Advisors often receive financial rewards for recommending certain investments over others, but H.R. 2269 does not require advisors to clearly disclose their incentives for making a particular recommendation. Advisors can bury disclosures in a mound of paperwork that the average investor will not read or understand. Advisors who will make money on giving advice should clearly and continually warn workers of any conflicts of interest.

Proponents of the bill say, well, the advice is free. This is not true. Each investment that the worker makes will pay from 1 to 1.5 percent of the money invested to the broker. There is big money at stake involved in the advice given and the advice taken. The bill allows investment companies to make billions of dollars every year.

Advisors entangled with payoffs, depending upon the advice given to the worker, should be absolutely forbidden in this access provision.

The bill does not provide any remedy or penalties for tainted advice. I urge this House to reject this legislation.

Mr. BOEHNER. Mr. Speaker, I am pleased to yield 2 minutes to the gentlewoman from Illinois (Mrs. BIGGERT), a member of our committee.

Mrs. BIGGERT. Mr. Speaker, I thank the gentleman for yielding time to me.

Mr. Speaker, when a person has a cold, he can go to his local drugstore and choose among dozens of different cold remedies. When he is not sure which medicine is appropriate, there is a pharmacist available who can provide expert advice and help him to make the best selection.

Yet, when it comes to 401(k) plans in the workplace, Congress, in effect, has gagged the pharmacist. Employers pay good money to provide an excellent benefit to their employees, 401(k) plans run by professionals, yet our 27-year-old law, ERISA, effectively silences those investment professionals, denying employees a major part of the benefit their employer has intended for them.

Now, more than ever, Americans investing their retirement income in 401(k) plans need access to critical investment advice that will help them achieve their financial goals. The Retirement Security Advice Act of 2001 updates our laws so workers can have access to high-quality professional investment advice. These advisors will be required to fully disclose their fees and any potential conflicts. This legislation also establishes important safeguards to ensure that investors' goals are met.

Mr. Speaker, let us stop gagging the pharmacist or silencing the investment advisor. Let us make it easier for the 42 million Americans who participate in 401(k) plans to choose among investments. Let us pass H.R. 2269, which will increase employee participation and enable more workers to live out their American dreams.

I urge my colleagues to support the Retirement Security Advice Act of 2001.

Mr. BOEHNER. Mr. Speaker, I yield 2 minutes to the gentleman from New Jersey (Mr. HOLT), a member of our committee.

Mr. HOLT. Mr. Speaker, I thank the gentleman for yielding time to me.

Mr. Speaker, I rise in support of the Retirement Security Advice Act of 2001. We need to be sure that the law allows families to have a wide range of investment advice as they plan for their retirement. As we do so, we need to ensure that there are adequate protections for these workers.

Under the bill, there are protections. The advisors are subject to a fiduciary duty and will be personally liable for failure to act solely in the interest of the worker. Under the bill, the Labor Department is authorized to seek both criminal and civil penalties if an advisor breaches that responsibility.

The language also contains provisions to ensure that there is full disclosure in plain language to the workers of fees and conflicts of interest. These disclosures and fiduciary protections are significantly stronger than the average investor has today.

Now, the bill is not perfect. I believe that we may strengthen the bill by adding provisions to make sure that workers know where they can get a financial second opinion. I want to express my appreciation to the gentleman from Ohio (Chairman BOEHNER) for representing my views and agreeing to take these into consideration in conference. I want to continue to work with him and the gentleman from California (Chairman THOMAS) on this subject as the bill moves through the legislative process.

This bill gives workers important new options they do not now have. That is why we want to do it. It modernizes the law to reflect the realities of the real world, the way people actually invest and plan their retirements today. This is a step forward and worthy of support.

Mr. ANDREWS. Mr. Speaker, I am happy to yield 3 minutes to the gentlewoman from California (Ms. WOOLSEY), a real authority on human resources and employee relations.

(Ms. WOOLSEY asked and was given permission to revise and extend her remarks.)

Ms. WOOLSEY. Mr. Speaker, I thank the gentleman for yielding time to me.

Mr. Speaker, H.R. 2269 is a prime example of how a good idea can be turned into a bad bill. It is a good idea to make investment advice available to employees at their workplace. Of course it is a good idea. But allowing self-interested advisors, those who could benefit from the advice they give, in the workplace is not a good idea; it is an extremely bad idea. But that is exactly what H.R. 2269 does.

Please remember why ERISA was enacted in the first place. It was enacted to protect workers from abuses related to their benefits. So ERISA now prohibits investment advisors from coming to a workplace and providing employees with investment advice if there is any reason to think that the advisor might benefit from recommending one investment or another.

ERISA was enacted to protect workers from abuses related to their benefits, and this protection has worked for over 25 years. But with H.R. 2269, we are saying that it is okay to have investment sales folks at the workplace under the guise of the employer's endorsement providing investment advice to their employees.

Think about this: We have employees with 401(k) plans, many of whom have little or no knowledge of high finance. The employer brings an investment advisor to the workplace. That has to appear as if the employer endorses whatever this advisor is selling. Members cannot tell me that most employees will not be strongly inclined to accept the investment advice given them under those circumstances.

If the advice is poor or, heaven forbid, the advice is downright wrong, or if it is some kind of scam in the short run, there is no protection for that employee.

There is hope, however. Fortunately, we have a substitute to H.R. 2269. That is the Andrews substitute. The Andrews substitute keeps the good idea of making investment advice available to employees in the workplace, but it builds on the protections in current law that employees need and must have and must be able to depend on.

The Andrews substitute is a win-win for employees, and I urge my colleagues to vote against H.R. 2269 unless the substitute is included.

PARLIAMENTARY INQUIRY

Mr. BOEHNER. Parliamentary inquiry, Mr. Speaker.

The SPEAKER pro tempore (Mr. LAHOOD). The gentleman will state it.

Mr. BOEHNER. Mr. Speaker, we just have the remaining time we expect to use. Who has the right to close, or what would the order of closing be?

The SPEAKER pro tempore. The Committee on Ways and Means will finish their time first, and then the gentleman from Ohio (Mr. BOEHNER) has the right to close.

Mr. BOEHNER. I thank the Chair.

Mr. MCDERMOTT. Mr. Speaker, I yield myself such time as I may consume.

Mr. Speaker, sometimes when I come out on this floor I think I have entered the French theater of the absurd.

We are having a bill brought here to us about financial advice. I remember, when this year started, that we had $5.6 trillion in surplus, and all the discussion was about what should we do with it: Shall we pay off the debt? Shall we save it for Social Security? Shall we save it for Medicare?

The decision was, oh, the first thing we should do is give about $2 trillion of it away.

□ 1230

We are going to do that with a tax break. We said it is 130 trillion, but it

turned out to be more like two, and so we go.

We have now spent all the Social Security money. That is the advice we are giving to the American people, and then we say, we want to turn you over to the hands of these nice salesmen, they will take care of you. We have taken away their medical security. We have not even put the money that they contributed into the Medicare program. If we were under ERISA, we would be before the courts for the way we are handling the investments of our constituents.

We got so wild around here with our tax cuts and all the problems after they figured it all out, and said, well, we need an economic stimulus bill. So we come out here with a nonsense bill, give it another $161 billion off to major companies in this country. This is our advice to America. This is what we think and then this bill is the follow-on.

That nonsense of the stimulus package has run into the ditch over in the Senate. I never thought I would count on another body to save us from ourselves. I know they are going to save us from this bill ultimately. This really looks to me like, the other bill, sort of a fund-raising bill, and when I stand here and think about it and listen to all this talk, I cannot help thinking about my grandfather.

He was an Irish immigrant, went to the second grade. He could read the newspaper a little bit and he could sign his name. That was the basis of his education. He was a hod carrier down in central Illinois, and in the 1920s, there was a scam in this country. A guy named Samuel Insull was selling energy stock or utility stock all over the country, and the whole rage in this little town where my grandparents lived, Streator, Illinois, everybody was buying Insull stock, you have got to buy Insull stock, you are going to get rich, real rich real quick. Everybody in the neighborhood was borrowing and putting their money into the Insull business.

My grandmother came to my grandfather and said, well, Jim, I think we should buy some of that Insull stock, and he said to her, if this is such a good idea, why are those boys from Chicago down here in the cornfield selling it to us? He did not put any of his money in. He said we have got $500 in the bank. I tell you what, Jane, you can take your 250 and put it in the stock, but I am keeping mine in the bank.

