

Union Calendar No. 392

114TH CONGRESS
2^D SESSION

H. R. 4294

[Report No. 114–512, Parts I and II]

To amend 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

DECEMBER 18, 2015

Mr. ROSKAM (for himself, Mr. NEAL, Mr. ROE of Tennessee, Mr. LARSON of Connecticut, Mr. REED, and Ms. MICHELLE LUJAN GRISHAM of New Mexico) introduced the following bill; which was referred to the Committee on Ways and Means, and in addition to the Committee on Education and the Workforce, 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

APRIL 20, 2016

Additional sponsors: Mr. DAVID SCOTT of Georgia, Mr. CARTER of Georgia, Mr. YOUNG of Indiana, Mr. BYRNE, Mr. BOUSTANY, Mr. WILSON of South Carolina, Mr. CLAY, Mr. HOLDING, Mr. RENACCI, Ms. JENKINS of Kansas, Mr. MACARTHUR, Mrs. WALORSKI, Mr. PAULSEN, Mr. ASHFORD, Mr. ZINKE, Mr. DUNCAN of Tennessee, Mr. TIBERI, Mr. MEEHAN, Mr. NUNES, Mr. REICHERT, Mr. GIBBS, Mr. GUTHRIE, Mr. THOMPSON of Pennsylvania, Mr. BISHOP of Michigan, Mr. MARCHANT, Mr. BARLETTA, Mr. ALLEN, Mr. CRAMER, Mr. OLSON, Mr. LATTA, Mr. SESSIONS, Mr. AMODEI, and Mr. GOHMERT

APRIL 20, 2016

Reported from the Committee on Ways and Means with an amendment

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

APRIL 20, 2016

Reported from the Committee on Education and the Workforce with an amendment, committed to the Committee of the Whole House on the State of the Union, and ordered to be printed

[Strike out all after the enacting clause and insert the part printed in boldface roman]

[For text of introduced bill, see copy of bill as introduced on December 18, 2015]

A BILL

To amend 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 “Strengthening Access*
5 *to Valuable Education and Retirement Support Act of*
6 *2015” or the “SAVERS Act of 2015”.*

7 **SEC. 2. PURPOSE.**

8 *The purpose of this Act is to provide that advisors*
9 *who—*

10 *(1) provide advice that is impermissible under*
11 *the prohibited transaction provisions under section*
12 *4975 of the Internal Revenue Code of 1986, or*

13 *(2) breach the best interest standard for the pro-*
14 *vision of investment advice,*

15 *are subject to liability under the Internal Revenue Code of*
16 *1986.*

17 **SEC. 3. RULES RELATING TO THE PROVISION OF INVEST-**
18 **MENT ADVICE.**

19 *(a) AMENDMENTS TO THE INTERNAL REVENUE CODE*
20 *OF 1986.—*

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

1 (23) and inserting “, or”, and by inserting after
2 paragraph (23) the following:

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

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

11 “(10) INVESTMENT ADVICE.—

12 “(A) IN GENERAL.—For purposes of this
13 section, the term ‘investment advice’ means a
14 recommendation that—

15 “(i) relates to—

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

1 *property of such plan to be distributed*
2 *from such plan;*

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

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

15 *“(I) a written acknowledgment*
16 *that the person is a fiduciary with re-*
17 *spect to the provision of such rec-*
18 *ommendation; or*

19 *“(II) a mutual agreement, ar-*
20 *rangement, or understanding which*
21 *may include limitations on scope, tim-*
22 *ing, and responsibility to provide on-*
23 *going monitoring or advice services, be-*
24 *tween the person making such rec-*
25 *ommendation and the plan, plan par-*

1 *participant, or beneficiary that such rec-*
2 *ommendation is individualized to the*
3 *plan, plan participant, or beneficiary*
4 *and such plan, plan participant, or*
5 *beneficiary intends to materially rely*
6 *on such recommendation in making in-*
7 *vestment or management decisions*
8 *with respect to any moneys or other*
9 *property of such plan.*

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

1 “(C) *WHEN RECOMMENDATION TREATED AS*
2 *MADE PURSUANT TO A MUTUAL AGREEMENT, AR-*
3 *RANGEMENT, OR UNDERSTANDING.—For pur-*
4 *poses of subparagraph (A)(i)(II), information*
5 *shall not be treated as a recommendation made*
6 *pursuant to a mutual agreement, arrangement,*
7 *or understanding, and such information shall*
8 *contain the disclaimer required by subparagraph*
9 *(B), if—*

10 “(i) *SELLER’S EXCEPTION.—The infor-*
11 *mation is provided in conjunction with full*
12 *and fair disclosure in writing to a plan,*
13 *plan participant, or beneficiary that the*
14 *person providing the information is doing*
15 *so in its marketing or sales capacity, in-*
16 *cluding any information regarding the*
17 *terms and conditions of the engagement of*
18 *the person providing the information, and*
19 *that the person is not intending to provide*
20 *investment advice within the meaning of*
21 *this subparagraph or to otherwise act as a*
22 *fiduciary to the plan or under the obliga-*
23 *tions of a best interest recommendation.*

