

401(k) FAIR DISCLOSURE AND PENSION SECURITY ACT  
OF 2009

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JULY 31, 2009.—Ordered to be printed  
—————

Mr. GEORGE MILLER of California, from the Committee on  
Education and Labor, submitted the following

R E P O R T

together with

MINORITY VIEWS

[To accompany H.R. 2989]

[Including cost estimate of the Congressional Budget Office]

The Committee on Education and Labor, to whom was referred the bill (H.R. 2989) to amend the Employee Retirement Income Security Act of 1974 to provide special reporting and disclosure rules for individual account plans and to provide a minimum investment option requirement for such plans, to amend such Act to provide for independent investment advice for participants and beneficiaries under individual account plans, and to amend such Act and the Internal Revenue Code of 1986 to provide transitional relief under certain pension funding rules added by the Pension Protection Act of 2006, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment is as follows:

Strike all after the enacting clause and insert the following:

**SECTION 1. SHORT TITLE AND TABLE OF CONTENTS.**

(a) **SHORT TITLE.**—This Act may be cited as the “401(k) Fair Disclosure and Pension Security Act of 2009”.

(b) **TABLE OF CONTENTS.**—The table of contents for this Act is as follows:

Sec. 1. Short title and table of contents.

**TITLE I—401(K) FAIR DISCLOSURE FOR RETIREMENT**

Sec. 101. Special reporting and disclosure rules for individual account plans.  
Sec. 102. Minimum investment option requirement for individual account plans.  
Sec. 103. Enforcement coordination and review by the Department of Labor.

## TITLE II—PROHIBITION OF CONFLICTED INVESTMENT ADVICE

- Sec. 201. Findings.  
 Sec. 202. Independent investment advisers for individual account plans.  
 Sec. 203. Expansion of outreach to promote retirement income savings to include promotion of education on financial literacy with respect to investment for retirement.

## TITLE III—TRANSITIONAL FUNDING RELIEF FOR DEFINED BENEFIT PLANS

- Sec. 301. Election to use yield curve.  
 Sec. 302. Effective date of regulations.  
 Sec. 303. Clarification of treatment of expenses.  
 Sec. 304. Information reporting.  
 Sec. 305. 5-year extension of automatic amortization extension period for multiemployer plans.  
 Sec. 306. Pension plan maintained by Christian Schools International treated as church plan.  
 Sec. 307. Special rule for determining adequate consideration in connection with the purchase and sale of qualifying employer securities.  
 Sec. 308. Extended period for single-employer defined benefit plans to amortize the shortfall amortization base for 2009 and 2010.

## TITLE I—401(k) FAIR DISCLOSURE FOR RETIREMENT

### SEC. 101. SPECIAL REPORTING AND DISCLOSURE RULES FOR INDIVIDUAL ACCOUNT PLANS.

(a) ADDITIONAL REPORTING AND DISCLOSURE RULES.—Part 1 of subtitle B of title I of the Employee Retirement Income Security Act of 1974 is amended—

(1) by redesignating section 111 (29 U.S.C. 1031) as section 112; and

(2) by inserting after section 110 (29 U.S.C. 1030) the following new section:

#### “SEC. 111. SPECIAL REPORTING AND DISCLOSURE RULES FOR INDIVIDUAL ACCOUNT PLANS.

“(a) DISCLOSURE TO EMPLOYERS SPONSORING INDIVIDUAL ACCOUNT PLANS REGARDING SERVICES NECESSARY FOR ESTABLISHMENT OR OPERATION OF PLANS.—

“(1) SERVICE DISCLOSURE STATEMENT.—The plan administrator of an individual account plan (or any other plan official with contracting authority under the terms of the plan) may not enter into a contract or arrangement for services to the plan (including, for purposes of this section, the offering of any investment option to the plan) unless such plan administrator or other official has received, reasonably in advance of entering into the contract or arrangement, a single written statement from the service provider which—

“(A) specifies such services for the plan that will be provided in connection with the contract or arrangement, and

“(B) provides the expected total annual charges for such services for the plan that will be provided in connection with the contract or arrangement, including a reasonable allocation of such total annual charges among all relevant component charges specified in paragraph (2) (regardless of how the charges are actually assessed).

The description of the services and specification of the charges for the services shall be displayed prominently in the written statement and shall be presented in a format which is understandable to the typical plan administrator.

“(2) MINIMUM ALLOCATION REQUIREMENTS.—The allocation required under paragraph (1)(B) in connection with the services provided under each contract or arrangement shall specify component charges (to the extent such services for the plan are provided under the contract or arrangement) as follows:

“(A) charges for administration and recordkeeping,

“(B) transaction based charges,

“(C) charges for investment management, and

“(D) all such charges not described in subparagraph (A), (B), or (C).

The Secretary may by regulation provide for the appropriate allocation of component charges among the categories of charges provided in subparagraphs (A), (B), (C), and (D).

“(3) PRESENTATION OF CHARGES.—The total charges described in paragraph (2)(A) and the total charges described in paragraph (2)(C) shall each be presented in the written statement as an aggregate total dollar amount, and, in addition, each of such total charges may also be presented as a percentage of assets. The charges described in paragraph (2)(B) shall be itemized separately as dollar amounts or as percentages of the applicable base amounts.

