

106TH CONGRESS
2D SESSION

S. 2969

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

JULY 27, 2000

Mr. GORTON introduced the following bill; which was read twice and referred to the Committee on Finance

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.**

4 This Act may be cited as the “Retirement Security
5 Advice Act of 2000”.

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) IN GENERAL.—Section 408(b) of the Em-
6 ployee Retirement Income Security Act of 1974 (29
7 U.S.C. 1108(b)) is amended by adding at the end
8 the following new paragraph:

9 “(14) If the requirements of subsection (g) are
10 met—

11 “(A) the provision of investment advice re-
12 ferred to in section 3(21)(A)(ii) provided by a
13 fiduciary adviser (as defined in subsection
14 (g)(4)(A)) to an employee benefit plan or to a
15 participant or beneficiary of an employee ben-
16 efit plan,

17 “(B) the sale, acquisition, or holding of se-
18 curities or other property (including any exten-
19 sion of credit associated with the sale, acquisi-
20 tion, or holding of securities or other property)
21 pursuant to such investment advice, and

22 “(C) the direct or indirect receipt of fees
23 or other compensation by the fiduciary adviser
24 or an affiliate thereof (or any employee, agent,
25 or registered representative of the fiduciary ad-

1 viser or affiliate) in connection with the provi-
2 sion of such investment advice.”.

3 (2) REQUIREMENTS.—Section 408 of such Act
4 is amended by adding at the end the following new
5 subsection:

6 “(g)(1) The requirements of this subsection are met
7 in connection with the provision of advice referred to in
8 section 3(21)(A)(ii), provided to an employee benefit plan
9 or a participant or beneficiary of an employee benefit plan
10 by a fiduciary adviser with respect to such plan, in connec-
11 tion with any sale or acquisition of a security or other
12 property for purposes of investment of amounts held by
13 such plan, if—

14 “(A) in the case of the initial provision of such
15 advice with regard to a security or other property by
16 such fiduciary adviser to such plan, participant, or
17 beneficiary, the fiduciary adviser provides to the re-
18 cipient of such advice, at the time of or before the
19 initial provision of such advice, a clear and con-
20 spicuous description, in writing (including by means
21 of electronic communication) of—

22 “(i) all fees or other compensation relating
23 to such advice that the fiduciary adviser or any
24 affiliate thereof is to receive (including com-
25 pensation provided by any third party) in con-

1 nection with the provision of such advice or in
2 connection with such acquisition or sale,

3 “(ii) any material affiliation or contractual
4 relationship of the fiduciary adviser or affiliates
5 thereof in such security or other property,

6 “(iii) any limitation placed on the scope of
7 the investment advice to be provided by the fi-
8 duciary adviser with respect to any such sale or
9 acquisition, and

10 “(iv) the types of services offered by the fi-
11 duciary advisor in connection with the provision
12 of investment advice by the fiduciary adviser,

13 “(B) in the case of the initial or any subsequent
14 provision of such advice to such plan, participant, or
15 beneficiary, the fiduciary adviser, throughout the 1-
16 year period following the provision of such advice,
17 maintains the information described in clauses (i)
18 through (iv) of subparagraph (A) in currently accu-
19 rate form for availability, upon request and without
20 charge, to the recipient of such advice,

21 “(C) the fiduciary adviser provides appropriate
22 disclosure, in connection with any such acquisition
23 or sale, in accordance with all applicable securities
24 laws,

1 “(D) such acquisition or sale occurs solely at
2 the discretion of the recipient of such advice,

3 “(E) the compensation received by the fiduciary
4 adviser and affiliates thereof in connection with such
5 acquisition or sale is reasonable, and

6 “(F) the terms of such acquisition or sale are
7 at least as favorable to such plan as an arm’s length
8 transaction would be.

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

20 “(3)(A) Subject to subparagraph (B), a plan sponsor
21 or other person who is a fiduciary shall not be treated
22 as failing to meet the requirements of this part solely by
23 reason of the provision of investment advice referred to
24 in section 3(21)(A)(ii) (or solely by reason of contracting

1 for or otherwise arranging for the provision of such invest-
2 ment advice), if—

3 “(i) such advice is provided by a fiduciary ad-
4 viser pursuant to an arrangement between such plan
5 sponsor or other fiduciary and such fiduciary adviser
6 for the provision by such fiduciary adviser of invest-
7 ment advice referred to in such section, and

8 “(ii) the terms of such arrangement require
9 compliance by the fiduciary adviser with the require-
10 ments of this subsection.