She followed his advice, and they had their money when Insull went belly up in 1929, and everybody in Streator, Illinois, lost every blooming dime they had put in it.

Investment advice to ordinary people is a big issue. If you are a hod carrier or you are a cab driver or you are doing any one of a number of jobs in this country and you are suddenly faced with this question of what should I do with my money for when I get old and somebody comes to you who has a conflict of interest about it, what do you do at that point? You say to your employer, give me another advisor.

The bill does not allow that. It does not say you can give me this guy with the vested interest, but I would also like one who is just sort of on my side maybe, and maybe I can get back at him if he gives me bad advice. We say to the workers of this country, we are going to take this away from you at the very time when we are acting financially as irresponsible as we could be.

We are the Congress. If it was run by the House of Representatives, we would be borrowing money right now to give back to the companies of this country $25 billion they paid back in 1986. That is the kind of financial advice we are giving this country. We are saying, well, we are going to stimulate things, we are going to give money back to IBM and Ford and all those companies while they are laying people off. We give $15 billion to the airlines because we do not want them to get in trouble, right, and all those investment people are out there selling those stocks, right, keep buying that American Airlines and United Airlines and all those stocks.

So we give them $15 billion. We are going to stabilize it. We do not give one single penny to the workers for their health insurance or for their unemployment, and they lay off 100,000 people in the airline industry, and Boeing lays off 30,000 because when the airline industry goes down, so does Boeing go down and everybody else; but they have still got their 401(k), and we say, well, we are going to give you an advisor to tell you what to do with your money, and that is business.

I say this is bad legislation. It looks to me like a fund-raising piece, not a real serious effort to take care of people's investments. If the amendments that were offered here were accepted, all of us would be in favor of it. We think people ought to have advice, but it has got to be advice that is not conflicted, that does not have its own pocket interest, and I think that we will have a substitute offered by the gentleman from New Jersey (Mr. ANDREWS) and the gentleman from New York (Mr. RANGEL) which will fix this bill, but I urge people to vote against the bill.

Mr. Speaker, I yield back the balance of my time.

Mr. SAM JOHNSON of Texas. Mr. Speaker, I yield myself such time as I may consume.

There is a broad consensus that workers need access to expert investment advice. I did not know we were going to talk about tax relief and other subjects, but there are only 16 percent of 401(k) participants that have access to investment advice through their retirement plans, and only 17 percent have access through outside advisors. Seventy-five percent of full-time employees surveyed said they would take advantage of individualized advice service if their employers offered it, and we have been hearing about banks.

Banks are regularly examined. Examinations occur frequently. Bank tellers cannot provide investment advice. Bank trust departments have a long history of trust investment, and they have been managing trusts for over two centuries. Banks manage over $2 trillion in employment benefit trusts, and banks have strong capital, which provides added protection for funds being invested. I doubt there is a bank in this country that would allow their trust department to make bad advice because the bank would be out of business.

Recent market volatility tells us investment decisions must be based on solid and experienced judgment. Yet, as of today, we continue to deny our employees the same tools that corporations and unions are allowed to use in making sound investment decisions for their defined benefit plans. This bill changes that. Simply put, this measure ends investment ignorance and provides workers full control over their investment decisions. It repeals an outdated 1974 law that denies millions of Americans access to investment advice that could help them make the most of their retirement savings.

No longer will wealthy individuals be the only ones to enjoy the luxury of being able to afford their own professional investment advice. Now low and middle income Americans will have the same choice.

Since individuals bear the risk of stock market volatility in their 401(k) accounts, they are the ones who must have advice on how to better diversify their portfolios so they are financially prepared for retirement.

H.R. 2269 will permit employers to offer investment advice as an employee benefit. This legislation does not require any employer to contract with an investment advisor and no employee is under any obligation to accept or follow any advice.

This bill is good policy for today's workers and tomorrow's retirees. That is why the bill has been endorsed by the Department of Labor, the Department of Treasury and the Department of Commerce.

In testifying before my subcommittee, Department of Labor Assistant Secretary Ann Combs praised the bill and said, ''We believe the bill creates a strong protective framework for the provision of investment advice to participants. Both the Committee on Ways and Means and the Committee on Education and the Workforce have worked hard to take a balanced approach for increasing worker access to advice while including safeguards to protect employees' interests.

I urge Members to join all of us in supporting H.R. 2269. Without it, millions of Americans will be in the dark in protecting and growing their retirement nest egg.

Mr. Speaker, I yield back the balance of my time.

Mr. ANDREWS. Mr. Speaker, I yield myself such time as I may consume.

Mr. Speaker, I urge my colleagues to vote against this bill. People need investment advice, that is true, but it is also true they are getting it from the independent sources that are out there in increasingly high numbers.

Just 2 years ago only 17 percent of employers were offering investment advice options; today it is up to 31 percent, nearly double, and it is growing. When someone goes for investment advice and the advice is being given by a conflicted advisor, that conflict ought to be disclosed at the time of the decision. That does not happen under this bill.

The advisor ought to be completely qualified and accountable. That does not happen under this bill. The person receiving the advice ought to know that he or she has other independent choices. That does not happen under this bill. And if the advice that is given is bad and hurts the investor, there ought to be adequate remedies to make that investor whole. That does not happen under this bill.

For all of these reasons, and the others stated by my colleagues, I would urge a vote against the underlying legislation.

Mr. Speaker, I yield back the balance of my time.

Mr. BOEHNER. Mr. Speaker, I yield myself the balance of my time.

Mr. Speaker, I think all of us agree that we want to do everything possible to improve the retirement security of all American workers. And I think, based on what we have heard here today, all of the Members believe that providing investment advice for those employees who have self-directed pension accounts is vital.

In 1974, when ERISA was enacted, 95 percent of pension assets were in defined benefit programs. And no one in 1974 with the enactment of ERISA ever envisioned that we would have the number of self-directed accounts, such as 401(k) accounts, and the amount of participation and the huge shift in assets away from defined benefit plans towards defined contribution plans.

What that has done is leave us in a situation today, where millions of American workers have trillions of dollars in their retirement savings, that basically they are left to their own ability to hire an investment advisor, because under the law as written in 1974, we have so protected and insulated American workers that there is really no place they can turn for advice. And so where do they turn for advice? They turn to Bob at the coffee shop.

So what we are trying to do here in this bill today is to provide a mechanism for providing specific investment advice to employees while providing safeguards to protect their retirement security. We believe that there has to be a balance between the offering of the advice and the amount of protections.

Is there risk involved in this bill? Yes, there is. Do we think American workers are smart enough and bright enough to make these decisions? Yes, they are.

It is a completely voluntary program for employers and employees. Once the advice is given within the safeguards that will be outlined in this bill, the employee has no inhibitions about making their own decisions about how they want to allocate their assets and their needs based on their own retirements.

The problem that we have with the additional safeguards that are being proposed here is that they will so restrict the ability to get advice that we will get what we have today and that is no advice at all. Now, if our goal truly is to provide more investment advice for American workers, we have got to strike a balance, a balance that will work for employers and those who would be there to provide advice.

Now, we are hearing an awful lot of criticism about people who sell products and the fact that under this bill they would be able to give advice after they have disclosed any potential conflicts, after they have disclosed their fees, and with other protections.

Now, what they really want to do is, they want to eliminate this sector from being able to give advice. These are the most respected investment firms in the country, with the best track record of investment advice in the country, that we would want to shove out of this market and prevent these people from giving their expertise and advice to the American workers. I just do not think that that makes any sense in the marketplace we are in. And so I think if we all step back and look at where we are trying to go, I have worked with Members on both sides of the aisle trying to craft a proper set of balances.

□ 1245

And in the debate today, the gentleman from North Dakota (Mr. POMEROY) and I came to an agreement to add additional protections to this bill that I do think will protect American workers more without hindering the ability of employers or their agents to provide the kind of investment advice that American workers so sorely need and want today.

So I would ask my colleagues, as we continue to move this process along, that we continue to work together to try to find the right balance, because, as we know, the action in the House today will not be the end of the process. It is actually the beginning of the process. This bill will have to go through the Senate, and I am confident that we will be able to continue to move this in a strong bipartisan manner.