“(4) ESTIMATIONS.—For purposes of providing the statement required under this subsection in connection with any service, the service provider may provide a reasonable and representative estimate of the charges required to be specified under paragraph (1)(B) and shall indicate any such estimate as being such an estimate. Any such estimate shall be based on reasonable assumptions specified in the statement (which shall include the previous year’s experience of the plan

or, in the case of a new plan, a reasonable estimate, taking into account the plan's participants and beneficiaries).

“(5) DISCLOSURE OF FINANCIAL RELATIONSHIPS.—

“(A) IN GENERAL.—The statement required under paragraph (1) shall include a written disclosure of—

“(i) any payment to be provided (or the amount representing the value of any services to be provided) to the service provider (or any affiliate thereof) from any entity other than the plan or the accounts of participants or beneficiaries pursuant to, or in connection with, the contract or arrangement described in paragraph (1) and the amount and type of any payment to be made or credit to be received for such services (irrespective of whether the service provider (or affiliate thereof) or other person providing such services is affiliated or unaffiliated with the plan, the plan sponsor, the plan administrator, or any other plan official), and

“(ii) such other similar arrangements benefitting the service provider (or any affiliate thereof) as may be specified by the Secretary.

In any case in which the contract or arrangement described in paragraph (1) provides for the payments described in clause (i) in terms of a formula, the requirements of such clause may be met by specifying the formula to be used in connection with such payments and describing the application of such formula.

“(B) INCLUSIONS.—

“(i) IN GENERAL.—Disclosures described under subparagraph (A)(ii) shall include the extent to which the service provider (or any affiliate thereof) may benefit from the offering of its own proprietary investment products or those of third parties, including (but not limited to) cross-selling of affiliated products or services to the plan sponsor or participants.

“(ii) APPLICABLE PROHIBITED TRANSACTION EXEMPTION.—Disclosures under this paragraph may include a description of any applicable prohibited transaction exemption under section 408 related to the services described in the statement required under paragraph (1).

“(6) DISCLOSURE OF IMPACT OF SHARE CLASSES.—The statement required under paragraph (1) shall, to the extent applicable, disclose that the share prices of certain mutual fund investments that are available to the plan may be different from the share prices outside of the plan due to the existence of different share classes and provide the basis for these differences.

“(7) DISCLOSURE OF CERTAIN ARRANGEMENTS IN CONNECTION WITH FREE OR DISCOUNTED SERVICES OR REIMBURSEMENTS BY SERVICE PROVIDERS.—In any case in which services are provided to the plan, or to the plan sponsor in connection with the plan, by any service provider without explicit charge or for charges set at a discounted rate or subject to rebate, the statement required under paragraph (1) shall specify the manner in which, the extent to which, and the amount by which consideration is otherwise obtained by the service provider (or any affiliate thereof), the plan, or the plan sponsor for such services, directly or indirectly, by means of any charges against the plan.

“(8) REVIEW BY THE SECRETARY.—The Secretary shall, from time to time as determined appropriate by the Secretary, review the accuracy and sufficiency of statements provided pursuant to this subsection.

“(9) UPDATING.—Each service provider shall provide to the plan administrator an updated written statement described in paragraph (1) describing any material change in the information included in the statement provided pursuant to paragraph (1) as soon as is reasonable after the occurrence of the change is known. Such an updated written statement, or, in the case of a plan year in which no material change in the information included in the statement provided pursuant to paragraph (1) has occurred, a written statement setting forth such fact, shall be provided by the service provider not less often than annually.

“(10) LIMITATIONS.—

“(A) DOLLAR LIMITATION.—

“(i) IN GENERAL.—The requirements of this subsection shall apply with respect to any contract or arrangement for services provided during any plan year only if the total charged for such services under such contract or arrangement is reasonably expected to equal or exceed \$5,000.

“(ii) ADJUSTMENTS BY THE SECRETARY.—The Secretary may be regulation adjust the dollar amount specified in this subparagraph to a lesser amount for small plans and to a greater amount for other plans and provide for appropriate annual adjustments in such adjusted amounts

“(B) GENERAL APPLICABILITY OF REQUIREMENTS WITH RESPECT TO SERVICES.—Nothing in this subsection shall be construed to require any service provider to provide any service with respect to any particular plan sponsor.

“(11) SATISFACTION OF FIDUCIARY RULES.—Nothing in the preceding provisions of this subsection affects the obligations of fiduciaries under part 4 of this subtitle.

“(b) DISCLOSURES TO PARTICIPANTS AND BENEFICIARIES.—

“(1) ADVANCE NOTICE OF AVAILABLE INVESTMENT OPTIONS.—The plan administrator of an individual account plan that permits participants or beneficiaries to direct the investment of assets in their individual accounts shall provide to the participant or beneficiary notice of the investment options available for election under the plan before a reasonable period prior to—

“(A) the earliest date provided for under the plan for the participant’s initial investment of any contribution made on behalf of such participant, and

“(B) the effective date of any material change in investment options.

