

Union Calendar No. 443

115TH CONGRESS
2D SESSION

H. R. 2823

[Report No. 115–371, Part I]

To amend the Employee Retirement Income Security Act of 1974 and the Internal Revenue Code of 1986 to ensure that retirement investors receive advice in their best interests, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

JUNE 8, 2017

Mr. ROE of Tennessee (for himself, Mr. ROSKAM, Mr. WALBERG, and Mr. WILSON of South Carolina) introduced the following bill; which was referred to the Committee on Education and the Workforce, and in addition to the Committee on Ways and Means, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

OCTOBER 25, 2017

Reported from the Committee on Education and the Workforce with an amendment

[Strike out all after the enacting clause and insert the part printed in *italic*]

OCTOBER 25, 2017

Referral to the Committee on Ways and Means extended for a period ending not later than January 10, 2018

[For text of introduced bill, see copy of bill as introduced on June 8, 2017]

JANUARY 10, 2018

Referral to the Committee on Ways and Means extended for a period ending not later than February 2, 2018

FEBRUARY 2, 2018

Referral to the Committee on Ways and Means extended for a period ending not later than March 5, 2018

MARCH 5, 2018

Additional sponsors: Mr. GROTHMAN, Mr. SAM JOHNSON of Texas, Mr. MARSHALL, Mr. SESSIONS, Mr. LAHOOD, Mr. BARTON, Mr. LATTA, Mr. BISHOP of Michigan, Mr. ROKITA, Mr. ALLEN, Mr. RENACCI, Mr. MITCHELL, Mr. FLEISCHMANN, Mr. DUNCAN of Tennessee, Mr. KELLY of Pennsylvania, Mr. BARLETTA, Mr. BUDD, Ms. STEFANIK, Mr. PAULSEN, Mr. MARCHANT, Mr. THOMPSON of Pennsylvania, Ms. FOXX, Mr. GUTHRIE, Mr. FRANCIS ROONEY of Florida, Mr. FERGUSON, Mr. ESTES of Kansas, and Mr. MESSER

MARCH 5, 2018

The Committee on Ways and Means discharged; committed to the Committee of the Whole House on the State of the Union and ordered to be printed

A BILL

To amend the Employee Retirement Income Security Act of 1974 and the Internal Revenue Code of 1986 to ensure that retirement investors receive advice in their best interests, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
 2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 *This Act may be cited as the “Affordable Retirement*
 5 *Advice for Savers Act”.*

6 **SEC. 2. REPEAL OF FIDUCIARY DEFINITION RULEMAKING.**

7 (a) *IN GENERAL.*—*The Fiduciary Definition rule-*
 8 *making described in subsection (b) is repealed and shall*
 9 *have no force or effect, and the regulations and prohibited*
 10 *transaction exemptions amended or repealed by such rule-*
 11 *making are restored or revived as if such rulemaking had*
 12 *not been issued.*

13 (b) *FIDUCIARY DEFINITION RULEMAKING.*—*The Fidu-*
 14 *ciary Definition rulemaking described in this subsection*
 15 *consists of the following:*

16 (1) *The final rule of the Department of Labor ti-*
 17 *tled “Definition of the Term ‘Fiduciary’; Conflict of*
 18 *Interest Rule—Retirement Investment Advice” pub-*
 19 *lished April 8, 2016 (81 Fed. Reg. 20946).*

20 (2) *The “Best Interest Contract Exemption”*
 21 *published April 8, 2016 (81 Fed. Reg. 21002), and the*
 22 *technical correction published July 11, 2016 (81 Fed.*
 23 *Reg. 44773).*

24 (3) *The “Class Exemption for Principal Trans-*
 25 *actions in Certain Assets Between Investment Advice*

1 *Fiduciaries and Employee Benefit Plans and IRAs”*
 2 *published April 8, 2016 (81 Fed. Reg. 21089), and the*
 3 *technical correction published July 11, 2016 (81 Fed.*
 4 *Reg. 44784).*