24 “(ii) *SWAP AND SECURITY-BASED SWAP*
25 *TRANSACTION.—The person providing the*

1 *information is a counterparty or service*
2 *provider to the plan in connection with any*
3 *transaction based on the information (in-*
4 *cluding a service arrangement, sale, pur-*
5 *chase, loan, bilateral contract, swap (as de-*
6 *fined in section 1a of the Commodity Ex-*
7 *change Act (7 U.S.C. 1a)), or security-based*
8 *swap (as defined in section 3(a) of the Se-*
9 *curities Exchange Act (15 U.S.C. 78c(a))),*
10 *but only if—*

11 *“(I) the plan is represented, in*
12 *connection with such transaction, by a*
13 *plan fiduciary that is independent of*
14 *the person providing the information,*
15 *and, except in the case of a swap or se-*
16 *curity-based swap, independent of the*
17 *plan sponsor; and*

18 *“(II) prior to entering into such*
19 *transaction, the independent plan fidu-*
20 *ciary represents in writing to the per-*
21 *son providing the information that it*
22 *is aware that the person has a finan-*
23 *cial interest in the transaction and*
24 *that it has determined that the person*
25 *is not intending to provide investment*

1 *advice within the meaning of this sub-*
2 *paragraph or to otherwise act as a fi-*
3 *duciary to the plan, plan participants,*
4 *or plan beneficiaries.*

5 “(iii) *EMPLOYEES OF A PLAN SPON-*
6 *SOR.—The person providing the informa-*
7 *tion is an employee of any sponsoring em-*
8 *ployer or employee organization who pro-*
9 *vides the information to the plan for no fee*
10 *or other compensation other than the em-*
11 *ployee’s normal compensation.*

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

22 *“(I) making available to the plan,*
23 *plan participants, or plan bene-*
24 *ficiaries, without regard to the individ-*
25 *ualized needs of the plan, plan partici-*

1 *pants, or plan beneficiaries, securities*
2 *or other property through a platform*
3 *or similar mechanism from which a*
4 *plan fiduciary may select or monitor*
5 *investment alternatives, including*
6 *qualified default investment alter-*
7 *natives, into which plan participants*
8 *or beneficiaries may direct the invest-*
9 *ment of assets held in, or contributed*
10 *to, their individual accounts, 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, such*
17 *as criteria concerning expense ra-*
18 *tios, fund sizes, types of asset, or*
19 *credit quality, or*

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

24 *“(v) VALUATION.—The information*
25 *consists solely of valuation information.*

1 “(vi) *FINANCIAL EDUCATION.*—*The in-*
2 *formation consists solely of—*

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

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

20 “(III) *any additional information*
21 *treated as education by the Secretary.*

22 “(11) *BEST INTEREST RECOMMENDATION.*—*For*
23 *purposes of this subsection—*

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

1 “(i) for which no more than reasonable
2 compensation is paid (as determined under
3 subsection (d)(2)),

4 “(ii) provided by a person acting with
5 the care, skill, prudence, and diligence
6 under the circumstances then prevailing
7 that a prudent person would exercise based
8 on—

9 “(I) the information obtained
10 through the reasonable diligence of the
11 person regarding factors such as the
12 advice recipient’s age, and

13 “(II) any other information that
14 the advice recipient discloses to the
15 person in connection with receiving
16 such recommendation, and

17 “(iii) where the person places the inter-
18 ests of the plan or advice recipient above its
19 own.

20 “(B) INVESTMENT OPTIONS; VARIABLE COM-
21 PENSATION.—A best interest recommendation
22 may include a recommendation that—

23 “(i) is based on a limited range of in-
24 vestment options (which may consist, in
25 whole or in part, of proprietary products),

1 *but only if any such limitations shall be*
2 *clearly disclosed to the advice recipient*
3 *prior to any transaction based on the in-*
4 *vestment advice in the form of a notice that*
5 *only states the following: ‘This recommenda-*
6 *tion is based on a limited range of invest-*
7 *ment options, and the same or similar in-*
8 *vestments may be available at a different*
9 *cost (greater or lesser) from other sources.’,*
10 *or*

11 *“(ii) may result in variable compensa-*
12 *tion to the person providing the rec-*
13 *ommendation (or any affiliate of such per-*
14 *son), but only if the receipt of such com-*
15 *ensation shall be clearly disclosed to the*
16 *advice recipient prior to any transaction*
17 *based on the investment advice.*

18 “(C) *CLEAR DISCLOSURE OF VARIABLE*
19 *COMPENSATION.—For purposes of this para-*
20 *graph, clear disclosure of variable compensation*
21 *shall include, in a manner calculated to be un-*
22 *derstood by the average individual, each of the*
23 *following:*