In the case of a plan that provides for immediate eligibility or that contains an automatic contribution arrangement (as defined in subparagraphs (A) and (B) of section 514(e)(2)), the notice required under subparagraph (A) may be provided within any reasonable period prior to such initial investment. With respect to any notice required under this paragraph, the Secretary shall prescribe regulations creating specific requirements for periods of advance notice to be treated as reasonable under this paragraph (of not less than 10 days) in circumstances similar to those described in section 101(i)(2)(C), and such notice may be combined with any similar notice that may be required under section 404(c)(5) or under this section.

“(2) INFORMATION INCLUDED IN NOTICE.—The notice required under paragraph (1) shall—

“(A) include a prominent statement, in language presented in a manner which is easily understandable by the typical participant, indicating which components of the charges (both direct and indirect) for each investment option are payable by the participant or beneficiary and how such components are to be paid,

“(B) set forth, with respect to each available investment option—

“(i) the name of the option,

“(ii) information effectively describing the investment objectives of the option (such as a description of a broadly recognized asset class),

“(iii) the risk level associated with the option,

“(iv) whether the option is diversified among various classes of assets so as to minimize the risk of large losses or should be combined with other options so as to obtain such diversification,

“(v) whether the investment option is actively managed or passively managed in relation to an index and the difference between active management and passive management,

“(vi) where, and the manner in which, additional plan-specific, option-specific, and generally available investment information regarding the option may be obtained, and

“(vii) a statement explaining that investment options should not be evaluated solely on the basis of the charges for each option but should also be based on careful consideration of other key factors, including the risk level of the option, the investment objectives of the option, the principal investment strategies of the option, and historical returns of the option, and

“(C) include a plan fee comparison chart, relating to the charges described in paragraph (3) in connection with all investment options available under the plan, as provided in paragraph (3).

“(3) PLAN FEE COMPARISON CHART.—

“(A) IN GENERAL.—

“(i) IN GENERAL.—The notice provided under this subsection shall include a plan fee comparison chart consisting of a comparison of actual service and investment charges (including, for purposes of this clause, charges for the offering of an investment option) that will or could be assessed against the account of the participant or beneficiary with respect to the plan year. The plan fee comparison chart shall be presented in a manner which is easily understood by the typical participant and include such information as the Secretary determines necessary to permit participants and beneficiaries to assess the services for which charges will or could be assessed against the account.

“(ii) FORM.—For purposes of this paragraph, the potential service charges shall be provided in the form of a dollar amount or as a for-

mula (such as a percentage of assets), as appropriate. The form of the potential service charges shall be presented in a manner which is easily understandable by the typical participant, including examples that demonstrate how the charges will be assessed against the account of the participant or beneficiary.

“(B) CATEGORIZATION OF CHARGES.—The plan fee comparison chart shall provide information in relation to the following categories of charges that will or could be assessed against the account of the participant or beneficiary:

“(i) ASSET-BASED CHARGES SPECIFIC TO INVESTMENT.—Charges that vary depending on the investment options selected by the participant or beneficiary, including expense ratios and investment-specific asset-based charges. The information relating to such charges shall include a statement noting any charges for 1 or more investment options which pay for services other than investment management.

“(ii) ASSET-BASED CHARGES NOT SPECIFIC TO INVESTMENT.—Charges that are assessed as a percentage of the total assets in the account of the participant or beneficiary, regardless of the investment option selected.

“(iii) ADMINISTRATIVE AND TRANSACTION-BASED CHARGES.—Administration and transaction-based charges, including fees charged to participants to cover plan administration, compliance, and recordkeeping costs, plan loan origination fees, possible redemption fees, and possible surrender charges, that are not assessed as a percentage of the total assets in the account and are either automatically deducted each year or result from certain transactions engaged in by the participant or beneficiary.

“(iv) OTHER CHARGES.—Any other charges which may be deducted from participants’ or beneficiaries’ accounts and which are not described in clauses (i), (ii), and (iii).

“(C) DESCRIPTION OF PURPOSE FOR CHARGES.—The notice shall indicate the extent to which each charge is for investment management, transactions, plan administration and recordkeeping, or other identified services.

“(D) FEES AND HISTORICAL RETURNS.—In connection with each investment option listed in the plan fee comparison chart, the chart shall also include, as determined periodically by the Secretary in consultation with the Securities and Exchange Commission, appropriate and consistent benchmarks, indices, or other points of comparison that may be used by beneficiaries to compare each investment option’s historical returns, net of fees and expenses, for the previous year, 5 years, and 10 years (or for the period since inception, if shorter) as shown in the chart pursuant to this paragraph, including a separate point of comparison with respect to each such time period.

“(4) MODEL NOTICES.—The Secretary shall prescribe one or more model notices that may be used for purposes of satisfying the requirements of this subsection, including model plan fee comparison charts.

“(5) ESTIMATIONS.—For purposes of providing the notice required under this subsection, the plan administrator may provide a reasonable and representative estimate for any charges or percentages disclosed under paragraph (2) or (3) and shall indicate any such estimate as being such an estimate. Any such estimate shall be based on reasonable assumptions stated in the notice (such as the previous year’s experience or, in the case of a new plan, a reasonable estimate, taking into account the plan’s participants and beneficiaries).

