

114TH CONGRESS
2D SESSION

S. 2505

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 SENATE OF THE UNITED STATES

FEBRUARY 4, 2016

Mr. KIRK (for himself, Mr. ISAKSON, Mr. BLUNT, Ms. AYOTTE, Mr. COTTON, and Mr. WICKER) introduced the following bill; which was read twice and referred to the Committee on Finance

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 2016” or the “SAVERS Act of 2016”.

7 **SEC. 2. PURPOSE.**

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

1 (1) provide advice that is impermissible under
2 the prohibited transaction provisions under section
3 4975 of the Internal Revenue Code of 1986, or

4 (2) breach the best interest standard for the
5 provision of investment advice,

6 are subject to liability under the Internal Revenue Code
7 of 1986.

8 **SEC. 3. RULES RELATING TO THE PROVISION OF INVEST-**
9 **MENT ADVICE.**

10 (a) IN GENERAL.—

11 (1) EXEMPTION FOR INVESTMENT ADVICE
12 WHICH IS BEST INTEREST RECOMMENDATION.—Sec-
13 tion 4975(d) of the Internal Revenue Code of 1986
14 is amended by striking “or” at the end of paragraph
15 (22), by striking the period at the end of paragraph
16 (23) and inserting “, or”, and by inserting after
17 paragraph (23) the following:

18 “(24) provision of investment advice by a fidu-
19 ciary to a plan, plan participant, or beneficiary with
20 respect to the plan, which is a best interest rec-
21 ommendation.”.

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

25 “(10) INVESTMENT ADVICE.—

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

4 “(i) relates to—

5 “(I) the advisability of acquiring,
6 holding, disposing, or exchanging any
7 moneys or other property of a plan by
8 the plan, plan participants, or plan
9 beneficiaries, including any rec-
10 ommendation whether to take a dis-
11 tribution of benefits from such plan or
12 any recommendation relating to the
13 investment of any moneys or other
14 property of such plan to be rolled over
15 or otherwise distributed from such
16 plan;

17 “(II) the management of moneys
18 or other property of such plan, includ-
19 ing recommendations relating to the
20 management of moneys or other prop-
21 erty to be rolled over or otherwise dis-
22 tributed from such plan; or

23 “(III) the advisability of retain-
24 ing or ceasing to retain a person who
25 would receive a fee or other com-

1 pensation for providing any of the
2 types of advice described in this sub-
3 clause; and

4 “(ii) is rendered pursuant to—

5 “ (I) a written acknowledgment
6 that the person is a fiduciary with re-
7 spect to the provision of such rec-
8 ommendation; or

9 “ (II) a mutual agreement, ar-
10 rangement, or understanding which
11 may include limitations on scope, tim-
12 ing, and responsibility to provide on-
13 going monitoring or advice services,
14 between the person making such rec-
15 ommendation and the plan, plan par-
16 ticipant, or beneficiary that such rec-
17 ommendation is individualized to the
18 plan, plan participant, or beneficiary
19 and such plan, plan participant, or
20 beneficiary intends to materially rely
21 on such recommendation in making
22 investment or management decisions
23 with respect to any moneys or other
24 property of such plan.

1 “(B) DISCLAIMER OF A MUTUAL AGREE-
2 MENT, ARRANGEMENT, OR UNDERSTANDING.—
3 For purposes of subparagraph (A)(ii)(II), any
4 disclaimer of a mutual agreement, arrangement,
5 or understanding shall only state the following:
6 ‘This information is not individualized to you,
7 and there is no intent for you to materially rely
8 on this information in making investment or
9 management decisions.’. Such disclaimer shall
10 not be effective unless such disclaimer is in
11 writing and is communicated in a clear and
12 prominent manner and an objective person
13 would reasonably conclude that, based on all
14 the facts and circumstances, there was not a
15 mutual agreement, arrangement, or under-
16 standing.

17 “(C) WHEN RECOMMENDATION TREATED
18 AS MADE PURSUANT TO A MUTUAL AGREE-
19 MENT, ARRANGEMENT, OR UNDERSTANDING.—
20 For purposes of subparagraph (A)(ii)(II), infor-
21 mation shall not be treated as a recommenda-
22 tion made pursuant to a mutual agreement, ar-
23 rangement, or understanding if such informa-
24 tion contains the disclaimer required by clause
25 (ii) and—

1 “(i) SELLER’S EXCEPTION.—The in-
2 formation is provided in conjunction with
3 full and fair disclosure in writing to a plan,
4 plan participant, or beneficiary that the
5 person providing the information is doing
6 so in its marketing or sales capacity, in-
7 cluding any information regarding the
8 terms and conditions of the engagement of
9 the person providing the information, and
10 that the person is not intending to provide
11 investment advice within the meaning of
12 this subparagraph or to otherwise act as a
13 fiduciary to the plan or under the obliga-
14 tions of a best interest recommendation.