11 “(B) Nothing in subparagraph (A) shall be construed
12 to exempt a plan sponsor or other person who is a fidu-
13 ciary from any requirement of this part for the prudent
14 selection and periodic review of a fiduciary adviser with
15 whom the plan sponsor or other person enters into an ar-
16 rangement for the provision of advice referred to in section
17 3(21)(A)(ii). Such plan sponsor or other person who is a
18 fiduciary has no duty under this part to monitor the spe-
19 cific investment advice given by the fiduciary adviser to
20 any particular recipient of such advice.

21 “(C) Nothing in this part shall be construed to pre-
22 clude the use of plan assets to pay for reasonable expenses
23 in providing investment advice referred to in section
24 3(21)(A)(ii).

1 “(4) For purposes of this subsection and subsection
2 (b)(14)—

3 “(A) The term ‘fiduciary adviser’ means, with
4 respect to a plan, a person who is a fiduciary of the
5 plan by reason of the provision of investment advice
6 by such person to the plan or to a participant or
7 beneficiary and who is—

8 “(i) registered as an investment adviser
9 under the Investment Advisers Act of 1940 (15
10 U.S.C. 80b–1 et seq.) or under the laws of the
11 State in which the fiduciary maintains its prin-
12 cipal office and place of business,

13 “(ii) a bank or similar financial institution
14 referred to in subsection (b)(4),

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

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

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

22 “(vi) an employee, agent, or registered rep-
23 resentative of a person described in any of
24 clauses (i) through (v).

1 “(B) The term ‘affiliate’ means an affiliated
2 person, as defined in section 2(a)(3) of the Invest-
3 ment Company Act of 1940 (15 U.S.C. 80a-
4 2(a)(3)).

5 “(C) The term ‘registered representative’ means
6 a person described in section 3(a)(18) of the Securi-
7 ties Exchange Act of 1934 (15 U.S.C. 78c(a)(18))
8 or section 202(a)(17) of the Investment Advisers Act
9 of 1940 (15 U.S.C. 80b-2(a)(17)).”.

10 (b) AMENDMENTS TO THE INTERNAL REVENUE
11 CODE OF 1986.—

12 (1) IN GENERAL.—Subsection (d) of section
13 4975 of the Internal Revenue Code of 1986 (relating
14 to exemptions from tax on prohibited transactions)
15 is amended—

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

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

20 (C) by adding at the end the following new
21 paragraph:

22 “(16) If the requirements of subsection (f)(7)
23 are met—

24 “(A) the provision of investment advice re-
25 ferred to in subsection (e)(3)(B) provided by a

1 fiduciary adviser (as defined in subsection
2 (f)(7)(C)(i)) to a plan or to a participant or
3 beneficiary of a plan,

4 “(B) the sale, acquisition, or holding of se-
5 curities or other property (including any exten-
6 sion of credit associated with the sale, acquisi-
7 tion, or holding of securities or other property)
8 pursuant to such investment advice, and

9 “(C) the direct or indirect receipt of fees
10 or other compensation by the fiduciary adviser
11 or an affiliate thereof (or any employee, agent,
12 or registered representative of the fiduciary ad-
13 viser or affiliate) in connection with the provi-
14 sion of such investment advice.”.

15 (2) REQUIREMENTS.—Subsection (f) of such
16 section 4975 (relating to other definitions and spe-
17 cial rules) is amended by adding at the end the fol-
18 lowing new paragraph:

19 “(7) REQUIREMENTS FOR EXEMPTION FOR IN-
20 VESTMENT ADVICE PROVIDED BY FIDUCIARY ADVIS-
21 ERS.—

22 “(A) IN GENERAL.—The requirements of
23 this paragraph are met in connection with the
24 provision of advice referred to in subsection
25 (e)(3)(B), provided to a plan or a participant or

1 beneficiary of a plan by a fiduciary adviser with
2 respect to such plan, in connection with any
3 sale or acquisition of a security or other prop-
4 erty for purposes of investment of amounts held
5 by such plan, if—

