in the plan,
 - (D) bears a reasonable rate of interest, and
 - (E) is adequately secured;
- (2) any contract, or reasonable arrangement, made with a disqualified person for office space, or legal, accounting, or other services necessary for the establishment or operation of the plan, if no more than reasonable compensation is paid therefor;
- (3) any loan to an leveraged employee stock ownership plan (as defined in subsection (e)(7)), if—
- (A) such loan is primarily for the benefit of participants and beneficiaries of the plan, and
 - (B) such loan is at a reasonable rate of interest, and any collateral which is given to a disqualified person by the plan consists only of qualifying employer securities (as defined in subsection (e)(8));
- (4) the investment of all or part of a plan's assets in deposits which bear a reasonable interest rate in a bank or similar financial institution supervised by the United States or a State, if such bank or other institution is a fiduciary of such plan and if—
- (A) the plan covers only employees of such bank or other institution and employees of affiliates of such bank or other institution, or
 - (B) such investment is expressly authorized by a provision of the plan or by a fiduciary (other than such bank or institution or affiliates thereof) who is expressly empowered by the plan to so instruct the trustee with respect to such investment;
- (5) any contract for life insurance, health insurance, or annuities with one or more insurers which are qualified to do business in a State if the plan pays no more than adequate consideration, and if each such insurer or insurers is—
- (A) the employer maintaining the plan, or
 - (B) a disqualified person which is wholly owned (directly or indirectly) by the employer establishing the plan, or by any person which is a disqualified person with respect to the plan, but only if the total premiums and annuity considerations written by such insurers for life insurance, health insurance, or annuities for all plans (and their employers) with respect to which such insurers are disqualified persons (not including premiums or annuity considerations written by the employer maintaining the plan) do not exceed 5 percent of the total premiums and annuity considerations written for all lines of insurance in that year by such insurers (not including premiums or annuity considerations written by the employer maintaining the plan);
- (6) the provision of any ancillary service by a bank or similar financial institution supervised by the United States or a State, if such service is provided at not more than reasonable

compensation, if such bank or other institution is a fiduciary of such plan, and if—

(A) such bank or similar financial institution has adopted adequate internal safeguards which assure that the provision of such ancillary service is consistent with sound banking and financial practice, as determined by Federal or State supervisory authority, and

(B) the extent to which such ancillary service is provided is subject to specific guidelines issued by such bank or similar financial institution (as determined by the Secretary after consultation with Federal and State supervisory authority), and under such guidelines the bank or similar financial institution does not provide such ancillary service—

(i) in an excessive or unreasonable manner, and

(ii) in a manner that would be inconsistent with the best interests of participants and beneficiaries of employee benefit plans;

(7) the exercise of a privilege to convert securities, to the extent provided in regulations of the Secretary but only if the plan receives no less than adequate consideration pursuant to such conversion;

(8) any transaction between a plan and a common or collective trust fund or pooled investment fund maintained by a disqualified person which is a bank or trust company supervised by a State or Federal agency or between a plan and a pooled investment fund of an insurance company qualified to do business in a State if—

(A) the transaction is a sale or purchase of an interest in the fund,

(B) the bank, trust company, or insurance company receives not more than a reasonable compensation, and

(C) such transaction is expressly permitted by the instrument under which the plan is maintained, or by a fiduciary (other than the bank, trust company, or insurance company, or an affiliate thereof) who has authority to manage and control the assets of the plan;

(9) receipt by a disqualified person of any benefit to which he may be entitled as a participant or beneficiary in the plan, so long as the benefit is computed and paid on a basis which is consistent with the terms of the plan as applied to all other participants and beneficiaries;

(10) receipt by a disqualified person of any reasonable compensation for services rendered, or for the reimbursement of expenses properly and actually incurred, in the performance of his duties with the plan, but no person so serving who already receives full-time pay from an employer or an association of employers, whose employees are participants in the plan or from an employee organization whose members are participants in such plan shall receive compensation from such fund, except for reimbursement of expenses properly and actually incurred;

(11) service by a disqualified person as a fiduciary in addition to being an officer, employee, agent, or other representative of a disqualified person;

(12) the making by a fiduciary of a distribution of the assets of the trust in accordance with the terms of the plan if such assets are distributed in the same manner as provided under section 4044 of title IV of the Employee Retirement Income Security Act of 1974 (relating to allocation of assets);

(13) any transaction which is exempt from section 406 of such Act by reason of section 408(e) of such Act (or which would be so exempt if such section 406 applied to such transaction) or which is exempt from section 406 of such Act by reason of section 408(b)(12) of such Act;

(14) any transaction required or permitted under part 1 of subtitle E of title IV or section 4223 of the Employee Retirement Income Security Act of 1974, but this paragraph shall not apply with respect to the application of subsection (c)(1) (E) or (F);

(15) a merger of multiemployer plans, or the transfer of assets or liabilities between multiemployer plans, determined by the Pension Benefit Guaranty Corporation to meet the requirements of section 4231 of such Act, but this paragraph shall not apply with respect to the application of subsection (c)(1) (E) or (F);

(16) a sale of stock held by a trust which constitutes an individual retirement account under section 408(a) to the individual for whose benefit such account is established if—

(A) such stock is in a bank (as defined in section 581) or a depository institution holding company (as defined in section 3(w)(1) of the Federal Deposit Insurance Act (12 U.S.C. 1813(w)(1)),

(B) such stock is held by such trust as of the date of the enactment of this paragraph,

(C) such sale is pursuant to an election under section 1362(a) by such bank or company,

(D) such sale is for fair market value at the time of sale (as established by an independent appraiser) and the terms of the sale are otherwise at least as favorable to such trust as the terms that would apply on a sale to an unrelated party,

(E) such trust does not pay any commissions, costs, or other expenses in connection with the sale, and

(F) the stock is sold in a single transaction for cash not later than 120 days after the S corporation election is made;

(17) Any transaction in connection with the provision of investment advice described in subsection (e)(3)(B) to a participant or beneficiary in a plan that permits such participant or beneficiary to direct the investment of plan assets in an individual account, if—

(A) the transaction is—

(i) the provision of the investment advice to the participant or beneficiary of the plan with respect to a security or other property available as an investment under the plan,

(ii) the acquisition, holding, or sale of a security or other property available as an investment under the plan pursuant to the investment advice, or

(iii) the direct or indirect receipt of fees or other compensation by the fiduciary adviser or an affiliate thereof (or any employee, agent, or registered representative of the fiduciary adviser or affiliate) in connection with the provision of the advice or in connection with an acquisition, holding, or sale of a security or other property available as an investment under the plan pursuant to the investment advice; and