15 “(ii) SWAP AND SECURITY-BASED
16 SWAP TRANSACTION.—The person pro-
17 viding the information is a counterparty or
18 service provider to the plan in connection
19 with any transaction based on the informa-
20 tion (including a service arrangement, sale,
21 purchase, loan, bilateral contract, swap (as
22 defined in section 1a of the Commodity
23 Exchange Act (7 U.S.C. 1a)), or security-
24 based swap (as defined in section 3(a) of

1 the Securities Exchange Act (15 U.S.C.
2 78c(a))), but only if—

3 “(I) the plan is represented, in
4 connection with such transaction, by a
5 plan fiduciary who is independent of
6 the person providing the information,
7 and, except in the case of a swap or
8 security-based swap, independent of
9 the plan sponsor; and

10 “(II) prior to entering into such
11 transaction, the independent plan fi-
12 duciary represents in writing to the
13 person providing the information that
14 it is aware that the person has a fi-
15 nancial interest in the transaction and
16 that it has determined that the person
17 is not intending to provide investment
18 advice within the meaning of this sub-
19 paragraph or to otherwise act as a fi-
20 duciary to the plan, plan participants,
21 or plan beneficiaries.

22 “(iii) EMPLOYEES OF A PLAN SPON-
23 SOR.—The person providing the informa-
24 tion is an employee of any sponsoring em-
25 ployer or employee organization who pro-

1 provides the information to the plan for no fee
2 or other compensation other than the em-
3 ployee's normal compensation.

4 “(iv) PLATFORM PROVIDERS SELEC-
5 TION AND MONITORING ASSISTANCE.—The
6 person providing the information discloses
7 in writing to the plan fiduciary that the
8 person is not undertaking to provide in-
9 vestment advice as a fiduciary (within the
10 meaning of this paragraph) or under the
11 obligations of a best interest recommenda-
12 tion and the information consists solely
13 of—

14 “(I) making available to the plan,
15 plan participants, or plan bene-
16 ficiaries, without regard to the indi-
17 vidualized needs of the plan, plan par-
18 ticipants, or plan beneficiaries, securi-
19 ties or other property through a plat-
20 form or similar mechanism from
21 which a plan fiduciary may select or
22 monitor investment alternatives, in-
23 cluding qualified default investment
24 alternatives, into which plan partici-
25 pants or beneficiaries may direct the

1 investment of assets held in, or con-
2 tributed to, their individual accounts,
3 or

4 “(II) in connection with a plat-
5 form or similar mechanism described
6 in subclause (I)—

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

13 “(bb) providing objective fi-
14 nancial data and comparisons
15 with independent benchmarks to
16 the plan.

17 “(v) VALUATION.—The information
18 consists solely of valuation information.

19 “(vi) FINANCIAL EDUCATION.—The
20 information consists solely of—

21 “(I) information described in De-
22 partment of Labor Interpretive Bul-
23 letin 96–1 (29 C.F.R. 2509.96–1, as
24 in effect on January 1, 2015), regard-
25 less of whether such education is pro-

1 vided to a plan or plan fiduciary or a
2 participant or beneficiary,

3 “(II) information provided to
4 participants or beneficiaries regarding
5 the factors to consider in deciding
6 whether to elect to receive a distribu-
7 tion from a plan and whether to roll
8 over such distribution to a plan, so
9 long as any examples of different dis-
10 tribution and rollover alternatives are
11 accompanied by all material facts and
12 assumptions on which the examples
13 are based, or

14 “(III) any additional information
15 treated as education by the Secretary.

16 “(11) BEST INTEREST RECOMMENDATION.—

17 For purposes of this subsection—

18 “(A) IN GENERAL.—The term ‘best inter-
19 est recommendation’ means a recommenda-
20 tion—

21 “(i) for which no more than reason-
22 able compensation is paid (as determined
23 under subsection (d)(2)),

24 “(ii) provided by a person acting with
25 the care, skill, prudence, and diligence

1 under the circumstances then prevailing
2 that a prudent person would exercise based
3 on—

4 “(I) the information obtained
5 through the reasonable diligence of
6 the person regarding factors such as
7 the advice recipient’s age, and

8 “(II) any other information that
9 the advice recipient discloses to the
10 person in connection with receiving
11 such recommendation, and

12 “(iii) where the person places the in-
13 terests of the plan or advice recipient
14 above its own.

