

108TH CONGRESS
1ST SESSION

S. 1698

To amend title I of the Employee Retirement Income Security Act of 1974 and the Internal Revenue Code of 1986 to promote the provision of retirement investment advice to workers managing their retirement income assets.

IN THE SENATE OF THE UNITED STATES

OCTOBER 1, 2003

Mr. ENZI (for himself, Mr. GREGG, Mr. BOND, and Mr. SANTORUM) introduced the following bill; which was read twice and referred to the Committee on Health, Education, Labor, and Pensions

A BILL

To amend title I of the Employee Retirement Income Security Act of 1974 and the Internal Revenue Code of 1986 to promote the provision of retirement investment advice to workers managing their retirement income assets.

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 AND TABLE OF CONTENTS.**

4 This Act may be cited as the “Retirement Security
5 Advice Act of 2003”.

1 **SEC. 2. PROHIBITED TRANSACTION EXEMPTION FOR THE**
2 **PROVISION OF INVESTMENT ADVICE.**

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

5 (1) EXEMPTION FROM PROHIBITED TRANS-
6 ACTIONS.—Section 408(b) of the Employee Retire-
7 ment Income Security Act of 1974 (29 U.S.C.
8 1108(b)) is amended by adding at the end the fol-
9 lowing new paragraph:

10 “(14)(A) Any transaction described in subpara-
11 graph (B) in connection with the provision of invest-
12 ment advice described in section 3(21)(A)(ii), in any
13 case in which—

14 “(i) the investment of assets of the plan is
15 subject to the direction of plan participants or
16 beneficiaries,

17 “(ii) the advice is provided to the plan or
18 a participant or beneficiary of the plan by a fi-
19 duciary adviser in connection with any sale, ac-
20 quisition, or holding of a security or other prop-
21 erty for purposes of investment of plan assets,
22 and

23 “(iii) the requirements of subsection (g)
24 are met in connection with the provision of the
25 advice.

1 “(B) The transactions described in this sub-
2 paragraph are the following:

3 “(i) the provision of the advice to the plan,
4 participant, or beneficiary;

5 “(ii) the sale, acquisition, or holding of a
6 security or other property (including any lend-
7 ing of money or other extension of credit associ-
8 ated with the sale, acquisition, or holding of a
9 security or other property) pursuant to the ad-
10 vice; and

11 “(iii) the direct or indirect receipt of fees
12 or other compensation by the fiduciary adviser
13 or an affiliate thereof (or any employee, agent,
14 or registered representative of the fiduciary ad-
15 viser or affiliate) in connection with the provi-
16 sion of the advice or in connection with a sale,
17 acquisition, or holding of a security or other
18 property pursuant to the advice.”.

19 (2) REQUIREMENTS.—Section 408 of such Act
20 is amended further by adding at the end the fol-
21 lowing new subsection:

22 “(g) REQUIREMENTS RELATING TO PROVISION OF
23 INVESTMENT ADVICE BY FIDUCIARY ADVISERS.—

24 “(1) IN GENERAL.—The requirements of this
25 subsection are met in connection with the provision

1 of investment advice referred to in section
2 3(21)(A)(ii), provided to an employee benefit plan or
3 a participant or beneficiary of an employee benefit
4 plan by a fiduciary adviser with respect to the plan
5 in connection with any sale, acquisition, or holding
6 of a security or other property for purposes of in-
7 vestment of amounts held by the plan, if—

8 “(A) in the case of the initial provision of
9 the advice with regard to the security or other
10 property by the fiduciary adviser to the plan,
11 participant, or beneficiary, the fiduciary adviser
12 provides to the recipient of the advice, at a time
13 reasonably contemporaneous with the initial
14 provision of the advice, a written notification
15 (which may consist of notification by means of
16 electronic communication)—

17 “(i) of all fees or other compensation
18 relating to the advice that the fiduciary ad-
19 viser or any affiliate thereof is to receive
20 (including compensation provided by any
21 third party) in connection with the provi-
22 sion of the advice or in connection with the
23 sale, acquisition, or holding of the security
24 or other property,

