

114TH CONGRESS
2D SESSION

S. _____

To amend the nondiscrimination provisions of the Internal Revenue Code of 1986 to protect older, longer service participants.

IN THE SENATE OF THE UNITED STATES

Mr. CARDIN (for himself and Mr. PORTMAN) introduced the following bill; which was read twice and referred to the Committee on

A BILL

To amend the nondiscrimination provisions of the Internal Revenue Code of 1986 to protect older, longer service participants.

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 Preservation Act of 2016”.

1 **SEC. 2. MODIFICATION OF NONDISCRIMINATION RULES TO**
2 **PROTECT OLDER, LONGER SERVICE PARTICI-**
3 **PANTS.**

4 (a) IN GENERAL.—Section 401 of the Internal Rev-
5 enue Code of 1986 is amended—

6 (1) by redesignating subsection (o) as sub-
7 section (p), and

8 (2) by inserting after subsection (n) the fol-
9 lowing new subsection:

10 “(o) SPECIAL RULES FOR APPLYING NON-
11 DISCRIMINATION RULES TO PROTECT OLDER, LONGER
12 SERVICE AND GRANDFATHERED PARTICIPANTS.—

13 “(1) TESTING OF DEFINED BENEFIT PLANS
14 WITH CLOSED CLASSES OF PARTICIPANTS.—

15 “(A) BENEFITS, RIGHTS, OR FEATURES
16 PROVIDED TO CLOSED CLASSES.—A defined
17 benefit plan which provides benefits, rights, or
18 features to a closed class of participants shall
19 not fail to satisfy the requirements of sub-
20 section (a)(4) by reason of the composition of
21 such closed class or the benefits, rights, or fea-
22 tures provided to such closed class, if—

23 “(i) for the plan year as of which the
24 class closes and the 2 succeeding plan
25 years, such benefits, rights, and features
26 satisfy the requirements of subsection

1 (a)(4) (without regard to this subpara-
2 graph but taking into account the rules of
3 subparagraph (I)),

4 “(ii) after the date as of which the
5 class was closed, any plan amendment
6 which modifies the closed class or the ben-
7 efits, rights, and features provided to such
8 closed class does not discriminate signifi-
9 cantly in favor of highly compensated em-
10 ployees, and

11 “(iii) the class was closed before Sep-
12 tember 21, 2016, or the plan is described
13 in subparagraph (C).

14 “(B) AGGREGATE TESTING WITH DEFINED
15 CONTRIBUTION PLANS PERMITTED ON A BENE-
16 FITS BASIS.—

17 “(i) IN GENERAL.—For purposes of
18 determining compliance with subsection
19 (a)(4) and section 410(b), a defined benefit
20 plan described in clause (iii) may be aggre-
21 gated and tested on a benefits basis with
22 1 or more defined contribution plans, in-
23 cluding with the portion of 1 or more de-
24 fined contribution plans which—

1 “(I) provides matching contribu-
2 tions (as defined in subsection
3 (m)(4)(A)),

4 “(II) provides annuity contracts
5 described in section 403(b) which are
6 purchased with matching contribu-
7 tions or nonelective contributions, or

8 “(III) consists of an employee
9 stock ownership plan (within the
10 meaning of section 4975(e)(7)) or a
11 tax credit employee stock ownership
12 plan (within the meaning of section
13 409(a)).

14 “(ii) SPECIAL RULES FOR MATCHING
15 CONTRIBUTIONS.—For purposes of clause
16 (i), if a defined benefit plan is aggregated
17 with a portion of a defined contribution
18 plan providing matching contributions—

19 “(I) such defined benefit plan
20 must also be aggregated with any por-
21 tion of such defined contribution plan
22 which provides elective deferrals de-
23 scribed in subparagraph (A) or (C) of
24 section 402(g)(3), and

1 “(II) such matching contribu-
2 tions shall be treated in the same
3 manner as nonelective contributions,
4 including for purposes of applying the
5 rules of subsection (l).

