

114TH CONGRESS  
2D SESSION

# S. 2502

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

---

## IN THE SENATE OF THE UNITED STATES

FEBRUARY 4, 2016

Mr. ISAKSON (for himself, Mr. KIRK, Mr. COTTON, Mr. DAINES, and Mr. WICKER) introduced the following bill; which was read twice and referred to the Committee on Health, Education, Labor, and Pensions

---

## A BILL

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

1 *Be it enacted by the Senate and House of 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 Protection Act”.

6 **SEC. 2. PURPOSE.**

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

1           (1) provide advice that is impermissible under  
2           the prohibited transaction provisions under section  
3           406 of the Employee Retirement Income Security  
4           Act of 1974, or

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

7           are subject to liability under the Employee Retirement In-  
8           come Security Act of 1974.

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

11           (a) IN GENERAL.—

12           (1) DEFINITION OF INVESTMENT ADVICE.—

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

16           “(C)(i) For purposes of clause (ii) of subparagraph  
17           (A), the term ‘investment advice’ means a recommenda-  
18           tion that—

19           “(I) relates to—

20           “(aa) the advisability of acquiring, holding,  
21           disposing, or exchanging any moneys or other  
22           property of a plan by the plan, plan partici-  
23           pants, or plan beneficiaries, including any rec-  
24           ommendation whether to take a distribution of  
25           benefits from such plan or any recommendation

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

4 “(bb) the management of moneys or other  
5 property of such plan, including recommenda-  
6 tions relating to the management of moneys or  
7 other property to be rolled over or otherwise  
8 distributed from such plan; or

9 “(cc) the advisability of retaining or ceas-  
10 ing to retain a person who would receive a fee  
11 or other compensation for providing any of the  
12 types of advice described in this subclause; and  
13 “(II) is rendered pursuant to—

14 “(aa) a written acknowledgment of the ob-  
15 ligation of the advisor to comply with section  
16 404 with respect to the provision of such rec-  
17 ommendation; or

18 “(bb) a mutual agreement, arrangement,  
19 or understanding, which may include limitations  
20 on scope, timing, and responsibility to provide  
21 ongoing monitoring or advice services, between  
22 the person making such recommendation and  
23 the plan that such recommendation is individ-  
24 ualized to the plan and such plan intends to  
25 materially rely on such recommendation in

1 making investment or management decisions  
2 with respect to any moneys or other property of  
3 such plan.

4 “(ii) For purposes of clause (i)(II)(bb), any dis-  
5 claimer of a mutual agreement, arrangement, or under-  
6 standing shall only state the following: ‘This information  
7 is not individualized to you, and there is no intent for you  
8 to materially rely on this information in making invest-  
9 ment or management decisions.’. Such disclaimer shall not  
10 be effective unless such disclaimer is in writing and is  
11 communicated in a clear and prominent manner and an  
12 objective person would reasonably conclude that, based on  
13 all the facts and circumstances, there was not a mutual  
14 agreement, arrangement, or understanding described in  
15 clause (i)(II)(bb).

16 “(iii) For purposes of clause (i)(II)(bb), information  
17 shall not be considered to be a recommendation made pur-  
18 suant to a mutual agreement, arrangement, or under-  
19 standing if such information contains the disclaimer re-  
20 quired by clause (ii) and—

21 “(I) it is provided in conjunction with full and  
22 fair disclosure in writing to a plan, plan participant,  
23 or beneficiary that the person providing the informa-  
24 tion is doing so in its marketing or sales capacity,  
25 including any information regarding the terms and

1 conditions of the engagement of the person providing  
2 the information, and that the person is not intending  
3 to provide investment advice within the meaning of  
4 this subparagraph or to otherwise act within and  
5 under the obligations of the best interest standard  
6 as described in this subparagraph;

7 “(II) the person providing the information is a  
8 counterparty or service provider to the plan in con-  
9 nection with any transaction based on the informa-  
10 tion (including a service arrangement, sale, pur-  
11 chase, loan, bilateral contract, swap (as defined in  
12 section 1a of the Commodity Exchange Act (7  
13 U.S.C. 1a)), or security-based swap (as defined in  
14 section 3(a) of the Securities Exchange Act (15  
15 U.S.C. 78c(a))), but only if—

16 “(aa) the plan is represented, in connection  
17 with such transaction, by a plan fiduciary who  
18 is independent of the person providing the in-  
19 formation, and, except in the case of a swap or  
20 security-based swap, independent of the plan  
21 sponsor; and

22 “(bb) prior to such transaction, the inde-  
23 pendent plan fiduciary represents in writing to  
24 the person providing the information that it is  
25 aware that the person has a financial interest

1 in the transaction and that it has determined  
2 that the person is not intending to provide in-  
3 vestment advice within the meaning of this sub-  
4 paragraph or to otherwise act as a fiduciary to  
5 the plan subject to section 404;

6 “(III) the person providing the information is  
7 an employee of any sponsoring employer or employee  
8 organization who provides the information to the  
9 plan for no fee or other compensation other than the  
10 employee’s normal compensation;

11 “(IV) the person providing the information dis-  
12 closes in writing to the plan fiduciary that the per-  
13 son is not undertaking to provide investment advice  
14 as a fiduciary to the plan subject to section 404 and  
15 the information consists solely of—

16 “(aa) making available to the plan, without  
17 regard to the individualized needs of the plan,  
18 securities or other property through a platform  
19 or similar mechanism from which a plan fidu-  
20 ciary may select or monitor investment alter-  
21 natives, including qualified default investment  
22 alternatives, into which plan participants or  
23 beneficiaries may direct the investment of as-  
24 sets held in, or contributed to, their individual  
25 accounts; or