5 (4) *The “Amendment to Prohibited Transaction*
 6 *Exemption (PTE) 75–1, Part V, Exemptions From*
 7 *Prohibitions Respecting Certain Classes of Trans-*
 8 *actions Involving Employee Benefit Plans and Cer-*
 9 *tain Broker-Dealers, Reporting Dealers and Banks”*
 10 *published April 8, 2016 (81 Fed. Reg. 21139).*

11 (5) *The “Amendment to and Partial Revocation*
 12 *of Prohibited Transaction Exemption (PTE) 86–128*
 13 *for Securities Transactions Involving Employee Ben-*
 14 *efit Plans and Broker-Dealers; Amendment to and*
 15 *Partial Revocation of PTE 75–1, Exemptions From*
 16 *Prohibitions Respecting Certain Classes of Trans-*
 17 *actions Involving Employee Benefits Plans and Cer-*
 18 *tain Broker-Dealers, Reporting Dealers and Banks”*
 19 *published April 8, 2016 (81 Fed. Reg. 21181).*

20 (6) *The “Amendments to Class Exemptions 75–*
 21 *1, 77–4, 80–83 and 83–1” published April 8, 2016*
 22 *(81 Fed. Reg. 21208).*

23 (7) *The “Amendment to and Partial Revocation*
 24 *of Prohibited Transaction Exemption (PTE) 84–24*
 25 *for Certain Transactions Involving Insurance Agents*

7 (a) AMENDMENTS TO THE EMPLOYEE RETIREMENT
8 INCOME SECURITY ACT OF 1974.—

9 (1) *DEFINITION OF INVESTMENT ADVICE.*—Sec-
10 tion 3(21) of the *Employee Retirement Income Secu-*
11 *rity Act of 1974 (29 U.S.C. 1002(21))* is amended by
12 adding at the end the following:

13 “(C)(i) For purposes of clause (ii) of subparagraph
14 (A), the term ‘investment advice’ means a recommendation
15 communicated electronically, on paper, or orally that—

16 “(I) relates to—

“(aa) the advisability of acquiring, holding, disposing, or exchanging any moneys or other property of a plan by the plan, plan participants, or plan beneficiaries, including any recommendation whether to take a distribution of benefits from such plan or any recommendation relating to the investment of any moneys or other property of such plan to be distributed from such plan;

1 “(bb) the management of moneys or other
2 property of such plan, including recommenda-
3 tions relating to the management of moneys or
4 other property to be distributed from such plan;
5 or

6 “(cc) the advisability of retaining or ceas-
7 ing to retain a person who would receive a fee
8 or other compensation for providing any of the
9 types of advice described in this subclause; and

10 “(II) is rendered pursuant to—

11 “(aa) a written acknowledgment, provided
12 electronically or on paper, of the obligation of
13 the advisor to comply with section 404 with re-
14 spect to the provision of such recommendation;
15 or

16 “(bb) a mutual agreement, arrangement, or
17 understanding, which may include limitations
18 on scope, timing, and responsibility to provide
19 ongoing monitoring or advice services, between
20 the person making such recommendation and the
21 plan that such recommendation is individualized
22 to the plan and such plan intends to materially
23 rely on such recommendation in making invest-
24 ment or management decisions with respect to
25 any moneys or other property of such plan.

1 “(ii) *For purposes of clause (i)(II)(bb), any disclaimer*
2 *of a mutual agreement, arrangement, or understanding*
3 *shall state only the following: ‘This communication is not*
4 *individualized to you, and you are not intended to rely ma-*
5 *terially on this communication in making investment or*
6 *management decisions.’. Such disclaimer shall not be effec-*
7 *tive unless such disclaimer is in writing and is commu-*
8 *nicated in a clear and prominent manner and an objective*
9 *person would reasonably conclude that, based on all the*
10 *facts and circumstances, there was not a mutual agreement,*
11 *arrangement, or understanding.*

12 “(iii) *For purposes of clause (i)(II)(bb), a communica-*
13 *tion shall not be considered to be a recommendation made*
14 *pursuant to a mutual agreement, arrangement, or under-*
15 *standing, if such communication contains the disclaimer re-*
16 *quired by clause (ii), and—*