6 “(iii) PLANS DESCRIBED.—A defined
7 benefit plan is described in this clause if—

8 “(I) the plan provides benefits to
9 a closed class of participants,

10 “(II) for the plan year as of
11 which the class closes and the 2 suc-
12 ceeding plan years, the plan satisfies
13 the requirements of section 410(b)
14 and subsection (a)(4) (without regard
15 to this subparagraph but taking into
16 account the rules of subparagraph
17 (I)),

18 “(III) after the date as of which
19 the class was closed, any plan amend-
20 ment which modifies the closed class
21 or the benefits provided to such closed
22 class does not discriminate signifi-
23 cantly in favor of highly compensated
24 employees, and

1 “(IV) the class was closed before
2 September 21, 2016, or the plan is
3 described in subparagraph (C).

4 “(C) PLANS DESCRIBED.—A plan is de-
5 scribed in this subparagraph if, taking into ac-
6 count any predecessor plan—

7 “(i) such plan has been in effect for
8 at least 5 years as of the date the class is
9 closed, and

10 “(ii) during the 5-year period pre-
11 ceding the date the class is closed, there
12 has not been a substantial increase in the
13 coverage or value of the benefits, rights, or
14 features described in subparagraph (A) or
15 in the coverage or benefits under the plan
16 described in subparagraph (B)(iii) (which-
17 ever is applicable).

18 “(D) DETERMINATION OF SUBSTANTIAL
19 INCREASE FOR BENEFITS, RIGHTS, AND FEA-
20 TURES.—In applying subparagraph (C)(ii) for
21 purposes of subparagraph (A)(iii), a plan shall
22 be treated as having had a substantial increase
23 in coverage or value of the benefits, rights, or
24 features described in subparagraph (A) during

1 the applicable 5-year period only if, during such
2 period—

3 “(i) the number of participants cov-
4 ered by such benefits, rights, or features
5 on the date such period ends is more than
6 50 percent greater than the number of
7 such participants on the first day of the
8 plan year in which such period began, or

9 “(ii) such benefits, rights, and fea-
10 tures have been modified by 1 or more
11 plan amendments in such a way that, as of
12 the date the class is closed, the value of
13 such benefits, rights, and features to the
14 closed class as a whole is substantially
15 greater than the value as of the first day
16 of such 5-year period, solely as a result of
17 such amendments.

18 “(E) DETERMINATION OF SUBSTANTIAL
19 INCREASE FOR AGGREGATE TESTING ON BENE-
20 FITS BASIS.—In applying subparagraph (C)(ii)
21 for purposes of subparagraph (B)(iii)(IV), a
22 plan shall be treated as having had a substan-
23 tial increase in coverage or benefits during the
24 applicable 5-year period only if, during such pe-
25 riod—

1 “(i) the number of participants bene-
2 fitting under the plan on the date such pe-
3 riod ends is more than 50 percent greater
4 than the number of such participants on
5 the first day of the plan year in which such
6 period began, or

7 “(ii) the average benefit provided to
8 such participants on the date such period
9 ends is more than 50 percent greater than
10 the average benefit provided on the first
11 day of the plan year in which such period
12 began.

13 “(F) CERTAIN EMPLOYEES DIS-
14 REGARDED.—For purposes of subparagraphs
15 (D) and (E), any increase in coverage or value
16 or in coverage or benefits, whichever is applica-
17 ble, which is attributable to such coverage and
18 value or coverage and benefits provided to em-
19 ployees—

20 “(i) who became participants as a re-
21 sult of a merger, acquisition, or similar
22 event which occurred during the 7-year pe-
23 riod preceding the date the class is closed,
24 or

1 “(ii) who became participants by rea-
2 son of a merger of the plan with another
3 plan which had been in effect for at least
4 5 years as of the date of the merger,
5 shall be disregarded, except that clause (ii)
6 shall apply for purposes of subparagraph (D)
7 only if, under the merger, the benefits, rights,
8 or features under 1 plan are conformed to the
9 benefits, rights, or features of the other plan
10 prospectively.