“(c) ELECTRONIC MEDIA.—Any disclosure required under this section may be provided through an electronic medium under such rules as shall be prescribed by the Secretary not later than 1 year after the date of the enactment of the 401(k) Fair Disclosure and Pension Security Act of 2009. Such rules shall be similar to those applicable under the Internal Revenue Code of 1986 with respect to notices to participants in pension plans. The Secretary shall regularly modify such rules as appropriate to take into account new developments, including new forms of electronic media, and to fairly take into consideration the interests of plan sponsors, service providers, and participants. The rules prescribed by the Secretary pursuant to this subsection shall provide for a method for the typical participant or beneficiary to obtain without undue burden any such disclosure in writing on paper in lieu of receipt through an electronic medium.

“(d) REGULATIONS REGARDING CERTAIN PRODUCTS.—The Secretary may by regulation identify certain types of investment options, such as an option that provides a guaranteed rate of return and that does not identify specific fees, and prescribe

alternative disclosures of cost and performance measures that correspond to the particular circumstances of such options.

“(e) DEFINITIONS.—For purposes of this section—

“(1) CHARGE.—The term ‘charge’ means, in connection with any service provided to a plan or any financial product provided to the plan in which plan assets are to be invested, any fee, credit, or other compensation charged or paid for such service or product, including money and any other thing of monetary value to be received by the provider of the service or product, or its affiliate, in connection with the service or product.

“(2) SERVICE.—The term ‘service’ means, in connection with a plan, a service provided directly or indirectly to, or with respect to, the plan or a service provided directly or indirectly in connection with a financial product in which plan assets are to be invested.

“(3) CONTRACT OR ARRANGEMENT.—The term ‘contract or arrangement’ means, in connection with any 2 or more parties, any contract or arrangement entered into between or among such parties, and any extension or renewal thereof.

“(4) SERVICE PROVIDER.—The terms ‘service provider’ and ‘provider’ mean, in connection with a service, a person directly or indirectly providing such service.

“(5) REGULATIONS.—The Secretary shall provide by regulation such definitions of other terms used in this section as the Secretary determines appropriate.”.

(b) QUARTERLY BENEFIT STATEMENTS.—Section 105 of such Act (29 U.S.C. 1025) is amended—

(1) in subsection (a)(2)—

(A) by redesignating subparagraph (C) as subparagraph (H);

(B) in subparagraph (B)(ii)—

(i) in subclause (II), by striking “diversified, and” and inserting “diversified,”;

(ii) in subclause (III), by striking the period and inserting “, and”;

(iii) by adding after subclause (III) the following new subclause:

“(IV) with respect to the portion of a participant’s account for which the participant has the right to direct the investment of assets, the information described in subparagraph (C).”; and

(C) by inserting after subparagraph (B) the following new subparagraphs:

“(C) PERIODIC ACCOUNT INFORMATION FOR PARTICIPANTS AND BENEFICIARIES.—For purposes of subparagraph (B)(ii)(IV), the information described in this subparagraph consists of the following, indicating the portion of each amount described in clauses (i) through (vii) attributable to each investment option elected in connection with the participant’s account:

“(i) the starting balance of the participant’s account,

“(ii) contributions made during the quarter, itemizing separately totals for employer and totals for employee contributions,

“(iii) investment earnings or losses on the account balance during the quarter (if any),

“(iv) actual or estimated charges (within the meaning of section 111(e)(1) which reduce the account during the quarter, expressed in dollars or, if estimated, such estimated dollar charges as are derived from an expense ratio (which may be expressed as a specific date estimate based on reasonable assumptions stated in the disclosure (such as the previous year’s expense ratio).

“(v) any other direct charges to the participant or beneficiary in connection with the participant’s account,

“(vi) the ending balance of the account,

“(vii) the participant’s asset allocation to each investment option, expressed as an amount and as a percentage, and

“(viii) how to obtain the most recently updated version of the plan fee comparison chart prepared for purposes of section 111(b)(3).

“(D) OTHER INFORMATION.—The plan administrator may include in the quarterly pension benefit statement information relating to the historical return and risk of each investment option and the estimated amount that the participant needs to contribute each month or year so as to retire at retirement age (as defined in section 216(l) of the Social Security Act).

“(E) ESTIMATIONS.—For purposes of making the disclosure of actual charges or percentages as required under this paragraph, the plan administrator may provide a reasonable and representative estimate of such charges or percentages and shall indicate any such estimate as being such an estimate. Any such estimate shall be based on reasonable assumptions included in the statement (such as the previous year’s experience).

“(F) MODEL STATEMENTS.—The Secretary shall prescribe one or more model pension benefit statements that may be used for purposes of satisfying the requirements of subparagraphs (B)(ii) and (C).

“(G) ANNUAL COMPLIANCE FOR SMALL PLANS AND WITH RESPECT TO CERTAIN INFORMATION.—In the case of a plan providing for investment as described in paragraph (1)(A)(i)—

“(i) if the plan has 100 or fewer participants and beneficiaries, the plan may provide the pension benefit statement under paragraph (1) on an annual rather than a quarterly basis, and

“(ii) the plan may comply with the requirements of subparagraph (B)(ii)(IV) on an annual rather than a quarterly basis.”; and

(2) by adding at the end the following new subsections:

“(d) ASSISTANCE TO SMALL EMPLOYERS.—The Secretary shall make available to employers with 100 or fewer employees—

“(1) educational and compliance materials designed to assist such employers in selecting and monitoring service providers for individual account plans which permit a participant or beneficiary to exercise control over the assets in the account of the participant or beneficiary, investment options under such plans, and charges relating to such options, and

“(2) services designed to assist such employers in finding and understanding affordable investment options for such plans and in comparing the investment performance of, and charges for, such options on an ongoing basis against appropriate benchmarks or other appropriate measures.