17 “(I) *it is provided in conjunction with clear and*
18 *prominent disclosure in writing to a plan, plan par-*
19 *ticipant, or beneficiary that the person providing the*
20 *communication is doing so in its marketing or sales*
21 *capacity, including any communication regarding the*
22 *terms and conditions of the engagement of the person*
23 *providing the communication, and that the person is*
24 *not intending to provide investment advice within the*

1 *meaning of this subparagraph or to otherwise act as*
2 *a fiduciary to the plan;*

3 *“(II) the person providing the communication is*
4 *a current or potential counterparty or service pro-*
5 *vider to the plan in connection with any transaction*
6 *based on the communication, but only if—*

7 *“(aa) the plan is represented, in connection*
8 *with such transaction, by a plan fiduciary that*
9 *is independent of the person providing the com-*
10 *munication, and, except in the case of a swap*
11 *(as defined in section 1a of the Commodity Ex-*
12 *change Act (7 U.S.C. 1a) or security-based swap*
13 *(as defined in section 3(a) of the Securities Ex-*
14 *change Act (15 U.S.C. 78c(a))), independent of*
15 *the plan sponsor; and*

16 *“(bb) prior to such transaction, the inde-*
17 *pendent plan fiduciary represents in writing to*
18 *the person providing the communication that it*
19 *is aware that the person has a financial interest*
20 *in the transaction and that it has determined*
21 *that the person is not intending to provide in-*
22 *vestment advice within the meaning of this sub-*
23 *paragraph or to otherwise act as a fiduciary to*
24 *the plan subject to section 404;*

1 “(III) the person providing the communication
2 is an employee of any sponsoring employer or affil-
3 iate or employee organization who provides the com-
4 munication to the plan for no fee or other compensa-
5 tion other than the employee’s normal compensation;

6 “(IV) the person providing the communication
7 discloses in writing to the plan fiduciary that the per-
8 son is not undertaking to provide investment advice
9 as a fiduciary to the plan subject to section 404 and
10 the communication consists solely of—

11 “(aa) making available to the plan, without
12 regard to the individualized needs of the plan,
13 securities or other property or investment prod-
14 ucts through a platform or similar mechanism
15 from which a plan fiduciary may select or mon-
16 itor investment alternatives; or

17 “(bb) in connection with a platform or
18 similar mechanism described in item (aa)—

19 “(AA) identifying investment alter-
20 natives that meet objective criteria specified
21 by the plan, such as criteria concerning ex-
22 pense ratios, fund sizes, types of asset, or
23 credit quality;

1 “(BB) providing objective financial
2 data and comparisons with independent
3 benchmarks to the plan; or

4 “(CC) identifying a sample set of in-
5 vestment alternatives based on the plan’s
6 stated criteria in response to an inquiry
7 from a plan fiduciary;

8 “(V) the communication consists solely of valu-
9 ation information; or

10 “(VI) the communication consists solely of—

11 “(aa) information described in Department
12 of Labor Interpretive Bulletin 96–1 (29 C.F.R.
13 2509.96–1, as in effect on January 1, 2015), re-
14 gardless of whether such education is provided to
15 a plan or plan fiduciary or a participant or
16 beneficiary;

17 “(bb) information provided to participants
18 or beneficiaries regarding the factors to consider
19 in deciding whether to elect to receive a distribu-
20 tion from a plan or an individual retirement
21 plan (as defined in section 7701(a)(37) of the In-
22 ternal Revenue Code of 1986) and whether to roll
23 over such distribution to a plan or an individual
24 retirement plan (as defined in section
25 7701(a)(37) of the Internal Revenue Code of

1 1986), so long as any examples of different dis-
 2 tribution alternatives are accompanied by all
 3 material facts and assumptions on which the ex-
 4 amples are based; or

5 “(cc) any additional information treated as
 6 education by the Secretary.”.