11 “(G) RULES RELATING TO AVERAGE BEN-
12 EFIT.—For purposes of subparagraph (E)—

13 “(i) the average benefit provided to
14 participants under the plan will be treated
15 as having remained the same between the
16 2 dates described in subparagraph (E)(ii)
17 if the benefit formula applicable to such
18 participants has not changed between such
19 dates, and

20 “(ii) if the benefit formula applicable
21 to 1 or more participants under the plan
22 has changed between such 2 dates, then
23 the average benefit under the plan shall be
24 considered to have increased by more than
25 50 percent only if—

1 “(I) the total amount determined
2 under section 430(b)(1)(A)(i) for all
3 participants benefiting under the plan
4 for the plan year in which the 5-year
5 period described in subparagraph (E)
6 ends, exceeds

7 “(II) the total amount deter-
8 mined under section 430(b)(1)(A)(i)
9 for all such participants for such plan
10 year, by using the benefit formula in
11 effect for each such participant for
12 the first plan year in such 5-year pe-
13 riod,

14 by more than 50 percent. In the case of a
15 CSEC plan (as defined in section 414(y)),
16 the normal cost of the plan (as determined
17 under section 433(j)(1)(B)) shall be used
18 in lieu of the amount determined under
19 section 430(b)(1)(A)(i).

20 “(H) TREATMENT AS SINGLE PLAN.—For
21 purposes of subparagraphs (E) and (G), a plan
22 described in section 413(c) shall be treated as
23 a single plan rather than as separate plans
24 maintained by each participating employer.

1 “(I) SPECIAL RULES.—For purposes of
2 subparagraphs (A)(i) and (B)(iii)(II), the fol-
3 lowing rules shall apply:

4 “(i) In applying section 410(b)(6)(C),
5 the closing of the class of participants shall
6 not be treated as a significant change in
7 coverage under section 410(b)(6)(C)(i)(II).

8 “(ii) 2 or more plans shall not fail to
9 be eligible to be aggregated and treated as
10 a single plan solely by reason of having dif-
11 ferent plan years.

12 “(iii) Changes in the employee popu-
13 lation shall be disregarded to the extent at-
14 tributable to individuals who become em-
15 ployees or cease to be employees, after the
16 date the class is closed, by reason of a
17 merger, acquisition, divestiture, or similar
18 event.

19 “(iv) Aggregation and all other testing
20 methodologies otherwise applicable under
21 subsection (a)(4) and section 410(b) may
22 be taken into account.

23 The rule of clause (ii) shall also apply for pur-
24 poses of determining whether plans to which
25 subparagraph (B)(i) applies may be aggregated

1 and treated as 1 plan for purposes of deter-
2 mining whether such plans meet the require-
3 ments of subsection (a)(4) and section 410(b).

4 “(J) SPUN-OFF PLANS.—For purposes of
5 this paragraph, if a portion of a defined benefit
6 plan described in subparagraph (A) or (B)(iii)
7 is spun off to another employer and the spun-
8 off plan continues to satisfy the requirements
9 of—

10 “(i) subparagraph (A)(i) or
11 (B)(iii)(II), whichever is applicable, if the
12 original plan was still within the 3-year pe-
13 riod described in such subparagraph at the
14 time of the spin off, and

15 “(ii) subparagraph (A)(ii) or
16 (B)(iii)(III), whichever is applicable,
17 the treatment under subparagraph (A) or (B)
18 of the spun-off plan shall continue with respect
19 to such other employer.

20 “(2) TESTING OF DEFINED CONTRIBUTION
21 PLANS.—

22 “(A) TESTING ON A BENEFITS BASIS.—A
23 defined contribution plan shall be permitted to
24 be tested on a benefits basis if—

1 “(i) such defined contribution plan
2 provides make-whole contributions to a
3 closed class of participants whose accruals
4 under a defined benefit plan have been re-
5 duced or eliminated,

6 “(ii) for the plan year of the defined
7 contribution plan as of which the class eli-
8 gible to receive such make-whole contribu-
9 tions closes and the 2 succeeding plan
10 years, such closed class of participants sat-
11 isfies the requirements of section
12 410(b)(2)(A)(i) (determined by applying
13 the rules of paragraph (1)(I)),

14 “(iii) after the date as of which the
15 class was closed, any plan amendment to
16 the defined contribution plan which modi-
17 fies the closed class or the allocations, ben-
18 efits, rights, and features provided to such
19 closed class does not discriminate signifi-
20 cantly in favor of highly compensated em-
21 ployees, and

22 “(iv) the class was closed before Sep-
23 tember 21, 2016, or the defined benefit
24 plan under clause (i) is described in para-

1 graph (1)(C) (as applied for purposes of
2 paragraph (1)(B)(iii)(IV)).