I ask all of my colleagues today to support the underlying bill and do what we can to help American workers increase their retirement security.

Mr. STARK. Mr. Speaker, I oppose H.R. 2269, the falsely named Retirement Security Advice Act of 2001, introduced by Representative BOEHNER. The bill not only neglects to provide any type of security for workers' retirement, but it actually puts worker retirement plans at greater risk for fraudulent activity.

Workers need independent financial advice, not advice plagued by self-interest. Current pension law ensures that those who manage or administer assets of a pension plan cannot engage in any transaction under the plan in which they have a financial or other conflict of interest. These rules, known as the prohibited transaction rules, are designed to ensure that the best interest of the investor is maintained. When these rules are eliminated, as H.R. 2269 calls for, the integrity of the pension system is threatened by fraud and abuse.

For example, one of our nation's premier investment companies, Prudential, in 1996, agreed to pay at least $410 million in restitution and fines to compensate investors who suffered losses to fraud as far back as 1980. Many Wall Street brokerage firms sold limited partnerships in the 1980's to customers seeking tax deductions and the potential for profit from asset appreciation. However, these investments were typically suitable only for wealthy investors because of their speculative nature. Prudential made nearly $1 billion in commissions and fees from the sale of its partnerships. In addition to the limited partnership claims, widespread securities law violations were made at various Prudential branches across the country. These practices included:

Lying about risk—Selling risky real estate and energy partnerships to pension funds, retirees and other individual investors who were told their investments were safe.

Lying about return—Publishing promotional material that misled investors about the return they could expect on their money.

Turning a blind eye to a subsidiary—Inadequately supervising the subsidiary that advertised and sold the partnerships.

Turning a blind eye to employees—Inadequately supervising employees in nine branch offices, whose fraudulent practices resulted in losses of hundreds of thousands of dollars from customers.

Churning—Trading excessively without authorization in clients' accounts to increase brokers' commissions.

The settlement affected 8 million investors in every state, the District of Columbia and Puerto Rico. Many of the investors were elderly and faced the risk of not being compensated in their lifetime.

Workers should have access to investment advice they can be certain is neither influenced by corporate profit motives or driven by a company's need to unload undesirable financial products. H.R. 2269 undermines that certainty by permitting advisors to provide plan participants with self-interested advice regarding the investment options under the plan, as well as asset allocation. Under H.R. 2269, both financially sophisticated and financially inexperienced workers would lose access to independent investment advice under their 401(k) plans. Clearly, this provides less security than employees currently receive and has the potential for fraudulent activity that would be virtually impossible to remedy under our judicial system.

The fraudulent Prudential activity illustrates the need for unbiased, independent investment advice for employees. We cannot allow

motivation and campaign contributions from the securities, banking and insurance industry to imperil the pensions of 42 million workers who participate in self-directed pension plans. It is easy to see who will benefit from this bill when organizations like Prudential and Citigroup support the bill and organizations that oppose it include AARP and the AFL–CIO.

Workers won't get the critical independent advice from the Boehner bill, but they will from the Democratic substitute bill. The Democratic substitute bill requires that if a conflict of interest exists, that the investment advisor would be required to provide additional independent advice at no additional charge to the investor. If Prudential is going to make a greater profit by advising the investor to invest in Prudential funds, then an independent advisor with no such direct profit interest, must be available to either validate Prudential's advice or provide alternative advice to give the employee a less biased opinion.

The debate is clear. The bill before us will hurt the retirement of millions of workers, but it will increase profits for investment advisors and investment companies. I urge my colleagues to vote for the Democratic substitute bill and vote no on H.R. 2269.

Mr. CARDIN. Mr. Speaker, over the past twenty years, this country has witnessed a revolution in the way American workers save for their retirement. The central feature of this revolution has been the shift from defined benefit to defined contribution plans, and, in particular, the explosion in the growth of 401(k) plans. Through employer-sponsored 401(k) plans, tens of millions of middle class Americans have entered the investment class, many of them encountering their first exposure to the workings of the stock markets.

This trend has important implications with respect to the retirement security of these workers. Under the defined benefit model, the risk and responsibility for making prudent investments rests with the employer. At the end of the day, the employer is on the hook to provide the promised benefits. Should the employer fail to meet this obligation, the federal government, through the Pension Benefit Guaranty Corporation, provides added protection to make sure those benefits will be there when workers retire.

In the 401(k) world, however, the risk and the responsibility rest with the worker. Individual investment choices and decisions can make a huge difference in terms of the size of the retirement nest egg that a worker accumulates. For many workers, this reality leads to one very basic question: "Where should I put my money?"

This bill recognizes the need to provide workers with a responsible, reliable answer to that question. I commend the gentleman from Ohio, the Chairman of the Education and the Workforce Committee, for his leadership on this issue. He has recognized that the need for retirement investment advice for America's workers is great, and deserves our thanks for bringing this issue to the fore.

The bill does two things to make it more possible for workers to get investment advice. First, it provides liability relief for employers. Currently, surveys of employers tell us that a major impediment to employers retaining investment advice firms for their employees is the concern that they, the employer, will ultimately be held responsible for the specific advice provided. The bill before the House says that if the employer exercises prudence in selecting the adviser, he or she will not be subject to liability for the advice provided. This is a good, sensible reform, and I support it.

The second issue addressed by the bill goes to the current restrictions within ERISA dealing with "prohibited transactions." ERISA contains important protections that prevent investment advisers from advising plan participants to invest in products where the adviser has a conflict of interest. It is a sensible protection, and one that should only be lifted with great care.

The bill before us does not, in my judgment, provide satisfactory protections for workers faced with investment advisers providing conflicted advice. The bill will require advisers to disclose that they are in a position to make money on the advice they are offering. That is an important provision, and the disclosure provisions were strengthened by the amendment presented by the Chairman of the Ways and Means Committee.

But disclosure of the conflict by itself is not enough. Workers need to know more than that the person sitting in front of them will make money if their advice is followed. They need to have a full range of investment options. They need to know the range of fees that are charged for different types of investments, and how those fees will affect their long-term returns.

In short, this bill does not provide any assurance or requirement that workers will have the information they need to make prudent investment decisions. On the other hand, at the end of this debate, we will have a substitute that attempts to address these problems. I certainly commend the gentleman from New Jersey for his work on this issue and for his longstanding commitment to expanding retirement savings opportunities for American workers. But I am concerned that the substitute imposes requirements that will make it unlikely that employers will take the necessary first step of providing investment advice to their workers.

Mr. Speaker, America's workers need investment advice on their retirement savings accounts. Unfortunately, today we have two choices. The Republican bill takes the position that bad advice is better than no advice, and the substitute takes the position that no advice is better than bad advice. The right answer, of course, is that what the 42 million Americans who participate in a 401(k) account need is not bad advice, or no advice, but good advice. We need to put together a bill that will give employers, workers, and the investment community the chance to get that job done.

Mr. CRANE. Mr. Speaker, I rise in strong support of the Retirement Security Advice Act of 2001. As a cosponsor of this legislation, I would like to commend Mr. JOHNSON of Texas, Chairman THOMAS, and Chairman BOEHNER for crafting common sense legislation that will help millions of hard-working Americans plan more wisely for their retirement.

Mr. Speaker, while ERISA law is quite complicated, this legislation is quite simple. It allows employers to provide their workers with access to professional investment advice as long as the investment advisers fully disclose their fees and any potential conflicts. At the same time, it establishes significant safeguards to ensure that these workers receive advice that is solely in their best interests.

Under current law, employers are discouraged from providing this service because employers may be held liable for specific advice that is provided to their employees. H.R. 2269 removes the barrier to employers contracting with advice providers and their workers by clarifying that employers are not responsible for the individual advice given by professional advisers to individual participants.

Under this legislation, investment advice may only be offered by "fiduciary advisors"—qualified entities that are already fully regulated under other federal and state laws, such as registered investment advisers, registered broker dealers, insurance companies, and banks. Existing federal and state laws that regulate individual industries will continue to apply. Moreover, employers will remain responsible under ERISA fiduciary rules for the prudent selection and periodic review of any investment advisor.

I urge my colleagues to support H.R. 2269 as amended by the rule.

Mr. BOEHNER. Mr. Speaker, I yield back the balance of my time.