7 (2) *EXEMPTION RELATING TO INVESTMENT AD-*
 8 *VICE.*—Section 408(b) of the Employee Retirement
 9 Income Security Act of 1974 is amended by adding
 10 at the end the following:

11 “(21)(A) Any transaction, including a contract
 12 for service, between a person providing investment ad-
 13 vice described in section 3(21)(A)(ii) and the advice
 14 recipient in connection with such investment advice,
 15 and any transaction consisting of the provision of
 16 such investment advice, if the following conditions are
 17 satisfied:

18 “(i) No more than reasonable compensation
 19 is paid (as determined under section 408(b)(2))
 20 for such investment advice.

21 “(ii) If the investment advice is based on a
 22 limited range of investment options (which may
 23 consist, in whole or in part, of proprietary prod-
 24 ucts), such limitations shall be clearly disclosed
 25 to the advice recipient prior to any transaction

1 *based on the investment advice in the form of a*
2 *notice that only states the following: ‘This rec-*
3 *ommendation is based on a limited range of in-*
4 *vestment options, and the same or similar in-*
5 *vestments may be available at a different cost*
6 *(greater or lesser) from other sources.’.*

7 *“(iii) If the investment advice may result in*
8 *variable compensation to the person providing*
9 *the investment advice (or any affiliate of such*
10 *person), the receipt of such compensation shall be*
11 *clearly disclosed to the advice recipient prior to*
12 *any transaction based on the investment advice.*
13 *For purposes of this subparagraph, clear disclo-*
14 *sure of variable compensation shall include, in a*
15 *manner calculated to be understood by the aver-*
16 *age individual, each of the following:*

17 *“(I) A notice that states only the fol-*
18 *lowing: ‘This recommendation may result*
19 *in varying amounts of fees or other com-*
20 *ensation to the person providing the rec-*
21 *ommendation (or its affiliate), and the*
22 *same or similar investments may be avail-*
23 *able at a different cost (greater or lesser)*
24 *from other sources.’. Any regulations or ad-*
25 *ministrative guidance implementing this*

1 *subclause may not require this notice to be*
2 *updated more than annually.*

3 *“(II) A description of any fee or other*
4 *compensation that is directly or indirectly*
5 *payable to the person (or its affiliate) by*
6 *the advice recipient with respect to such*
7 *transaction (expressed as an amount, for-*
8 *mula, percentage of assets, per capita*
9 *charge, or estimate or range of such com-*
10 *pensation).*

11 *“(III) A description of the types and*
12 *ranges of any compensation that are rea-*
13 *sonably expected to be directly or indirectly*
14 *payable to the person (or its affiliate) by*
15 *any third party in connection with such*
16 *transaction (expressed as an amount, for-*
17 *mula, percentage of assets, per capita*
18 *charge, or estimate or range of such com-*
19 *pensation).*

20 *“(IV) Upon request of the advice re-*
21 *cipient, a disclosure of the specific amounts*
22 *of compensation described in clause (iii)*
23 *that the person will receive in connection*
24 *with the particular transaction (expressed*
25 *as an amount, formula, percentage of assets,*

1 *per capita charge, or estimate of such com-*
 2 *pensation).*

3 “(B) *No recommendation will fail to satisfy the*
 4 *conditions described in clauses (i) through (iii) of*
 5 *subparagraph (A) solely because the person, acting in*
 6 *good faith and with reasonable diligence, makes an*
 7 *error or omission in disclosing the information speci-*
 8 *fied in such clauses, provided that the person discloses*
 9 *the correct information to the advice recipient as soon*
 10 *as practicable, but not later than 30 days from the*
 11 *date on which the person knows of such error or omis-*
 12 *sion.*

13 “(C) *Any notice provided pursuant to a require-*
 14 *ment under clause (ii) or clause (iii)(I) of subpara-*
 15 *graph (A) shall have no effect on any other notice oth-*
 16 *erwise required without regard to this title, and shall*
 17 *be provided in addition to, and not in lieu of, any*
 18 *other such notice.*

19 “(D) *For purposes of this paragraph, the term*
 20 *‘affiliate’ has the meaning given in subsection*
 21 *(g)(11)(B).’.*

22 ***(b) AMENDMENTS TO THE INTERNAL REVENUE CODE***
 23 ***OF 1986.—***

24 ***(1) EXEMPTION FOR INVESTMENT ADVICE WHICH***
 25 ***IS BEST INTEREST RECOMMENDATION.—Section***

1 4975(d) of the Internal Revenue Code of 1986 is
 2 amended by striking “or” at the end of paragraph
 3 (22), by striking the period at the end of paragraph
 4 (23) and inserting “, or”, and by inserting after
 5 paragraph (23) the following:

6 “(24) provision of investment advice by a fidu-
 7 ciary to a plan, plan participant, or beneficiary with
 8 respect to the plan, which is a best interest rec-
 9 ommendation or a transaction connected to such ad-
 10 vice.”.