24 *“(i) A notice that states only the fol-*
25 *lowing: ‘This recommendation may result*

1 *in varying amounts of fees or other com-*
2 *ensation to the person providing the rec-*
3 *ommendation (or its affiliate), and the*
4 *same or similar investments may be avail-*
5 *able at a different cost (greater or lesser)*
6 *from other sources.’. Any regulations or ad-*
7 *ministrative guidance implementing this*
8 *clause may not require this notice to be up-*
9 *dated more than annually.*

10 “(ii) *A description of any fee or other*
11 *compensation that is directly or indirectly*
12 *payable to the person (or its affiliate) by*
13 *the advice recipient with respect to 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 *ensation).*

18 “(iii) *A description of the types and*
19 *ranges of any compensation that may be di-*
20 *rectly or indirectly payable to the person*
21 *(or its affiliate) by any third party in con-*
22 *nection with such transaction (expressed as*
23 *an amount, formula, percentage of assets,*
24 *per capita charge, or estimate or range of*
25 *such compensation).*

1 “(iv) Upon request of the advice recipi-
2 ent, a disclosure of the specific amounts of
3 compensation described in clause (iii) that
4 the person will receive in connection with
5 the particular transaction (expressed as an
6 amount, formula, percentage of assets, per
7 capita charge, or estimate of such com-
8 pensation).

9 “(D) DEFINITION OF AFFILIATE.—For pur-
10 poses of this paragraph, the term ‘affiliate’ has
11 the meaning given in subsection (f)(8)(J)(ii).

12 “(E) CORRECTION OF CERTAIN ERRORS AND
13 OMISSIONS.—A recommendation shall not fail to
14 be a best interest recommendation solely because
15 a person who, acting in good faith and with rea-
16 sonable diligence, makes an error or omission in
17 disclosing the information specified in subpara-
18 graph (B), if the person discloses the correct in-
19 formation to the advice recipient as soon as
20 practicable but not later than 30 days from the
21 date on which the person knows of such error or
22 omission.

23 “(F) SPECIAL RULE.—Any notice provided
24 pursuant to a requirement under subparagraph
25 (B)(i) or subparagraph (C)(i) shall have no effect

1 *on any other notice otherwise required without*
2 *regard to this title, and shall be provided in ad-*
3 *dition to, and not in lieu of, any other such no-*
4 *tice.”.*

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

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

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

11 “*(5) CORRECTION.—*

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

14 (ii) *by adding at the end the following:*

15 “*(B) DETERMINATION OF ‘CORRECTION’*
16 *AND ‘CORRECT’ WITH RESPECT TO BEST INTER-*
17 *EST ADVICE RECOMMENDATIONS.—In the case of*
18 *a prohibited transaction arising by the failure of*
19 *investment advice to be a best interest rec-*
20 *ommendation, the terms ‘correction’ and ‘correct’*
21 *mean the payment to, or reimbursement of, ac-*
22 *tual damages of the plan, plan participants, or*
23 *plan beneficiaries resulting directly from the*
24 *plan’s, plan participant’s, or plan beneficiary’s*
25 *reliance on such investment advice, if any, that*

1 *have not otherwise been paid or reimbursed to*
2 *the plan, plan participants, or plan bene-*
3 *ficiaries, including payments and reimburse-*
4 *ments made pursuant to subparagraph (A) if*
5 *such amount is greater than the amount deter-*
6 *mined under subparagraph (A).”.*

7 *(B) AMOUNT INVOLVED FOR PURPOSES OF*
8 *EXCISE TAX.—The first sentence of section*
9 *4975(f)(4) of such Code is amended by striking*
10 *“excess compensation.” and inserting “excess*
11 *compensation, and in the case of a prohibited*
12 *transaction arising by the failure of investment*
13 *advice to be a best interest recommendation, the*
14 *amount involved shall be the amount paid to the*
15 *person providing the advice (or its affiliate, as*
16 *defined in paragraph (8)(J)(ii)) that has not*
17 *been paid or reimbursed to the plan, plan par-*
18 *ticipants, or plan beneficiaries, including pay-*
19 *ments and reimbursements made pursuant to*
20 *paragraph (5).”.*

21 *(b) EFFECTIVE DATE.—*

22 *(1) MODIFICATION OF CERTAIN RULES, AND*
23 *RULES AND ADMINISTRATIVE POSITIONS PROMUL-*
24 *GATED BEFORE ENACTMENT BUT NOT EFFECTIVE ON*
25 *JANUARY 1, 2015, PROHIBITED.—The Department of*