The SPEAKER pro tempore (Mr. LAHOOD). All time for general debate on this bill has expired.

AMENDMENT IN THE NATURE OF A SUBSTITUTE OFFERED BY MR. ANDREWS

Mr. ANDREWS. Mr. Speaker, as the designee of the gentleman from California (Mr. GEORGE MILLER), I offer an amendment in the nature of a substitute.

The text of the amendment in the nature of a substitute is as follows:

Amendment in the nature of a substitute printed in part B of House Report 107–289 offered by Mr. ANDREWS:

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Retirement Security Advice Act of 2001".

SEC. 2. PROHIBITED TRANSACTION EXEMPTION FOR THE PROVISION OF INVESTMENT ADVICE.

(a) AMENDMENTS TO THE INTERNAL REVENUE CODE OF 1986.—

(1) IN GENERAL.—Subsection (d) of section 4975 of the Internal Revenue Code of 1986 (relating to exemptions from tax on prohibited transactions) is amended by striking "or" at the end of paragraph (14), by striking the period at the end of paragraph (15) and inserting "; or"; and by adding at the end the following new paragraph:

"(16) any transaction described in subsection (f)(7)(A) in connection with the provision of investment advice described in subsection (e)(3)(B), in any case in which—

"(A) the plan provides for individual accounts and permits a participant or beneficiary to exercise control over assets in his or her account,

"(B) the advice is qualified investment advice provided to a participant or beneficiary of the plan by a fiduciary adviser in connection with any sale, acquisition, or holding of a security or other property for purposes of investment of plan assets, and

"(C) the requirements of subsection (f)(7)(B) are met in connection with each instance of the provision of the advice.".

(2) RULES RELATING TO INVESTMENT ADVICE PROVIDED BY FIDUCIARY ADVISERS.—Subsection (f) of section 4975 of such Code (relating to other definitions and special rules) is amended by adding at the end the following new paragraph:

"(7) INVESTMENT ADVICE PROVIDED BY FIDUCIARY ADVISERS.—

''(A) ALLOWABLE TRANSACTIONS.—The transactions described in this subsection, in connection with the provision of investment advice by a fiduciary adviser, are the following:

''(i) the provision of the advice to the participant or beneficiary;

''(ii) the sale, acquisition, or holding of a security or other property (including any lending of money or other extension of credit associated with the sale, acquisition, or holding of a security or other property) pursuant to the advice; and

''(iii) the direct or indirect receipt of fees or other compensation by the fiduciary adviser or an affiliate thereof (or any employee, agent, or registered representative of the fiduciary adviser or affiliate) in connection with the provision of the advice.

''(B) REQUIREMENTS FOR EXEMPTION FROM PROHIBITED TRANSACTIONS WITH RESPECT TO PROVISION OF INVESTMENT ADVICE.—The requirements of this subparagraph are met in connection with the provision of qualified investment advice provided to a participant or beneficiary of an employee benefit plan by a fiduciary adviser with respect to the plan in connection with any sale, acquisition, or holding of a security or other property for purposes of investment of amounts held by the plan, if the requirements of the following clauses are met:

''(i) WRITTEN OR ELECTRONIC DISCLOSURES.—At a time contemporaneous with the provision of the advice in connection with the sale, acquisition, or holding of the security or other property, the fiduciary adviser shall provide to the recipient of the advice a clear and conspicuous notification, written (or by electronic means) in a manner to be reasonably understood by the average plan participant pursuant to regulations which shall be prescribed by the Secretary (including mathematical examples), of the following:

''(I) INTERESTS HELD BY THE FIDUCIARY ADVISER.—Any interest of the fiduciary adviser in, or any affiliation or contractual relationship of the fiduciary adviser (or affiliates thereof) with any third party having an interest in, the security or other property.

''(II) RELATED FEES OR COMPENSATION IN CONNECTION WITH THE PROVISION OF THE ADVICE.—All fees or other compensation relating to the advice (including fees or other compensation itemized with respect to each security or other property with respect to which the advice is provided) that the fiduciary 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.

''(III) ONGOING FEES OR COMPENSATION IN CONNECTION WITH THE SECURITY OR PROPERTY INVOLVED.—All fees or other compensation that the fiduciary adviser (or any affiliate thereof) is to receive, on an ongoing basis, in connection with any security or other property with respect to which the fiduciary adviser gives the advice.

''(IV) APPLICABLE LIMITATIONS ON SCOPE OF ADVICE.—Any limitation placed (in accordance with the requirements of this subsection) on the scope of the advice to be provided by the fiduciary adviser with respect to the sale, acquisition, or holding of the security or other property.

''(V) TYPES OF SERVICES GENERALLY OFFERED.—The types of services offered by the fiduciary adviser in connection with the provision of qualified investment advice by the fiduciary adviser.

''(VI) FIDUCIARY STATUS OF THE FIDUCIARY ADVISER.—That the fiduciary advisor is a fiduciary of the plan.

''(ii) DISCLOSURE BY FIDUCIARY ADVISER IN ACCORDANCE WITH APPLICABLE SECURITIES LAWS.—The fiduciary adviser shall provide appropriate disclosure, in connection with the sale, acquisition, or holding of the security or other property, in accordance with all applicable securities laws.

''(iii) TRANSACTION OCCURRING SOLELY AT DIRECTION OF RECIPIENT OF ADVICE.—The sale, acquisition, or holding of the security or other property shall occur solely at the direction of the recipient of the advice.

''(iv) REASONABLE COMPENSATION.—The compensation received by the fiduciary adviser and affiliates thereof in connection with the sale, acquisition, or holding of the security or other property shall be reasonable.

''(v) ARM'S LENGTH TRANSACTION.—The terms of the sale, acquisition, or holding of the security or other property shall be at least as favorable to the plan as an arm's length transaction would be.

''(C) CONTINUED AVAILABILITY OF INFORMATION FOR AT LEAST 1 YEAR.—The requirements of subparagraph (B)(i) shall be deemed not to have been met in connection with the initial or any subsequent provision of advice described in subparagraph (B) if, at any time during the 1-year period following the provision of the advice, the fiduciary adviser fails to maintain the information described in subclauses (I) through (IV) of subparagraph (B)(i) in currently accurate form or to make the information available, upon request and without charge, to the recipient of the advice.

''(D) EVIDENCE OF COMPLIANCE MAINTAINED FOR AT LEAST 6 YEARS.—A fiduciary adviser referred to in subparagraph (B) who has provided advice referred to in such subparagraph shall, for a period of not less than 6 years after the provision of the advice, maintain any records necessary for determining whether the requirements of the preceding provisions of this paragraph and of subsection (d)(16) have been met. A transaction prohibited under subsection (c)(1) 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 fiduciary adviser.

''(E) MODEL DISCLOSURE FORMS.—The Secretary shall prescribe regulations setting forth model disclosure forms to assist fiduciary advisers in complying with the disclosure requirements of under this paragraph.

''(F) ANNUAL REVIEWS BY THE SECRETARY.—The Secretary shall conduct annual reviews of randomly selected fiduciary advisers providing qualified investment advice to participants and beneficiaries. In the case of each review, the Secretary shall review the following:

''(i) COMPLIANCE BY ADVICE COMPUTER MODELS WITH REASONABLE INVESTMENT METHODOLOGIES.—The extent to which advice computer models employed by the fiduciary adviser comply with reasonable investment methodologies.

''(ii) COMPLIANCE WITH DISCLOSURE REQUIREMENTS.—The extent to which disclosures provided by the fiduciary adviser have complied with the requirements of this subsection.

''(iii) EXTENT OF VIOLATIONS.—The extent to which any violations of fiduciary duties have occurred in connection with the provision of the advice.

''(iv) EXTENT OF REPORTED COMPLAINTS.—The extent to which complaints to relevant agencies have been made in connection with the provision of the advice.

Any proprietary information obtained by the Secretary shall be treated as confidential.

''(G) DUTY OF CONFLICTED FIDUCIARY ADVISER TO PROVIDE FOR ALTERNATIVE INDEPENDENT ADVICE.—

''(i) IN GENERAL.—In connection with any qualified investment advice provided by a fiduciary adviser to a participant or beneficiary regarding any security or other property, if the fiduciary adviser—

''(I) has an interest in the security or other property, or

''(II) has an affiliation or contractual relationship with any third party that has an interest in the security or other property,

the requirements of subparagraph (B) shall be treated as not met in connection with the advice unless the fiduciary adviser has arranged, as an alternative to the advice that would otherwise be provided by the fiduciary advisor, for qualified investment advice with respect to the security or other property provided by at least one alternative investment adviser meeting the requirements of clause (ii).

