AMENDMENT IN THE NATURE OF A SUBSTITUTE
TO H.R. 1988
OFFERED BY MR. ANDREWS OF NEW JERSEY

Strike all after the enacting clause and insert the following:

1 SECTION 1. SHORT TITLE.
2 This Act may be cited as the “Conflicted Investment
3 Advice Prohibition Act of 2009”.

4 SEC. 2. FINDINGS.
5 The Congress finds as follows:
6 (1) The market downturn of 2008 had a dev-
7 astating effect on the retirement security income of
8 millions of American workers.
9 (2) According to the Congressional Budget Of-
10 fice, $2 trillion of Americans’ retirement savings was
11 wiped out over a 15-month period starting in 2008.
12 (3) According to Congressional Budget Office
13 estimates, the value of pension funds and retirement
14 accounts dropped by roughly $1 trillion last year.
15 (4) Individual average losses of participants in
16 401(k) plans ranged from 7.2 percent to 11.2 per-
17 cent in the first nine months of 2008, according to
an Employee Benefit Research Institute analysis of 2.2 million retirements account participants.

(5) During the first nine months of 2008, stocks were down, with the S&P 500 index losing more than 19 percent. With over two-thirds of the assets in 401(k)-style defined contribution plans invested in equities, either directly or through mutual funds, participants are exposed to increased risk and lack meaningful access to independent investment advise to help them better plan for their retirement.

(6) Currently, 401(k) plan account holders have access to a self-interested or conflicted investment adviser.

(7) In 2007, the Government Accountability Office concluded that conflicts of interest can have an adverse affect on defined benefit and defined contribution plans.

SEC. 3. INDEPENDENT INVESTMENT ADVISERS FOR INDIVIDUAL ACCOUNT PLANS.

(a) IN GENERAL.—Section 3 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002) is amended by adding at the end the following new paragraph:

“(43) INDEPENDENT INVESTMENT ADVISER.—
“(A) IN GENERAL.—The term ‘independent investment adviser’ means, with respect to an individual account plan that permits a participant or beneficiary to direct the investment of assets in their individual account, a person who—

“(i) is a fiduciary of the plan by reason of the provision of investment advice referred to in section 3(21)(A)(ii) by the person to the plan or a participant or beneficiary of the plan (irrespective of the manner in which such advice is provided or the extent to which such advice is based on a computer model), and

“(ii) meets the requirements of either subparagraph (B) or (C).

“(B) REQUIREMENTS APPLICABLE TO INVESTMENT ADVISER.—An investment adviser meets the requirements of this subparagraph, if—

“(i) such adviser is—

“(I) 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 adviser maintains its principal office and place of business,

“(II) a bank or similar financial institution referred to in section 408(b)(4) or a savings association (as defined in section 3(b)(1) of the Federal Deposit Insurance Act (12 U.S.C. 1813(b)(1))), but only if the investment advice referred to in section 3(21)(A)(ii) which is provided by such bank or institution is provided through a trust department of the bank or similar financial institution or savings association which is subject to periodic examination and review by Federal or State banking authorities, or

“(III) any other person, but only if every individual providing the investment advice referred to in section 3(21)(A)(ii) on behalf of such person (or on behalf of any affiliate thereof) is a registered representative,

“(ii) such adviser is not a plan investment provider,
“(iii) the fees or other compensation received, directly or indirectly, by such adviser (and any affiliate thereof) with respect to the provision of investment advice to any individual account plan or the participants or beneficiaries of such a plan either—

“(I) are not received from any person or persons (or anyone affiliated with such persons) that market, sell, manage or provide investments in which plan assets of any individual account plan are invested, or

“(II) do not vary depending on the basis of any investment option selected, and are calculated pursuant to one or more of the following bases—

“(aa) a flat-dollar basis,

“(bb) a flat percentage of total plan assets basis,

“(cc) a flat or sliding-scale percentage of the assets in a participant’s or beneficiary’s account basis, or
“(dd) a per-participant or per-beneficiary account basis,

and

“(iv) such adviser provides the investment advice pursuant to a written arrangement with the individual account plan that—

“(I) provides that the investment adviser is a fiduciary of the plan with respect to the provision of the advice,

“(II) requires that the advice be provided only by registered representatives of the investment adviser or an affiliate thereof,

“(III) discloses, before a reasonable period prior to entering into such arrangement, whether the investment adviser or any affiliate thereof has any material financial, referral, or other relationship or arrangement with a money manager, broker, other client of the investment adviser or any affiliate thereof, other service provider to the plan, or any other entity that creates or may create a conflict of in-
terest for the investment adviser in performing services pursuant to the arrangement with the plan and, if so, includes a description of such relationship or arrangement,

