111TH CONGRESS
1ST SESSION

H. R. ______

To amend title I of the Employee Retirement Income Security Act of 1974 to provide for independent investment advice for participants and beneficiaries under individual account plans.

IN THE HOUSE OF REPRESENTATIVES

Mr. ANDREWS introduced the following bill; which was referred to the Committee on _______________________

A BILL

To amend title I of the Employee Retirement Income Security Act of 1974 to provide for independent investment advice for participants and beneficiaries under individual account plans.

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 “Conflicted Investment Advice Prohibition Act of 2009”.

SEC. 2. FINDINGS.

The Congress finds as follows:
(1) The market downturn of 2008 had a devastating effect on the retirement security income of millions of American workers.

(2) According to the Congressional Budget Office, $2 trillion of Americans’ retirement savings was wiped out over a 15-month period starting in 2008.

(3) According to Congressional Budget Office estimates, the value of pension funds and retirement accounts dropped by roughly $1 trillion last year.

(4) Individual average losses of participants in 401(k) plans ranged from 7.2 percent to 11.2 percent 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.
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 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 and who 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 (and any affiliate thereof) does not provide or manage any investments in which plan assets of any individual account plan is invested,

“(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 se-
lected, 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, or

“(cc) a per-participant 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 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 cre-
ate a conflict of interest for the in-
vestment adviser in performing serv-
ices pursuant to the arrangement with
the plan and, if so, includes a descrip-
tion of such relationship or arrange-
ment,

“(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 em-
ployee benefit plan to enter into (or
extend or renew) the arrangement a
written statement disclosing all fees or
other compensation that the invest-
ment 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, and

“(V) provides that the investment
adviser will provide to such plan fidu-
(C) Advice provided to participants and beneficiaries under an investment advice program meeting requirements.—

An investment adviser meets the requirements of this subparagraph if the investment advice provided by the adviser, to the extent that such advice is provided to participants and beneficiaries of individual account plans, is provided under an investment advice program with respect to which the requirements 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 investment advice 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 bear any material affiliation or contractual relationship with any investment adviser or a related person thereof (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 providing investment options under 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 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 pro-
vides to the participant or beneficiary
receiving investment advice under the
program with regard to any security
or other property offered as an invest-
ment option, before providing the ad-
vice, a written notification (which may
consist of notification by means of
electronic communication)—

“(aa) of the role of any
party that has a material affili-
ation or contractual relationship
with the investment adviser in
the development of the invest-
ment 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 pro-
vision 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 re-
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 provisions of this subparagraph and of subsection (b)(14) have been met. A transaction prohibited under section 406 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’
of an investment adviser means any person
directly or indirectly (through one or more
intermediaries) controlling, controlled by,
or under common control with the invest-
ment adviser, or any officer, director,
agent, or employee of, or partner with, the
investment adviser.

“(ii) REGISTERED REPRESENTA-
tive.—The term ‘registered representa-
tive’ of another entity means a person de-
scribed in section 3(a)(18) of the Securi-
78c(a)(18)) (substituting the entity for the
broker or dealer referred to in such sec-
tion) or a person described in section
202(a)(17) of the Investment Advisers Act
of 1940 (15 U.S.C. 80b-2(a)(17)) (sub-
stituting the entity for the investment ad-
viser referred to in such section).
“(iii) 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, directly from the plan or plan sponsor or indirectly (i.e., from any source other than the plan or the plan sponsor) by the investment 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 compensation may be expressed in terms of a monetary amount, percentage of the plan’s assets, or per capita charge for each participant or beneficiary of the plan. The manner in which compensation or fees are expressed shall contain sufficient information to enable the plan fiduciary to evaluate the reasonableness of such compensation or fees.”.

(b) Fiduciary Duties With Respect to Investment Advice.—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 investment of assets in the individual account shall not appoint, contract with, or otherwise arrange for an investment adviser to provide investment advice referred to in section 3(21)(A)(ii) to the plan or the participant or beneficiary unless the investment adviser is an independent investment adviser (as defined in section 3(43)(A)).

“(B) The independent investment adviser providing investment advice to a plan or to a participant or beneficiary shall provide, before the initial provision of the advice, a written notification (which may consist of notification by means of electronic communication)—

“(i) of the past performance and historical rates of return of the investment options available with respect to the plan and comparisons of such options 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 adviser 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). The plan sponsor or other person who is a fiduciary has no duty under this part to monitor the specific investment advice given by the independent investment adviser to any particular recipient of the advice.

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

(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.