“(e) ASSISTANCE TO PLAN SPONSORS AND PLAN PARTICIPANTS AND BENEFICIARIES.—The Secretary shall provide assistance to plan sponsors of individual account plans and participants and beneficiaries under such plans with any questions or problems regarding compliance with the requirements of this section.

“(f) ELECTRONIC MEDIA.—Any disclosure required under this section may be provided through an electronic medium under such rules as shall be prescribed by the Secretary not later than 1 year after the date of the enactment of the 401(k) Fair Disclosure and Pension Security Act of 2009. Such rules shall be similar to those applicable under the Internal Revenue Code of 1986 with respect to notices to participants in pension plans. The Secretary shall regularly modify such rules as appropriate to take into account new developments, including new forms of electronic media, and to fairly take into consideration the interests of plan sponsors, service providers, and participants. The rules prescribed by the Secretary pursuant to this subsection shall provide for a method for the typical participant or beneficiary to obtain without undue burden any such disclosure in writing on paper in lieu of receipt through an electronic medium.

“(g) DEFINITIONS.—For purposes of this section—

“(1) CHARGE.—The term ‘charge’ means, in connection with any service provided to a plan or any financial product provided to the plan in which plan assets are to be invested, any fee, credit, or other compensation charged or paid for such service or product, including money and any other thing of monetary value to be received by the provider of the service or product, or its affiliate, in connection with the service or product.

“(2) SERVICE PROVIDER.—The terms ‘service provider’ and ‘provider’ mean, in connection with a service (as defined in section 111(e)(2)), a person directly or indirectly providing such service.

“(3) REGULATIONS.—The Secretary shall provide by regulation such definitions of other terms used in this section as the Secretary determines appropriate.”.

(c) ENFORCEMENT.—Section 502 of such Act (29 U.S.C. 1132) is amended—

(1) in subsection (a)(6), by striking “under paragraph (2)” and all that follows through “subsection (c)” and inserting “under paragraph (2), (4), (5), (6), (7), (8), (9), (10), or (11) of subsection (c)”;

(2) in subsection (c), by redesignating the second paragraph (10) as paragraph (12), and by inserting after the first paragraph (10) the following new paragraph:

“(11)(A) In the case of any violation of section 111(a) by a service provider (as defined in section 111(e)(4)), the service provider may be assessed by the Secretary a civil penalty of up to \$1,000 a day with respect to each such violation from the date of the initial violation until the date on which such violation is corrected, subject to a total maximum penalty of 10 percent of the amount involved, as determined by the Secretary.

“(B) Any plan administrator with respect to a plan who fails or refuses to provide a statement to participants and beneficiaries in accordance with section 105(a)(2)(B)(ii) or 111(b) may be assessed by the Secretary a civil penalty of up to \$100 a day from the date of the failure or refusal to the date on which such statement or notice is so provided.

“(C) For purposes of this paragraph, each violation with respect to any single participant, beneficiary, or plan administrator shall be treated as a separate violation.”.

(d) CONFORMING AMENDMENT.—The table of contents in section 1 of such Act is amended by striking the item relating to section 111 and inserting the following new items:

“Sec. 111. Special reporting and disclosure rules for individual account plans.

“Sec. 112. Repeal and effective date.”.

(e) EFFECTIVE DATES.—

(1) Section 111(a) of the Employee Retirement Income Security Act of 1974 (as added by subsection (a) of this section) shall apply with respect to contracts or arrangements for services entered into after one year after the date of the enactment of this Act.

(2) Section 111(b) of such Act (as added by subsection (a) of this section) shall apply with respect to plan years beginning after one year after the date of the enactment of this Act.

(3) The amendments made by subsection (b) of this section shall apply with respect to pension benefit statements for calendar quarters beginning after one year after the date of the enactment of this Act.

(4) The Secretary shall issue final regulations under the amendments made by this section not later than 270 days after the date of the enactment of this Act. Any act or practice in advance of the issuance of final regulations under the amendments made by this section which is in good faith compliance with the requirements of such amendments shall be treated as in compliance with any such final regulations.

(f) STUDY REGARDING USE OF BENCHMARKS, INDICES, AND OTHER POINTS OF COMPARISON IN PLAN FEE COMPARISON CHARTS.—

(1) STUDY.—As soon as practicable after the date of the enactment of this Act, the Secretary of Labor shall study the efficacy of including benchmarks, indices, and other points of comparison in plan fee comparison charts provided to participants and beneficiaries pursuant to section 111(b)(3) of the Employee Retirement Income Security Act of 1974 (as added by this Act).