11 (2) INVESTMENT ADVICE; BEST INTEREST REC-
 12 COMMENDATION.—Section 4975(e) of such Code is
 13 amended by adding at the end the following:

14 “(10) INVESTMENT ADVICE.—

15 “(A) IN GENERAL.—For purposes of this
 16 section, the term ‘investment advice’ means a
 17 recommendation, communicated electronically,
 18 on paper, or orally, that—

19 “(i) relates to—

20 “(I) the advisability of acquiring,
 21 holding, disposing, or exchanging any
 22 moneys or other property of a plan by
 23 the plan, plan participants, or plan
 24 beneficiaries, including any rec-
 25 ommendation whether to take a dis-

1 *tribution of benefits from such plan or*
2 *any recommendation relating to the*
3 *investment of any moneys or other*
4 *property of such plan to be distributed*
5 *from such plan;*

6 *“(II) the management of moneys*
7 *or other property of such plan, includ-*
8 *ing recommendations relating to the*
9 *management of moneys or other prop-*
10 *erty to be distributed from such plan;*
11 *or*

12 *“(III) the advisability of retain-*
13 *ing or ceasing to retain a person who*
14 *would receive a fee or other compensa-*
15 *tion for providing any of the types of*
16 *advice described in this subclause; and*
17 *“(ii) is rendered pursuant to—*

18 *“(I) a written acknowledgment,*
19 *provided electronically or on paper,*
20 *that the person is a fiduciary with re-*
21 *spect to the provision of such rec-*
22 *ommendation; or*

23 *“(II) a mutual agreement, ar-*
24 *rangement, or understanding which*
25 *may include limitations on scope, tim-*

1 *ing, and responsibility to provide on-*
2 *going monitoring or advice services, be-*
3 *tween the person making such rec-*
4 *ommendation and the plan, plan par-*
5 *ticipant, or beneficiary that such rec-*
6 *ommendation is individualized to the*
7 *plan, plan participant, or beneficiary*
8 *and such plan, plan participant, or*
9 *beneficiary intends to materially rely*
10 *on such recommendation in making in-*
11 *vestment or management decisions*
12 *with respect to any moneys or other*
13 *property of such plan.*

14 *“(B) DISCLAIMER OF A MUTUAL AGREE-*
15 *MENT, ARRANGEMENT, OR UNDERSTANDING.—*
16 *For purposes of subparagraph (A)(ii)(II), any*
17 *disclaimer of a mutual agreement, arrangement,*
18 *or understanding shall state only the following:*
19 *‘This communication is not individualized to*
20 *you, and you are not intended to rely materially*
21 *on this communication in making investment or*
22 *management decisions.’. Such disclaimer shall*
23 *not be effective unless such disclaimer is in writ-*
24 *ing and is communicated in a clear and promi-*
25 *nent manner and an objective person would rea-*

1 sonably conclude that, based on all the facts and
2 circumstances, there was not a mutual agree-
3 ment, arrangement, or understanding.

