To amend the Securities Exchange Act of 1934 to establish standards of conduct for brokers and dealers that are in the best interest of their retail customers.

IN THE HOUSE OF REPRESENTATIVES

SEPTEMBER 27, 2017

Mrs. Wagner (for herself, Mr. Barr, Mr. Messer, Mr. Trott, Mr. Posey, Mr. Williams, Mr. Budd, Mr. Hollingsworth, and Mr. Kustoff of Tennessee) introduced the following bill; which was referred to the Committee on Financial Services, and in addition to the Committees on Ways and Means, and Education and the Workforce, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

A BILL

To amend the Securities Exchange Act of 1934 to establish standards of conduct for brokers and dealers that are in the best interest of their retail customers.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the “Protecting Advice for Small Savers Act of 2017” or the “PASS Act of 2017”.

SEC. 2. REPEAL OF DEPARTMENT OF LABOR FIDUCIARY RULE.

The final rule of the Department of Labor titled “Definition of the Term ‘Fiduciary’ Conflict of Interest Rule—Retirement Investment Advice” and related prohibited transaction exemptions published April 8, 2016 (81 Fed. Reg. 20946), shall have no force or effect.

SEC. 3. STANDARDS OF CONDUCT FOR BROKERS AND DEALERS.

(a) Standard of Conduct for Brokers and Dealers When Making Recommendations to Retail Customers.—

(1) In general.—The second subsection (k) of section 15 of the Securities Exchange Act of 1934 (15 U.S.C. 78o(k)) (relating to standards of conduct) is amended to read as follows:

“(k) Standard of Conduct for Recommendations to Retail Customers.—

“(1) In general.—The standard of conduct for a broker or dealer (or registered representative) when providing recommendations to a retail customer is as follows:

“(A) Recommendation to retail customer.—When a broker or dealer (or registered representative) makes a recommendation to a retail customer, the recommendation shall
be in the retail customer’s best interest at the time it is made by—

“(i) reflecting reasonable diligence;

and

“(ii) reflecting the reasonable care, skill, and prudence that a broker or dealer (or registered representative) would exercise based on the customer’s investment profile.

“(B) Disclosure to retail customer.—

“(i) In general.—Before a broker or dealer (or registered representative) executes a transaction for the first time for each retail customer based on a recommendation to such retail customer, such broker or dealer (or registered representative) shall disclose prior to the point of sale to such customer, in a clear and concise manner—

“(I) the type and scope of services the broker or dealer (or registered representative) provides;

“(II) the standard of conduct that applies to the relationship;
“(III) the types of compensation the broker or dealer (or registered representative) receives; and

“(IV) any material conflict of interest.

“(ii) CONTENT OF DISCLOSURE.—The Commission may issue regulations determining the content of the disclosure required in clause (i). Such regulations may provide for a disclosure of fees received by the broker or dealer, whether from the retail customer or a third party, prior to the execution of the transaction.

“(C) MATERIAL CONFLICT OF INTEREST.—A broker or dealer (or registered representative) shall avoid, disclose, or otherwise reasonably manage any material conflict of interest with a retail customer.

“(2) NONVIOLATION OF STANDARD OF CONDUCT.—The following is not, by itself, a violation of the standard of conduct described in paragraph (1):

“(A) The receipt of compensation, including transaction-based compensation, by a broker or dealer (or registered representative)
or any affiliate of such broker or dealer (or registered representative).

“(B) The recommendation by a broker or dealer (or registered representative) to a retail customer of principal transactions (including cross transactions), or the recommendation of affiliated, unaffiliated, or proprietary products or services, or a limited range of products or services.

“(3) NO REQUIREMENT TO RECOMMEND LEAST EXPENSIVE PRODUCT.—Nothing in this subsection shall require a broker or dealer (or registered representative) to recommend the least expensive security or investment strategy (however quantified) or to analyze all possible securities, other products, or investment strategies before making a recommendation.