1 “(ii) of any material affiliation or con-
2 tractual relationship of the fiduciary ad-
3 viser or affiliates thereof in the security or
4 other property,

5 “(iii) of any limitation placed on the
6 scope of the investment advice to be pro-
7 vided by the fiduciary adviser with respect
8 to any such sale, acquisition, or holding of
9 a security or other property,

10 “(iv) of the types of services provided
11 by the fiduciary adviser in connection with
12 the provision of investment advice by the
13 fiduciary adviser,

14 “(v) that the adviser is acting as a fi-
15 duciary of the plan in connection with the
16 provision of the advice, and

17 “(vi) that a recipient of the advice
18 may separately arrange for the provision of
19 advice by another adviser, that could have
20 no material affiliation with and receive no
21 fees or other compensation in connection
22 with the security or other property,

23 “(B) the fiduciary adviser provides appro-
24 priate disclosure, in connection with the sale,
25 acquisition, or holding of the security or other

1 property, in accordance with all applicable secu-
 2 rities laws,

3 “(C) the sale, acquisition, or holding oc-
 4 curs solely at the direction of the recipient of
 5 the advice,

6 “(D) the compensation received by the fi-
 7 duciary adviser and affiliates thereof in connec-
 8 tion with the sale, acquisition, or holding of the
 9 security or other property is reasonable, and

10 “(E) the terms of the sale, acquisition, or
 11 holding of the security or other property are at
 12 least as favorable to the plan as an arm’s
 13 length transaction would be.

14 “(2) STANDARDS FOR PRESENTATION OF IN-
 15 FORMATION.—

16 “(A) IN GENERAL.—The notification re-
 17 quired to be provided to participants and bene-
 18 ficiaries under paragraph (1)(A) shall be writ-
 19 ten in a clear and conspicuous manner and in
 20 a manner calculated to be understood by the av-
 21 erage plan participant and shall be sufficiently
 22 accurate and comprehensive to reasonably ap-
 23 prise such participants and beneficiaries of the
 24 information required to be provided in the noti-
 25 fication.

1 “(B) MODEL FORM FOR DISCLOSURE OF
 2 FEES AND OTHER COMPENSATION.—The Sec-
 3 retary shall issue a model form for the disclo-
 4 sure of fees and other compensation required in
 5 paragraph (1)(A)(i) which meets the require-
 6 ments of subparagraph (A).

7 “(3) EXEMPTION CONDITIONED ON MAKING RE-
 8 QUIRED INFORMATION AVAILABLE ANNUALLY, ON
 9 REQUEST, AND IN THE EVENT OF MATERIAL
 10 CHANGE.—The requirements of paragraph (1)(A)
 11 shall be deemed not to have been met in connection
 12 with the initial or any subsequent provision of advice
 13 described in paragraph (1) to the plan, participant,
 14 or beneficiary if, at any time during the provision of
 15 advisory services to the plan, participant, or bene-
 16 ficiary, the fiduciary adviser fails to maintain the in-
 17 formation described in clauses (i) through (iv) of
 18 paragraph (1)(A) in currently accurate form and in
 19 the manner described in paragraph (2) or fails—

20 “(A) to provide, without charge, such cur-
 21 rently accurate information to the recipient of
 22 the advice no less than annually,

23 “(B) to make such currently accurate in-
 24 formation available, upon request and without
 25 charge, to the recipient of the advice, or

1 “(C) in the event of a material change to
 2 the information described in clauses (i) through
 3 (iv) of paragraph (1)(A), to provide, without
 4 charge, such currently accurate information to
 5 the recipient of the advice at a time reasonably
 6 contemporaneous to the material change in in-
 7 formation.