15 “(B) INVESTMENT OPTIONS; VARIABLE
16 COMPENSATION.—A best interest recommenda-
17 tion may include a recommendation that—

18 “(i) is based on a limited range of in-
19 vestment options (which may consist, in
20 whole or in part, of proprietary products),
21 but only if any such limitations, including
22 a clearly stated notice that the same or
23 similar investments may be available at a
24 different cost (greater or lesser) from other
25 sources, are clearly disclosed to the advice

1 recipient prior to any transaction based on
2 the recommendation, or

3 “(ii) may result in variable compensa-
4 tion to the person providing the rec-
5 ommendation (or any affiliate of such per-
6 son), but only if the receipt of such com-
7 pensation, including a clearly stated notice
8 that the same or similar investments may
9 be available at a different cost (greater or
10 lesser) from other sources, is clearly dis-
11 closed to the advice recipient prior to any
12 transaction based on the recommendation.

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

18 “(C) CLEAR DISCLOSURE OF VARIABLE
19 COMPENSATION.—For purposes of subpara-
20 graph (B)(ii), variable compensation is clearly
21 disclosed if notification is provided at any time
22 prior to a transaction based on the person’s rec-
23 ommendation, in a manner calculated to be un-
24 derstood by the average individual, of the fol-
25 lowing:

1 “(i) A notice in writing, including a
2 clearly stated notice that the same or simi-
3 lar investments may be available at a dif-
4 ferent cost (greater or lesser) from other
5 sources, that the person providing the rec-
6 ommendation (or its affiliate) may receive
7 varying amounts of fees or other com-
8 pensation with respect to such transaction.

9 “(ii) A description of any fee or other
10 compensation that is directly payable to
11 the person (or its affiliate) from the advice
12 recipient with respect to such transaction
13 (expressed as an amount, formula, percent-
14 age of assets, per capita charge, or esti-
15 mate or range of such compensation).

16 “(iii) A description of the types and
17 ranges of any indirect compensation that
18 may be paid to the person (or its affiliate)
19 by any third party in connection with such
20 transaction (expressed as an amount, for-
21 mula, percentage of assets, per capita
22 charge, or estimate of such ranges of com-
23 pensation).

24 “(iv) Upon request of the advice re-
25 cipient, a disclosure of the specific

1 amounts of compensation described in
2 clause (iii) that the person will receive in
3 connection with the particular transaction
4 (expressed as an amount, formula, percent-
5 age of assets, per capita charge, or esti-
6 mate of such compensation).

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

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

22 (3) FAILURES RELATING TO BEST INTEREST
23 RECOMMENDATION.—

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

1 (i) by striking “(5) CORRECTION.—
2 The terms” and inserting “(5) CORREC-
3 TION.—

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

6 (ii) by adding at the end the fol-
7 lowing:

8 “(B) DETERMINATION OF ‘CORRECTION’
9 AND ‘CORRECT’ WITH RESPECT TO BEST INTER-
10 EST ADVICE RECOMMENDATIONS.—In the case
11 of a prohibited advice transaction arising from
12 the failure of investment advice to be a best in-
13 terest recommendation, the terms ‘correction’
14 and ‘correct’ mean the payment to, or reim-
15 bursement of, actual damages of the plan, plan
16 participants, or plan beneficiaries resulting di-
17 rectly from the plan’s, plan participant’s, or
18 plan beneficiary’s reliance on such investment
19 advice, if any, that have not otherwise been
20 paid or reimbursed to the plan, plan partici-
21 pants, or plan beneficiaries, including payments
22 and reimbursements made pursuant to subpara-
23 graph (A).”.

24 (B) AMOUNT INVOLVED FOR PURPOSES OF
25 EXCISE TAX.—The first sentence of section

1 4975(f)(4) of such Code is amended by striking
2 “excess compensation.” and inserting “excess
3 compensation, and in the case of a prohibited
4 transaction arising by the failure of investment
5 advice to be a best interest recommendation,
6 the amount involved shall be the amount paid
7 to the person providing the advice (or its affil-
8 iate, as defined in paragraph (8)(J)(ii)) that
9 has not been paid or reimbursed to the plan,
10 plan participants, or plan beneficiaries, includ-
11 ing payments and reimbursements made pursu-
12 ant to paragraph (5).”.