(B) the requirements of subsection (f)(8) are met,

(18) any transaction involving the purchase or sale of securities, or other property (as determined by the Secretary of Labor), between a plan and a disqualified person (other than a fiduciary described in subsection (e)(3)) with respect to a plan if—

(A) the transaction involves a block trade,

(B) at the time of the transaction, the interest of the plan (together with the interests of any other plans maintained by the same plan sponsor), does not exceed 10 percent of the aggregate size of the block trade,

(C) the terms of the transaction, including the price, are at least as favorable to the plan as an arm's length transaction, and

(D) the compensation associated with the purchase and sale is not greater than the compensation associated with an arm's length transaction with an unrelated party,

(19) any transaction involving the purchase or sale of securities, or other property (as determined by the Secretary of Labor), between a plan and a disqualified person if—

(A) the transaction is executed through an electronic communication network, alternative trading system, or similar execution system or trading venue subject to regulation and oversight by—

(i) the applicable Federal regulating entity, or

(ii) such foreign regulatory entity as the Secretary of Labor may determine by regulation,

(B) either—

(i) the transaction is effected pursuant to rules designed to match purchases and sales at the best price available through the execution system in accordance with applicable rules of the Securities and Exchange Commission or other relevant governmental authority, or

(ii) neither the execution system nor the parties to the transaction take into account the identity of the parties in the execution of trades,

(C) the price and compensation associated with the purchase and sale are not greater than the price and compensation associated with an arm's length transaction with an unrelated party,

(D) if the disqualified person has an ownership interest in the system or venue described in subparagraph (A), the system or venue has been authorized by the plan sponsor or other independent fiduciary for transactions described in this paragraph, and

- (E) not less than 30 days prior to the initial transaction described in this paragraph executed through any system or venue described in subparagraph (A), a plan fiduciary is provided written or electronic notice of the execution of such transaction through such system or venue,
- (20) transactions described in subparagraphs (A), (B), and (D) of subsection (c)(1) between a plan and a person that is a disqualified person other than a fiduciary (or an affiliate) who has or exercises any discretionary authority or control with respect to the investment of the plan assets involved in the transaction or renders investment advice (within the meaning of subsection (e)(3)(B)) with respect to those assets, solely by reason of providing services to the plan or solely by reason of a relationship to such a service provider described in subparagraph (F), (G), (H), or (I) of subsection (e)(2), or both, but only if in connection with such transaction the plan receives no less, nor pays no more, than adequate consideration,
- (21) any foreign exchange transactions, between a bank or broker-dealer (or any affiliate of either) and a plan (as defined in this section) with respect to which such bank or broker-dealer (or affiliate) is a trustee, custodian, fiduciary, or other disqualified person person, if—
- (A) the transaction is in connection with the purchase, holding, or sale of securities or other investment assets (other than a foreign exchange transaction unrelated to any other investment in securities or other investment assets),
- (B) at the time the foreign exchange transaction is entered into, the terms of the transaction are not less favorable to the plan than the terms generally available in comparable arm's length foreign exchange transactions between unrelated parties, or the terms afforded by the bank or broker-dealer (or any affiliate of either) in comparable arm's-length foreign exchange transactions involving unrelated parties,
- (C) the exchange rate used by such bank or broker-dealer (or affiliate) for a particular foreign exchange transaction does not deviate by more than 3 percent from the interbank bid and asked rates for transactions of comparable size and maturity at the time of the transaction as displayed on an independent service that reports rates of exchange in the foreign currency market for such currency, and
- (D) the bank or broker-dealer (or any affiliate of either) does not have investment discretion, or provide investment advice, with respect to the transaction,
- (22) any transaction described in subsection (c)(1)(A) involving the purchase and sale of a security between a plan and any other account managed by the same investment manager, if—
- (A) the transaction is a purchase or sale, for no consideration other than cash payment against prompt delivery of a security for which market quotations are readily available,

(B) the transaction is effected at the independent current market price of the security (within the meaning of section 270.17a-7(b) of title 17, Code of Federal Regulations),

(C) no brokerage commission, fee (except for customary transfer fees, the fact of which is disclosed pursuant to subparagraph (D)), or other remuneration is paid in connection with the transaction,

(D) a fiduciary (other than the investment manager engaging in the cross-trades or any affiliate) for each plan participating in the transaction authorizes in advance of any cross-trades (in a document that is separate from any other written agreement of the parties) the investment manager to engage in cross trades at the investment manager's discretion, after such fiduciary has received disclosure regarding the conditions under which cross trades may take place (but only if such disclosure is separate from any other agreement or disclosure involving the asset management relationship), including the written policies and procedures of the investment manager described in subparagraph (H),

(E) each plan participating in the transaction has assets of at least \$100,000,000, except that if the assets of a plan are invested in a master trust containing the assets of plans maintained by employers in the same controlled group (as defined in section 407(d)(7) of the Employee Retirement Income Security Act of 1974), the master trust has assets of at least \$100,000,000,

(F) the investment manager provides to the plan fiduciary who authorized cross trading under subparagraph (D) a quarterly report detailing all cross trades executed by the investment manager in which the plan participated during such quarter, including the following information, as applicable: (i) the identity of each security bought or sold; (ii) the number of shares or units traded; (iii) the parties involved in the cross-trade; and (iv) trade price and the method used to establish the trade price,

(G) the investment manager does not base its fee schedule on the plan's consent to cross trading, and no other service (other than the investment opportunities and cost savings available through a cross trade) is conditioned on the plan's consent to cross trading,

(H) the investment manager has adopted, and cross-trades are effected in accordance with, written cross-trading policies and procedures that are fair and equitable to all accounts participating in the cross-trading program, and that include a description of the manager's pricing policies and procedures, and the manager's policies and procedures for allocating cross trades in an objective manner among accounts participating in the cross-trading program, and

(I) the investment manager has designated an individual responsible for periodically reviewing such purchases and sales to ensure compliance with the written policies and procedures described in subparagraph (H), and following such review, the individual shall issue an annual written

report no later than 90 days following the period to which it relates signed under penalty of perjury to the plan fiduciary who authorized cross trading under subparagraph (D) describing the steps performed during the course of the review, the level of compliance, and any specific instances of non-compliance.