8 “(4) MAINTENANCE FOR 6 YEARS OF EVIDENCE
 9 OF COMPLIANCE.—A fiduciary adviser referred to in
 10 paragraph (1) who has provided advice referred to in
 11 such paragraph shall, for a period of not less than
 12 6 years after the provision of the advice, maintain
 13 any records necessary for determining whether the
 14 requirements of the preceding provisions of this sub-
 15 section and of subsection (b)(14) have been met. A
 16 transaction prohibited under section 406 shall not
 17 be considered to have occurred solely because the
 18 records are lost or destroyed prior to the end of the
 19 6-year period due to circumstances beyond the con-
 20 trol of the fiduciary adviser.

21 “(5) EXEMPTION FOR PLAN SPONSOR AND CER-
 22 TAIN OTHER FIDUCIARIES.—

23 “(A) IN GENERAL.—Subject to subpara-
 24 graph (B), a plan sponsor or other person who
 25 is a fiduciary (other than a fiduciary adviser)

1 shall not be treated as failing to meet the re-
2 quirements of this part solely by reason of the
3 provision of investment advice referred to in
4 section 3(21)(A)(ii) (or solely by reason of con-
5 tracting for or otherwise arranging for the pro-
6 vision of the advice), if—

7 “(i) the advice is provided by a fidu-
8 ciary adviser pursuant to an arrangement
9 between the plan sponsor or other fidu-
10 ciary and the fiduciary adviser for the pro-
11 vision by the fiduciary adviser of invest-
12 ment advice referred to in such section,

13 “(ii) the terms of the arrangement re-
14 quire compliance by the fiduciary adviser
15 with the requirements of this subsection,
16 and

17 “(iii) the terms of the arrangement
18 include a written acknowledgment by the
19 fiduciary adviser that the fiduciary adviser
20 is a fiduciary of the plan with respect to
21 the provision of the advice.

22 “(B) CONTINUED DUTY OF PRUDENT SE-
23 LECTION OF ADVISER AND PERIODIC REVIEW.—
24 Nothing in subparagraph (A) shall be construed
25 to exempt a plan sponsor or other person who

1 is a fiduciary from any requirement of this part
2 for the prudent selection and periodic review of
3 a fiduciary adviser with whom the plan sponsor
4 or other person enters into an arrangement for
5 the provision of advice referred to in section
6 3(21)(A)(ii). The plan sponsor or other person
7 who is a fiduciary has no duty under this part
8 to monitor the specific investment advice given
9 by the fiduciary adviser to any particular recipi-
10 ent of the advice.

11 “(C) AVAILABILITY OF PLAN ASSETS FOR
12 PAYMENT FOR ADVICE.—Nothing in this part
13 shall be construed to preclude the use of plan
14 assets to pay for reasonable expenses in pro-
15 viding investment advice referred to in section
16 3(21)(A)(ii).

17 “(6) DEFINITIONS.—For purposes of this sub-
18 section and subsection (b)(14)—

19 “(A) FIDUCIARY ADVISER.—The term ‘fi-
20 duciary adviser’ means, with respect to a plan,
21 a person who is a fiduciary of the plan by rea-
22 son of the provision of investment advice by the
23 person to the plan or to a participant or bene-
24 ficiary and who is—

1 “(i) registered as an investment ad-
2 viser under the Investment Advisers Act of
3 1940 (15 U.S.C. 80b–1 et seq.) or under
4 the laws of the State in which the fiduciary
5 maintains its principal office and place of
6 business,

7 “(ii) a bank or similar financial insti-
8 tution referred to in section 408(b)(4) or a
9 savings association (as defined in section
10 3(b)(1) of the Federal Deposit Insurance
11 Act (12 U.S.C. 1813(b)(1))), but only if
12 the advice is provided through a trust de-
13 partment of the bank or similar financial
14 institution or savings association which is
15 subject to periodic examination and review
16 by Federal or State banking authorities,

17 “(iii) an insurance company qualified
18 to do business under the laws of a State,

19 “(iv) a person registered as a broker
20 or dealer under the Securities Exchange
21 Act of 1934 (15 U.S.C. 78a et seq.),

22 “(v) an affiliate of a person described
23 in any of clauses (i) through (iv), or

24 “(vi) an employee, agent, or registered
25 representative of a person described in any

1 of clauses (i) through (v) who satisfies the
 2 requirements of applicable insurance,
 3 banking, and securities laws relating to the
 4 provision of the advice.