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

20 “(25) any transaction, including a contract for
21 service, between a person providing investment ad-
22 vice described in subsection (e)(3)(B) and the advice
23 recipient in connection with such investment advice,
24 if—

1 “(A) no more than reasonable compensa-
2 tion is paid (as determined under paragraph
3 (2)) for such investment advice,

4 “(B) in a case in which the investment ad-
5 vice is based on a limited range of investment
6 options (which may consist, in whole or in part,
7 of proprietary products), such limitations, in-
8 cluding a clearly stated notice that the same or
9 similar investments may be available at a dif-
10 ferent cost (greater or lesser) from other
11 sources), shall be clearly disclosed to the advice
12 recipient prior to any transaction based on the
13 investment advice,

14 “(C) in a case in which the investment ad-
15 vice may result in variable compensation to the
16 person providing the investment advice (or any
17 affiliate of such person), the receipt of such
18 compensation, including a clearly stated notice
19 that the same or similar investments may be
20 available at a different cost (greater or lesser)
21 from other sources, shall be clearly disclosed to
22 the advice recipient (within the meaning of sub-
23 section (e)(11)(C)), and

24 “(D) in any case in which a person who,
25 acting in good faith and with reasonable dili-

1 gence, makes an error or omission in disclosing
2 the information specified in subparagraphs (B)
3 or (C), the person discloses the correct informa-
4 tion to the advice recipient as soon as prac-
5 ticable but not later than 30 days from the date
6 on which the person knows of such error or
7 omission.”.

8 (b) EFFECTIVE DATE.—

9 (1) MODIFICATION OF CERTAIN RULES, AND
10 RULES AND ADMINISTRATIVE POSITIONS PROMUL-
11 GATED BEFORE ENACTMENT BUT NOT EFFECTIVE
12 ON JANUARY 1, 2015, PROHIBITED.—The Depart-
13 ment of Labor is prohibited from amending any
14 rules or administrative positions promulgated under
15 section 3(21) of the Employee Retirement Security
16 Act of 1974 and section 4975(e)(3) of the Internal
17 Revenue Code of 1986 (including Department of
18 Labor Interpretive Bulletin 96–1 (29 C.F.R.
19 2509.96–1) and Department of Labor Advisory
20 Opinion 2005–23A), and no such rule or administra-
21 tive position promulgated by the Department of
22 Labor prior to the date of the enactment of this Act
23 but not effective on January 1, 2015, may become
24 effective unless a bill or joint resolution referred to
25 in paragraph (3) is enacted as described in such

1 paragraph not later than 60 days after the date of
2 the enactment of this Act.

3 (2) GENERAL EFFECTIVE DATE OF AMEND-
4 MENTS.—Except as provided in paragraph (3), the
5 amendments made by subsection (a) shall take effect
6 on the 61st day after the date of the enactment of
7 this Act and shall apply with respect to information
8 provided or recommendations made on or after 2
9 years after the date of the enactment of this Act.

10 (3) EXCEPTION.—If a bill or joint resolution is
11 enacted prior to the 61st day after the date of the
12 enactment of this Act that specifically approves any
13 rules or administrative positions promulgated under
14 section 3(21) of the Employee Retirement Security
15 Act of 1974 and section 4975(e)(3) of the Internal
16 Revenue Code of 1986 that is not in effect on Janu-
17 ary 1, 2015, the amendments made by subsection
18 (a) shall not take effect.

19 (c) GRANDFATHERED TRANSACTIONS AND SERV-
20 ICES.—The amendments made by subsection (a) shall not
21 apply to any service or transaction rendered, entered into,
22 or for which a person has been compensated prior to the
23 date on which the amendments made by subsection (a)
24 become effective under subsection (b)(2).

1 (d) TRANSITION.—If the amendments made by sub-
2 section (a) take effect, then nothing in this section shall
3 be construed to prohibit the issuance of guidance to carry
4 out such amendments so long as such guidance is nec-
5 essary to implement such amendments. Until such time
6 as regulations or other guidance are issued to carry out
7 such amendments, a plan and a fiduciary shall be treated
8 as meeting the requirements of such amendments if the
9 plan or fiduciary, as the case may be, makes a good faith
10 effort to comply with such requirements.

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