“(4) DEFINITIONS.—In this subsection:

“(A) COMPENSATION.—The term ‘compensation’ includes commissions or sales charges, or other fees or variable compensation, for or related to the sale of securities or for the servicing of customer accounts, whether paid by the retail customer or received from a third party.
“(B) Customer’s Investment Profile.—The term ‘customer’s investment profile’ has the meaning of such term as described in Rule 2111 of the Financial Industry Regulatory Authority as of the date of the enactment of this subsection.

“(C) Institutional Account.—The term ‘institutional account’ has the same meaning given such term in Rule 4512 of the Financial Industry Regulatory Authority as of the date of the enactment of this subsection.

“(D) Material Conflict of Interest.—The term ‘material conflict of interest’ means a financial interest of a broker or dealer (or registered representative) that a reasonable person would expect to affect the impartiality of a recommendation.

“(E) Reasonable Diligence.—The term ‘reasonable diligence’ has the meaning of such term as described in Rule 2111 of the Financial Industry Regulatory Authority as of the date of the enactment of this subsection.

“(F) Recommendation.—The term ‘recommendation’ means either of the following recommendations (under the meaning ascribed to
such term in Rule 2111 of the Financial Industry Regulatory Authority) for which the broker or dealer (or registered representative) making the recommendation receives or will receive compensation:

“(i) A non-discretionary recommendation to buy, hold, or sell securities, or to follow an investment strategy involving securities, for taxable or non-taxable accounts.

“(ii) A non-discretionary recommendation to rollover or transfer assets in an employer-sponsored retirement plan to an individual retirement account.

“(G) RETAIL CUSTOMER.—The term ‘retail customer’ means a natural person or legal entity, or the legal representative of such natural person or legal entity, in each case other than an institutional account, who—

“(i) receives a recommendation from a broker or dealer (or registered representative); and

“(ii) implements such recommendation with such broker or dealer primarily
for personal, family, retirement, or household purposes.

“(5) **Superseession.**—The provisions of this subsection shall supersede and preempt State law, other than a State law that regulates insurance products that are not securities, insofar as they may now or hereafter relate to a broker or dealer, or registered representative of a broker or dealer.

“(6) **Fiduciary Status under ERISA, the Internal Revenue Code, the Investment Advisers Act of 1940, or other Fiduciary Regimes.**—The fact that a person may owe, or may in fact comply with, the standard of conduct under this subsection shall not mean or create any presumption that such person is a ‘fiduciary’ under the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1001 et seq.), section 4975 of the Internal Revenue Code of 1986, the Investment Advisers Act of 1940 (15 U.S.C. 80b et seq.), or any other Federal, State, or local statutory or regulatory fiduciary regime.”.

(2) **Application.**—The amendment made by paragraph (1) shall apply to brokers and dealers (or registered representative) on the date that is 18 months after the date of the enactment of this Act.
(b) Rulemaking Authority.—Section 913 of the Dodd-Frank Wall Street Reform and Consumer Protection Act is amended to read as follows:

"SEC. 913. OBLIGATIONS OF BROKERS AND DEALERS AND OTHER PERSONS AND ENTITIES.

“(a) Rulemaking.—

“(1) Rulemaking by the Commission.—The Commission may issue regulations as the Commission determines is necessary to facilitate compliance by brokers and dealers (including their registered representative) with the obligations of such brokers and dealers (and their registered representative) under the second subsection (k) of section 15 of the Securities Exchange Act of 1934 only if such rule-making does not impose any obligation related to standard of care on a broker or dealer (or its registered representative) that is in addition to, duplicative of, or inconsistent with, the obligations set forth in such subsection.