1 *Labor is prohibited from amending any rules or ad-*
2 *ministrative positions promulgated under section*
3 *3(21) of the Employee Retirement Security Act of*
4 *1974 and section 4975(e)(3) of the Internal Revenue*
5 *Code of 1986 (including Department of Labor Inter-*
6 *pretive Bulletin 96-1 (29 C.F.R. 2509.96-1) and De-*
7 *partment of Labor Advisory Opinion 2005-23A), and*
8 *no such rule or administrative position promulgated*
9 *by the Department of Labor prior to the date of the*
10 *enactment of this Act but not effective on January 1,*
11 *2015, may become effective unless a bill or joint reso-*
12 *lution referred to in paragraph (3) is enacted as de-*
13 *scribed in such paragraph not later than 60 days*
14 *after the date of the enactment of this Act.*

15 (2) *GENERAL EFFECTIVE DATE OF AMEND-*
16 *MENTS.—Except as provided in paragraph (3), the*
17 *amendments made by subsection (a) of this section*
18 *shall take effect on the 61st day after the date of the*
19 *enactment of this Act and shall apply with respect to*
20 *information provided or recommendations made on or*
21 *after 2 years after the date of the enactment of this*
22 *Act.*

23 (3) *EXCEPTION.—If a bill or joint resolution is*
24 *enacted prior to the 61st day after the date of the en-*
25 *actment of this Act that specifically approves any*

1 *rules or administrative positions promulgated under*
2 *section 3(21) of the Employee Retirement Income Se-*
3 *curity Act of 1974 and section 4975(e)(3) of the Inter-*
4 *nal Revenue Code of 1986 that is not in effect on Jan-*
5 *uary 1, 2015, the amendments made by subsection (a)*
6 *of this section shall not take effect.*

7 *(c) GRANDFATHERED TRANSACTIONS AND SERV-*
8 *ICES.—The amendments made by subsection (a) shall not*
9 *apply to any service or transaction rendered, entered into,*
10 *or for which a person has been compensated prior to the*
11 *date on which the amendments made by subsection (a) of*
12 *this Act become effective under subsection (b)(2).*

13 *(d) TRANSITION.—If the amendments made by sub-*
14 *section (a) of this section take effect, then nothing in this*
15 *section shall be construed to prohibit the issuance of guid-*
16 *ance to carry out such amendments so long as such guid-*
17 *ance is necessary to implement such amendments. Until*
18 *such time as regulations or other guidance is issued to carry*
19 *out such amendments, a plan or a fiduciary shall be treated*
20 *as meeting the requirements of such amendments if the plan*
21 *or fiduciary, as the case may be, complies with a reasonable*
22 *good faith interpretation of such amendments.*

23 **SECTION 1. SHORT TITLE.**

24 **This Act may be cited as the “Strength-**
25 **ening Access to Valuable Education and Re-**

1 **irement Support Act of 2015” or the “SAVERS**
2 **Act of 2015”.**

3 **SEC. 2. PURPOSE.**

4 **The purpose of this Act is to provide that**
5 **advisors who—**

6 **(1) provide advice that is impermis-**
7 **sible under the prohibited transaction**
8 **provisions under section 4975 of the In-**
9 **ternal Revenue Code of 1986, or**

10 **(2) breach the best interest standard**
11 **for the provision of investment advice,**
12 **are subject to liability under the Internal Rev-**
13 **enue Code of 1986.**

14 **SEC. 3. RULES RELATING TO THE PROVISION OF INVEST-**
15 **MENT ADVICE.**

16 **(a) AMENDMENTS TO THE INTERNAL REVENUE**
17 **CODE OF 1986.—**

18 **(1) EXEMPTION FOR INVESTMENT ADVICE**
19 **WHICH IS BEST INTEREST RECOMMENDA-**
20 **TION.—Section 4975(d) of the Internal**
21 **Revenue Code of 1986 is amended by**
22 **striking “or” at the end of paragraph (22),**
23 **by striking the period at the end of para-**
24 **graph (23) and inserting “, or”, and by in-**

1 serting after paragraph (23) the fol-
2 lowing:

3 “(24) provision of investment advice
4 by a fiduciary to a plan, plan participant,
5 or beneficiary with respect to the plan,
6 which is a best interest recommenda-
7 tion.”.

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

12 “(10) INVESTMENT ADVICE.—

13 “(A) IN GENERAL.—For purposes of
14 this section, the term ‘investment ad-
15 vice’ means a recommendation that—

16 “(i) relates to—

17 “(I) the advisability of ac-
18 quiring, holding, disposing, or
19 exchanging any moneys or
20 other property of a plan by
21 the plan, plan participants, or
22 plan beneficiaries, including
23 any recommendation whether
24 to take a distribution of bene-
25 fits from such plan or any rec-

1 **ommendation relating to the**
2 **investment of any moneys or**
3 **other property of such plan to**
4 **be rolled over or otherwise**
5 **distributed from such plan;**

6 **“(II) the management of**
7 **moneys or other property of**
8 **such plan, including rec-**
9 **ommendations relating to the**
10 **management of moneys or**
11 **other property to be rolled**
12 **over or otherwise distributed**
13 **from such plan; or**

