

115TH CONGRESS
1ST SESSION

H. R. 2823

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

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”.

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

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3 making described in subsection (b) is repealed and shall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5 transaction exemptions amended or repealed by such rule-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

8 (b) FIDUCIARY DEFINITION RULEMAKING.—The Fi-
9 duciary Definition rulemaking described in this subsection
10 consists of the following:

11 (1) The final rule of the Department of Labor
12 titled “Definition of the Term ‘Fiduciary’; Conflict
13 of Interest Rule—Retirement Investment Advice”
14 published April 8, 2016 (81 Fed. Reg. 20946).

15 (2) The “Best Interest Contract Exemption”
16 published April 8, 2016 (81 Fed. Reg. 21002), and
17 the technical correction published July 11, 2016 (81
18 Fed. Reg. 44773).

19 (3) The “Class Exemption for Principal Trans-
20 actions in Certain Assets Between Investment Ad-
21 vice Fiduciaries and Employee Benefit Plans and
22 IRAs” published April 8, 2016 (81 Fed. Reg.
23 21089), and the technical correction published July
24 11, 2016 (81 Fed. Reg. 44784).

25 (4) The “Amendment to Prohibited Transaction
26 Exemption (PTE) 75–1, Part V, Exemptions From

1 Prohibitions Respecting Certain Classes of Trans-
2 actions Involving Employee Benefit Plans and Cer-
3 tain Broker-Dealers, Reporting Dealers and Banks”
4 published April 8, 2016 (81 Fed. Reg. 21139).

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

14 (6) The “Amendments to Class Exemptions
15 75–1, 77–4, 80–83 and 83–1” published April 8,
16 2016 (81 Fed. Reg. 21208).

17 (7) The “Amendment to and Partial Revocation
18 of Prohibited Transaction Exemption (PTE) 84–24
19 for Certain Transactions Involving Insurance Agents
20 and Brokers, Pension Consultants, Insurance Com-
21 panies, and Investment Company Principal Under-
22 writers” published April 8, 2016 (81 Fed. Reg.
23 21147).

1 **SEC. 3. RULES RELATING TO THE PROVISION OF INVEST-**
2 **MENT ADVICE.**

3 (a) AMENDMENTS TO THE EMPLOYEE RETIREMENT
4 INCOME SECURITY ACT OF 1974.—

5 (1) DEFINITION OF INVESTMENT ADVICE.—

6 Section 3(21) of the Employee Retirement Income
7 Security Act of 1974 (29 U.S.C. 1002(21)) is
8 amended by adding at the end the following:

9 “(C)(i) For purposes of clause (ii) of subparagraph
10 (A), the term ‘investment advice’ means a recommenda-
11 tion communicated electronically, on paper, or orally
12 that—

13 “(I) relates to—

14 “(aa) the advisability of acquiring, holding,
15 disposing, or exchanging any moneys or other
16 property of a plan by the plan, plan partici-
17 pants, or plan beneficiaries, including any rec-
18 ommendation whether to take a distribution of
19 benefits from such plan or any recommendation
20 relating to the investment of any moneys or
21 other property of such plan to be distributed
22 from such plan;

23 “(bb) the management of moneys or other
24 property of such plan, including recommenda-
25 tions relating to the management of moneys or

1 other property to be distributed from such plan;
2 or

3 “(cc) the advisability of retaining or ceas-
4 ing to retain a person who would receive a fee
5 or other compensation for providing any of the
6 types of advice described in this subclause; and
7 “(II) is rendered pursuant to—

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

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

24 “(ii) For purposes of clause (i)(II)(bb), any dis-
25 claimer of a mutual agreement, arrangement, or under-

1 standing shall state only the following: ‘This communica-
2 tion is not individualized to you, and you are not intended
3 to rely materially on this communication in making invest-
4 ment or management decisions.’. Such disclaimer shall not
5 be effective unless such disclaimer is in writing and is
6 communicated in a clear and prominent manner and an
7 objective person would reasonably conclude that, based on
8 all the facts and circumstances, there was not a mutual
9 agreement, arrangement, or understanding.