The written report shall also notify the plan fiduciary of the plan's right to terminate participation in the investment manager's cross-trading program at any time, **[or]**

(23) except as provided in subsection (f)(11), a transaction described in subparagraph (A), (B), (C), or (D) of subsection (c)(1) in connection with the acquisition, holding, or disposition of any security or commodity, if the transaction is corrected before the end of the correction period~~].~~

(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*

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

(A) *no more than reasonable compensation is paid (as determined under section 4975(d)(2)) for such investment advice,*

(B) *in a case in which 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, 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 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.*

(e) DEFINITIONS.—

(1) PLAN.—For purposes of this section, the term “plan” means—

(A) a trust described in section 401(a) which forms a part of a plan, or a plan described in section 403(a), which trust or plan is exempt from tax under section 501(a),

(B) an individual retirement account described in section 408(a),

- (C) an individual retirement annuity described in section 408(b),
 - (D) an Archer MSA described in section 220(d),
 - (E) a health savings account described in section 223(d),
 - (F) a Coverdell education savings account described in section 530, or
 - (G) a trust, plan, account, or annuity which, at any time, has been determined by the Secretary to be described in any preceding subparagraph of this paragraph.
- (2) DISQUALIFIED PERSON.—For purposes of this section, the term “disqualified person” means a person who is—
- (A) a fiduciary;
 - (B) a person providing services to the plan;
 - (C) an employer any of whose employees are covered by the plan;
 - (D) an employee organization any of whose members are covered by the plan;
 - (E) an owner, direct or indirect, of 50 percent or more of—
 - (i) the combined voting power of all classes of stock entitled to vote or the total value of shares of all classes of stock of a corporation,
 - (ii) the capital interest or the profits interest of a partnership, or
 - (iii) the beneficial interest of a trust or unincorporated enterprise,
 which is an employer or an employee organization described in subparagraph (C) or (D);
 - (F) a member of the family (as defined in paragraph (6)) of any individual described in subparagraph (A), (B), (C), or (E);
 - (G) a corporation, partnership, or trust or estate of which (or in which) 50 percent or more of—
 - (i) the combined voting power of all classes of stock entitled to vote or the total value of shares of all classes of stock of such corporation,
 - (ii) the capital interest or profits interest of such partnership, or
 - (iii) the beneficial interest of such trust or estate, is owned directly or indirectly, or held by persons described in subparagraph (A), (B), (C), (D), or (E);
 - (H) an officer, director (or an individual having powers or responsibilities similar to those of officers or directors), a 10 percent or more shareholder, or a highly compensated employee (earning 10 percent or more of the yearly wages of an employer) of a person described in subparagraph (C), (D), (E), or (G); or
 - (I) a 10 percent or more (in capital or profits) partner or joint venturer of a person described in subparagraph (C), (D), (E), or (G).

The Secretary, after consultation and coordination with the Secretary of Labor or his delegate, may by regulation prescribe a percentage lower than 50 percent for subparagraphs (E) and (G) and lower than 10 percent for subparagraphs (H) and (I).

(3) FIDUCIARY.—For purposes of this section, the term “fiduciary” means any person who—

(A) exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets,

(B) renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or

(C) has any discretionary authority or discretionary responsibility in the administration of such plan.

Such term includes any person designated under section 405(c)(1)(B) of the Employee Retirement Income Security Act of 1974.

(4) STOCKHOLDINGS.—For purposes of paragraphs (2)(E)(i) and (G)(i) there shall be taken into account indirect stockholdings which would be taken into account under section 267(c), except that, for purposes of this paragraph, section 267(c)(4) shall be treated as providing that the members of the family of an individual are the members within the meaning of paragraph (6).

(5) PARTNERSHIPS; TRUSTS.—For purposes of paragraphs (2)(E)(ii) and (iii), (G)(ii) and (iii), and (I) the ownership of profits or beneficial interests shall be determined in accordance with the rules for constructive ownership of stock provided in section 267(c) (other than paragraph (3) thereof), except that section 267(c)(4) shall be treated as providing that the members of the family of an individual are the members within the meaning of paragraph (6).

(6) MEMBER OF FAMILY.—For purposes of paragraph (2)(F), the family of any individual shall include his spouse, ancestor, lineal descendant, and any spouse of a lineal descendant.

(7) EMPLOYEE STOCK OWNERSHIP PLAN.—The term “employee stock ownership plan” means a defined contribution plan—

(A) which is a stock bonus plan which is qualified, or a stock bonus and a money purchase plan both of which are qualified under section 401(a), and which are designed to invest primarily in qualifying employer securities; and

(B) which is otherwise defined in regulations prescribed by the Secretary.

A plan shall not be treated as an employee stock ownership plan unless it meets the requirements of section 409(h), section 409(o), and, if applicable, section 409(n), section 409(p), and section 664(g) and, if the employer has a registration-type class of securities (as defined in section 409(e)(4)), it meets the requirements of section 409(e).

(8) QUALIFYING EMPLOYER SECURITY.—The term “qualifying employer security” means any employer security within the meaning of section 409(l). If any moneys or other property of a plan are invested in shares of an investment company registered under the Investment Company Act of 1940, the investment shall not cause that investment company or that investment company’s investment adviser or principal underwriter to be treated as a fiduciary or a disqualified person for purposes

of this section, except when an investment company or its investment adviser or principal underwriter acts in connection with a plan covering employees of the investment company, its investment adviser, or its principal underwriter.

(9) SECTION MADE APPLICABLE TO WITHDRAWAL LIABILITY PAYMENT FUNDS.—For purposes of this section—

(A) IN GENERAL.—The term “plan” includes a trust described in section 501(c)(22).

(B) DISQUALIFIED PERSON.—In the case of any trust to which this section applies by reason of subparagraph (A), the term “disqualified person” includes any person who is a disqualified person with respect to any plan to which such trust is permitted to make payments under section 4223 of the Employee Retirement Income Security Act of 1974.

(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 distribution 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, including recommendations relating to the management of moneys or other property to be rolled over or otherwise 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 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 com-

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 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 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, 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 compensation to the person providing the recommendation (or any affiliate of such person), but only if 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, 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.

(f) OTHER DEFINITIONS AND SPECIAL RULES.—For purposes of this section—

(1) JOINT AND SEVERAL LIABILITY.—If more than one person is liable under subsection (a) or (b) with respect to any one prohibited transaction, all such persons shall be jointly and severally liable under such subsection with respect to such transaction.

(2) TAXABLE PERIOD.—The term “taxable period” means, with respect to any prohibited transaction, the period beginning with the date on which the prohibited transaction occurs and ending on the earliest of—

(A) the date of mailing a notice of deficiency with respect to the tax imposed by subsection (a) under section 6212,

(B) the date on which the tax imposed by subsection (a) is assessed, or

(C) the date on which correction of the prohibited transaction is completed.