14 **“(III) the advisability of**
15 **retaining or ceasing to retain**
16 **a person who would receive a**
17 **fee or other compensation for**
18 **providing any of the types of**
19 **advice described in this sub-**
20 **clause; and**

21 **“(ii) is rendered pursuant to—**

22 **“(I) a written acknowledg-**
23 **ment that the person is a fidu-**
24 **ciary with respect to the pro-**

1 vision of such recommenda-
2 tion; or

3 “(II) a mutual agreement,
4 arrangement, or under-
5 standing which may include
6 limitations on scope, timing,
7 and responsibility to provide
8 ongoing monitoring or advice
9 services, between the person
10 making such recommendation
11 and the plan, plan partici-
12 pant, or beneficiary that such
13 recommendation is individ-
14 ualized to the plan, plan par-
15 ticipant, or beneficiary and
16 such plan, plan participant, or
17 beneficiary intends to materi-
18 ally rely on such rec-
19 ommendation in making in-
20 vestment or management de-
21 cisions with respect to any
22 moneys or other property of
23 such plan.

24 “(B) DISCLAIMER OF A MUTUAL
25 AGREEMENT, ARRANGEMENT, OR UNDER-

1 **STANDING.—For purposes of subpara-**
2 **graph (A)(ii)(II), any disclaimer of a**
3 **mutual agreement, arrangement, or**
4 **understanding shall only state the fol-**
5 **lowing: ‘This information is not indi-**
6 **vidualized to you, and there is no in-**
7 **tent for you to materially rely on this**
8 **information in making investment or**
9 **management decisions.’. Such dis-**
10 **claimer shall not be effective unless**
11 **such disclaimer is in writing and is**
12 **communicated in a clear and promi-**
13 **nent manner and an objective person**
14 **would reasonably conclude that,**
15 **based on all the facts and cir-**
16 **cumstances, there was not a mutual**
17 **agreement, arrangement, or under-**
18 **standing.**

19 **“(C) WHEN RECOMMENDATION**
20 **TREATED AS MADE PURSUANT TO A MU-**
21 **TUAL AGREEMENT, ARRANGEMENT, OR**
22 **UNDERSTANDING.—For purposes of**
23 **subparagraph (A)(ii)(II), information**
24 **shall not be treated as a recommenda-**
25 **tion made pursuant to a mutual**

1 **agreement, arrangement, or under-**
2 **standing, and such information shall**
3 **contain the disclaimer required by**
4 **subparagraph (B), if—**

5 **“(i) SELLER’S EXCEPTION.—The**
6 **information is provided in con-**
7 **junction with full and fair disclo-**
8 **sure in writing to a plan, plan**
9 **participant, or beneficiary that**
10 **the person providing the informa-**
11 **tion is doing so in its marketing**
12 **or sales capacity, including any**
13 **information regarding the terms**
14 **and conditions of the engagement**
15 **of the person providing the infor-**
16 **mation, and that the person is not**
17 **intending to provide investment**
18 **advice within the meaning of this**
19 **subparagraph or to otherwise act**
20 **as a fiduciary to the plan or**
21 **under the obligations of a best in-**
22 **terest recommendation.**

23 **“(ii) SWAP AND SECURITY-BASED**
24 **SWAP TRANSACTION.—The person**
25 **providing the information is a**

1 **counterparty or service provider**
2 **to the plan in connection with**
3 **any transaction based on the in-**
4 **formation (including a service ar-**
5 **rangement, sale, purchase, loan,**
6 **bilateral contract, swap (as de-**
7 **defined in section 1a of the Com-**
8 **modity Exchange Act (7 U.S.C.**
9 **1a)), or security-based swap (as**
10 **defined in section 3(a) of the Se-**
11 **curities Exchange Act (15 U.S.C.**
12 **78c(a))))), but only if—**

13 **“(I) the plan is rep-**
14 **resented, in connection with**
15 **such transaction, by a plan fi-**
16 **duciary who is independent of**
17 **the person providing the in-**
18 **formation, and, except in the**
19 **case of a swap or security-**
20 **based swap, independent of**
21 **the plan sponsor; and**

22 **“(II) prior to entering into**
23 **such transaction, the inde-**
24 **pendent plan fiduciary rep-**
25 **resents in writing to the per-**

1 son providing the information
2 that it is aware that the per-
3 son has a financial interest in
4 the transaction and that it
5 has determined that the per-
6 son is not intending to pro-
7 vide investment advice within
8 the meaning of this subpara-
9 graph or to otherwise act as a
10 fiduciary to the plan, plan
11 participants, or plan bene-
12 ficiaries.

13 “(iii) EMPLOYEES OF A PLAN
14 SPONSOR.—The person providing
15 the information is an employee of
16 any sponsoring employer or em-
17 ployee organization who provides
18 the information to the plan for no
19 fee or other compensation other
20 than the employee’s normal com-
21 pensation.