4 “(C) *WHEN RECOMMENDATION TREATED AS*
5 *MADE PURSUANT TO A MUTUAL AGREEMENT, AR-*
6 *RANGEMENT, OR UNDERSTANDING.—For pur-*
7 *poses of subparagraph (A)(ii)(II), a communica-*
8 *tion shall not be treated as a recommendation*
9 *made pursuant to a mutual agreement, arrange-*
10 *ment, or understanding, if such communication*
11 *contains the disclaimer required by subpara-*
12 *graph (B), and—*

13 “(i) *SELLER’S EXCEPTION.—The com-*
14 *munication is provided in conjunction with*
15 *clear and prominent disclosure in writing*
16 *to a plan, plan participant, or beneficiary*
17 *that the person providing the communica-*
18 *tion is doing so in its marketing or sales*
19 *capacity, including any communication re-*
20 *garding the terms and conditions of the en-*
21 *gagement of the person providing the com-*
22 *munication, and that the person is not in-*
23 *tending to provide investment advice within*
24 *the meaning of this subparagraph or to oth-*
25 *erwise act as a fiduciary to the plan or*

1 *under the obligations of a best interest rec-*
2 *ommendation.*

3 “(ii) *CERTAIN COUNTERPARTIES OR*
4 *SERVICE PROVIDERS.—The person pro-*
5 *viding the communication is a current or*
6 *potential counterparty or service provider to*
7 *the plan in connection with any transaction*
8 *based on the communication, but only if—*

9 *“(I) the plan is represented, in*
10 *connection with such transaction, by a*
11 *plan fiduciary that is independent of*
12 *the person providing the communica-*
13 *tion, and, except in the case of a swap*
14 *(as defined in section 1a of the Com-*
15 *modity Exchange Act (7 U.S.C. 1a) or*
16 *security-based swap (as defined in sec-*
17 *tion 3(a) of the Securities Exchange*
18 *Act (15 U.S.C. 78c(a))), independent*
19 *of the plan sponsor; and*

20 *“(II) prior to entering into such*
21 *transaction, the independent plan fidu-*
22 *ciary represents in writing to the per-*
23 *son providing the communication that*
24 *it is aware that the person has a fi-*
25 *nancial interest in the transaction and*

1 *that it has determined that the person*
2 *is not intending to provide investment*
3 *advice within the meaning of this sub-*
4 *paragraph or to otherwise act as a fi-*
5 *ducuary to the plan, plan participants,*
6 *or plan beneficiaries.*

7 “(iii) *EMPLOYEES OF A PLAN SPON-*
8 *SOR.—The person providing the commu-*
9 *nication is an employee of any sponsoring*
10 *employer or affiliate or employee organiza-*
11 *tion who provides the communication to the*
12 *plan for no fee or other compensation other*
13 *than the employee’s normal compensation.*

14 “(iv) *PLATFORM PROVIDERS SELEC-*
15 *TION AND MONITORING ASSISTANCE.—The*
16 *person providing the communication dis-*
17 *closes in writing to the plan fiduciary that*
18 *the person is not undertaking to provide in-*
19 *vestment advice as a fiduciary (within the*
20 *meaning of this paragraph) or under the*
21 *obligations of a best interest recommenda-*
22 *tion and the communication consists solely*
23 *of—*

24 *“(I) making available to the plan,*
25 *plan participants, or plan bene-*

1 *ficiaries, without regard to the individ-*
2 *ualized needs of the plan, plan partici-*
3 *pants, or plan beneficiaries, securities*
4 *or other property or investment prod-*
5 *ucts through a platform or similar*
6 *mechanism from which a plan fidu-*
7 *ciary may select or monitor investment*
8 *alternatives; or*

9 *“(II) in connection with a plat-*
10 *form or similar mechanism described*
11 *in subclause (I)—*

12 *“(aa) identifying investment*
13 *alternatives that meet objective*
14 *criteria specified by the plan, such*
15 *as criteria concerning expense ra-*
16 *tios, fund sizes, types of asset, or*
17 *credit quality;*

18 *“(bb) providing objective fi-*
19 *nancial data and comparisons*
20 *with independent benchmarks to*
21 *the plan; or*

22 *“(cc) identifying a sample*
23 *set of investment alternatives*
24 *based on the plan’s stated criteria*

1 *in response to an inquiry from a*
2 *plan fiduciary.*

3 “(v) *VALUATION.*—*The communication*
4 *consists solely of valuation information.*