(3) SALE OR EXCHANGE; ENCUMBERED PROPERTY.—A transfer or real or personal property by a disqualified person to a plan shall be treated as a sale or exchange if the property is subject to a mortgage or similar lien which the plan assumes or if it is subject to a mortgage or similar lien which a disqualified person placed on the property within the 10-year period ending on the date of the transfer.

(4) AMOUNT INVOLVED.—The term “amount involved” means, with respect to a prohibited transaction, the greater of the amount of money and the fair market value of the other property given or the amount of money and the fair market value of the other property received; except that, in the case of services described in paragraphs (2) and (10) of subsection (d) the amount involved shall be only the **[excess compensation.]** *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). For purposes of the preceding sentence, the fair market value—

(A) in the case of the tax imposed by subsection (a), shall be determined as of the date on which the prohibited transaction occurs; and

(B) in the case of the tax imposed by subsection (b), shall be the highest fair market value during the taxable period.

[(5) CORRECTION.—The terms]

(5) CORRECTION.—

(A) *IN GENERAL.—Except as provided in subparagraph (B), the terms “correction” and “correct” mean, with respect to a prohibited transaction, undoing the transaction to the extent possible, but in any case placing the plan in a financial position not worse than that in which it would be if the disqualified person were acting under the highest fiduciary standards.*

(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).*

(6) EXEMPTIONS NOT TO APPLY TO CERTAIN TRANSACTIONS.—

(A) *IN GENERAL.—In the case of a trust described in section 401(a) which is part of a plan providing contributions or benefits for employees some or all of whom are owner-employees (as defined in section 401(c)(3)), the exemptions provided by subsection (d) (other than paragraphs (9) and (12)) shall not apply to a transaction in which the plan directly or indirectly—*

(i) lends any part of the corpus or income of the plan to,

(ii) pays any compensation for personal services rendered to the plan to, or

(iii) acquires for the plan any property from, or sells any property to,

any such owner-employee, a member of the family (as defined in section 267(c)(4)) of any such owner-employee, or any corporation in which any such owner-employee owns, directly or indirectly, 50 percent or more of the total combined voting power of all classes of stock entitled to vote or 50 percent or more of the total value of shares of all classes of stock of the corporation.

(B) Special rules for shareholder-employees, etc.

(i) IN GENERAL.—For purposes of subparagraph (A), the following shall be treated as owner-employees:

(I) A shareholder-employee.

(II) A participant or beneficiary of an individual retirement plan (as defined in section 7701(a)(37)).

(III) An employer or association of employees which establishes such an individual retirement plan under section 408(c).

(ii) EXCEPTION FOR CERTAIN TRANSACTIONS INVOLVING SHAREHOLDER-EMPLOYEES.—Subparagraph (A)(iii) shall not apply to a transaction which consists of a sale of employer securities to an employee stock ownership plan (as defined in subsection (e)(7)) by a shareholder-employee, a member of the family (as defined in section 267(c)(4)) of such shareholder-employee, or a corporation in which such a shareholder-employee owns stock representing a 50 percent or greater interest described in subparagraph (A).

(iii) LOAN EXCEPTION.—For purposes of subparagraph (A)(i), the term “owner-employee” shall only include a person described in subclause (II) or (III) of clause (i).

(C) SHAREHOLDER-EMPLOYEE.—For purposes of subparagraph (B), the term “shareholder-employee” means an employee or officer of an S corporation who owns (or is considered as owning within the meaning of section 318(a)(1)) more than 5 percent of the outstanding stock of the corporation on any day during the taxable year of such corporation.

(7) S CORPORATION REPAYMENT OF LOANS FOR QUALIFYING EMPLOYER SECURITIES.—A plan shall not be treated as violating the requirements of section 401 or 409 or subsection (e)(7), or as engaging in a prohibited transaction for purposes of subsection (d)(3), merely by reason of any distribution (as described in section 1368(a)) with respect to S corporation stock that constitutes qualifying employer securities, which in accordance with the plan provisions is used to make payments on a loan described in subsection (d)(3) the proceeds of which were used to acquire such qualifying employer securities (whether or not allocated to participants). The preceding sentence shall not apply in the case of a distribution which is paid with respect to any employer security which is allocated to a participant unless the plan provides that employer securities with a fair market value of not less than the amount of such distribution are allocated to such participant for the year which (but for the preceding sentence) such distribution would have been allocated to such participant.

(8) PROVISION OF INVESTMENT ADVICE TO PARTICIPANT AND BENEFICIARIES.—

(A) IN GENERAL.—The prohibitions provided in subsection (c) shall not apply to transactions described in subsection (d)(17) if the investment advice provided by a fiduciary adviser is provided under an eligible investment advice arrangement.

(B) ELIGIBLE INVESTMENT ADVICE ARRANGEMENT.—For purposes of this paragraph, the term “eligible investment advice arrangement” means an arrangement—

(i) which either—

(I) provides that any fees (including any commission or other compensation) received by the fiduciary adviser for investment advice or with respect to the sale, holding, or acquisition of any security or other property for purposes of investment of plan assets do not vary depending on the basis of any investment option selected, or

(II) uses a computer model under an investment advice program meeting the requirements of subparagraph (C) in connection with the provision of investment advice by a fiduciary adviser to a participant or beneficiary, and

(ii) with respect to which the requirements of subparagraphs (D), (E), (F), (G), (H), and (I) are met.

(C) INVESTMENT ADVICE PROGRAM USING COMPUTER MODEL.—

(i) IN GENERAL.—An investment advice program meets the requirements of this subparagraph if the requirements of clauses (ii), (iii), and (iv) are met.

(ii) COMPUTER MODEL.—The requirements of this clause are met if the investment advice provided under the investment advice program is provided pursuant to a computer model that—

(I) applies generally accepted investment theories that take into account the historic returns of different asset classes over defined periods of time,

(II) utilizes relevant information about the participant, which may include age, life expectancy, retirement age, risk tolerance, other assets or sources of income, and preferences as to certain types of investments,

(III) utilizes prescribed objective criteria to provide asset allocation portfolios comprised of investment options available under the plan,

(IV) operates in a manner that is not biased in favor of investments offered by the fiduciary adviser or a person with a material affiliation or contractual relationship with the fiduciary adviser, and

(V) takes into account all investment options under the plan in specifying how a participant’s account balance should be invested and is not inappropriately weighted with respect to any investment option.

(iii) CERTIFICATION.—

(I) IN GENERAL.—The requirements of this clause are met with respect to any investment advice program if an eligible investment expert certifies, prior to the utilization of the computer model and in accordance with rules prescribed by

the Secretary of Labor, that the computer model meets the requirements of clause (ii).