“(IV) includes a representation by the investment adviser that, before the arrangement was entered into (or extended or renewed), the investment adviser provided to the plan fiduciary that has authority to cause the employee benefit plan to enter into (or extend or renew) the arrangement a written statement disclosing all fees or other compensation that the investment adviser or any affiliate thereof anticipates to receive with respect to the advice during the first year, or other period if less than a year, of the arrangement,

“(V) provides that the investment adviser will provide to such plan fiduciary (and the participant and beneficiary receiving the advice, if applicable) a statement annually disclosing
all fees or other compensation that
the investment adviser or any affiliate
thereof has received with respect to
the advice during the prior year, and

“(VI) provides that the terms of
the arrangement required under this
clause and any information provided
under such arrangement pursuant to
subclauses (III) and (IV) will also be
furnished by the investment adviser to
the participant or beneficiary that is
the recipient of the advice.

“(C) ADVICE PROVIDED TO PARTICIPANTS
AND BENEFICIARIES UNDER AN INVESTMENT
ADVICE COMPUTER PROGRAM MEETING RE-
QUIREMENTS.—An investment adviser meets
the requirements of this subparagraph if the in-
vestment advice provided by the adviser, to the
extent that such advice is provided to partici-
pants and beneficiaries of individual account
plans, is provided under an investment advice
computer program with respect to which the re-
quirements of clauses (i) through (x) are met.

“(i) ADVISER REQUIREMENTS.—The
requirements of this clause are met if the
investment adviser providing the investment advice under the program is—

“(I) described in subclauses (I) or (II) of subparagraph (B)(i),

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

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

“(IV) an affiliate of a person described in any of subclauses (I) through (III), or

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

“(ii) COMPUTER MODEL.—The requirements of this clause are met if the investment advice provided under the invest-
ment advice computer program is provided pursuant to a computer model that—

“(I) applies generally accepted investment theories that take into account the historic returns of different asset classes over defined periods of time,

“(II) utilizes relevant information about the participant, which may include age, life expectancy, retirement age, risk tolerance, other assets or sources of income, and preferences as to certain types of investments,

“(III) utilizes prescribed objective criteria to provide asset allocation portfolios comprised of investment options available under the plan,

“(IV) operates in a manner that is not biased in favor of investments offered by the investment adviser or any person with a material affiliation or contractual relationship with the investment adviser, and

“(V) takes into account all investment options under the plan in
specifying how a participant’s account balance should be invested and is not inappropriately weighted with respect to any investment option.

“(iii) Certification.—

“(I) In general.—The requirements of this clause are met with respect to the program if an eligible investment expert certifies, prior to the utilization of the computer model and in accordance with rules prescribed by the Secretary, that the computer model meets the requirements of clause (ii).

“(II) Renewal of certifications.—If, as determined under regulations prescribed by the Secretary, there are material modifications to the computer model, the requirements of this subparagraph are met only if a certification described in subclause (I) is obtained with respect to the computer model as so modified.

“(III) Eligible investment expert.—For purposes of this
clause, the term ‘eligible investment expert’ means any person—

“(aa) which meets such requirements as the Secretary may provide, and

“(bb) does not have any material affiliation or contractual relationship with any investment adviser or a related person there-of (or any employee, agent, or registered representative of the investment adviser or related person).

“(iv) EXCLUSIVITY OF RECOMMENDATION.—The requirements of this clause are met with respect to the program, if—

“(I) the only investment advice provided under the program is the advice generated by the computer model described in clause (ii), and

“(II) any transaction pursuant to the investment advice occurs solely at the direction of the participant or beneficiary.
“(v) EXPRESS AUTHORIZATION BY SEPARATE FIDUCIARY.—The requirements of this clause are met with respect to the program if the program is expressly authorized by a plan fiduciary other than—

“(I) the person offering the program,

“(II) any person that is a plan investment provider with respect to the plan, and

“(III) any affiliate of either person described in subclause (I) or (II).

“(vi) ANNUAL AUDIT.—The requirements of this clause are met with respect to the program if an independent auditor, who has appropriate technical training or experience and proficiency and so represents in writing—

“(I) conducts an annual audit of the program other than the computer model referred to in clause (ii) which is certified pursuant to clause (iii)) for compliance with the requirements of this subparagraph, and
“(II) following completion of the annual audit, issues a written report to the fiduciary who authorized use of the program which presents its specific findings regarding compliance of the program with the requirements of this subsection.

For purposes of this clause, an auditor is considered independent if it is not related to the person offering the program to the plan and is not affiliated with any person providing investment options under the plan.

