

**AMENDMENT IN THE NATURE OF A SUBSTITUTE  
TO H.R. 4293  
OFFERED BY MR. ROE OF TENNESSEE**

Strike all after the enacting clause and insert the following:

**1 SECTION 1. SHORT TITLE.**

2 This Act may be cited as the “Affordable Retirement  
3 Advice Protection Act”.

**4 SEC. 2. PURPOSE.**

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

7 (1) provide advice that is impermissible under  
8 the prohibited transaction provisions under section  
9 406 of the Employee Retirement Income Security  
10 Act of 1974, or

11 (2) breach the best interest standard for the  
12 provision of investment advice,  
13 are subject to liability under the Employee Retirement In-  
14 come Security Act of 1974.

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

17 (a) AMENDMENTS TO THE EMPLOYEE RETIREMENT  
18 INCOME SECURITY ACT OF 1974.—

1 (1) DEFINITION OF INVESTMENT ADVICE.—

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

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

8 “(I) relates to—

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

18 “(bb) the management of moneys or other  
19 property of such plan, including recommenda-  
20 tions relating to the management of moneys or  
21 other property to be distributed from such plan;  
22 or

23 “(cc) the advisability of retaining or ceas-  
24 ing to retain a person who would receive a fee

1 or other compensation for providing any of the  
2 types of advice described in this subclause; and

3 “(II) is rendered pursuant to—

4 “(aa) a written acknowledgment of the ob-  
5 ligation of the advisor to comply with section  
6 404 with respect to the provision of such rec-  
7 ommendation; or

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

19 “(ii) For purposes of clause (i)(II)(bb), any dis-  
20 claimer of a mutual agreement, arrangement, or under-  
21 standing shall only state the following: ‘This information  
22 is not individualized to you, and you are not intended to  
23 materially rely on this information in making investment  
24 or management decisions.’. Such disclaimer shall not be  
25 effective unless such disclaimer is in writing and is com-

1 municated in a clear and prominent manner and an objec-  
2 tive person would reasonably conclude that, based on all  
3 the facts and circumstances, there was not a mutual  
4 agreement, arrangement, or understanding.

5 “(iii) For purposes of clause (i)(II)(bb), information  
6 shall not be considered to be a recommendation made pur-  
7 suant to a mutual agreement, arrangement, or under-  
8 standing, and such information shall contain the dis-  
9 claimer required by clause (ii), if—

10 “(I) it is provided in conjunction with full and  
11 fair disclosure in writing to a plan, plan participant,  
12 or beneficiary that the person providing the informa-  
13 tion is doing so in its marketing or sales capacity,  
14 including any information regarding the terms and  
15 conditions of the engagement of the person providing  
16 the information, and that the person is not intending  
17 to provide investment advice within the meaning of  
18 this subparagraph or to otherwise act within and  
19 under the obligations of the best interest standard  
20 as described in this subparagraph;

21 “(II) the person providing the information is a  
22 counterparty or service provider to the plan in con-  
23 nection with any transaction based on the informa-  
24 tion (including a service arrangement, sale, pur-  
25 chase, loan, bilateral contract, swap (as defined in

1 section 1a of the Commodity Exchange Act (7  
2 U.S.C. 1a)), or security-based swap (as defined in  
3 section 3(a) of the Securities Exchange Act (15  
4 U.S.C. 78c(a))), 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 in-  
8 formation, and, except in the case of a swap or  
9 security-based swap, independent of the plan  
10 sponsor; and

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

20 “(III) the person providing the information is  
21 an employee of any sponsoring employer or employee  
22 organization who provides the information to the  
23 plan for no fee or other compensation other than the  
24 employee’s normal compensation;

1           “(IV) the person providing the information dis-  
2 closes in writing to the plan fiduciary that the per-  
3 son is not undertaking to provide investment advice  
4 as a fiduciary to the plan subject to section 404 and  
5 the information consists solely of—

6           “(aa) making available to the plan, without  
7 regard to the individualized needs of the plan,  
8 securities or other property through a platform  
9 or similar mechanism from which a plan fidu-  
10 ciary may select or monitor investment alter-  
11 natives, including qualified default investment  
12 alternatives, into which plan participants or  
13 beneficiaries may direct the investment of as-  
14 sets held in, or contributed to, their individual  
15 accounts; or

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

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

23           “(BB) providing objective financial  
24 data and comparisons with independent  
25 benchmarks to the plan;

1           “(V) the information consists solely of valuation  
2 information; or

3           “(VI) the information consists solely of—

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

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

23               “(cc) any additional information treated as  
24 education by the Secretary.”.

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

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

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

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



1           ferent cost (greater or lesser) from other  
2           sources.’.

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

14                 “(I) A notice that states only the fol-  
15                 lowing: ‘This recommendation may result  
16                 in varying amounts of fees or other com-  
17                 pensation to the person providing the rec-  
18                 ommendation (or its affiliate), and the  
19                 same or similar investments may be avail-  
20                 able at a different cost (greater or lesser)  
21                 from other sources.’. Any regulations or  
22                 administrative guidance implementing this  
23                 subclause may not require this notice to be  
24                 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 may be  
11          directly or indirectly payable to the person  
12          (or its affiliate) by any third party in con-  
13          nection with such transaction (expressed as  
14          an amount, formula, percentage of assets,  
15          per capita charge, or estimate or range of  
16          such compensation).

17          “(IV) Upon request of the advice re-  
18          cipient, a disclosure of the specific  
19          amounts of compensation described in  
20          clause (iii) that the person will receive in  
21          connection with the particular transaction  
22          (expressed as an amount, formula, percent-  
23          age of assets, per capita charge, or esti-  
24          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) 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) of this section  
17 shall take effect on the 61st day after the date of  
18 the enactment of this Act and shall apply with re-  
19 spect to information provided or recommendations  
20 made on or after 2 years after the date of the enact-  
21 ment of this Act.

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

1 or applicable for purposes of, section 3(21) of the  
2 Employee Retirement Income Security Act of 1974  
3 that are not in effect on January 1, 2015, the  
4 amendments made by subsection (a) of this section  
5 shall not take effect.

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

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