22 “(iv) PLATFORM PROVIDERS SE-
23 LECTION AND MONITORING ASSIST-
24 ANCE.—The person providing the
25 information discloses in writing

1 **to the plan fiduciary that the per-**
2 **son is not undertaking to provide**
3 **investment advice as a fiduciary**
4 **(within the meaning of this para-**
5 **graph) or under the obligations of**
6 **a best interest recommendation**
7 **and the information consists sole-**
8 **ly of—**

9 **“(I) making available to**
10 **the plan, plan participants, or**
11 **plan beneficiaries, without re-**
12 **gard to the individualized**
13 **needs of the plan, plan par-**
14 **ticipants, or plan bene-**
15 **ficiaries, securities or other**
16 **property through a platform**
17 **or similar mechanism from**
18 **which a plan fiduciary may**
19 **select or monitor investment**
20 **alternatives, including quali-**
21 **fied default investment alter-**
22 **natives, into which plan par-**
23 **ticipants or beneficiaries may**
24 **direct the investment of as-**

1 sets held in, or contributed to,
2 their individual accounts, or

3 “(II) in connection with a
4 platform or similar mecha-
5 nism described in subclause
6 (I)—

7 “(aa) identifying in-
8 vestment alternatives that
9 meet objective criteria
10 specified by the plan, such
11 as criteria concerning ex-
12 pense ratios, fund sizes,
13 types of asset, or credit
14 quality, or

15 “(bb) providing objec-
16 tive financial data and
17 comparisons with inde-
18 pendent benchmarks to
19 the plan.

20 “(v) VALUATION.—The informa-
21 tion consists solely of valuation
22 information.

23 “(vi) FINANCIAL EDUCATION.—
24 The information consists solely
25 of—

1 **“(I) information described**
2 **in Department of Labor Inter-**
3 **pretive Bulletin 96–1 (29**
4 **C.F.R. 2509.96–1, as in effect**
5 **on January 1, 2015), regard-**
6 **less of whether such edu-**
7 **cation is provided to a plan or**
8 **plan fiduciary or a partici-**
9 **pant or beneficiary,**

10 **“(II) information provided**
11 **to participants or bene-**
12 **ficiaries regarding the factors**
13 **to consider in deciding wheth-**
14 **er to elect to receive a dis-**
15 **tribution from a plan and**
16 **whether to roll over such dis-**
17 **tribution to a plan, so long as**
18 **any examples of different dis-**
19 **tribution and rollover alter-**
20 **natives are accompanied by**
21 **all material facts and assump-**
22 **tions on which the examples**
23 **are based, or**

1 **“(III) any additional infor-**
2 **mation treated as education**
3 **by the Secretary.**

4 **“(11) BEST INTEREST RECOMMENDA-**
5 **TION.—For purposes of this subsection—**

6 **“(A) IN GENERAL.—The term ‘best**
7 **interest recommendation’ means a**
8 **recommendation—**

9 **“(i) for which no more than**
10 **reasonable compensation is paid**
11 **(as determined under subsection**
12 **(d)(2)),**

13 **“(ii) provided by a person act-**
14 **ing with the care, skill, prudence,**
15 **and diligence under the cir-**
16 **cumstances then prevailing that a**
17 **prudent person would exercise**
18 **based on—**

19 **“(I) the information ob-**
20 **tained through the reasonable**
21 **diligence of the person re-**
22 **garding factors such as the**
23 **advice recipient’s age, and**

24 **“(II) any other informa-**
25 **tion that the advice recipient**

1 **discloses to the person in con-**
2 **nection with receiving such**
3 **recommendation, and**

4 **“(iii) where the person places**
5 **the interests of the plan or advice**
6 **recipient above its own.**

7 **“(B) INVESTMENT OPTIONS; VARI-**
8 **ABLE COMPENSATION.—A best interest**
9 **recommendation may include a rec-**
10 **ommendation that—**

11 **“(i) is based on a limited**
12 **range of investment options**
13 **(which may consist, in whole or**
14 **in part, of proprietary products),**
15 **but only if any such limitations,**
16 **including a clearly-stated notice**
17 **that the same or similar invest-**
18 **ments may be available at a dif-**
19 **ferent cost (greater or lesser)**
20 **from other sources, are clearly**
21 **disclosed to the advice recipient**
22 **prior to any transaction based on**
23 **the recommendation, or**

24 **“(ii) may result in variable**
25 **compensation to the person pro-**

1 **viding the recommendation (or**
2 **any affiliate of such person), but**
3 **only if the receipt of such com-**
4 **ensation, including a clearly-**
5 **stated notice that the same or**
6 **similar investments may be avail-**
7 **able at a different cost (greater or**
8 **lesser) from other sources, is**
9 **clearly disclosed to the advice re-**
10 **ipient prior to any transaction**
11 **based on the recommendation.**