(II) RENEWAL OF CERTIFICATIONS.—If, as determined under regulations prescribed by the Secretary of Labor, there are material modifications to a computer model, the requirements of this clause are met only if a certification described in subclause (I) is obtained with respect to the computer model as so modified.

(III) ELIGIBLE INVESTMENT EXPERT.—The term “eligible investment expert” means any person which meets such requirements as the Secretary of Labor may provide and which does not bear any material affiliation or contractual relationship with any investment adviser or a related person thereof (or any employee, agent, or registered representative of the investment adviser or related person).

(iv) EXCLUSIVITY OF RECOMMENDATION.—The requirements of this clause are met with respect to any investment advice program if—

(I) the only investment advice provided under the program is the advice generated by the computer model described in clause (ii), and

(II) any transaction described in subsection (d)(17)(A)(ii) occurs solely at the direction of the participant or beneficiary.

Nothing in the preceding sentence shall preclude the participant or beneficiary from requesting investment advice other than that described in clause (i), but only if such request has not been solicited by any person connected with carrying out the arrangement.

(D) EXPRESS AUTHORIZATION BY SEPARATE FIDUCIARY.—The requirements of this subparagraph are met with respect to an arrangement if the arrangement is expressly authorized by a plan fiduciary other than the person offering the investment advice program, any person providing investment options under the plan, or any affiliate of either.

(E) AUDITS.—

(i) IN GENERAL.—The requirements of this subparagraph are met if an independent auditor, who has appropriate technical training or experience and proficiency and so represents in writing—

(I) conducts an annual audit of the arrangement for compliance with the requirements of this paragraph, and

(II) following completion of the annual audit, issues a written report to the fiduciary who authorized use of the arrangement which presents its specific findings regarding compliance of the arrangement with the requirements of this paragraph.

(ii) SPECIAL RULE FOR INDIVIDUAL RETIREMENT AND SIMILAR PLANS.—In the case of a plan described in

subparagraphs (B) through (F) (and so much of subparagraph (G) as relates to such subparagraphs) of subsection (e)(1), in lieu of the requirements of clause (i), audits of the arrangement shall be conducted at such times and in such manner as the Secretary of Labor may prescribe.

(iii) INDEPENDENT AUDITOR.—For purposes of this subparagraph, an auditor is considered independent if it is not related to the person offering the arrangement to the plan and is not related to any person providing investment options under the plan.

(F) DISCLOSURE.—The requirements of this subparagraph are met if—

(i) the fiduciary adviser provides to a participant or a beneficiary before the initial provision of the investment advice with regard to any security or other property offered as an investment option, a written notification (which may consist of notification by means of electronic communication)—

(I) of the role of any party that has a material affiliation or contractual relationship with the fiduciary adviser, in the development of the investment advice program and in the selection of investment options available under the plan,

(II) of the past performance and historical rates of return of the investment options available under the plan,

(III) of all fees or other compensation relating to the advice that the fiduciary adviser or any affiliate thereof is to receive (including compensation provided by any third party) in connection with the provision of the advice or in connection with the sale, acquisition, or holding of the security or other property,

(IV) of any material affiliation or contractual relationship of the fiduciary adviser or affiliates thereof in the security or other property,

(V) the manner, and under what circumstances, any participant or beneficiary information provided under the arrangement will be used or disclosed,

(VI) of the types of services provided by the fiduciary adviser in connection with the provision of investment advice by the fiduciary adviser,

(VII) that the adviser is acting as a fiduciary of the plan in connection with the provision of the advice, and

(VIII) that a recipient of the advice may separately arrange for the provision of advice by another adviser, that could have no material affiliation with and receive no fees or other compensation in connection with the security or other property, and

(ii) at all times during the provision of advisory services to the participant or beneficiary, the fiduciary adviser—

(I) maintains the information described in clause (i) in accurate form and in the manner described in subparagraph (H),

(II) provides, without charge, accurate information to the recipient of the advice no less frequently than annually,

(III) provides, without charge, accurate information to the recipient of the advice upon request of the recipient, and

(IV) provides, without charge, accurate information to the recipient of the advice concerning any material change to the information required to be provided to the recipient of the advice at a time reasonably contemporaneous to the change in information.

(G) OTHER CONDITIONS.—The requirements of this subparagraph are met if—

(i) the fiduciary adviser provides appropriate disclosure, in connection with the sale, acquisition, or holding of the security or other property, in accordance with all applicable securities laws,

(ii) the sale, acquisition, or holding occurs solely at the direction of the recipient of the advice,

(iii) the compensation received by the fiduciary adviser and affiliates thereof in connection with the sale, acquisition, or holding of the security or other property is reasonable, and

(iv) the terms of the sale, acquisition, or holding of the security or other property are at least as favorable to the plan as an arm's length transaction would be.

(H) STANDARDS FOR PRESENTATION OF INFORMATION.—

(i) IN GENERAL.—The requirements of this subparagraph are met if the notification required to be provided to participants and beneficiaries under subparagraph (F)(i) is written in a clear and conspicuous manner and in a manner calculated to be understood by the average plan participant and is sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of the information required to be provided in the notification.

(ii) MODEL FORM FOR DISCLOSURE OF FEES AND OTHER COMPENSATION.—The Secretary of Labor shall issue a model form for the disclosure of fees and other compensation required in subparagraph (F)(i)(III) which meets the requirements of clause (i).

(I) MAINTENANCE FOR 6 YEARS OF EVIDENCE OF COMPLIANCE.—The requirements of this subparagraph are met if a fiduciary adviser who has provided advice referred to in subparagraph (A) maintains, for a period of not less than 6 years after the provision of the advice, any records necessary for determining whether the requirements of the preceding provisions of this paragraph and of subsection

(d)(17) have been met. A transaction prohibited under subsection (c) shall not be considered to have occurred solely because the records are lost or destroyed prior to the end of the 6-year period due to circumstances beyond the control of the fiduciary adviser.