10 “(iii) For purposes of clause (i)(II)(bb), a commu-
11 nication shall not be considered to be a recommendation
12 made pursuant to a mutual agreement, arrangement, or
13 understanding, if such communication contains the dis-
14 claimer required by clause (ii), and—

15 “(I) it is provided in conjunction with clear and
16 prominent disclosure in writing to a plan, plan par-
17 ticipant, or beneficiary that the person providing the
18 communication is doing so in its marketing or sales
19 capacity, including any communication regarding the
20 terms and conditions of the engagement of the per-
21 son providing the communication, and that the per-
22 son is not intending to provide investment advice
23 within the meaning of this subparagraph or to other-
24 wise act within and under the obligations of the best
25 interest standard as described in this subparagraph;

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

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

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

23 “(III) the person providing the communication
24 is an employee of any sponsoring employer or affil-
25 iate or employee organization who provides the com-

1 munication to the plan for no fee or other compensa-
2 tion other than the employee’s normal compensation;

3 “(IV) the person providing the communication
4 discloses in writing to the plan fiduciary that the
5 person is not undertaking to provide investment ad-
6 vice as a fiduciary to the plan subject to section 404
7 and the communication consists solely of—

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

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

16 “(AA) identifying investment alter-
17 natives that meet objective criteria speci-
18 fied by the plan, such as criteria con-
19 cerning expense ratios, fund sizes, types of
20 asset, or credit quality;

21 “(BB) providing objective financial
22 data and comparisons with independent
23 benchmarks to the plan; or

24 “(CC) identifying a sample set of in-
25 vestment alternatives based on the plan’s

1 stated criteria in response to an inquiry
2 from a plan fiduciary;

3 “(V) the communication consists solely of valu-
4 ation information; or

5 “(VI) the communication consists solely of—

6 “(aa) information described in Department
7 of Labor Interpretive Bulletin 96–1 (29 C.F.R.
8 2509.96–1, as in effect on January 1, 2015),
9 regardless of whether such education is pro-
10 vided to a plan or plan fiduciary or a partici-
11 pant or beneficiary;

12 “(bb) information provided to participants
13 or beneficiaries regarding the factors to con-
14 sider in deciding whether to elect to receive a
15 distribution from a plan or an individual retire-
16 ment plan (as defined in section 7701(a)(37) of
17 the Internal Revenue Code of 1986) and wheth-
18 er to roll over such distribution to a plan or an
19 individual retirement plan (as defined in section
20 7701(a)(37) of the Internal Revenue Code of
21 1986), so long as any examples of different dis-
22 tribution alternatives are accompanied by all
23 material facts and assumptions on which the
24 examples are based; or

1 “(cc) any additional information treated as
2 education by the Secretary.”.

3 (2) EXEMPTION RELATING TO INVESTMENT AD-
4 VICE.—Section 408(b) of the Employee Retirement
5 Income Security Act of 1974 is amended by adding
6 at the end the following:

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

14 “(i) No more than reasonable compensa-
15 tion is paid (as determined under section
16 408(b)(2)) for such investment advice.

17 “(ii) If the investment advice is based on
18 a limited range of investment options (which
19 may consist, in whole or in part, of proprietary
20 products), such limitations shall be clearly dis-
21 closed to the advice recipient prior to any trans-
22 action based on the investment advice in the
23 form of a notice that only states the following:
24 ‘This recommendation is based on a limited
25 range of investment options, and the same or

1 similar investments may be available at a dif-
2 ferent cost (greater or lesser) from other
3 sources.’.

4 “(iii) If the investment advice may result
5 in variable compensation to the person pro-
6 viding the investment advice (or any affiliate of
7 such person), the receipt of such compensation
8 shall be clearly disclosed to the advice recipient
9 prior to any transaction based on the invest-
10 ment advice. For purposes of this subpara-
11 graph, clear disclosure of variable compensation
12 shall include, in a manner calculated to be un-
13 derstood by the average individual, each of the
14 following:

15 “(I) A notice that states only the fol-
16 lowing: ‘This recommendation may result
17 in varying amounts of fees or other com-
18 pensation to the person providing the rec-
19 ommendation (or its affiliate), and the
20 same or similar investments may be avail-
21 able at a different cost (greater or lesser)
22 from other sources.’. Any regulations or
23 administrative guidance implementing this
24 subclause may not require this notice to be
25 updated more than annually.

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

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

18 “(IV) Upon request of the advice re-
19 cipient, a disclosure of the specific
20 amounts of compensation described in
21 clause (iii) that the person will receive in
22 connection with the particular transaction
23 (expressed as an amount, formula, percent-
24 age of assets, per capita charge, or esti-
25 mate of such compensation).

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

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

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

20 (b) AMENDMENTS TO THE INTERNAL REVENUE
21 CODE OF 1986.—

22 (1) EXEMPTION FOR INVESTMENT ADVICE
23 WHICH IS BEST INTEREST RECOMMENDATION.—Sec-
24 tion 4975(d) of the Internal Revenue Code of 1986
25 is amended by striking “or” at the end of paragraph

1 (22), by striking the period at the end of paragraph
2 (23) and inserting “, or”, and by inserting after
3 paragraph (23) the following:

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

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

12 “(10) INVESTMENT ADVICE.—

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

17 “(i) relates to—

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

1 investment of any moneys or other
2 property of such plan to be distrib-
3 uted from such plan;

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

10 “(III) the advisability of retain-
11 ing or ceasing to retain a person who
12 would receive a fee or other com-
13 pensation for providing any of the
14 types of advice described in this sub-
15 clause; and

16 “(ii) is rendered pursuant to—

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

22 “(II) a mutual agreement, ar-
23 rangement, or understanding which
24 may include limitations on scope, tim-
25 ing, and responsibility to provide on-

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

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

1 the facts and circumstances, there was not a
2 mutual agreement, arrangement, or under-
3 standing.