5 “(B) AFFILIATE.—The term ‘affiliate’ of
 6 another entity means an affiliated person of the
 7 entity (as defined in section 2(a)(3) of the In-
 8 vestment Company Act of 1940 (15 U.S.C.
 9 80a–(a)(3))).

10 “(C) REGISTERED REPRESENTATIVE.—
 11 The term ‘registered representative’ of another
 12 entity means a person described in section
 13 3(a)(18) of the Securities Exchange Act of
 14 1934 (15 U.S.C. 78c(a)(18)) (substituting the
 15 entity for the broker or dealer referred to in
 16 such section) or a person described in section
 17 202(a)(17) of the Investment Advisers Act of
 18 1940 (15 U.S.C. 80b–(a)(17)) (substituting the
 19 entity for the investment adviser referred to in
 20 such section).”.

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

23 (1) EXEMPTION FROM PROHIBITED TRANS-
 24 ACTIONS.—Subsection (d) of section 4975 of the In-

1 ternal Revenue Code of 1986 (relating to exemptions
2 from tax on prohibited transactions) is amended—

3 (A) in paragraph (14), by striking “or” at
4 the end;

5 (B) in paragraph (15), by striking the pe-
6 riod at the end and inserting “; or”; and

7 (C) by adding at the end the following new
8 paragraph:

9 “(16) any transaction described in subsection
10 (f)(7)(A) in connection with the provision of invest-
11 ment advice described in subsection (e)(3)(B)(i), in
12 any case in which—

13 “(A) the investment of assets of the plan
14 is subject to the direction of plan participants
15 or beneficiaries,

16 “(B) the advice is provided to the plan or
17 a participant or beneficiary of the plan by a fi-
18 duciary adviser in connection with any sale, ac-
19 quisition, or holding of a security or other prop-
20 erty for purposes of investment of plan assets,
21 and

22 “(C) the requirements of subsection
23 (f)(7)(B) are met in connection with the provi-
24 sion of the advice.”.

1 (2) ALLOWED TRANSACTIONS AND REQUIRE-
 2 MENTS.—Subsection (f) of such section 4975 (relat-
 3 ing to other definitions and special rules) is amended
 4 by adding at the end the following new paragraph:

5 “(7) PROVISIONS RELATING TO INVESTMENT
 6 ADVICE PROVIDED BY FIDUCIARY ADVISERS.—

7 “(A) TRANSACTIONS ALLOWABLE IN CON-
 8 NECTION WITH INVESTMENT ADVICE PROVIDED
 9 BY FIDUCIARY ADVISERS.—The transactions re-
 10 ferred to in subsection (d)(16), in connection
 11 with the provision of investment advice by a fi-
 12 duciary adviser, are the following:

13 “(i) the provision of the advice to the
 14 plan, participant, or beneficiary;

15 “(ii) the sale, acquisition, or holding
 16 of a security or other property (including
 17 any lending of money or other extension of
 18 credit associated with the sale, acquisition,
 19 or holding of a security or other property)
 20 pursuant to the advice; and

21 “(iii) the direct or indirect receipt of
 22 fees or other compensation by the fiduciary
 23 adviser or an affiliate thereof (or any em-
 24 ployee, agent, or registered representative
 25 of the fiduciary adviser or affiliate) in con-

1 nection with the provision of the advice or
2 in connection with a sale, acquisition, or
3 holding of a security or other property pur-
4 suant to the advice.