12 **The notices provided pursuant to**
13 **clauses (i) and (ii) shall only state the**
14 **following: ‘The same or similar invest-**
15 **ments may be available at a different**
16 **cost (greater or lesser) from other**
17 **sources.’.**

18 **“(C) CLEAR DISCLOSURE OF VARI-**
19 **ABLE COMPENSATION.—For purposes of**
20 **subparagraph (B)(ii), variable com-**
21 **ensation is clearly disclosed if notifi-**
22 **cation is provided at any time prior**
23 **to a transaction based on the person’s**
24 **recommendation, in a manner cal-**

1 **culated to be understood by the aver-**
2 **age individual, of the following:**

3 **“(i) A notice in writing, in-**
4 **cluding a clearly-stated notice**
5 **that the same or similar invest-**
6 **ments may be available at a dif-**
7 **ferent cost (greater or lesser)**
8 **from other sources, that the per-**
9 **son providing the recommenda-**
10 **tion (or its affiliate) may receive**
11 **varying amounts of fees or other**
12 **compensation with respect to**
13 **such transaction.**

14 **“(ii) A description of any fee**
15 **or other compensation that is di-**
16 **rectly payable to the person (or**
17 **its affiliate) from the advice re-**
18 **ipient with respect to such**
19 **transaction (expressed as an**
20 **amount, formula, percentage of**
21 **assets, per capita charge, or esti-**
22 **mate or range of such compensa-**
23 **tion).**

24 **“(iii) A description of the**
25 **types and ranges of any indirect**

1 **compensation that may be paid to**
2 **the person (or its affiliate) by any**
3 **third party in connection with**
4 **such transaction (expressed as an**
5 **amount, formula, percentage of**
6 **assets, per capita charge, or esti-**
7 **mate of such ranges of compensa-**
8 **tion).**

9 **“(iv) Upon request of the ad-**
10 **vice recipient, a disclosure of the**
11 **specific amounts of compensation**
12 **described in clause (iii) that the**
13 **person will receive in connection**
14 **with the particular transaction**
15 **(expressed as an amount, formula,**
16 **percentage of assets, per capita**
17 **charge, or estimate of such com-**
18 **penetration).**

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

23 **“(E) CORRECTION OF CERTAIN ER-**
24 **RORS AND OMISSIONS.—A recommenda-**
25 **tion shall not fail to be a best interest**

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

12 **(3) FAILURES RELATING TO BEST INTER-**
13 **EST RECOMMENDATION.—**

14 **(A) CORRECTION.—Section**
15 **4975(f)(5) of such Code is amended—**

16 **(i) by striking “(5) CORREC-**
17 **TION.—The terms” and inserting:**

18 **“(5) CORRECTION.—**

19 **“(A) IN GENERAL.—Except as pro-**
20 **vided in subparagraph (B), the**
21 **terms”, and**

22 **(ii) by adding at the end the**
23 **following:**

24 **“(B) DETERMINATION OF ‘CORREC-**
25 **TION’ AND ‘CORRECT’ WITH RESPECT TO**

1 **BEST INTEREST ADVICE RECOMMENDA-**
2 **TIONS.—In the case of a prohibited ad-**
3 **vice transaction arising by the failure**
4 **of investment advice to be a best in-**
5 **terest recommendation, the terms**
6 **‘correction’ and ‘correct’ mean the**
7 **payment to, or reimbursement of, ac-**
8 **tual damages of the plan, plan par-**
9 **ticipants, or plan beneficiaries result-**
10 **ing directly from the plan’s, plan par-**
11 **ticipant’s, or plan beneficiary’s reli-**
12 **ance on such investment advice, if**
13 **any, that have not otherwise been**
14 **paid or reimbursed to the plan, plan**
15 **participants, or plan beneficiaries, in-**
16 **cluding payments and reimburse-**
17 **ments made pursuant to subpara-**
18 **graph (A).”.**

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

1 failure of investment advice to be a
2 best interest recommendation, the
3 amount involved shall be the amount
4 paid to the person providing the ad-
5 vice (or its affiliate, as defined in
6 paragraph (8)(J)(ii)) that has not been
7 paid or reimbursed to the plan, plan
8 participants, or plan beneficiaries, in-
9 cluding payments and reimburse-
10 ments made pursuant to paragraph
11 (5).”.

