115тн CONGRESS 1 st Session
S. 1321

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

## IN THE SENATE OF THE UNITED STATES

June 8, 2017
Mr. Isakson (for himself, Mr. Alexander, Mr. Enzi, Mr. Hatch, Mr. Roberts, Mr. Scott, and Mr. Young) introduced the following bill; which was read twice and referred to the Committee on Health, Education, Labor, and Pensions

## A BILL

To amend the Employee Retirement Income Security Act of 1974 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 Representa2 tives of the United States of America in Congress assembled,

## SECTION 1. SHORT TITLE.

This Act may be cited as the "Affordable Retirement Advice Protection Act".

SEC. 2. PURPOSE.
The purpose of this Act is to provide that advisors who-
(1) provide advice that is impermissible under the prohibited transaction provisions under section 406 of the Employee Retirement Income Security Act of 1974 , or
(2) breach the best interest standard for the provision of investment advice,
are subject to liability under the Employee Retirement Income Security Act of 1974.

## SEC. 3. RULES RELATING TO THE PROVISION OF INVEST-

 MENT ADVICE.(a) In General.-
(1) Definition of investment advice.Section 3(21) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002(21)) is amended by adding at the end the following:
"(C)(i) For purposes of clause (ii) of subparagraph (A), the term 'investment advice' means a recommendation that-
"(I) relates to-
"(aa) the advisability of acquiring, holding, disposing, or exchanging any moneys or other property of a plan by the plan, plan participants, or plan beneficiaries, including any recommendation whether to take a distribution of benefits from such plan or any recommendation
relating to the investment of any moneys or other property of such plan to be rolled over or otherwise distributed from such plan;
"(bb) the management of moneys or other property of such plan, including recommendations relating to the management of moneys or other property to be rolled over or otherwise distributed from such plan; or
"(cc) the advisability of retaining or ceasing to retain a person who would receive a fee or other compensation for providing any of the types of advice described in this subclause; and "(II) is rendered pursuant to-
"(aa) a written acknowledgment of the obligation of the advisor to comply with section 404 with respect to the provision of such recommendation; or
"(bb) a mutual agreement, arrangement, or understanding, which may include limitations on scope, timing, and responsibility to provide ongoing monitoring or advice services, between the person making such recommendation and the plan that such recommendation is individualized to the plan and such plan intends to materially rely on such recommendation in
making investment or management decisions with respect to any moneys or other property of such plan.
"(ii) For purposes of clause (i)(II)(bb), any 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 described in clause (i)(II)(bb).
"(iii) For purposes of clause (i)(II)(bb), information shall not be considered to be a recommendation made pursuant to a mutual agreement, arrangement, or understanding if such information contains the disclaimer required by clause (ii) and-
"(I) it is provided in conjunction with full and fair disclosure in writing to a plan, plan participant, or beneficiary that the person providing the 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 within and under the obligations of the best interest standard as described in this subparagraph;
"(II) the person providing the information is a counterparty or service provider to the plan in 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. $78 \mathrm{c}(\mathrm{a})$ ))), but only if-
"(aa) 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
"(bb) prior to such transaction, the independent plan fiduciary represents in writing to the person providing the information that it is aware that the person has a financial interest
in the transaction and that it has determined that the person is not intending to provide investment advice within the meaning of this subparagraph or to otherwise act as a fiduciary to the plan subject to section 404;
"(III) the person providing the information is an employee of any sponsoring employer or employee organization who provides the information to the plan for no fee or other compensation other than the employee's normal compensation;
"(IV) the person providing the information discloses in writing to the plan fiduciary that the person is not undertaking to provide investment advice as a fiduciary to the plan subject to section 404 and the information consists solely of-
"(aa) making available to the plan, without regard to the individualized needs of the plan, securities or other property through a platform or similar mechanism from which a plan fiduciary may select or monitor investment alternatives, including qualified default investment alternatives, into which plan participants or beneficiaries may direct the investment of assets held in, or contributed to, their individual accounts; or
"(bb) in connection with a platform or similar mechanism described in item (aa)—
"(AA) identifying investment alternatives that meet objective criteria specified by the plan, such as criteria concerning expense ratios, fund sizes, types of asset, or credit quality; or
"(BB) providing objective financial data and comparisons with independent benchmarks to the plan;
"(V) the information consists solely of valuation information; or
"(VI) the information consists solely of-
"(aa) information described in Department of Labor Interpretive Bulletin 96-1 (29 C.F.R. 2509.96-1, as in effect on January 1, 2015), regardless of whether such education is provided to a plan or plan fiduciary or a participant or beneficiary;
"(bb) information provided to participants or beneficiaries regarding the factors to consider in deciding whether to elect to receive a distribution from a plan or an individual retirement plan (as defined in section 7701(a)(37) of the Internal Revenue Code of 1986) and wheth-
er to roll over such distribution to a plan or an individual retirement plan (as defined in section 7701(a)(37) of the Internal Revenue Code of 1986), so long as any examples of different distribution and rollover alternatives are accompanied by all material facts and assumptions on which the examples are based; or
"(cc) any additional information treated as education by the Secretary.".
(2) Exemption relating to investment ad-vice.-Section 408(b) of the Employee Retirement Income Security Act of 1974 is amended by adding at the end the following:
"(21)(A) Any transaction, including a contract for service, between a person providing investment advice described in section 3(21)(A)(ii) and the advice recipient in connection with such investment advice, and any transaction consisting of the provision of such investment advice, if the following conditions are satisfied:
"(i) No more than reasonable compensation is paid (as determined under paragraph (2)) for such investment advice.
"(ii) If the investment advice is based on a limited range of investment options (which
may consist, in whole or in part, of proprietary products), such limitations, 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. The notice shall only state the following: 'The same or similar investments may be available at a different cost (greater or lesser) from other sources.'.
"(iii) If the investment advice may result in variable compensation to the person providing the investment advice (or any affiliate of such person), the receipt of such compensation, 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. The notice shall only state the following: 'The same or similar investments may be available at a different cost (greater or lesser) from other sources.'. For purposes of this subparagraph, clear disclosure of variable compensation means notification prior to any trans-
action based on the recommendation, in a manner calculated to be understood by the average individual, of the following:
"(I) A notice 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).
"(B) No recommendation will fail to satisfy the conditions described in clauses (i) through (iii) of subparagraph (A) solely because the person, acting in good faith and with reasonable diligence, makes an error or omission in disclosing the information specified in such clauses, provided that the person discloses the correct information to the advice recipient as soon as practicable, but not later than 30 days from the date on which the person knows of such error or omission.
"(C) For purposes of this paragraph, the term 'affiliate' has the meaning given in subsection (g)(11)(B).".
(b) Effective Date.-The amendments made by subsection (a) shall take effect on the date of the enactment of this Act and shall apply with respect to communications provided or recommendations made on or after 2 years after such date.
(c) Grandfathered Transactions and Serv-ICES.-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 become effective under subsection (b).
(d) Transition.-Until such time as regulations or other guidance are issued to carry out the amendments made by subsection (a), a plan or a fiduciary shall be treated as meeting the requirements of such amendments if the plan or fiduciary, as the case may be, complies with a reasonable good faith interpretation of such amendments.