“(2) Rulemaking by the Secretary of Labor and the Secretary of the Treasury.—After the date of the enactment of the PASS Act of 2017, the Secretary of Labor and the Secretary of the Treasury shall not promulgate any regulation under the Employee Retirement Income Security Act
of 1974 (29 U.S.C. 1001 et seq.) or section 4975 of
the Internal Revenue Code of 1986, respectively, de-
fining the circumstances under which a person is
considered a fiduciary that would impose any obliga-
tion on a broker or dealer (or its registered rep-
resentative) or on a life insurer fulfilling the term
‘insurance company’ as defined in section 3(a)(2) of
the Securities Act of 1933 (or its agents or distribu-
tors) that is in addition to, duplicative of, or incon-
sistent with, the obligations set forth in such sub-
section (k) of section 15 of the Securities Exchange

“(b) Exemption Available to Certain Persons
With Respect to Manufacture or Sale of Annu-
ities.—

“(1) Exemption.—With respect to the manu-
facture or sale of annuities within paragraphs (2) or
(8) of section 3(a) of the Securities Act of 1933 (15
U.S.C. 77c(a)) or section 989J of the Dodd-Frank
Wall Street Reform and Consumer Protection Act
(15 U.S.C. 77c note), a person regulated by a State
insurance regulator may rely on the exemptions in
section 408(b)(21) of the Employee Retirement In-
and section 4975(d)(24) of the Internal Revenue
only if—

“(A) such person adopts and implements practices on a nationwide basis for the sale of annuity contracts that meet or exceed the minimum requirements set forth in the second subsection (k) of section 15 of the Securities Exchange Act of 1934 (15 U.S.C. 78o) and such person is subject to regulation or examination by a State insurance regulator for purposes of assessing market conduct; or

“(B) such person complies with a standard substantially similar to such subsection (k) and is regulated by a State insurance regulator with respect to annuities within paragraphs (2) or (8) of section 3(a) of the Securities Act of 1933 (15 U.S.C. 77c(a)) or section 989J of the Dodd-Frank Wall Street Reform and Consumer Protection Act (15 U.S.C. 77c note).

“(2) COORDINATION AND COOPERATION.—

Upon the request of any State insurance regulator, the Commission or the Financial Industry Regulatory Authority shall provide such reasonable assistance to the requesting Authority as needed in con-
nection with the coordination or implementation of this section.

“(3) **Definition of State Insurance Regulator.**—As used in this subsection, the term ‘State insurance regulator’ means the principal insurance regulatory authority of a State, the District of Columbia, any territory of the United States, Puerto Rico, Guam, American Samoa, the Trust Territory of the Pacific Islands, the Virgin Islands, and the Northern Mariana Islands.

“(c) **Additional Exemptions.**—A person who complies with a standard substantially similar to the second subsection (k) of section 15 of the Securities Exchange Act of 1934 (15 U.S.C. 78o) may rely on the exemptions in section 408(b)(21) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1108(b)(21)) and section 4975(d)(24) of the Internal Revenue Code of 1986 (as added by the PASS Act of 2017) only if such person is—

“(1) registered as an investment adviser under the Investment Advisers Act of 1940 (15 U.S.C. 80b–1 et seq.) or under the laws of the State in which the person maintains its principal office and place of business; or

“(2) a bank or similar financial institution supervised by the United States or a State, or a sav-
ings association (as defined in section 3(b)(1) of the Federal Deposit Insurance Act (12 U.S.C. 1813(b)(1))).”.

(c) Exemption From Prohibited Transactions for Brokers and Dealers, and Other Persons and Entities, When Making Recommendations to Retail Customers.—

(1) Section 408(b) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1108(b)) is amended by adding at the end the following:

“(21) Any transaction involving a recommendation made by a broker or dealer (including its registered representative), or other persons or entities, that is subject to the requirements of the second subsection (k) of section 15 of the Securities Exchange Act of 1934 (15 U.S.C. 78o(k)).”.

(2) Section 4975(d) of the Internal Revenue Code of 1986 is amended by adding at the end the following:

“(24) any transaction involving a recommendation made by a broker or dealer (including its registered representatives), or other persons or entities, that is subject to the requirements of the second subsection (k) of section 15 of the Securities Exchange Act of 1934 (15 U.S.C. 78o(k)).”.
(d) **Repeal of Certain Provisions.**—The following provisions are hereby repealed:


(2) Subsections (g), (h), and (i) of section 211 of the Investment Advisers Act of 1940 (15 U.S.C. 80b–11).