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

3           “(AA) identifying investment alter-  
4 natives that meet objective criteria speci-  
5 fied by the plan, such as criteria con-  
6 cerning expense ratios, fund sizes, types of  
7 asset, or credit quality; or

8           “(BB) providing objective financial  
9 data and comparisons with independent  
10 benchmarks to the plan;

11          “(V) the information consists solely of valuation  
12 information; or

13          “(VI) the information consists solely of—

14           “(aa) information described in Department  
15 of Labor Interpretive Bulletin 96–1 (29 C.F.R.  
16 2509.96–1, as in effect on January 1, 2015),  
17 regardless of whether such education is pro-  
18 vided to a plan or plan fiduciary or a partici-  
19 pant or beneficiary;

20           “(bb) information provided to participants  
21 or beneficiaries regarding the factors to con-  
22 sider in deciding whether to elect to receive a  
23 distribution from a plan or an individual retire-  
24 ment plan (as defined in section 7701(a)(37) of  
25 the Internal Revenue Code of 1986) and wheth-

1 er to roll over such distribution to a plan or an  
2 individual retirement plan (as defined in section  
3 7701(a)(37) of the Internal Revenue Code of  
4 1986), so long as any examples of different dis-  
5 tribution and rollover alternatives are accom-  
6 panied by all material facts and assumptions on  
7 which the examples are based; or

8 “(cc) any additional information treated as  
9 education by the Secretary.”.

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

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

21 “(i) No more than reasonable compensa-  
22 tion is paid (as determined under section  
23 408(b)(2)) for such investment advice.

24 “(ii) If the investment advice is based on  
25 a limited range of investment options (which



1 may consist, in whole or in part, of proprietary  
2 products), such limitations, including a clearly  
3 stated notice that the same or similar invest-  
4 ments may be available at a different cost  
5 (greater or lesser) from other sources, shall be  
6 clearly disclosed to the advice recipient prior to  
7 any transaction based on the investment advice.  
8 The notice shall only state the following: ‘The  
9 same or similar investments may be available at  
10 a different cost (greater or lesser) from other  
11 sources.’.

12 “(iii) If the investment advice may result  
13 in variable compensation to the person pro-  
14 viding the investment advice (or any affiliate of  
15 such person), the receipt of such compensation,  
16 including a clearly stated notice that the same  
17 or similar investments may be available at a  
18 different cost (greater or lesser) from other  
19 sources, shall be clearly disclosed to the advice  
20 recipient. The notice shall only state the fol-  
21 lowing: ‘The same or similar investments may  
22 be available at a different cost (greater or less-  
23 er) from other sources.’. For purposes of this  
24 subparagraph, clear disclosure of variable com-  
25 pensation means notification prior to any trans-

1           action based on the recommendation, in a man-  
2           ner calculated to be understood by the average  
3           individual, of the following:

4                   “(I) A notice that the person pro-  
5                   viding the recommendation (or its affiliate)  
6                   may receive varying amounts of fees or  
7                   other compensation with respect to such  
8                   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 “(B) No recommendation will fail to satisfy the  
8 conditions described in clauses (i) through (iii) of  
9 subparagraph (A) solely because the person, acting  
10 in good faith and with reasonable diligence, makes  
11 an error or omission in disclosing the information  
12 specified in such clauses, provided that the person  
13 discloses the correct information to the advice recipi-  
14 ent as soon as practicable, but not later than 30  
15 days from the date on which the person knows of  
16 such error or omission.

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

20 (b) EFFECTIVE DATE.—

21 (1) MODIFICATION OF CERTAIN RULES, AND  
22 RULES AND ADMINISTRATIVE POSITIONS PROMUL-  
23 GATED BEFORE ENACTMENT BUT NOT EFFECTIVE  
24 ON JANUARY 1, 2015, PROHIBITED.—The Depart-  
25 ment of Labor is prohibited from amending any

1 rules or administrative positions promulgated under,  
2 or applicable for purposes of, section 3(21) of the  
3 Employee Retirement Income Security Act of 1974  
4 (including Department of Labor Interpretive Bul-  
5 letin 96–1 (29 C.F.R. 2509.96–1) and Department  
6 of Labor Advisory Opinion 2005–23A), and no such  
7 rule or administrative position promulgated by the  
8 Department of Labor prior to the date of the enact-  
9 ment of this Act but not effective on January 1,  
10 2015, may become effective unless a bill or joint res-  
11 olution referred to in paragraph (3) is enacted as de-  
12 scribed in such paragraph not later than 60 days  
13 after the date of the enactment of this Act.

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

21 (3) EXCEPTION.—If a bill or joint resolution is  
22 enacted prior to the 61st day after the date of the  
23 enactment of this Act that specifically approves any  
24 rules or administrative positions promulgated under,  
25 or applicable for purposes of, section 3(21) of the

1 Employee Retirement Income Security Act of 1974  
2 that is not in effect on January 1, 2015, the amend-  
3 ments made by subsection (a) shall not take effect.

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

10 (d) TRANSITION.—If the amendments made by sub-  
11 section (a) take effect, then nothing in this section shall  
12 be construed to prohibit the issuance of guidance to carry  
13 out such amendments so long as such guidance is nec-  
14 essary to implement such amendments. Until such time  
15 as regulations or other guidance are issued to carry out  
16 such amendments, a plan and a fiduciary shall be treated  
17 as meeting the requirements of such amendments if the  
18 plan or fiduciary, as the case may be, makes a good faith  
19 effort to comply with such requirements.

○