''(ii) INDEPENDENCE AND QUALIFICATIONS OF ALTERNATIVE INVESTMENT ADVISER.—Any alternative investment adviser whose qualified investment advice is arranged for by a fiduciary adviser pursuant to clause (i)—

''(I) shall have no material interest in, and no material affiliation or contractual relationship with any third party having a material interest in, the security or other property with respect to which the investment adviser is providing the advice, and

''(II) shall meet the requirements of a fiduciary adviser under subparagraph (H)(ii) and (iii), except that an alternative investment adviser may not be a fiduciary of the plan other than in connection with the provision of the advice.

''(iii) SCOPE AND FEES OF ALTERNATIVE INVESTMENT ADVICE.—Any qualified investment advice provided pursuant to this subparagraph by an alternative investment adviser shall be of the same type and scope, and provided under the same terms and conditions (including no additional charge to the participant or beneficiary), as apply with respect to the qualified investment advice to be provided by the fiduciary adviser.

''(H) FIDUCIARY ADVISER DEFINED.—For purposes of this paragraph and subsection (d)(16)—

''(i) IN GENERAL.—The term 'fiduciary adviser' means, with respect to a plan, a person who—

''(I) is a fiduciary of the plan by reason of the provision of qualified investment advice by such person to a participant or beneficiary,

''(II) meets the qualifications of clause (ii), and

''(III) meets the additional requirements of clause (iii).

''(ii) QUALIFICATIONS.—A person meets the qualifications of this clause if such person—

''(I) is registered as an investment adviser under the Investment Advisers Act of 1940 (15 U.S.C. 80b–1 et seq.),

''(II) if not registered as an investment adviser under such Act by reason of section 203A(a)(1) of such Act (15 U.S.C. 80b–3a(a)(1)), is registered under the laws of the State in which the fiduciary maintains its principal office and place of business, and, at the time the fiduciary last filed the registration form most recently filed by the fiduciary with such State in order to maintain the fiduciary's registration under the laws of such State, also filed a copy of such form with the Secretary,

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

''(IV) is a bank or similar financial institution referred to in subsection (d)(4),

''(V) is an insurance company qualified to do business under the laws of a State, or

''(VI) is any other comparable qualified entity which satisfies such criteria as the Secretary determines appropriate consistent with the purpose of this subsection.

''(iii) ADDITIONAL REQUIREMENTS WITH RESPECT TO CERTAIN EMPLOYEES OR OTHER AGENTS OF CERTAIN ADVISERS.—A person meets the additional requirements of this clause if every individual who is employed (or otherwise compensated) by such person and whose scope of duties includes the provision of qualified investment advice on behalf of such person to any participant or beneficiary is—

''(I) a registered representative of such person,

''(II) an individual described in subclause (I), (II), or (III) of clause (ii), or

''(III) such other comparable qualified individual who satisfies such criteria as the Secretary determines appropriate consistent with the purpose of this subsection.

''(I) ADDITIONAL DEFINITIONS.—For purposes of this paragraph and subsection (d)(16)—

''(i) QUALIFIED INVESTMENT ADVICE.—The term 'qualified investment advice' means, in connection with a participant or beneficiary, investment advice referred to in subsection (e)(3)(B) which—

''(I) consists of an individualized recommendation to the participant or beneficiary with respect to the purchase, sale, or retention of securities or other property for the individual account of the participant or beneficiary, in accordance with generally accepted investment management principles, and

''(II) takes into account all investment options under the plan.

''(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 such 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 such entity for the investment adviser referred to in such section).''.

(3) ASSUMPTION OF LIABILITY.—Subsection (b) of section 4975 of such Code is amended—

(A) by striking ''PERSON.—In'' and inserting ''PERSON.—

''(1) IN GENERAL.—In'', and moving the text 2 ems to the right, and

(B) by adding at the end the following new paragraph:

''(2) ASSUMPTION OF LIABILITY.—If a court determines that a fiduciary advisor has breached his fiduciary responsibility as a result of a failure to meet the requirements of subparagraph (B), (C), (D), or (G) of subsection (e)(7), then, notwithstanding any other provision of this title or the Employee Retirement Income Security Act of 1974, the fiduciary advisor shall be liable for any monetary losses suffered by a participant or beneficiary as a result of such breach.''.

(b) AMENDMENTS TO THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974.—

(1) IN GENERAL.—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 new paragraph:

''(14)(A) Any transaction described in subparagraph (B) in connection with the provision of investment advice described in section 3(21)(A)(ii), in any case in which—

''(i) the plan provides for individual accounts and permits a participant or beneficiary to exercise control over assets in his or her account,

''(ii) the advice is qualified investment advice provided to a participant or beneficiary of the plan by a fiduciary adviser in connection with any sale, acquisition, or holding of a security or other property for purposes of investment of plan assets, and

''(iii) the requirements of subsection (g) are met in connection with each instance of the provision of the advice.

''(B) The transactions described in this subparagraph are the following:

''(i) the provision of the advice to the participant or beneficiary;

''(ii) the sale, acquisition, or holding of a security or other property (including any lending of money or other extension of credit associated with the sale, acquisition, or holding of a security or other property) pursuant to the advice; and

''(iii) the direct or indirect receipt of fees or other compensation by the fiduciary adviser or an affiliate thereof (or any employee, agent, or registered representative of the fiduciary adviser or affiliate) in connection with the provision of the advice.''.

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

''(g) REQUIREMENTS FOR EXEMPTION FROM PROHIBITED TRANSACTIONS WITH RESPECT TO PROVISION OF INVESTMENT ADVICE.—

''(1) IN GENERAL.—The requirements of this subsection are met in connection with the provision of qualified investment advice provided to a participant or beneficiary of an employee benefit plan by a fiduciary adviser with respect to the plan in connection with any sale, acquisition, or holding of a security or other property for purposes of investment of amounts held by the plan, if the requirements of the following subparagraphs are met:

''(A) WRITTEN DISCLOSURES.—At a time contemporaneous with the provision of the advice in connection with the sale, acquisition, or holding of the security or other property, the fiduciary adviser shall provide to the recipient of the advice a clear and conspicuous notification, written in a manner to be reasonably understood by the average plan participant pursuant to regulations which shall be prescribed by the Secretary (including mathematical examples), of the following:

''(i) INTERESTS HELD BY THE FIDUCIARY ADVISER.—Any interest of the fiduciary adviser in, or any affiliation or contractual relationship of the fiduciary adviser (or affiliates thereof) with any third party having an interest in, the security or other property.

''(ii) RELATED FEES OR COMPENSATION IN CONNECTION WITH THE PROVISION OF THE ADVICE.—All fees or other compensation relating to the advice (including fees or other compensation itemized with respect to each security or other property with respect to which the advice is provided) that the fiduciary 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.

''(iii) ONGOING FEES OR COMPENSATION IN CONNECTION WITH THE SECURITY OR PROPERTY INVOLVED.—All fees or other compensation that the fiduciary adviser (or any affiliate thereof) is to receive, on an ongoing basis, in connection with any security or other property with respect to which the fiduciary adviser gives the advice.

''(iv) APPLICABLE LIMITATIONS ON SCOPE OF ADVICE.—Any limitation placed (in accordance with the requirements of this subsection) on the scope of the advice to be provided by the fiduciary adviser with respect to the sale, acquisition, or holding of the security or other property.

''(v) TYPES OF SERVICES GENERALLY OFFERED.—The types of services offered by the fiduciary adviser in connection with the provision of qualified investment advice by the fiduciary adviser.

''(vi) FIDUCIARY STATUS OF THE FIDUCIARY ADVISER.—That the fiduciary advisor is a fiduciary of the plan.

''(B) DISCLOSURE BY FIDUCIARY ADVISER IN ACCORDANCE WITH APPLICABLE SECURITIES LAWS.—The fiduciary adviser shall provide appropriate disclosure, in connection with any the sale, acquisition, or holding of the security or other property, in accordance with all applicable securities laws.