(J) DEFINITIONS.—For purposes of this paragraph and subsection (d)(17)—

(i) FIDUCIARY ADVISER.—The term “fiduciary adviser” means, with respect to a plan, a person who is a fiduciary of the plan by reason of the provision of investment advice referred to in subsection (e)(3)(B) by the person to a participant or beneficiary of the plan and who is—

(I) registered as an investment adviser under the Investment Advisers Act of 1940 (15 U.S.C. 80b-1 et seq.) or under the laws of the State in which the fiduciary maintains its principal office and place of business,

(II) a bank or similar financial institution referred to in subsection (d)(4) or a savings association (as defined in section 3(b)(1) of the Federal Deposit Insurance Act (12 U.S.C. 1813(b)(1))), but only if the advice is provided through a trust department of the bank or similar financial institution or savings association which is subject to periodic examination and review by Federal or State banking authorities,

(III) an insurance company qualified to do business under the laws of a State,

(IV) a person registered as a broker or dealer under the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.),

(V) an affiliate of a person described in any of subclauses (I) through (IV), or

(VI) an employee, agent, or registered representative of a person described in subclauses (I) through (V) who satisfies the requirements of applicable insurance, banking, and securities laws relating to the provision of the advice.

For purposes of this title, a person who develops the computer model described in subparagraph (C)(ii) or markets the investment advice program or computer model shall be treated as a person who is a fiduciary of the plan by reason of the provision of investment advice referred to in subsection (e)(3)(B) to a participant or beneficiary and shall be treated as a fiduciary adviser for purposes of this paragraph and subsection (d)(17), except that the Secretary of Labor may prescribe rules under which only 1 fiduciary adviser may elect to be treated as a fiduciary with respect to the plan.

(ii) AFFILIATE.—The term “affiliate” of another entity means an affiliated person of the entity (as defined in section 2(a)(3) of the Investment Company Act of 1940 (15 U.S.C. 80a-2(a)(3))).

(iii) REGISTERED REPRESENTATIVE.—The term “registered representative” of another entity means a person described in section 3(a)(18) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(18)) (substituting the entity for the broker or dealer referred to in such section) or a person described in section 202(a)(17) of the Investment Advisers Act of 1940 (15 U.S.C. 80b-2(a)(17)) (substituting the entity for the investment adviser referred to in such section).

(9) BLOCK TRADE.—The term “block trade” means any trade of at least 10,000 shares or with a market value of at least \$200,000 which will be allocated across two or more unrelated client accounts of a fiduciary.

(10) ADEQUATE CONSIDERATION.—The term “adequate consideration” means—

(A) in the case of a security for which there is a generally recognized market—

(i) the price of the security prevailing on a national securities exchange which is registered under section 6 of the Securities Exchange Act of 1934, taking into account factors such as the size of the transaction and marketability of the security, or

(ii) if the security is not traded on such a national securities exchange, a price not less favorable to the plan than the offering price for the security as established by the current bid and asked prices quoted by persons independent of the issuer and of the party in interest, taking into account factors such as the size of the transaction and marketability of the security, and

(B) in the case of an asset other than a security for which there is a generally recognized market, the fair market value of the asset as determined in good faith by a fiduciary or fiduciaries in accordance with regulations prescribed by the Secretary of Labor.

(11) CORRECTION PERIOD.—

(A) IN GENERAL.—For purposes of subsection (d)(23), the term “correction period” means the 14-day period beginning on the date on which the disqualified person discovers, or reasonably should have discovered, that the transaction would (without regard to this paragraph and subsection (d)(23)) constitute a prohibited transaction.

(B) EXCEPTIONS.—

(i) EMPLOYER SECURITIES.—Subsection (d)(23) does not apply to any transaction between a plan and a plan sponsor or its affiliates that involves the acquisition or sale of an employer security (as defined in section 407(d)(1) of the Employee Retirement Income Security Act of 1974) or the acquisition, sale, or lease of employer real property (as defined in section 407(d)(2) of such Act).

(ii) KNOWING PROHIBITED TRANSACTION.—In the case of any disqualified person, subsection (d)(23) does not apply to a transaction if, at the time the transaction is entered into, the disqualified person knew (or reasonably should have known) that the transaction

would (without regard to this paragraph) constitute a prohibited transaction.

(C) ABATEMENT OF TAX WHERE THERE IS A CORRECTION.—If a transaction is not treated as a prohibited transaction by reason of subsection (d)(23), then no tax under subsections (a) and (b) shall be assessed with respect to such transaction, and if assessed the assessment shall be abated, and if collected shall be credited or refunded as an overpayment.

(D) DEFINITIONS.—For purposes of this paragraph and subsection (d)(23)—

(i) SECURITY.—The term “security” has the meaning given such term by section 475(c)(2) (without regard to subparagraph (F)(iii) and the last sentence thereof).

(ii) COMMODITY.—The term “commodity” has the meaning given such term by section 475(e)(2) (without regard to subparagraph (D)(iii) thereof).

(iii) CORRECT.—The term “correct” means, with respect to a transaction—

(I) to undo the transaction to the extent possible and in any case to make good to the plan or affected account any losses resulting from the transaction, and

(II) to restore to the plan or affected account any profits made through the use of assets of the plan.

(g) APPLICATION OF SECTION.—This section shall not apply—

(1) in the case of a plan to which a guaranteed benefit policy (as defined in section 401(b)(2)(B) of the Employee Retirement Income Security Act of 1974) is issued, to any assets of the insurance company, insurance service, or insurance organization merely because of its issuance of such policy;

(2) to a governmental plan (within the meaning of section 414(d)); or

(3) to a church plan (within the meaning of section 414(e)) with respect to which the election provided by section 410(d) has not been made.

In the case of a plan which invests in any security issued by an investment company registered under the Investment Company Act of 1940, the assets of such plan shall be deemed to include such security but shall not, by reason of such investment, be deemed to include any assets of such company.

(h) NOTIFICATION OF SECRETARY OF LABOR.—Before sending a notice of deficiency with respect to the tax imposed by subsection (a) or (b), the Secretary shall notify the Secretary of Labor and provide him a reasonable opportunity to obtain a correction of the prohibited transaction or to comment on the imposition of such tax.

(i) CROSS REFERENCE.—For provisions concerning coordination procedures between Secretary of Labor and Secretary of the Treasury with respect to application of tax imposed by this section and for authority to waive imposition of the tax imposed by subsection (b), see section 3003 of the Employee Retirement Income Security Act of 1974.

* * * * *

MINORITY VIEWS

After decades of hard work, many middle-class Americans seek out financial advice on how to invest their retirement nest egg. This is one of the biggest financial decisions they will make in their lives. When making it, they often rely on the financial advice they are given and implicitly trust that it is in their best interest. Unfortunately, that's not always the case. Loopholes in a decades-old regulation allow unscrupulous advisors to provide "conflicted advice" and put their financial interests ahead of their retirement clients'. Conflicted advice costs retirement plan participants \$17 billion in losses every year and could result in a loss of almost a quarter of an individual's savings over a 35-year period.¹ Rather than taking steps to fix this problem, H.R. 4294 perpetuates this unacceptable status quo.