3 “(B) AGGREGATION WITH PLANS INCLUD-
4 ING MATCHING CONTRIBUTIONS.—

5 “(i) IN GENERAL.—With respect to 1
6 or more defined contribution plans de-
7 scribed in subparagraph (A), for purposes
8 of determining compliance with subsection
9 (a)(4) and section 410(b), the portion of
10 such plans which provides make-whole con-
11 tributions or other nonelective contribu-
12 tions may be aggregated and tested on a
13 benefits basis with the portion of 1 or
14 more other defined contribution plans
15 which—

16 “(I) provides matching contribu-
17 tions (as defined in subsection
18 (m)(4)(A)),

19 “(II) provides annuity contracts
20 described in section 403(b) which are
21 purchased with matching contribu-
22 tions or nonelective contributions, or

23 “(III) consists of an employee
24 stock ownership plan (within the
25 meaning of section 4975(e)(7)) or a

1 tax credit employee stock ownership
2 plan (within the meaning of section
3 409(a)).

4 “(ii) SPECIAL RULES FOR MATCHING
5 CONTRIBUTIONS.—Rules similar to the
6 rules of paragraph (1)(B)(ii) shall apply
7 for purposes of clause (i).

8 “(C) SPECIAL RULES FOR TESTING DE-
9 FINED CONTRIBUTION PLAN FEATURES PRO-
10 VIDING MATCHING CONTRIBUTIONS TO CERTAIN
11 OLDER, LONGER SERVICE PARTICIPANTS.—In
12 the case of a defined contribution plan which
13 provides benefits, rights, or features to a closed
14 class of participants whose accruals under a de-
15 fined benefit plan have been reduced or elimi-
16 nated, the plan shall not fail to satisfy the re-
17 quirements of subsection (a)(4) solely by reason
18 of the composition of the closed class or the
19 benefits, rights, or features provided to such
20 closed class if the defined contribution plan and
21 defined benefit plan otherwise meet the require-
22 ments of subparagraph (A) but for the fact that
23 the make-whole contributions under the defined
24 contribution plan are made in whole or in part
25 through matching contributions.

1 “(D) SPUN-OFF PLANS.—For purposes of
2 this paragraph, if a portion of a defined con-
3 tribution plan described in subparagraph (A) or
4 (C) is spun off to another employer, the treat-
5 ment under subparagraph (A) or (C) of the
6 spun-off plan shall continue with respect to the
7 other employer if such plan continues to comply
8 with the requirements of clauses (ii) (if the
9 original plan was still within the 3-year period
10 described in such clause at the time of the spin
11 off) and (iii) of subparagraph (A), as deter-
12 mined for purposes of subparagraph (A) or (C),
13 whichever is applicable.

14 “(3) DEFINITIONS.—For purposes of this sub-
15 section—

16 “(A) MAKE-WHOLE CONTRIBUTIONS.—Ex-
17 cept as otherwise provided in paragraph (2)(C),
18 the term ‘make-whole contributions’ means non-
19 elective allocations for each employee in the
20 class which are reasonably calculated, in a con-
21 sistent manner, to replace some or all of the re-
22 tirement benefits which the employee would
23 have received under the defined benefit plan
24 and any other plan or qualified cash or deferred
25 arrangement under subsection (k)(2) if no

1 change had been made to such defined benefit
2 plan and such other plan or arrangement. For
3 purposes of the preceding sentence, consistency
4 shall not be required with respect to employees
5 who were subject to different benefit formulas
6 under the defined benefit plan.

7 “(B) REFERENCES TO CLOSED CLASS OF
8 PARTICIPANTS.—References to a closed class of
9 participants and similar references to a closed
10 class shall include arrangements under which 1
11 or more classes of participants are closed, ex-
12 cept that 1 or more classes of participants
13 closed on different dates shall not be aggre-
14 gated for purposes of determining the date any
15 such class was closed.