4 “(C) WHEN RECOMMENDATION TREATED
5 AS MADE PURSUANT TO A MUTUAL AGREE-
6 MENT, ARRANGEMENT, OR UNDERSTANDING.—
7 For purposes of subparagraph (A)(ii)(II), a
8 communication shall not be treated as a rec-
9 ommendation made pursuant to a mutual
10 agreement, arrangement, or understanding, if
11 such communication contains the disclaimer re-
12 quired by subparagraph (B), and—

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

1 plan or under the obligations of a best in-
2 terest recommendation.

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
7 to the plan in connection with any trans-
8 action based on the communication, but
9 only if—

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

21 “(II) prior to entering into such
22 transaction, the independent plan fi-
23 duciary represents in writing to the
24 person providing the communication
25 that it is aware that the person has a

1 financial interest in the transaction
2 and that it has determined that the
3 person is not intending to provide in-
4 vestment advice within the meaning of
5 this subparagraph or to otherwise act
6 as a fiduciary to the plan, plan par-
7 ticipants, or plan beneficiaries.

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

16 “(iv) PLATFORM PROVIDERS SELEC-
17 TION AND MONITORING ASSISTANCE.—The
18 person providing the communication dis-
19 closes in writing to the plan fiduciary that
20 the person is not undertaking to provide
21 investment advice as a fiduciary (within
22 the meaning of this paragraph) or under
23 the obligations of a best interest rec-
24 ommendation and the communication con-
25 sists solely of—

1 “(I) making available to the plan,
2 plan participants, or plan bene-
3 ficiaries, without regard to the indi-
4 vidualized needs of the plan, plan par-
5 ticipants, or plan beneficiaries, securi-
6 ties or other property or investment
7 products through a platform or simi-
8 lar mechanism from which a plan fi-
9 duciary may select or monitor invest-
10 ment alternatives; or

11 “(II) in connection with a plat-
12 form or similar mechanism described
13 in subclause (I)—

14 “(aa) identifying investment
15 alternatives that meet objective
16 criteria specified by the plan,
17 such as criteria concerning ex-
18 pense ratios, fund sizes, types of
19 asset, or credit quality;

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

24 “(cc) identifying a sample
25 set of investment alternatives

1 based on the plan’s stated cri-
2 teria in response to an inquiry
3 from a plan fiduciary.

4 “(v) VALUATION.—The communica-
5 tion consists solely of valuation informa-
6 tion.

7 “(vi) FINANCIAL EDUCATION.—The
8 communication consists solely of—

9 “(I) information described in De-
10 partment of Labor Interpretive Bul-
11 letin 96–1 (29 C.F.R. 2509.96–1, as
12 in effect on January 1, 2015), regard-
13 less of whether such education is pro-
14 vided to a plan or plan fiduciary or a
15 participant or beneficiary;

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

1 “(III) any additional information
2 treated as education by the Secretary.

3 “(11) BEST INTEREST RECOMMENDATION.—

4 For purposes of this subsection—

5 “(A) IN GENERAL.—The term ‘best inter-
6 est recommendation’ means a recommenda-
7 tion—

8 “(i) for which no more than reason-
9 able compensation is paid (as determined
10 under subsection (d)(2));

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

16 “(I) the information obtained
17 through the reasonable diligence of
18 the person regarding factors such as
19 the advice recipient’s age; and

20 “(II) any other information that
21 the advice recipient discloses to the
22 person in connection with receiving
23 such recommendation; and

1 “(iii) where the person places the in-
2 terests of the plan or advice recipient
3 above its own.

4 “(B) INVESTMENT OPTIONS; VARIABLE
5 COMPENSATION.—A best interest recommenda-
6 tion may include a recommendation that—

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

20 “(ii) may result in variable compensa-
21 tion to the person providing the rec-
22 ommendation (or any affiliate of such per-
23 son), but only if the receipt of such com-
24 pensation shall be clearly disclosed to the

1 advice recipient prior to any transaction
2 based on the investment advice.