''(C) TRANSACTION OCCURRING SOLELY AT DIRECTION OF RECIPIENT OF ADVICE.—The sale, acquisition, or holding of the security or other property shall occur solely at the direction of the recipient of the advice.

''(D) REASONABLE COMPENSATION.—The compensation received by the fiduciary adviser and affiliates thereof in connection with the sale, acquisition, or holding of the security or other property shall be reasonable.

''(E) ARM'S LENGTH TRANSACTION.—The terms of the sale, acquisition, or holding of the security or other property shall be at least as favorable to the plan as an arm's length transaction would be.

''(2) CONTINUED AVAILABILITY OF INFORMATION FOR AT LEAST 1 YEAR.—The requirements of paragraph (1)(A) shall be deemed not to have been met in connection with the initial or any subsequent provision of advice described in paragraph (1) if, at any time during the 1-year period following the provision of the advice, the fiduciary adviser fails to maintain the information described in clauses (i) through (iv) of subparagraph (A) in currently accurate form or to make the information available, upon request and without charge, to the recipient of the advice.

''(3) EVIDENCE OF COMPLIANCE MAINTAINED FOR AT LEAST 6 YEARS.—A fiduciary adviser referred to in paragraph (1) who has provided advice referred to in such paragraph shall, for a period of not less than 6 years after the provision of the advice, maintain any records necessary for determining whether the requirements of the preceding provisions of this subsection 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 fiduciary adviser.

''(4) MODEL DISCLOSURE FORMS.—The Secretary shall prescribe regulations setting forth model disclosure forms to assist fiduciary advisers in complying with the disclosure requirements of under this subsection.

''(5) EXEMPTION FOR EMPLOYERS CONTRACTING FOR QUALIFIED INVESTMENT ADVICE.—

''(A) RELIANCE ON CONTRACTUAL ARRANGEMENTS.—Subject to subparagraph (B), a plan sponsor or other person who is a fiduciary (other than a fiduciary adviser) shall not be treated as failing to meet the requirements of this part solely by reason of the provision of qualified investment advice (or solely by reason of contracting for or otherwise arranging for the provision of the investment advice), if—

''(i) the advice is provided by a fiduciary adviser pursuant to an arrangement between the plan sponsor or other fiduciary and the fiduciary adviser for the provision by the fiduciary adviser of qualified investment advice, and

''(ii) the terms of the arrangement require compliance by the fiduciary adviser with the requirements of this subsection.

''(B) CONTINUED DUTY FOR EMPLOYER TO PRUDENTLY SELECT AND REVIEW FIDUCIARY ADVISERS.—Nothing in subparagraph (A) shall be construed to exempt a plan sponsor or other person who is a fiduciary from any requirement of this part for the prudent selection and periodic review of a fiduciary adviser with whom the plan sponsor or other person enters into an arrangement for the

provision of qualified investment advice. The plan sponsor or other person who is a fiduciary shall not be liable under this part with respect to the specific qualified investment advice given by the fiduciary adviser to any particular recipient of the advice. Pursuant to regulations which shall be prescribed by the Secretary, the fiduciary adviser shall provide appropriate disclosures to the plan sponsor to enable the plan sponsor to fulfill its fiduciary responsibilities under this part. In connection with the provision of the advice by a fiduciary adviser on an ongoing basis, such regulations shall provide for such disclosures on at least an annual basis.

''(C) PLAN ASSETS MAY BE USED TO PAY REASONABLE EXPENSES.—Nothing in this part shall be construed to preclude the use of plan assets to pay for reasonable expenses in providing qualified investment advice.

''(6) ANNUAL REVIEWS BY THE SECRETARY.—The Secretary shall conduct annual reviews of randomly selected fiduciary advisers providing qualified investment advice to participants and beneficiaries. In the case of each review, the Secretary shall review the following:

''(A) COMPLIANCE BY ADVICE COMPUTER MODELS WITH GENERALLY ACCEPTED INVESTMENT MANAGEMENT PRINCIPLES.—The extent to which advice computer models employed by the fiduciary adviser comply with generally accepted investment management principles.

''(B) COMPLIANCE WITH DISCLOSURE REQUIREMENTS.—The extent to which disclosures provided by the fiduciary adviser have complied with the requirements of this subsection.

''(C) EXTENT OF VIOLATIONS.—The extent to which any violations of fiduciary duties have occurred in connection with the provision of the advice.

''(D) EXTENT OF REPORTED COMPLAINTS.—The extent to which complaints to relevant agencies have been made in connection with the provision of the advice.

Any proprietary information obtained by the Secretary shall be treated as confidential.

''(7) DUTY OF CONFLICTED FIDUCIARY ADVISER TO PROVIDE FOR ALTERNATIVE INDEPENDENT ADVICE.—

''(A) IN GENERAL.—In connection with any qualified investment advice provided by a fiduciary adviser to a participant or beneficiary regarding any security or other property, if the fiduciary adviser—

''(i) has an interest in the security or other property, or

''(ii) has an affiliation or contractual relationship with any third party that has an interest in the security or other property,

the requirements of paragraph (1) shall be treated as not met in connection with the advice unless the fiduciary adviser has arranged, as an alternative to the advice that would otherwise be provided by the fiduciary advisor, for qualified investment advice with respect to the security or other property provided by at least one alternative investment adviser meeting the requirements of subparagraph (B).

''(B) INDEPENDENCE AND QUALIFICATIONS OF ALTERNATIVE INVESTMENT ADVISER.—Any alternative investment adviser whose qualified investment advice is arranged for by a fiduciary adviser pursuant to subparagraph (A)—

''(i) shall have no material interest in, and no material affiliation or contractual relationship with any third party having a material interest in, the security or other property with respect to which the investment adviser is providing the advice, and

''(ii) shall meet the requirements of a fiduciary adviser under paragraph (7)(A), except that an alternative investment adviser may not be a fiduciary of the plan other than in connection with the provision of the advice.

''(C) SCOPE AND FEES OF ALTERNATIVE INVESTMENT ADVICE.—Any qualified investment advice provided pursuant to this paragraph by an alternative investment adviser shall be of the same type and scope, and provided under the same terms and conditions (including no additional charge to the participant or beneficiary), as apply with respect to the qualified investment advice to be provided by the fiduciary adviser.

''(8) FIDUCIARY ADVISER DEFINED.—For purposes of this subsection and subsection (b)(14)—

''(A) IN GENERAL.—The term 'fiduciary adviser' means, with respect to a plan, a person—

''(i) who is a fiduciary of the plan by reason of the provision of qualified investment advice by such person to a participant or beneficiary,

''(ii) who—

''(I) is registered as an investment adviser under the Investment Advisers Act of 1940 (15 U.S.C. 80b–1 et seq.),

''(II) if not registered as an investment adviser under such Act by reason of section 203A(a)(1) of such Act (15 U.S.C. 80b–3a(a)(1)), is registered under the laws of the State in which the fiduciary maintains its principal office and place of business, and, at the time the fiduciary last filed the registration form most recently filed by the fiduciary with such State in order to maintain the fiduciary's registration under the laws of such State, also filed a copy of such form with the Secretary,

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

''(IV) is a bank or similar financial institution referred to in section 408(b)(4),

''(V) is an insurance company qualified to do business under the laws of a State, or

''(VI) is any other comparable entity which satisfies such criteria as the Secretary determines appropriate, and

''(iii) who is an entity meeting the requirements of subparagraph (B).

''(B) ADDITIONAL REQUIREMENTS WITH RESPECT TO CERTAIN EMPLOYEES OR OTHER AGENTS OF CERTAIN ADVISERS.—The requirements of this subparagraph are met if every individual who is employed (or otherwise compensated) by a person described subparagraph (A)(ii) and whose scope of duties includes the provision of qualified investment advice on behalf of such person to any participant or beneficiary is—

''(i) a registered representative of such person,

''(ii) an individual described in subclause (I), (II), or (III) of subparagraph (A)(ii), or

''(iii) such other comparable qualified individual as may be designated in regulations of the Secretary.

''(9) ADDITIONAL DEFINITIONS.—For purposes of this subsection and subsection (b)(14)—

''(A) QUALIFIED INVESTMENT ADVICE.—The term 'qualified investment advice' means, in connection with a participant or beneficiary, investment advice referred to in section 3(21)(A)(ii) which—

''(i) consists of an individualized recommendation to the participant or beneficiary with respect to the purchase, sale, or retention of securities or other property for the individual account of the participant or beneficiary, in accordance with generally accepted investment management principles, and

''(ii) takes into account all investment options under the plan.