6 “(i) in the case of the initial provision
7 of such advice by such fiduciary adviser to
8 such plan, participant, or beneficiary, the
9 fiduciary adviser provides to the plan, par-
10 ticipant, or beneficiary, at the time of or
11 before the initial provision of such advice,
12 a description, in writing or by means of
13 electronic communication, of—

14 “(I) all fees or other compensa-
15 tion relating to such advice that the
16 fiduciary adviser or any affiliate
17 thereof is to receive (including com-
18 pensation provided by any third
19 party) in connection with the provi-
20 sion of such advice or in connection
21 with such acquisition or sale,

22 “(II) any material affiliation or
23 contractual relationship of the fidu-
24 ciary adviser or affiliates thereof in
25 such security or other property,

1 “(III) any limitation placed on
2 the scope of the investment advice to
3 be provided by the fiduciary adviser
4 with respect to any such sale or acqui-
5 sition, and

6 “(IV) the types of services of-
7 fered by the fiduciary advisor in con-
8 nection with the provision of invest-
9 ment advice by the fiduciary adviser,

10 “(ii) in the case of the initial or any
11 subsequent provision of such advice to such
12 plan, participant, or beneficiary, the fidu-
13 ciary adviser, throughout the 1-year period
14 following the provision of such advice,
15 maintains the information described in
16 subclauses (I) through (IV) of clause (i) in
17 currently accurate form for availability,
18 upon request and without charge, to the
19 recipient of such advice,

20 “(iii) the fiduciary adviser provides
21 appropriate disclosure, in connection with
22 any such acquisition or sale, in accordance
23 with all applicable securities laws,

1 “(iv) such acquisition or sale occurs
2 solely at the discretion of the recipient of
3 such advice,

4 “(v) the compensation received by the
5 fiduciary adviser and affiliates thereof in
6 connection with such acquisition or sale is
7 reasonable, and

8 “(vi) the terms of such acquisition or
9 sale are at least as favorable to such plan
10 as an arm’s length transaction would be.

11 “(B) MAINTENANCE OF RECORDS.—A fi-
12 duciary adviser referred to in subparagraph (A)
13 who has provided advice referred to in such
14 subparagraph shall, for a period of not less
15 than 6 years after the provision of such advice,
16 maintain any records necessary for determining
17 whether the requirements of the preceding pro-
18 visions of this subsection and of subsection
19 (d)(16) have been met. A prohibited transaction
20 described in subsection (c)(1) shall not be con-
21 sidered to have occurred solely because the
22 records are lost or destroyed prior to the end of
23 the 6-year period due to circumstances beyond
24 the control of the fiduciary adviser.

1 “(C) DEFINITIONS.—For purposes of this
2 paragraph and subsection (d)(16)—

3 “(i) FIDUCIARY ADVISER.—The term
4 ‘fiduciary adviser’ means, with respect to a
5 plan, a person who is a fiduciary of the
6 plan by reason of the provision of invest-
7 ment advice by such person to the plan or
8 to a participant or beneficiary and who
9 is—

10 “(I) registered as an investment
11 adviser under the Investment Advisers
12 Act of 1940 (15 U.S.C. 80b–1 et seq.)
13 or under the laws of the State in
14 which the fiduciary maintains its prin-
15 cipal office and place of business,

16 “(II) a bank or similar financial
17 institution referred to in subsection
18 (d)(4),

19 “(III) an insurance company
20 qualified to do business under the
21 laws of a State,

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

1 “(V) an affiliate of a person de-
2 scribed in any of subclauses (I)
3 through (IV), or

4 “(VI) an employee, agent, or reg-
5 istered representative of a person de-
6 scribed in any of subclauses (I)
7 through (V).

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

12 “(iii) REGISTERED REPRESENTA-
13 TIVE.—The term ‘registered representa-
14 tive’ means a person described in section
15 3(a)(18) of the Securities Exchange Act of
16 1934 (15 U.S.C. 78c(a)(18)) or section
17 202(a)(17) of the Investment Advisers Act
18 of 1940 (15 U.S.C. 80b–2(a)(17)).”.

19 **SEC. 3. EFFECTIVE DATE.**

20 The amendments made by this Act shall apply with
21 respect to advice referred to in section 3(21)(A)(ii) of the
22 Employee Retirement Income Security Act of 1974 or sec-
23 tion 4975(e)(3)(B) of the Internal Revenue Code of 1986
24 provided on or after January 1, 2001.

○