5 “(vi) *FINANCIAL EDUCATION.*—*The*
6 *communication consists solely of—*

7 *“(I) information described in De-*
8 *partment of Labor Interpretive Bul-*
9 *letin 96–1 (29 C.F.R. 2509.96–1, as in*
10 *effect on January 1, 2015), regardless*
11 *of whether such education is provided*
12 *to a plan or plan fiduciary or a par-*
13 *ticipant or beneficiary;*

14 *“(II) information provided to*
15 *participants or beneficiaries regarding*
16 *the factors to consider in deciding*
17 *whether to elect to receive a distribu-*
18 *tion from a plan and whether to roll*
19 *over such distribution to a plan, so*
20 *long as any examples of different dis-*
21 *tribution alternatives are accompanied*
22 *by all material facts and assumptions*
23 *on which the examples are based; or*

24 *“(III) any additional information*
25 *treated as education by the Secretary.*

1 “(11) *BEST INTEREST RECOMMENDATION.*—*For*
2 *purposes of this subsection—*

3 “(A) *IN GENERAL.*—*The term ‘best interest*
4 *recommendation’ means a recommendation—*

5 “(i) *for which no more than reasonable*
6 *compensation is paid (as determined under*
7 *subsection (d)(2));*

8 “(ii) *provided by a person acting with*
9 *the care, skill, prudence, and diligence*
10 *under the circumstances then prevailing*
11 *that a prudent person would exercise based*
12 *on—*

13 “(I) *the information obtained*
14 *through the reasonable diligence of the*
15 *person regarding factors such as the*
16 *advice recipient’s age; and*

17 “(II) *any other information that*
18 *the advice recipient discloses to the*
19 *person in connection with receiving*
20 *such recommendation; and*

21 “(iii) *where the person places the inter-*
22 *ests of the plan or advice recipient above its*
23 *own.*

1 “(B) *INVESTMENT OPTIONS; VARIABLE COM-*
2 *PENSATION.—A best interest recommendation*
3 *may include a recommendation that—*

4 “(i) *is based on a limited range of in-*
5 *vestment options (which may consist, in*
6 *whole or in part, of proprietary products),*
7 *but only if any such limitations shall be*
8 *clearly disclosed to the advice recipient*
9 *prior to any transaction based on the in-*
10 *vestment advice in the form of a notice that*
11 *only states the following: ‘This recommenda-*
12 *tion is based on a limited range of invest-*
13 *ment options, and the same or similar in-*
14 *vestments may be available at a different*
15 *cost (greater or lesser) from other sources.’;*
16 *or*

17 “(ii) *may result in variable compensa-*
18 *tion to the person providing the rec-*
19 *ommendation (or any affiliate of such per-*
20 *son), but only if the receipt of such com-*
21 *ensation shall be clearly disclosed to the*
22 *advice recipient prior to any transaction*
23 *based on the investment advice.*

24 “(C) *CLEAR DISCLOSURE OF VARIABLE*
25 *COMPENSATION.—For purposes of this para-*

1 *graph, clear disclosure of variable compensation*
2 *shall include, in a manner calculated to be un-*
3 *derstood by the average individual, each of the*
4 *following:*

5 “(i) A notice that states only the fol-
6 *lowing: ‘This recommendation may result*
7 *in varying amounts of fees or other com-*
8 *ensation to the person providing the rec-*
9 *ommendation (or its affiliate), and the*
10 *same or similar investments may be avail-*
11 *able at a different cost (greater or lesser)*
12 *from other sources.’. Any regulations or ad-*
13 *ministrative guidance implementing this*
14 *clause may not require this notice to be up-*
15 *dated more than annually.*

16 “(ii) A description of any fee or other
17 *compensation that is directly or indirectly*
18 *payable to the person (or its affiliate) by*
19 *the advice recipient with respect to such*
20 *transaction (expressed as an amount, for-*
21 *mula, percentage of assets, per capita*
22 *charge, or estimate or range of such com-*
23 *ensation).*

24 “(iii) A description of the types and
25 *ranges of any compensation that are rea-*

sonably expected to be directly or indirectly payable to the person (or its affiliate) by any third party in connection with such transaction (expressed as an amount, formula, percentage of assets, per capita charge, or estimate or range of such compensation).