(2) MATTERS TO BE STUDIED.—In the study required under paragraph (1), the Secretary shall investigate whether, and the extent to which, benchmarks, indices, and other points of comparison included in plan fee comparison charts—

(A) help participants and beneficiaries understand the charges with respect to their individual account plans,

(B) help participants and beneficiaries make more informed decisions on which investment options to choose under such plans, and

(C) bias participants and beneficiaries against particular investment options under such plans, types of investment, or individual account plans as a whole.

(3) REPORT.—Not later than 180 days after the date of the enactment of this Act, the Secretary shall report to each House of the Congress regarding the results of the study conducted pursuant to this subsection, together with such recommendations as the Secretary may consider appropriate.

**SEC. 102. MINIMUM INVESTMENT OPTION REQUIREMENT FOR INDIVIDUAL ACCOUNT PLANS.**

(a) IN GENERAL.—Section 404(c) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1104(c)) is amended by adding at the end the following new paragraph:

“(6) MINIMUM INVESTMENT OPTION REQUIREMENT FOR INDIVIDUAL ACCOUNT PLANS.—Paragraph (1)(A)(ii) shall not apply in connection with any individual account plan which permits a participant or beneficiary to exercise control over the assets in the account of the participant or beneficiary unless the plan includes at least one investment option—

“(A) which is a passively managed investment with a portfolio of securities that is designed to be representative of the United States investable equity market (including representation of small, mid, and large cap stocks) or the United States investment grade bond market (including Treasury, agency, non-agency, and corporate issues), or a combination thereof, and

“(B) which is described in the terms of the plan as offered without any endorsement of the Government or the plan sponsor.

An investment shall not fail to satisfy the requirements of subparagraph (A) in connection with either market described in subparagraph (A) solely by reason of a failure to invest in all or substantially all equities or bonds (as applicable) in such market, if the methodology used to select the equities or bonds is designed to approximate in a reasonable manner the broad experience of such market.”.

(b) CONFORMING AMENDMENT.—Section 404(c)(1)(A)(ii) of such Act (29 U.S.C. 1104(c)(1)(A)(ii)) is amended by inserting “except as provided in section 404(c)(6) and” after “exercise of control.”

(c) EFFECTIVE DATES.—

(1) The amendments made by this section shall apply with respect to plan years beginning after one year after the date of the enactment of this Act.

(2) The Secretary shall issue final regulations under the amendments made by this section not later than 270 days after the date of the enactment of this Act. Any act or practice in advance of the issuance of final regulations under the amendments made by this section which is in good faith compliance with the requirements of such amendments shall be treated as in compliance with any such final regulations.

**SEC. 103. ENFORCEMENT COORDINATION AND REVIEW BY THE DEPARTMENT OF LABOR.**

(a) IN GENERAL.—Section 502 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1132) is amended by adding at the end the following new subsection:

“(n) ENFORCEMENT COORDINATION OF CERTAIN DISCLOSURE REQUIREMENTS AND REVIEW BY THE DEPARTMENT OF LABOR.—

“(1) IN GENERAL.—

“(A) NOTIFICATION AND ACTION.—The Secretary shall notify the applicable regulatory authority in any case in which the Secretary determines that a service provider is engaged in a pattern or practice that precludes compliance by plan administrators with section 111. The Secretary shall, in consultation with the applicable authority, take such timely enforcement action under this title as is necessary to assure that such pattern or practice ceases and desists and assess any appropriate penalties.

“(B) DISSEMINATION.—The Secretary shall widely disseminate to employee pension benefit plans covered by this title and their participants and beneficiaries the identity of any service providers with respect to such plans found to be engaged in any pattern or practice described in subparagraph (A) with the intent to preclude compliance by plan administrators with section 111 and the particulars of such pattern or practice. Prior to the dissemination of the identity of any service providers identified and determined by the Secretary to be engaged in such a pattern or practice, such service provider shall receive a notice of intent to disseminate, an opportunity to request an administrative hearing, and a timely appeal to the Secretary.

“(2) ANNUAL AUDIT OF REPRESENTATIVE SAMPLING OF INDIVIDUAL ACCOUNT PLANS.—The Secretary shall annually audit a representative sampling of individual account plans covered by this title to determine compliance with the requirements of section 111. The Secretary shall annually report the results of such audit and any related recommendations of the Secretary to the Committee on Education and Labor of the House of Representatives and the Committee on Health, Education, Labor, and Pensions of the Senate.”

(b) REVIEW AND REPORT TO THE CONGRESS BY SECRETARY OF LABOR RELATING TO REPORTING AND DISCLOSURE REQUIREMENTS.—

(1) STUDY.—As soon as practicable after the date of the enactment of this Act, the Secretary of Labor shall review the reporting and disclosure requirements of part 1 of subtitle B of title I of the Employee Retirement Income Security Act of 1974 and related provisions of the Pension Protection Act of 2006.

(2) REPORT.—Not later than 18 months after the date of the enactment of this Act, the Secretary of Labor, in consultation with the Secretary of the Treasury, shall make such recommendations as the Secretary of Labor considers appropriate to the appropriate committees of the Congress to consolidate, simplify, standardize, and improve the applicable reporting and disclosure requirements so as to simplify reporting for employee pension benefit plans and ensure that needed understandable information is provided to participants and beneficiaries of such plans.