“(vii) DISCLOSURE.—The requirements of this clause are met with respect to the program, if—

“(I) the investment adviser provides to the fiduciary referred to in clause (v) and the participant or beneficiary receiving investment advice under the program with regard to any security or other property offered as an investment option, before providing the advice, a written notification
(which may consist of notification by means of electronic communication)—

“(aa) of the role of any party that has a material affiliation or contractual relationship with the investment adviser in the development of the investment advice program and in the selection of investment options available under the plan,

“(bb) of all fees or other compensation relating to the advice that the investment adviser or any affiliate thereof is to receive (including compensation provided by any third party) in connection with the provision of the advice or in connection with the sale, acquisition, or holding of the security or other property,

“(cc) of any material affiliation or contractual relationship of the investment adviser or affiliates thereof in the security or other property,
“(dd) of the manner, and under what circumstances, any information relating to the participant or beneficiary which is provided under the program will be used or disclosed,

“(ee) of the types of services provided by the investment adviser in connection with the provision of investment advice by the investment adviser, and

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

“(II) at all times during the provision of advisory services to the participant or beneficiary, the investment adviser—
“(aa) maintains the information described in subclause (I) in accurate form and in the manner described in clause (ix),

“(bb) provides, without charge, accurate information to the recipient of the advice no less frequently than annually,

“(cc) provides, without charge, accurate information to the recipient of the advice upon request of the recipient, and

“(dd) provides, without charge, accurate information to the recipient of the advice concerning any material change to the information required to be provided to the recipient of the advice at a time reasonably contemporaneous to the change in information.

“(viii) OTHER CONDITIONS.—The requirements of this clause are met with respect to the program, if—
“(I) the investment adviser provides appropriate disclosure, in connection with the sale, acquisition, or holding of the security or other property with respect to which the investment advice is provided under the program, in accordance with all applicable securities laws,

“(II) the sale, acquisition, or holding occurs solely at the direction of the recipient of the advice,

“(III) the compensation received by the investment adviser and affiliates thereof in connection with the sale, acquisition, or holding of the security or other property is reasonable, and

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

“(ix) STANDARDS FOR PRESENTATION OF INFORMATION.—
“(I) IN GENERAL.—The requirements of this clause are met with respect to the program if the notification required to be provided to participants and beneficiaries under clause (vii)(I) is written in a clear and conspicuous manner and in a manner calculated to be understood by the average plan participant and is sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of the information required to be provided in the notification.

“(II) MODEL FORM FOR DISCLOSURE OF FEES AND OTHER COMPENSATION.—The Secretary shall issue a model form for the disclosure of fees and other compensation required in clause (vii)(I)(bb) which meets the requirements of subclause (I).

“(x) MAINTENANCE FOR 6 YEARS OF EVIDENCE OF COMPLIANCE.—The requirements of this clause are met with respect
to the program if the investment adviser
who provides advice under the program
maintains, for a period of not less than 6
years after the provision of the advice, any
records necessary for determining whether
the requirements of the preceding provi-
sions of this subparagraph and of sub-
section (b)(14) have been met. A failure to
meet the requirements of this clause shall
not be considered to have occurred solely
because the records are lost or destroyed
prior to the end of the 6-year period due
to circumstances beyond the control of the
investment adviser.

“(D) DEFINITIONS.—For purposes of this
paragraph—

“(i) AFFILIATE.—The term ‘affiliate’
means, in connection with any other per-
son, any person directly or indirectly
(through one or more intermediaries) con-
trolling, controlled by, or under common
control with such other person, or any offi-
cer, director, agent, or employee of, or
partner with, such other person.
“(ii) 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–2(a)(17)) (substituting the entity for the investment adviser referred to in such section).

“(iii) Plan Investment Provider.—The term ‘plan investment provider’ means any person that creates or manages any investment in which plan assets of the individual account plan are invested and held in trust on behalf of such plan and includes any affiliate of such person. Such term does not include—

“(I) a plan sponsor (or an affiliate thereof) with respect to any investment created or managed by the plan sponsor (or affiliate), if only employee benefit plans maintained by
such plan sponsor or an affiliate thereof invest in such investments,

“(II) any person who makes the investment available to the plan, or any participant or beneficiary in the plan, as a part of a portfolio of investment options, to the extent that the investment options are created and managed by a person who is not an affiliate of the person making such portfolio available, and

“(III) any person, solely by reason of authorization by a participant or beneficiary in the plan of such person to exercise control over the assets in the participant’s or beneficiary’s account in such plan, if such assets are not invested in any investments created or managed by such person (or an affiliate thereof).

“(iv) FEES OR OTHER COMPENSATION.—The term ‘fees or other compensation’ includes money or any other thing of monetary value (for example, gifts, awards, and trips) received, or to be received, di-
rectly from the plan or plan sponsor or indi-
directly (i.e., from any source other than
the plan or the plan sponsor) by the invest-
ment adviser or any affiliate thereof in
connection with the advice to be provided
pursuant to the arrangement or because of
the investment adviser’s or any affiliate’s
position with the plan. Fees or other comp-
pensation may be expressed in terms of a
monetary amount, percentage of the plan’s
assets, or per capita charge for each par-
ticipant or beneficiary of the plan. The
manner in which compensation or fees are
expressed shall contain sufficient informa-
tion to enable the plan fiduciary to evalu-
ate the reasonableness of such compensa-
tion or fees.”.