H.R. 4294 also includes an unnecessary, constitutionally-suspect procedural mechanism that prohibits the Department of Labor's (DOL's) final conflict of interest rule from taking effect unless it is approved by Congress within 60 days. This "affirmative approval" process is similar to the one enumerated in the Regulations from the Executive in Need of Scrutiny (REINS) Act. The REINS Act is a central component of the Republican-led Congress's hyper-partisan, anti-regulatory agenda. The Coalition for Sensible Safeguards (CSS), an alliance of over 150 labor, scientific, research, good government, faith, community, health, environment, and public interest groups, urged opposition to H.R. 4294 and another bill, H.R. 4293, which is nearly identical to H.R. 4294. In crafting a so-called alternative to the DOL's conflict of interest rule, House Republicans decided to advance two companion bills: H.R. 4294 amends the Internal Revenue Code (IRC), which governs tax-favored retirement savings such as Individual Retirement Accounts (IRAs). H.R. 4293 amends the Employee Retirement Income Security Act (ERISA; P.L. 93-406), which governs retirement plans of private employers. The core provisions of both bills are nearly identical, and the Education and Workforce Committee considered H.R. 4294 and H.R. 4293 during the same mark-up.

Many groups, including CSS, registered their opposition to both bills. CSS cited H.R. 4293 and H.R. 4294's procedural requirement as a "threat to our democratic process."² In its opposition letter, the CSS said using "a REINS-like mechanism to overturn this particular rule is unprecedented. These bills' passage will only embolden radical members of both chambers to attempt this scheme

¹ Council of Economic Advisors, *The Effects of Conflicted Investment Advice on Retirement Savings* 17-18 (Feb. 2015) ; available at: https://www.whitehouse.gov/sites/default/files/docs/cea_coi_report_final.pdf.

²Coalition for Sensible Safeguards, "Mark-up on H.R. 4293, the Affordable Retirement Advice Protection Act and H.R. 4294, Strengthening Access to Valuable Education and Retirement Support Act," (Feb. 2016); available at: <http://www.sensible safeguards.org/wp-content/uploads/CSS-letter-on-H.R.-4293-4294.pdf>.

to derail other rules, potentially jeopardizing crucial public health and safety and environmental protections.”³

In addition to the CSS, a diverse stakeholder coalition weighed in against H.R. 4294. That coalition includes: AARP, AFL–CIO, Alliance for Retired Americans, American Federation of State, County, and Municipal Employees (AFSCME), Association of University Centers on Disabilities, Better Markets, Center for Economic Justice, Center for Global Policy Solutions, Center for Responsible Lending, The Committee for the Fiduciary Standard, Consumer Action, Consumer Federation of America, Consumers Union, Demos, Financial Planning Coalition, International Association of Machinists and Aerospace Workers, International Association of Sheet Metal, Air, Rail, and Transportation Workers, International Brotherhood of Electrical Workers, Leadership Conference on Civil and Human Rights, Main Street Alliance, NAACP, National Active and Retired Federal Employees Association (NARFE), National Committee to Preserve Social Security and Medicare, National Consumers League, National Council of La Raza, Pension Rights Center, Public Citizen, Public Investors Arbitration Bar Association, Service Employees International Union (SEIU), and U.S. PIRG.

H.R. 4294 ENABLES UNSCRUPULOUS ADVISORS TO CONTINUE TO EVADE FIDUCIARY OBLIGATIONS AND PUT THEIR FINANCIAL INTERESTS AHEAD OF THEIR CLIENTS’

Enacted in 1974, ERISA describes the circumstances when a person has a fiduciary obligation for rendering investment advice.⁴ The DOL issued regulations in 1975 that further defined such circumstances using a five-part test. Under the regulations, to be held to ERISA’s fiduciary standard with respect to providing investment advice, an individual must: (1) make recommendations on investing in, purchasing or selling securities or other property, or give advice as to their value (2) on a regular basis (3) pursuant to a mutual understanding that the advice (4) will serve as a primary basis for investment decisions, and (5) will be individualized to the particular needs of the plan.⁵ Unless each of the five elements of this test is satisfied for each time advice is given, then an investment advisor is not treated as a fiduciary.

This five-part test has not kept pace with the changed retirement savings and planning landscape, and loopholes have emerged that can be exploited. For instance, an unscrupulous advisor providing individualized investment advice to a retirement client about rolling over assets from an employer-sponsored retirement plan—such as a 401(k)—to an Individual Retirement Account (IRA) does not have to abide by a fiduciary obligation. Neither does an advisor who provides retirement savings advice on a one-time basis. As a result of this deficient five-part test, certain advisors are able to provide substandard advice and steer retirement clients toward financial products with sky-high fees that are not in their clients’ best interest. Such products may enrich the advisor yet insidiously erode the savings of workers and retirees. To get away with this,

³*Id.*

⁴29 U.S.C. 1002(21).

⁵29 C.F.R. 2510.3–21(c), 40 Fed. Reg. 50843 (Oct. 1975); available at: <http://www.gpo.gov/fdsys/pkg/CFR-2011-title29-vo19/pdf/CFR-2011-title29-vo19-sec2510-3-21.pdf>.

so-called advisors can insert boilerplate disclaimers in the fine print. As Secretary Perez has correctly noted, “the corrosive power of fine print and buried fees can eat away like a chronic illness at a person’s savings.”⁶

Recognizing that the existing regulation is broken and in desperate need of reform, the DOL undertook a rulemaking effort to revise the definition of who is a fiduciary under the Employee Retirement Income Security Act (ERISA) as a result of giving investment advice. H.R. 4294 represents a deeply flawed response to the DOL’s conflict of interest rulemaking effort. Rather than closing loopholes in the existing regulation that enable unscrupulous advisors to offer substandard retirement savings advice to middle-class Americans, the bill codifies them.

Specifically, to qualify as a fiduciary under the provisions of H.R. 4294, investment advice must be rendered for a fee pursuant to 1) “written acknowledgement” of the fiduciary obligation; or 2) “a mutual agreement, arrangement, or understanding” that it is “individualized” to the client and the client “intends to materially rely” on the advice.

However, under H.R. 4294, financial advisors would be able to continue to avoid their fiduciary obligations just by providing a written disclaimer that says 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 and management decisions.