16 “(C) HIGHLY COMPENSATED EMPLOYEE.—
17 The term ‘highly compensated employee’ has
18 the meaning given such term in section
19 414(q).”.

20 (b) PARTICIPATION REQUIREMENTS.—Paragraph
21 (26) of section 401(a) of the Internal Revenue Code of
22 1986 is amended by adding at the end the following new
23 subparagraph:

24 “(I) PROTECTED PARTICIPANTS.—

1 “(i) IN GENERAL.—A plan shall be
2 deemed to satisfy the requirements of sub-
3 paragraph (A) if—

4 “(I) the plan is amended—

5 “(aa) to cease all benefit ac-
6 cruals, or

7 “(bb) to provide future ben-
8 efit accruals only to a closed
9 class of participants,

10 “(II) the plan satisfies subpara-
11 graph (A) (without regard to this sub-
12 paragraph) as of the effective date of
13 the amendment, and

14 “(III) the amendment was adopt-
15 ed before September 21, 2016, or the
16 plan is described in clause (ii).

17 “(ii) PLANS DESCRIBED.—A plan is
18 described in this clause if the plan would
19 be described in subsection (o)(1)(C), as ap-
20 plied for purposes of subsection
21 (o)(1)(B)(iii)(IV) and by treating the effec-
22 tive date of the amendment as the date the
23 class was closed for purposes of subsection
24 (o)(1)(C).

1 “(iii) SPECIAL RULES.—For purposes
2 of clause (i)(II), in applying section
3 410(b)(6)(C), the amendments described in
4 clause (i) shall not be treated as a signifi-
5 cant change in coverage under section
6 410(b)(6)(C)(i)(II).

7 “(iv) SPUN-OFF PLANS.—For pur-
8 poses of this subparagraph, if a portion of
9 a plan described in clause (i) is spun off to
10 another employer, the treatment under
11 clause (i) of the spun-off plan shall con-
12 tinue with respect to the other employer.”.

13 (c) EFFECTIVE DATE.—

14 (1) IN GENERAL.—Except as provided in para-
15 graph (2), the amendments made by this section
16 shall take effect on the date of the enactment of this
17 Act, without regard to whether any plan modifica-
18 tions referred to in such amendments are adopted or
19 effective before, on, or after such date of enactment.

20 (2) SPECIAL RULES.—

21 (A) ELECTION OF EARLIER APPLICA-
22 TION.—At the election of the plan sponsor, the
23 amendments made by this section shall apply to
24 plan years beginning after December 31, 2013.

1 (B) CLOSED CLASSES OF PARTICIPANTS.—
2 For purposes of paragraphs (1)(A)(iii),
3 (1)(B)(iii)(IV), and (2)(A)(iv) of section 401(o)
4 of the Internal Revenue Code of 1986 (as added
5 by this section), a closed class of participants
6 shall be treated as being closed before Sep-
7 tember 21, 2016, if the plan sponsor’s intention
8 to create such closed class is reflected in formal
9 written documents and communicated to par-
10 ticipants before such date.

11 (C) CERTAIN POST-ENACTMENT PLAN
12 AMENDMENTS.—A plan shall not be treated as
13 failing to be eligible for the application of sec-
14 tion 401(o)(1)(A), 401(o)(1)(B)(iii), or
15 401(a)(26) of such Code (as added by this sec-
16 tion) to such plan solely because in the case
17 of—

18 (i) such section 401(o)(1)(A), the plan
19 was amended before the date of the enact-
20 ment of this Act to eliminate 1 or more
21 benefits, rights, or features, and is further
22 amended after such date of enactment to
23 provide such previously eliminated benefits,
24 rights, or features to a closed class of par-
25 ticipants, or

1 (ii) such section 401(o)(1)(B)(iii) or
2 section 401(a)(26), the plan was amended
3 before the date of the enactment of this
4 Act to cease all benefit accruals, and is
5 further amended after such date of enact-
6 ment to provide benefit accruals to a closed
7 class of participants.

8 Any such section shall only apply if the plan
9 otherwise meets the requirements of such sec-
10 tion and in applying such section, the date the
11 class of participants is closed shall be the effec-
12 tive date of the later amendment.