## **TITLE II—PROHIBITION OF CONFLICTED INVESTMENT ADVICE**

**SEC. 201. 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 advice to help them better plan for their retirement.

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

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

**SEC. 202. INDEPENDENT INVESTMENT ADVISERS FOR INDIVIDUAL ACCOUNT PLANS.**

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

“(43) INDEPENDENT INVESTMENT ADVISER.—

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

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

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

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

“(i) such adviser is—

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

“(II) 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 of a person described in subclause (I),

“(ii) such adviser is not the plan investment provider,

“(iii) the fees or other compensation received, directly or indirectly, by such adviser (and any affiliate thereof) with respect to the provision of investment advice to any individual account plan or the participants or beneficiaries of such a plan either—

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

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

“(aa) a flat-dollar basis,

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

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

“(dd) a per-participant or per-beneficiary account basis, and

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

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

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

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

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

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

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

“(C) ADVICE PROVIDED TO PARTICIPANTS AND BENEFICIARIES UNDER AN INVESTMENT ADVICE COMPUTER PROGRAM MEETING 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 computer 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 computer program is provided pursuant to a computer model that—

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

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

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

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

“(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,

“(VI) operates so that it does not, directly or indirectly, in any manner act to benefit the investment adviser (or any affiliate of the adviser or any person with a material affiliation or contractual relationship with the adviser) at the expense of plan participants and beneficiaries,

“(VII) takes into account the fees associated with each investment option, and

“(VIII) conforms to such other requirements as shall be prescribed by the Secretary to ensure that it operates in the best interest of plan participants and beneficiaries.

“(iii) CERTIFICATION.—

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

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

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

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

“(bb) does not have any material affiliation or contractual relationship with any investment adviser or a related person 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 that is a plan investment provider with respect to the plan, and

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

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

“(I) conducts an annual audit of the program other than the computer model referred to in clause (ii) which is certified pursuant to clause (iii) for compliance with the requirements of this subparagraph, and

“(II) following completion of the annual audit, issues a written report to the fiduciary who authorized use of the program which presents its specific findings regarding compliance of the program with the requirements of this subsection.

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

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

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

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

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

“(cc) of any material affiliation or contractual relationship of the investment adviser or affiliates thereof in the security or other property,

“(dd) of the manner, and under what circumstances, any information relating to the participant or beneficiary which is provided under the program will be used or disclosed,

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

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

“(II) at all times during the provision of advisory services to the participant or beneficiary, the investment adviser—

“(aa) maintains the information described in subclause (I) in accurate form and in the manner described in clause (ix),

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

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

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

“(viii) OTHER CONDITIONS.—The requirements of this clause are met with respect to the program, if—

“(I) the investment adviser provides appropriate disclosure, in connection with the sale, acquisition, or holding of the security or other property with respect to which the investment advice is provided under the program, in accordance with all applicable securities laws,

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

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

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

“(ix) STANDARDS FOR PRESENTATION OF INFORMATION.—

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

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

“(x) MAINTENANCE FOR 6 YEARS OF EVIDENCE OF COMPLIANCE.—The requirements of this clause are met with respect to the program if the investment adviser who provides advice under the program maintains, for a period of not less than 6 years after the provision of the advice,

any records necessary for determining whether the requirements of the preceding provisions of this subparagraph and of subsection (b)(14) have been met. A failure to meet the requirements of this clause shall not be considered to have occurred solely because the records are lost or destroyed prior to the end of the 6-year period due to circumstances beyond the control of the investment adviser.

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

“(i) AFFILIATE.—The term ‘affiliate’ means, in connection with any other person, any person directly or indirectly (through one or more intermediaries) controlling, controlled by, or under common control with such other person, or any officer, director, agent, or employee of, or partner with, such other person.

“(ii) REGISTERED REPRESENTATIVE.—The term ‘registered representative’ of another entity means a person described in section 3(a)(18) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(18)) (substituting the entity for the broker or dealer referred to in such section) or a person described in section 202(a)(17) of the Investment Advisers Act of 1940 (15 U.S.C. 80b-2(a)(17)) (substituting the entity for the investment adviser referred to in such section).

“(iii) PLAN INVESTMENT PROVIDER.—The term ‘plan investment provider’ means any person (or any person affiliated with such person) that creates or manages any investment in which any individual account plan invests. Such term does not include—

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

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

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

“(iv) FEES OR OTHER COMPENSATION.—The term ‘fees or other compensation’ includes money or any other thing of monetary value (for example, gifts, awards, and trips) received, or to be received, 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.—

(1) IN GENERAL.—Section 404(a) of such Act (29 U.S.C. 1104(a)) is amended by adding at the end the following new paragraph:

“(3)(A) The fiduciary of an individual account plan that permits a participant or beneficiary to direct the 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)).

“(B) The independent investment adviser providing investment advice to a plan or to a participant or beneficiary shall provide, before a reasonable period prior to the initial provision of the advice, a written notification—

“(i) of the past performance and historical rates of return of the investment options available with respect to the plan and comparisons of such 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

selection 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), except that any such requirement shall not be construed to preclude reasonable reliance by the plan sponsor or other person on the representation of any person that such person making the representation meets the requirements of section 3(43)(A). The plan sponsor and any other person who is a fiduciary (other than the independent investment adviser) 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 and shall not be liable under this title for any loss, or by reason of any breach, which results from such specific investment advice given by the independent investment adviser.