5 “(B) REQUIREMENTS RELATING TO PROVI-
6 SION OF INVESTMENT ADVICE BY FIDUCIARY
7 ADVISERS.—The requirements of this subpara-
8 graph (referred to in subsection (d)(16)(C)) are
9 met in connection with the provision of invest-
10 ment advice referred to in subsection (e)(3)(B),
11 provided to a plan or a participant or bene-
12 ficiary of a plan by a fiduciary adviser with re-
13 spect to the plan in connection with any sale,
14 acquisition, or holding of a security or other
15 property for purposes of investment of amounts
16 held by the plan, if—

17 “(i) in the case of the initial provision
18 of the advice with regard to the security or
19 other property by the fiduciary adviser to
20 the plan, participant, or beneficiary, the fi-
21 duciary adviser provides to the recipient of
22 the advice, at a time reasonably contem-
23 poraneous with the initial provision of the
24 advice, a written notification (which may

1 consist of notification by means of elec-
2 tronic communication)—

3 “(I) of all fees or other com-
4 pensation relating to the advice that
5 the fiduciary adviser or any affiliate
6 thereof is to receive (including com-
7 pensation provided by any third
8 party) in connection with the provi-
9 sion of the advice or in connection
10 with the sale, acquisition, or holding
11 of the security or other property,

12 “(II) of any material affiliation
13 or contractual relationship of the fidu-
14 ciary adviser or affiliates thereof in
15 the security or other property,

16 “(III) of any limitation placed on
17 the scope of the investment advice to
18 be provided by the fiduciary adviser
19 with respect to any such sale, acquisi-
20 tion, or holding of a security or other
21 property,

22 “(IV) of the types of services
23 provided by the fiduciary adviser in
24 connection with the provision of in-

1 vestment advice by the fiduciary ad-
2 viser,

3 “(V) that the adviser is acting as
4 a fiduciary of the plan in connection
5 with the provision of the advice, and

6 “(VI) that a recipient of the ad-
7 vice may separately arrange for the
8 provision of advice by another adviser,
9 that could have no material affiliation
10 with and receive no fees or other com-
11 pensation in connection with the secu-
12 rity or other property,

13 “(ii) the fiduciary adviser provides ap-
14 propriate disclosure, in connection with the
15 sale, acquisition, or holding of the security
16 or other property, in accordance with all
17 applicable securities laws,

18 “(iii) the sale, acquisition, or holding
19 occurs solely at the direction of the recipi-
20 ent of the advice,

21 “(iv) the compensation received by the
22 fiduciary adviser and affiliates thereof in
23 connection with the sale, acquisition, or
24 holding of the security or other property is
25 reasonable, and

1 “(v) the terms of the sale, acquisition,
2 or holding of the security or other property
3 are at least as favorable to the plan as an
4 arm’s length transaction would be.

5 “(C) STANDARDS FOR PRESENTATION OF
6 INFORMATION.—The notification required to be
7 provided to participants and beneficiaries under
8 subparagraph (B)(i) shall be written in a clear
9 and conspicuous manner and in a manner cal-
10 culated to be understood by the average plan
11 participant and shall be sufficiently accurate
12 and comprehensive to reasonably apprise such
13 participants and beneficiaries of the information
14 required to be provided in the notification.

15 “(D) EXEMPTION CONDITIONED ON MAK-
16 ING REQUIRED INFORMATION AVAILABLE ANNU-
17 ALLY, ON REQUEST, AND IN THE EVENT OF MA-
18 TERIAL CHANGE.—The requirements of sub-
19 paragraph (B)(i) shall be deemed not to have
20 been met in connection with the initial or any
21 subsequent provision of advice described in sub-
22 paragraph (B) to the plan, participant, or bene-
23 ficiary if, at any time during the provision of
24 advisory services to the plan, participant, or
25 beneficiary, the fiduciary adviser fails to main-

tain the information described in subclauses (I) through (IV) of subparagraph (B)(i) in currently accurate form and in the manner required by subparagraph (C), or fails—

“(i) to provide, without charge, such currently accurate information to the recipient of the advice no less than annually,

“(ii) to make such currently accurate information available, upon request and without charge, to the recipient of the advice, or

“(iii) in the event of a material change to the information described in subclauses (I) through (IV) of subparagraph (B)(i), to provide, without charge, such currently accurate information to the recipient of the advice at a time reasonably contemporaneous to the material change in information.