This language mirrors the kind of boilerplate disclaimer currently used by certain firms and advisors to avoid fiduciary obligations. While Committee Democrats believe disclosures and disclaimers are no substitute for a meaningful, enforceable fiduciary standard, there is also research to suggest that, on their own, disclosures and disclaimers can be ineffective and even detrimental to clients:

- According to an industry association study, “two-thirds of Americans with defined contribution (DC) plans or IRAs admit to spending less than five minutes examining their retirement plan disclosures—one in five say they rarely or never read the disclosure paperwork at all.”⁷
- Disclosures often fail to make clients aware of the nature of their advisors’ conflicts, let alone understand the potential implications of such conflicts.⁸
- Disclosure of advisor conflicts can backfire since clients can interpret disclosure of advisor conflicts as a sign of honesty.⁹ In this case, disclosure may even be harmful to workers and retirees seeking to invest their savings because they could potentially create an illusion of fiduciary protection.

⁶Testimony of Secretary of Labor Thomas E. Perez before the Health, Employment, Labor, and Pensions (HELP) Subcommittee of the Education and Workforce Committee (June 2015); available at: http://www.dol.gov/newsroom/congress/20150617_Perez.

⁷Life Insurance Management Research Association (LIMRA), “Many Americans Don’t Fully Read Retirement Plan Disclosures; Few Know What Fees they Pay,” (August 2012); available at: http://www.limra.com/Posts/PR/News_Releases/LIMRA_Study_Many_Americans_Don't_Fully_Read_Retirement_Plan_Disclosures;_Few_Know_What_Fees_They_Pay.aspx.

⁸Department of Labor, “Fiduciary Investment Advice, Regulatory Impact Analysis,” (April 2015); available at: <http://www.dol.gov/ebsa/pdf/conflictsofinterestria.pdf>.

⁹*Id.*

Committee Democrats believe H.R. 4294 includes two other incredibly broad and ill-advised exemptions from fiduciary responsibilities. According to the Financial Planning Coalition, “firms and advisors will be allowed to provide an unlimited amount of advice to their clients, as long as they provide disclosure in writing that they are only providing the advice in a ‘marketing or sales capacity’ . . . In addition, the bills allow for advisors to escape fiduciary duty by claiming they made a ‘good-faith’ error in their disclosure to their clients.”¹⁰

H.R. 4294 ESTABLISHES AN UNNECESSARY, CONSTITUTIONALLY-SUSPECT PROCESS TO ENABLE THE REPUBLICAN-LED CONGRESS TO ASSERT VETO POWER OVER THE DOL RULE

H.R. 4294 requires that Congress affirmatively approve the DOL’s final “conflict of interest” rule within 60 days after the bill’s enactment. If a bill or joint resolution is not approved within 60 days, then H.R. 4294’s provisions shall take effect. The bill’s “affirmative approval” requirement is akin to the one specified in the REINS Act (H.R. 427). In July 2015, the REINS Act was brought to the House floor for a vote. The bill passed on a near party-line vote. Only 2 House Democrats supported it.

Committee Democrats believe the bill’s “affirmative approval” mechanism is not necessary. Under the Congressional Review Act (CRA), which was enacted as part of then-Speaker Gingrich and House Republicans’ so-called Contract with America, Congress already possesses the authority to review and nullify a rule. According to the Government Accountability Office (GAO), the CRA “gives Congress an opportunity to review most rules before they take effect and to disapprove those found to be too burdensome, excessive, inappropriate, duplicative, or otherwise objectionable.”¹¹

Additionally, Committee Democrats share the concerns that have been raised about the potential constitutionality of the bill’s “affirmative approval” mechanism. After the Immigration and Naturalization Service (INS) suspended a particular deportation, the agency was overruled by the U.S. House of Representatives under certain provisions of the Immigration and Nationality Act. In *INS v. Chadha*, the Supreme Court found this House veto to be unconstitutional because Congress was taking a legislative action, which had to be passed by both houses of Congress and presented to the President for approval in order to satisfy the bicameralism and presentment clauses of the U.S. Constitution.¹²

The “affirmative approval” mechanism in H.R. 4294 may run afoul of the Court’s decision in *Chadha*, as either the House or Senate—acting alone—could reject or not act upon the bill or joint resolution. Such an outcome may raise similar “one House legislative

¹⁰Financial Planning Coalition, “H.R. 4293 and H.R. 4294 Would Reduce Protections for Retirement Investors,” (Jan. 2016); available at: https://filemanager.capwiz.com/filemanager/file_mgr/cfp/2016_01_29_HR_4294_and_4293_Would_Reduce_Protection_for_Retirement_Investors.pdf.

¹¹United States Government Accountability Office, Testimony Before the Subcommittee on Commercial and Administrative Law, House Committee on Judiciary, “Perspectives of 10 Years of Congressional Review Act Implementation,” (March 2006); available at: <http://www.gao.gov/new.items/d06601t.pdf>.

¹²*INS v. CHADHA*, 462 U.S. 919 (1983).

veto” concerns that the Court ruled to be unconstitutional in *Chadha*.

DEMOCRATIC MOTION AND AMENDMENT

Ranking Member Scott offered a motion to indefinitely postpone the mark-up, asserting it was premature for the Committee to consider H.R. 4293 and H.R. 4294 prior to the DOL’s finalization of the conflict of interest rule. The motion failed on a voice vote.

ROLL CALL VOTES ON FINAL PASSAGE

H.R. 4294 was reported by straight party-line votes of 22 ayes and 14 nays. No Democratic Committee Members voted in favor of the bills.

CONCLUSION

Committee Democrats remain committed to responsible solutions that help workers earn and collectively bargain for decent wages, achieve a better balance between work and family life, end workplace discrimination, and retire with security and dignity. H.R. 4294 is not among these solutions.

Instead of reserving judgment on the DOL’s final conflict of interest rulemaking, the Majority rushed to mark-up these deeply flawed, constitutionally-questionable bills. Committee Democrats believe that we can do better. Workers and retirement savers deserve better. They deserve fiduciary protections when investing their hard-earned retirement savings; and, regrettably, that’s not what H.R. 4294 delivers.

For the reasons stated above, among others, Committee Democrats unanimously opposed H.R. 4294 when the Committee on Education and the Workforce considered them on February 2, 2016. We urge the full House of Representatives to do the same.

ROBERT C. “BOBBY” SCOTT,
Ranking Member.
 JOE COURTNEY.
 FREDERICA S. WILSON.
 MARK POCAN.
 RAÚL M. GRIJALVA.
 MARK DESAULNIER.
 SUSAN A. DAVIS.
 JARED POLIS.
 ALMA S. ADAMS.
 MARCIA L. FUDGE.
 MARK TAKANO.
 HAKEEM S. JEFFRIES.
 SUZANNE BONAMICI.
 RUBÉN HINOJOSA.