12 (4) EXEMPTION RELATING TO INVEST-
13 MENT ADVICE WITH RESPECT TO CERTAIN FEE
14 ARRANGEMENTS.—Section 4975(d) of such
15 Code (as amended by paragraph (1)) is
16 amended by striking “or” at the end of
17 paragraph (23), by striking the period at
18 the end of paragraph (24) and inserting “,
19 or”, and by adding after paragraph (24)
20 the following:

21 “(25) any transaction, including a
22 contract for service, between a person
23 providing investment advice described in
24 subsection (e)(3)(B) and the advice recipi-

1 ent in connection with such investment
2 advice, if—

3 “(A) no more than reasonable
4 compensation is paid (as determined
5 under section 4975(d)(2)) for such in-
6 vestment advice,

7 “(B) in a case in which the invest-
8 ment advice is based on a limited
9 range of investment options (which
10 may consist, in whole or in part, of
11 proprietary products), such limita-
12 tions, including a clearly-stated no-
13 tice that the same or similar invest-
14 ments may be available at a different
15 cost (greater or lesser) from other
16 sources), shall be clearly disclosed to
17 the advice recipient prior to any
18 transaction based on the investment
19 advice,

20 “(C) in a case in which the invest-
21 ment advice may result in variable
22 compensation to the person providing
23 the investment advice (or any affil-
24 iate of such person), the receipt of
25 such compensation, including a clear-

1 ly-stated notice that the same or simi-
2 lar investments may be available at a
3 different cost (greater or lesser) from
4 other sources, shall be clearly dis-
5 closed to the advice recipient (within
6 the meaning of subsection (e)(11)(C)),
7 and

8 “(D) in any case in which a per-
9 son who, acting in good faith and
10 with reasonable diligence, makes an
11 error or omission in disclosing the in-
12 formation specified in subparagraphs
13 (B) or (C), the person discloses the
14 correct information to the advice re-
15 cipient as soon as practicable but not
16 later than 30 days from the date on
17 which the person knows of such error
18 or omission.”.

19 **(b) EFFECTIVE DATE.—**

20 **(1) MODIFICATION OF CERTAIN RULES,**
21 **AND RULES AND ADMINISTRATIVE POSITIONS**
22 **PROMULGATED BEFORE ENACTMENT BUT NOT**
23 **EFFECTIVE ON JANUARY 1, 2015, PROHIB-**
24 **ITED.—The Department of Labor is pro-**
25 **hibited from amending any rules or ad-**

1 **ministrative positions promulgated under**
2 **section 3(21) of the Employee Retirement**
3 **Income Security Act of 1974 and section**
4 **4975(e)(3) of the Internal Revenue Code**
5 **of 1986 (including Department of Labor**
6 **Interpretive Bulletin 96-1 (29 C.F.R.**
7 **2509.96-1) and Department of Labor Advi-**
8 **sory Opinion 2005-23A), and no such rule**
9 **or administrative position promulgated**
10 **by the Department of Labor prior to the**
11 **date of the enactment of this Act but not**
12 **effective on January 1, 2015, may become**
13 **effective unless a bill or joint resolution**
14 **referred to in paragraph (3) is enacted as**
15 **described in such paragraph not later**
16 **than 60 days after the date of the enact-**
17 **ment of this Act.**

18 **(2) GENERAL EFFECTIVE DATE OF**
19 **AMENDMENTS.—Except as provided in**
20 **paragraph (3), the amendments made by**
21 **subsection (a) of this section shall take**
22 **effect on the 61st day after the date of the**
23 **enactment of this Act and shall apply**
24 **with respect to information provided or**
25 **recommendations made on or after 2**

1 years after the date of the enactment of
2 this Act.

3 **(3) EXCEPTION.**—If a bill or joint reso-
4 lution is enacted prior to the 61st day
5 after the date of the enactment of this
6 Act that specifically approves any rules
7 or administrative positions promulgated
8 under section 3(21) of the Employee Re-
9 tirement Security Act of 1974 and section
10 4975(e)(3) of the Internal Revenue Code
11 of 1986 that is not in effect on January 1,
12 2015, the amendments made by sub-
13 section (a) of this section shall not take
14 effect.

15 **(c) GRANDFATHERED TRANSACTIONS AND**
16 **SERVICES.**—The amendments made by sub-
17 section (a) shall not apply to any service or
18 transaction rendered, entered into, or for
19 which a person has been compensated prior
20 to the date on which the amendments made
21 by subsection (a) of this Act become effective
22 under subsection (b)(2).

23 **(d) TRANSITION.**—If the amendments made
24 by subsection (a) of this section take effect,
25 then nothing in this section shall be con-

1 **strued to prohibit the issuance of guidance to**
2 **carry out such amendments so long as such**
3 **guidance is necessary to implement such**
4 **amendments. Until such time as regulations**
5 **or other guidance are issued to carry out such**
6 **amendments, a plan and a fiduciary shall be**
7 **treated as meeting the requirements of such**
8 **amendments if the plan or fiduciary, as the**
9 **case may be, makes a good faith effort to com-**
10 **ply with such requirements.**

Union Calendar No. 392

114TH CONGRESS
2^D SESSION

H. R. 4294

[Report No. 114-512, Parts I and II]

A BILL

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

APRIL 20, 2016

Reported from the Committee on Ways and Means with an amendment

APRIL 20, 2016

Reported from the Committee on Education and the Workforce with an amendment, committed to the Committee of the Whole House on the State of the Union, and ordered to be printed