“(E) MAINTENANCE FOR 6 YEARS OF EVIDENCE OF COMPLIANCE.—A fiduciary adviser referred to in subparagraph (B) who has provided advice referred to in such subparagraph shall, for a period of not less than 6 years after the provision of the advice, maintain any

1 records necessary for determining whether the
2 requirements of the preceding provisions of this
3 paragraph and of subsection (d)(16) have been
4 met. A transaction prohibited under subsection
5 (c)(1) shall not be considered to have occurred
6 solely because the records are lost or destroyed
7 prior to the end of the 6-year period due to cir-
8 cumstances beyond the control of the fiduciary
9 adviser.

10 “(F) EXEMPTION FOR PLAN SPONSOR AND
11 CERTAIN OTHER FIDUCIARIES.—A plan sponsor
12 or other person who is a fiduciary (other than
13 a fiduciary adviser) shall not be treated as fail-
14 ing to meet the requirements of this section
15 solely by reason of the provision of investment
16 advice referred to in subsection (e)(3)(B) (or
17 solely by reason of contracting for or otherwise
18 arranging for the provision of the advice), if—

19 “(i) the advice is provided by a fidu-
20 ciary adviser pursuant to an arrangement
21 between the plan sponsor or other fidu-
22 ciary and the fiduciary adviser for the pro-
23 vision by the fiduciary adviser of invest-
24 ment advice referred to in such section,

1 “(ii) the terms of the arrangement re-
 2 quire compliance by the fiduciary adviser
 3 with the requirements of this paragraph,

4 “(iii) the terms of the arrangement
 5 include a written acknowledgment by the
 6 fiduciary adviser that the fiduciary adviser
 7 is a fiduciary of the plan with respect to
 8 the provision of the advice, and

9 “(iv) the requirements of part 4 of
 10 subtitle B of title I of the Employee Re-
 11 tirement Income Security Act of 1974 are
 12 met in connection with the provision of
 13 such advice.

14 “(G) DEFINITIONS.—For purposes of this
 15 paragraph and subsection (d)(16)—

16 “(i) FIDUCIARY ADVISER.—The term
 17 ‘fiduciary adviser’ means, with respect to a
 18 plan, a person who is a fiduciary of the
 19 plan by reason of the provision of invest-
 20 ment advice by the person to the plan or
 21 to a participant or beneficiary and who
 22 is—

23 “(I) registered as an investment
 24 adviser under the Investment Advisers
 25 Act of 1940 (15 U.S.C. 80b–1 et seq.)

1 or under the laws of the State in
2 which the fiduciary maintains its prin-
3 cipal office and place of business,

4 “(II) a bank or similar financial
5 institution referred to in subsection
6 (d)(4) or a savings association (as de-
7 fined in section 3(b)(1) of the Federal
8 Deposit Insurance Act (12 U.S.C.
9 1813(b)(1))), but only if the advice is
10 provided through a trust department
11 of the bank or similar financial insti-
12 tution or savings association which is
13 subject to periodic examination and
14 review by Federal or State banking
15 authorities,

16 “(III) an insurance company
17 qualified to do business under the
18 laws of a State,

19 “(IV) a person registered as a
20 broker or dealer under the Securities
21 Exchange Act of 1934 (15 U.S.C. 78a
22 et seq.),

23 “(V) an affiliate of a person de-
24 scribed in any of subclauses (I)
25 through (IV), or

“(VI) an employee, agent, or registered representative of a person described in any of subclauses (I) through (V) who satisfies the requirements of applicable insurance, banking, and securities laws relating to the provision of the advice.

“(ii) AFFILIATE.—The term ‘affiliate’ of another entity means an affiliated person of the entity (as defined in section 2(a)(3) of the Investment Company Act of 1940 (15 U.S.C. 80a–(a)(3))).

“(iii) REGISTERED REPRESENTATIVE.—The term ‘registered representative’ of another entity means a person described in section 3(a)(18) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(18)) (substituting the entity for the broker or dealer referred to in such section) or a person described in section 202(a)(17) of the Investment Advisers Act of 1940 (15 U.S.C. 80b–(a)(17)) (substituting the entity for the investment adviser referred to in such section).”.

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