3 “(C) CLEAR DISCLOSURE OF VARIABLE
4 COMPENSATION.—For purposes of this para-
5 graph, clear disclosure of variable compensation
6 shall include, in a manner calculated to be un-
7 derstood by the average individual, each of the
8 following:

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

20 “(ii) A description of any fee or other
21 compensation that is directly or indirectly
22 payable to the person (or its affiliate) by
23 the advice recipient with respect to such
24 transaction (expressed as an amount, for-
25 mula, percentage of assets, per capita

1 charge, or estimate or range of such com-
2 pensation).

3 “(iii) A description of the types and
4 ranges of any compensation that are rea-
5 sonably expected to be directly or indirectly
6 payable to the person (or its affiliate) by
7 any third party in connection with such
8 transaction (expressed as an amount, for-
9 mula, percentage of assets, per capita
10 charge, or estimate or range of such com-
11 pensation).

12 “(iv) Upon request of the advice re-
13 cipient, a disclosure of the specific
14 amounts of compensation described in
15 clause (iii) that the person will receive in
16 connection with the particular transaction
17 (expressed as an amount, formula, percent-
18 age of assets, per capita charge, or esti-
19 mate of such compensation).

20 “(D) DEFINITION OF AFFILIATE.—For
21 purposes of this paragraph, the term ‘affiliate’
22 has the meaning given in subsection
23 (f)(8)(J)(ii).

24 “(E) CORRECTION OF CERTAIN ERRORS
25 AND OMISSIONS.—A recommendation shall not

1 fail to be a best interest recommendation solely
2 because a person who, acting in good faith and
3 with reasonable diligence, makes an error or
4 omission in disclosing the information specified
5 in subparagraph (B), if the person discloses the
6 correct information to the advice recipient as
7 soon as practicable but not later than 30 days
8 from the date on which the person knows of
9 such error or omission.

10 “(F) SPECIAL RULE.—Any notice provided
11 pursuant to a requirement under subparagraph
12 (B)(i) or subparagraph (C)(i) shall have no ef-
13 fect on any other notice otherwise required
14 without regard to this title, and shall be pro-
15 vided in addition to, and not in lieu of, any
16 other such notice.”.

17 (3) FAILURES RELATING TO BEST INTEREST
18 RECOMMENDATION.—

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

21 (i) by striking “(5) CORRECTION-

22 The terms” and inserting:

23 “(5) CORRECTION.—

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

1 (ii) by adding at the end the fol-
2 lowing:

3 “(B) DETERMINATION OF ‘CORRECTION’
4 AND ‘CORRECT’ WITH RESPECT TO BEST INTER-
5 EST ADVICE RECOMMENDATIONS.—In the case
6 of a prohibited transaction arising by the fail-
7 ure of investment advice to be a best interest
8 recommendation, the terms ‘correction’ and
9 ‘correct’ mean the payment to, or reimburse-
10 ment of, actual damages of the plan, plan par-
11 ticipants, or plan beneficiaries resulting directly
12 from the plan’s, plan participant’s, or plan
13 beneficiary’s reliance on such investment advice,
14 if any, that have not otherwise been paid or re-
15 imbursemented to the plan, plan participants, or plan
16 beneficiaries, including payments and reim-
17 bursements made pursuant to subparagraph
18 (A) if such amount is greater than the amount
19 determined under subparagraph (A).”.

20 (B) AMOUNT INVOLVED FOR PURPOSES OF
21 EXCISE TAX.—The first sentence of section
22 4975(f)(4) of such Code is amended by striking
23 “excess compensation.” and inserting “excess
24 compensation, and in the case of a prohibited
25 transaction arising by the failure of investment

1 advice to be a best interest recommendation,
2 the amount involved shall be the amount paid
3 to the person providing the advice (or its affil-
4 iate, as defined in paragraph (8)(J)(ii)) that
5 has not been paid or reimbursed to the plan,
6 plan participants, or plan beneficiaries, includ-
7 ing payments and reimbursements made pursu-
8 ant to paragraph (5).”.

9 (c) EFFECTIVE DATE.—The amendments made by
10 subsections (a) and (b) shall take effect on the date of
11 the enactment of this Act and shall apply with respect to
12 communications provided or recommendations made on or
13 after 2 years after such date.

14 (d) GRANDFATHERED TRANSACTIONS AND SERV-
15 ICES.—The amendments made by subsections (a) and (b)
16 shall not apply to any service or transaction rendered, en-
17 tered into, or for which a person has been compensated
18 prior to the date on which the amendments become effec-
19 tive under subsection (c).

20 (e) TRANSITION.—Until such time as regulations or
21 other guidance are issued to carry out the amendments
22 made by subsections (a) and (b), a plan or a fiduciary
23 shall be treated as meeting the requirements of such
24 amendments if the plan or fiduciary, as the case may be,

- 1 complies with a reasonable good faith interpretation of
- 2 such amendments.