''(B) AFFILIATE.—The term 'affiliate' of another entity means an affiliated person of such entity (as defined in section 2(a)(3) of the Investment Company Act of 1940 (15 U.S.C. 80a–2(a)(3))).

''(C) 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 such 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 such entity for the investment adviser referred to in such section).''.

(c) ENFORCEMENT.—

(1) LIABILITY FOR BREACH.—

(A) LIABILITY IN CONNECTION WITH INDIVIDUAL ACCOUNT PLANS.—Section 409 of such Act (29 U.S.C. 1109) is amended by adding at the end the following new subsection:

''(c)(1) In any case in which the provision by a fiduciary adviser of qualified investment advice to a participant or beneficiary regarding any security or other property consists of a breach described in subsection (a), the fiduciary adviser shall be personally liable to make good to the individual account of the participant or beneficiary any losses to the individual account resulting from the breach, and to restore to the individual account any profits of the fiduciary adviser which have been made through use of assets of the individual account by—

''(A) the fiduciary adviser, or

''(B) any other party with respect to whom a material affiliation or contractual relationship of the fiduciary adviser resulted in a violation of section 408(g)(1)(A) in connection with the advice.

''(2) In the case of any action under this title by a participant or beneficiary against a fiduciary adviser for relief under this subsection in connection with the provision of any qualified investment advice—

''(A) if the participant or beneficiary shows that the fiduciary adviser had any interest in, or had any affiliation or contractual relationship with a third party having an interest in, the security or other property, there shall be a presumption (rebuttable by a preponderance of the evidence) that the fiduciary adviser failed to meet the requirements of subparagraphs (A) and (B) of section 404(a)(1) in connection with the provision of the advice, and

''(B) the dispute may be settled by arbitration, but only pursuant to terms and conditions established by agreement entered into voluntarily by both parties after the commencement of the dispute.

''(3) For purposes of this subsection, the terms 'fiduciary adviser' and 'qualified investment advice' shall have the meanings provided such terms in subparagraphs (A) and (B), respectively, of section 406(g)(7).''.

(B) LIMITATION ON EXEMPTION FROM LIABILITY.—Section 404(c) of such Act (29 U.S.C. 1104(c)) is amended—

(i) by redesignating paragraph (2) as paragraph (3) (and by adjusting the margination of such paragraph to full measure and adjusting the margination of subparagraphs (A) through (B) thereof accordingly); and

(ii) by inserting after paragraph (1) the following new paragraph:

''(2)(A) In any case in which—

''(i) a participant or beneficiary exercises control over the assets in his or her account by means of a sale, acquisition, or holding of a security or other property with regard to which qualified investment advice was provided by a fiduciary adviser, and

''(ii) any transaction in connection with the exercise of such control is not a prohibited transaction solely by reason of section 408(b)(14),

paragraph (1) shall not apply with respect to the fiduciary adviser in connection with the provision of the advice.

''(B) For purposes of this subsection, the terms 'fiduciary adviser' and 'qualified investment advice' shall have the meanings provided such terms in subparagraphs (A) and (B), respectively, of section 408(g)(7).''.

(2) ATTORNEY'S FEES.—Section 502(g) of such Act (29 U.S.C. 1132(g)) is amended—

(A) in paragraph (1), by inserting ''or (3)'' after ''paragraph (2)''; and

(B) by adding at the end the following new paragraph:

''(3) In any action under this title by the participant or beneficiary against a fiduciary adviser for relief under section 409(c) in which the plaintiff prevails, the court shall allow a reasonable attorney's fee and costs of action to the prevailing plaintiff.''.

(3) APPLICABILITY OF STATE FRAUD LAWS.—Section 514(b) of such Act (29 U.S.C. 1144(b)) is amended—

(A) by redesignating paragraph (9) as paragraph (10); and

(B) by inserting after paragraph (8) the following new paragraph:

''(9) Nothing in this title shall be construed to supersede any State action for fraud against a fiduciary adviser for any act or failure to act by the fiduciary adviser constituting a violation of section 409(c).''.

SEC. 3. EFFECTIVE DATE.

The amendments made by this Act shall apply with respect to advice referred to in section 3(21)(A)(ii) of the Employee Retirement Income Security Act of 1974 or section 4975(e)(3)(B) of the Internal Revenue Code of 1986 provided on or after January 1, 2002.

The SPEAKER pro tempore. Pursuant to House Resolution 288, the gentleman from New Jersey (Mr. ANDREWS) and a Member opposed each will control 30 minutes.

The Chair recognizes the gentleman from New Jersey (Mr. ANDREWS).

Mr. ANDREWS. Mr. Speaker, I yield myself such time as I may consume.

Mr. Speaker, this piece of legislation is about a person who is at the age of 30 or 40 in his or her life and starting to think about retirement, hopefully sooner than that, and they find they have a few thousand dollars in an account, in an IRA or a 401(k). They pick up the newspaper and they see wild fluctuations in the Dow Jones average, and they hear from some of their neighbors that they are doing great in their investments, and from others they are not doing so well; and they realize they need some help. They need some good sound advice as to what to do with this very crucial asset.

Both sides of this debate agree that the present situation is not very good; that the advice does come from people who are like Bob at the coffee shop, the friend of the gentleman from Ohio (Mr. BOEHNER), someone who is not really qualified, that people get advice through hearsay, and we think something should be done about that. The proposal the gentleman from New York (Mr. RANGEL) and myself are putting forward now, we think, is a more sensible way to address this need.

We think that when this individual goes to get advice as to what to do with his or her money, that there ought to be some choices of the advisor. We do not rule out the prospect of an advisor who has an interest in a fund that he or she is advising about. We do say, though, that if such advice is going to be given, if the person giving the advice has a vested interest in our hypothetical investor putting his or her money in one fund as opposed to another, if there is a higher commission or some other gain that derives to that advisor, we say the following:

Each time a decision is made by the investor as to what to do, the advisor has to tell the investor in plain language, in plain math, in an understandable way what the nature of the advisor's interest is. The advisor has to say to the investor, You know, if you put your money in fund A instead of fund B, I make a little more money than I otherwise would, and you ought to know that before you make the decision.

Our substitute says that the person giving that advice must be qualified, and not most of the time but all of the time. The person giving the advice must have proper education. The person giving the advice must be part of a regulated industry, whether he or she is a broker or some other form of advisor. And if the person gives advice that is in violation of law, that is a violation of what we call the fiduciary duty, then the person must lose their license, and not most of the time, but all of the time, to make sure that the advisor is properly qualified.

Our substitute says that there must be some mechanism so that when our investor goes to ask for advice, and the advice may be given by a conflicted advisor, by someone having an interest in one or more of the funds, the employee should also be told that there is at least one other choice; that if they do not want to take advice from this person who has an interest in some of the funds that he or she is advising about, there is somewhere else that individual can go, to a person who has no interest whatsoever in the advice that he or she is giving. At least one other option on the menu so that the investor knows that there is somewhere else to go.

Finally, this substitute differs from the underlying bill because the substitute provides that if the advisor gives advice that is so bad that it is a violation of the law, so bad that it subverts and violates the fiduciary duty of that advisor, the investor can be made whole. He or she can get their pension money back, get back any lost profits or gains they would have had while they were waiting to get it back, and can get the cost of recovering those funds back in attorneys' fees as well. The investor does not have to wait for some bureaucracy in Washington to take action on his or her behalf; they do not have to hope that they can get represented in a case that is not worth very much money to an attorney, but worth an awful lot to them. They have the ability to be made whole.

The proposal that the gentleman from New York and I are putting forward provides for more advice for people who need it, but it does so in a way that is careful and it does so in a way that does not subvert and discard the 27-year history of the ERISA statute that has provided safer pensions and sounder investments for our citizens.

Mr. Speaker, I urge Members of both sides to consider this proposal, and I urge a ''yes'' vote on it.

Mr. Speaker, I reserve the balance of my time.

The SPEAKER pro tempore. Does the gentleman from Ohio (Mr. BOEHNER) claim the time in opposition?