(b) FIDUCIARY DUTIES WITH RESPECT TO INVEST-
MENT ADVICE.—

(1) IN GENERAL.—Section 404(a) of such Act
(29 U.S.C. 1104(a)) is amended by adding at the
end the following new paragraph:
“(3)(A) The fiduciary of an individual account plan
that permits a participant or beneficiary to direct the in-
vestment of assets in the individual account shall not ap-
point, contract with, or otherwise arrange for an invest-
ment adviser to provide investment advice referred to in
section 3(21)(A)(ii) to the plan or the participant or bene-
ficiary unless the investment adviser is an independent in-
vestment adviser (as defined in section 3(43)).

“(B) The independent investment adviser providing
investment advice to a plan or to a participant or benefi-
ciary shall provide, before a reasonable period prior to
the initial provision of the advice, a written notification—
“(i) of the past performance and historical
rates of return of the investment options available
with respect to the plan and comparisons of such op-
tions to relevant benchmarks, and
“(ii) that the investment adviser is acting as a
fiduciary of the plan in connection with the provision
of the advice.
“(C) Nothing in this paragraph shall be construed to
exempt a plan sponsor or other person who is a fiduciary
from any requirement of this part for the prudent selec-
tion and periodic review of an independent investment ad-
viser with whom the plan sponsor or other person enters
into an arrangement for the provision of investment advice
referred to in section 3(21)(A)(ii), except that any such
requirement shall not be construed to preclude reasonable
reliance by the plan sponsor or other person on the rep-
representation of any person that such person making the
representation meets the requirements of section
3(43)(A). The plan sponsor and any other person who is
a fiduciary (other than the independent investment ad-
viser) has no duty under this part to monitor the specific
investment advice given by the independent investment ad-
viser to any particular recipient of the advice and shall
not be liable under this title for any loss, or by reason
of any breach, which results from such specific investment
advice given by the independent investment adviser.

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

“(E)(i) This paragraph shall not apply to a fiduciary
of an individual account plan that permits a participant
or beneficiary to direct the investment of assets in their
individual account in any case in which the fiduciary ap-
points, contracts with, or otherwise arranges for an invest-
ment adviser to provide investment advice referred to in
section 3(21)(A)(ii) to the plan or the participant or bene-
ficiary if, in such case, such advice—

“(I) is provided under an arrangement that
meets the requirements set forth in Advisory Opin-
ion 2001-09A issued under ERISA Procedure 76-1 (41 Fed. Reg. 36281 (Aug. 27, 1976)), or

“(II) is provided under an arrangement that meets the requirements of any Advisory Opinion issued under ERISA Procedure 76-1 or any exemption issued by the Secretary under section 408(a), as determined under the law in effect immediately prior to the enactment of the Pension Protection Act of 2006.

“(ii) The Secretary shall prescribe rules requiring such reporting and disclosure as the Secretary considers appropriate with respect to investment advice arrangements permitted by reason of this subparagraph.”.

(2) REPORT ON PRIOR ADVISORY OPINIONS AND EXCEPTIONS.—The Secretary of Labor shall, as soon as practicable after the date of the enactment of this Act—

(A) review each Advisory Opinion and exception described in section 404(a)(3)(E)(i) of the Employee Retirement Income Security Act of 1974 (as added by this paragraph (1)) to determine the extent to which such Advisory Opinion or exception fails to adequately serve the interests of participants and beneficiaries
and to be adequately protective of the rights of participants and beneficiaries, and
(B) submit a report to each House of the Congress describing the extent of any such failure by any such Advisory Opinion or exception.
(c) CONFORMING AMENDMENTS.—Section 408 of such Act (29 U.S.C. 1108) is amended—
(1) by striking subsection (g); and
(2) by striking subsection (b)(14)(B) and inserting the following:
“(B) the investment advice is provided by an independent investment adviser (as defined in section 3(43)).”.
(d) REGULATORY AUTHORITY.—The Secretary of Labor may issue regulations providing that an investment adviser can still be considered as meeting the requirements of section 3(43)(B) of the Employee Retirement Income Security Act of 1974 despite the receipt of a de minimus amount of compensation that fails to meet the requirements of section 3(43)(B)(iii) of such Act due to the existence of previously existing contracts.
(e) EFFECTIVE DATE.—The amendments made by this section shall apply to plan years beginning after one year after the date of the enactment of this Act.