“(iv) Upon request of the advice recipient, a disclosure of the specific amounts of compensation described in clause (iii) that the person will receive in connection with the particular transaction (expressed as an amount, formula, percentage of assets, per capita charge, or estimate of such compensation).

“(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 in-

formation to the advice recipient as soon as practicable but not later than 30 days from the date on which the person knows of such error or omission.

“(F) *SPECIAL RULE.*—Any notice provided pursuant to a requirement under subparagraph (B)(i) or subparagraph (C)(i) shall have no effect on any other notice otherwise required without regard to this title, and shall be provided in addition to, and not in lieu of, any other such notice.”.

(3) *FAILURES RELATING TO BEST INTEREST RECOMMENDATION.*—

(A) *CORRECTION.*—Section 4975(f)(5) of such Code is amended—

(i) by striking “(5) *CORRECTION.*—The terms” and inserting:

“(5) *CORRECTION.*—

“(A) *IN GENERAL.*—Except as provided in subparagraph (B), the terms”, and

(ii) by adding at the end the following:

“(B) *DETERMINATION OF ‘CORRECTION’ AND ‘CORRECT’ WITH RESPECT TO BEST INTEREST ADVICE RECOMMENDATIONS.*—In the case of a prohibited transaction arising by the failure of

1 *investment advice to be a best interest rec-*
2 *ommendation, the terms ‘correction’ and ‘correct’*
3 *mean the payment to, or reimbursement of, ac-*
4 *tual damages of the plan, plan participants, or*
5 *plan beneficiaries resulting directly from the*
6 *plan’s, plan participant’s, or plan beneficiary’s*
7 *reliance on such investment advice, if any, that*
8 *have not otherwise been paid or reimbursed to*
9 *the plan, plan participants, or plan bene-*
10 *ficiaries, including payments and reimburse-*
11 *ments made pursuant to subparagraph (A) if*
12 *such amount is greater than the amount deter-*
13 *mined under subparagraph (A).’.*

14 *(B) AMOUNT INVOLVED FOR PURPOSES OF*
15 *EXCISE TAX.—The first sentence of section*
16 *4975(f)(4) of such Code is amended by striking*
17 *“excess compensation.” and inserting “excess*
18 *compensation, and in the case of a prohibited*
19 *transaction arising by the failure of investment*
20 *advice to be a best interest recommendation, the*
21 *amount involved shall be the amount paid to the*
22 *person providing the advice (or its affiliate, as*
23 *defined in paragraph (8)(J)(ii)) that has not*
24 *been paid or reimbursed to the plan, plan par-*
25 *ticipants, or plan beneficiaries, including pay-*

1 *ments and reimbursements made pursuant to*
2 *paragraph (5).”.*

3 *(c) EFFECTIVE DATE.—The amendments made by sub-*
4 *sections (a) and (b) shall take effect on the date of the enact-*
5 *ment of this Act and shall apply with respect to commu-*
6 *nications provided or recommendations made on or after*
7 *2 years after such date.*

8 *(d) GRANDFATHERED TRANSACTIONS AND SERV-*
9 *ICES.—The amendments made by subsections (a) and (b)*
10 *shall not apply to any service or transaction rendered, en-*
11 *tered into, or for which a person has been compensated*
12 *prior to the date on which the amendments become effective*
13 *under subsection (c).*

14 *(e) TRANSITION.—Until such time as regulations or*
15 *other guidance are issued to carry out the amendments*
16 *made by subsections (a) and (b), a plan or a fiduciary shall*
17 *be treated as meeting the requirements of such amendments*
18 *if the plan or fiduciary, as the case may be, complies with*
19 *a reasonable good faith interpretation of such amendments.*

Union Calendar No. 443

115TH CONGRESS
2^D Session

H. R. 2823

[Report No. 115-371, Part I]

A BILL

To amend the Employee Retirement Income Security Act of 1974 and the Internal Revenue Code of 1986 to ensure that retirement investors receive advice in their best interests, and for other purposes.

MARCH 5, 2018

The Committee on Ways and Means discharged; committed to the Committee of the Whole House on the State of the Union and ordered to be printed