Mr. BOEHNER. Mr. Speaker, I am opposed to the amendment, and I do so claim the time.

The SPEAKER pro tempore. The gentleman from Ohio is recognized for 30 minutes.

Mr. BOEHNER. Mr. Speaker, I yield myself such time as I may consume.

Mr. Speaker, I first want to thank the gentleman from New Jersey (Mr. ANDREWS) and the gentleman from New York (Mr. RANGEL) for the serious and hard work they have brought to our debate today. The entire process has been marked by bipartisan respect, and I am glad to see that is continuing today. I look forward to working with both my friends as this process continues.

Nonetheless, I must oppose their amendment because it falls into the trap of so overprotecting people from one set of dangers that, instead, we push them into another. If the Andrews-Rangel amendment were adopted, we could say that workers would never receive misleading or self-serving advice, but it is almost certain that they would not receive any advice at all. Despite my good friends' intentions, I believe the substitute would practically guarantee that no employers would provide investment advice at all to their workers.

First, the substitute unnecessarily intrudes upon an extensive and effective regulatory regime that protects investors who are paying for advice with their own money outside of an ERISA plan. In addition to this regulatory scheme, which includes banking, securities, insurance laws, regulations, and agencies at the Federal and State levels, the substitute requires Department of Labor qualitative oversight on computer models of advice, the substantive qualifications of financial advisors, and the adequacy of disclosure forms. Now, this not only creates overlapping and confusing jurisdiction between the Department of Labor and the Securities and Exchange Commission, it adds additional and unnecessary regulations to existing securities laws.

H.R. 2269, the underlying bill, seeks to reduce and streamline regulatory burdens on employers and financial advisors rather than to create additional rules and regulations. The new and unnecessary burdens created by the substitute will only drive up the cost of investment advice, discourage competition, and, in the end, mean that fewer numbers of American workers will ever get real investment advice.

The substitute also requires that if investment advice is offered, two investment advisors must be offered to plan participants. Employers have told us that this simply will not work.

When we are trying to make investment advice more accessible and affordable, I do not see any sense in driving up costs and compliance effort by, in effect, forcing employers to select and monitor two advisors instead of just one.

Finally, the substitute creates huge problems with ERISA's remedy structure and would subject employers to a stream of unfair and costly lawsuits by reversing the burden of proof and dramatically increasing ERISA's already intimidating remedies provisions. The substitute also erodes ERISA's careful preemption which gives employers legal certainty and clarity amongst our 50 States.

The underlying bill is meant to make very minor change to ERISA to allow employers to offer investment advice to their employees. H.R. 2269 works within the existing ERISA structure to do this without affecting ERISA's important protections or modifying the flexibility that courts have to fashion appropriate remedies within ERISA.

Amending ERISA's remedy structure will likely have unintended consequences on all ERISA claims. And before significantly changing ERISA's structure, we should look at the remedies offered in more detail. ERISA's current remedies structure permits courts to flexibly fashion appropriate remedies, including attorneys' fees, economic damages, disgorgement of profits, and banning advisors. Moreover, reversing the assumption of proof will not protect plan participants, but will only line the pockets of trial attorneys. So I urge my colleagues to vote against the substitutes for these reasons.

Put yourself in the place of an employer. Why would you offer investment advice to your workers if your litigation risks were so high that you might lose your entire business? Or in the place of an advisor, why would you even try to enter the investment advice market when, by doing so, would subject yourself to 50 different standards of litigation, 50 States under a standard of proof that guarantees you costly litigation, even if you have done nothing wrong?

H.R. 2269 effectively protects plan participants in a way that still makes employer-provided investment advice economically viable to employers and their employees. The fiduciary duty that it imposes on employers and advisers alike is the highest duty of loyalty in the law. Its disclosure requirements are actually more consumer friendly than the Andrews-Rangel substitute because it requires disclosure on an annual basis, or when there is a material change in disclosure. And it provides for the most vital consumer protection of all, a vibrant competitive marketplace, by opening the field to many of the most highly regarded investment advice firms in the country. The underlying bill reaches the right balance of increasing worker access to advice while safeguarding the interests of the American workers without discouraging employers from offering any advice at all.

Mr. Speaker, the Andrews-Rangel substitute, I do not believe, will protect workers; and I do think it will discourage any employer from offering advice. This will not help workers that desperately need this kind of advice to try to increase their own retirement securities. So I urge my colleagues to oppose the substitute.

Mr. Speaker, I reserve the balance of my time.

Mr. ANDREWS. Mr. Speaker, I yield myself 30 seconds.

The liability provisions in this substitute do not impose new liability upon employers. What they do is impose new responsibility and liability upon advisors who breach their fiduciary duty.

And the employer-protection provisions in this substitute are essentially identical to those in the underlying bill.

Mr. Speaker, I yield 4 minutes to the gentleman from Washington (Mr. McDERMOTT), a member of the Committee on Ways and Means.

Mr. McDERMOTT. Mr. Speaker, I rise in support of the Andrews-Rangel substitute. I told a story earlier which sort of makes you wonder about why it is that the employee groups are not here saying this is such a good deal. Where is the AFL–CIO? Why are they not running in here? Why is the AARP not coming in here saying we want old folks to have this investment? Because the bill is not a good one, that is why.

Now, the substitute that has been offered, really deals with the four issues that we need to deal with: one is the disclosure of conflicts, and that has to be done in a way that people actually hear it and know what is going on. Under the disclosure requirements contained in this substitute, plan participants or beneficiaries under the plan would receive adequate disclosure of fees and other compensation that would be received by the advisor with respect to the product being recommended.

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So they would know at the time they are getting this pitch, who is doing what.

Secondly, the qualification of advisors. We hear a lot of talk about banks are regulated. Yes, banks are regulated. But the fact is that under the Investors' Advisors Act, that is, the Federal law that controls advisors on money, banks are exempted. So all this talk about banks are regulated, blah, blah, blah, but not in this area. Our substitute closes that loophole.

Now, the ability to get some nonconflicted advice, investors should be able to have at least two, one that is selling something and someone who is not selling something.

The fourth area is the question of remedies. If someone sells us something, and most Americans do not know what is going on in the stock market, if somebody says this is the thing to buy, and they know that it is about to take a dive, maybe they have even sold short. Who knows? I do not know that. Here is somebody that is gives me that advice. We close that possibility by the conflicted question, and then we give a remedy.

Mr. Speaker, to do any less than this is to say to people, yes, we are going to give Members another chance. Maybe Members can get it in the Senate or in the conference committee; or maybe we will pass a bill next year and fix this. This ought to be fixed right now. We have the opportunity. We know what the problems are.

We have the chairman suggesting he agrees with the gentleman from North Dakota (Mr. POMEROY). We should be able to do it. There is a real question here that we cannot do what we all agree from the chairman on down is the thing to do. I urge Members to vote for this Andrews-Rangel substitute, and then we will have a pretty good bill.

PERMISSION TO POSTPONE FURTHER CONSIDERATION OF H.R. 2269

Mr. FLETCHER. Mr. Speaker, I ask unanimous consent that during consideration of H.R. 2269 pursuant to House Resolution 288, notwithstanding the operation of the previous question, the Chair may postpone further consideration of the bill to a time designated by the Speaker on this legislative day.

The SPEAKER pro tempore (Mr. LAHOOD). Is there objection to the request of the gentleman from Kentucky?

There was no objection.

Mr. FLETCHER. Mr. Speaker, I yield 3 minutes to the gentleman from Texas (Mr. SAM JOHNSON).

(Mr. SAM JOHNSON of Texas asked and was given permission to revise and extend his remarks.)

Mr. SAM JOHNSON of Texas. Mr. Speaker, we talk about two advisors. I do not know how we keep both of them from being bad. As I mentioned, our measure removes the obstacles for employers to provide millions of workers professional investment advice.

The bill requires financial service providers to fully disclose their fees and any potential conflicts. In this bill's current form, we protect people from fly-by-night groups and scam artists looking to make a fast buck.

There are a number of safeguards that will protect workers and ensure that they receive investment advice on their 401(k) plans that is in their best interest. The pension fund managers at corporations and unions who make decisions about their defined benefit funds have access to professional portfolio managers. Now this bill will give rank and file the same protections.

The Democrat substitute will not help people. It will just add layers of bureaucracy and could prevent people from seeking advice. People value their