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

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

(A) review each Advisory Opinion and exception described in section 404(a)(3)(E)(i) of the Employee Retirement Income Security Act of 1974 (as added by this paragraph (1)) to determine the extent to which such Advisory Opinion or exception fails to adequately serve the interests of participants and beneficiaries and to be adequately protective of the rights of participants and beneficiaries, and

(B) submit a report to each House of the Congress describing the extent of any such failure by any such Advisory Opinion or exception.

(c) **CONFORMING AMENDMENTS.**—Section 408 of such Act (29 U.S.C. 1108) is amended—

(1) by striking subsection (g); and

(2) by striking subsection (b)(14)(B) and inserting the following:

“(B) the investment advice is provided by an independent investment adviser (as defined in section 3(43)).”

(d) **REGULATORY AUTHORITY.**—The Secretary of Labor may issue regulations providing that an investment adviser can still be considered as meeting the requirements of section 3(43)(B) of the Employee Retirement Income Security Act of 1974 despite the receipt of a de minimus amount of compensation that fails to meet the requirements of section 3(43)(B)(iii) of such Act due to the existence of previously existing contracts.

(e) **EFFECTIVE DATE.**—The amendments made by this section shall apply to plan years beginning after one year after the date of the enactment of this Act.

**SEC. 203. EXPANSION OF OUTREACH TO PROMOTE RETIREMENT INCOME SAVINGS TO INCLUDE PROMOTION OF EDUCATION ON FINANCIAL LITERACY WITH RESPECT TO INVESTMENT FOR RETIREMENT.**

Section 516 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1146) is amended—

(1) in subsection (b), by inserting after “creation of educational materials,” the following: “promotion of education in financial literacy with respect to investment for retirement as provided in subsection (e).”;

(2) by redesignating subsection (e) as subsection (f); and

(3) by inserting after subsection (d) the following new subsection:

“(e) **PROMOTION OF EDUCATION IN FINANCIAL LITERACY WITH RESPECT TO INVESTMENT FOR RETIREMENT.**—The Secretary, in consultation with the Secretary of Education and the Secretary of the Treasury, shall establish a program under which—

“(1) employees and the general public are provided with information and materials—

“(A) informing them about resources available for attaining financial literacy with respect to investment for retirement,

“(B) effectively educating them about the importance of, and appropriate techniques with respect to, personal finance, saving for retirement, and choosing independent investment advisers when managing their accounts under individual account plans, and

“(C) effectively educating them about debt obligations, the relationship of debt to savings, and the potential consequences of debt with respect to saving for retirement,

“(2) employers are enlisted to participate in such program so as to assist in the attainment of the goals described in subparagraphs (A), (B), and (C) of paragraph (1) with respect to their employees, and

“(3) appropriate standards of financial literacy of employees and the general public with respect to investment for retirement are developed and published for utilization under such program.”.

(4) **STUDY AND REPORT TO THE CONGRESS.**—

(A) IN GENERAL.—The Secretary of Labor shall conduct a survey of ongoing efforts by the Federal Government to assist employees and the general public with attainment of financial literacy with respect to investment for retirement and to educate them about the importance of, and appropriate techniques with respect to, personal finance, debt obligations, saving for retirement, and choosing independent investment advisers when managing their accounts under individual account plans.

(B) REPORT.—Not later than 180 days after the date of the enactment of this Act, the Secretary shall submit a report to each House of the Congress setting forth the results of the Secretary's survey conducted pursuant to subparagraph (A), together with such recommendations as the Secretary considers appropriate for improvement in efforts by the Federal Government in assisting employees and the general public with attainment of financial literacy in connection with investment for retirement and educating them about the importance of, and appropriate techniques with respect to, personal finance, debt obligations, saving for retirement, and choosing independent investment advisers when managing their accounts under individual account plans.

### **TITLE III—TRANSITIONAL FUNDING RELIEF FOR DEFINED BENEFIT PLANS**

#### **SEC. 301. ELECTION TO USE YIELD CURVE.**

(a) AMENDMENT TO ERISA.—The last sentence of clause (ii) of section 303(h)(2)(D) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1083(h)(2)(D)(ii)) is amended to read as follows: “Such election, once made, may be revoked only with the consent of the Secretary, except that any election in effect for a plan with respect to a plan year beginning in 2009 may be revoked for the plan year beginning in 2010 without such consent.”.

(b) AMENDMENT TO IRC.—The last sentence of clause (ii) of section 430(h)(2)(D) of the Internal Revenue Code of 1986 (relating to election to use yield curve) is amended to read as follows: “Such election, once made, may be revoked only with the consent of the Secretary, except that any election in effect for a plan with respect to a plan year beginning in 2009 may be revoked for the plan year beginning in 2010 without such consent.”.

(c) EFFECTIVE DATE.—The amendments made by this section shall apply to plan years beginning after December 31, 2009.

#### **SEC. 302. EFFECTIVE DATE OF REGULATIONS.**

The Secretary of the Treasury shall—

(1) make the final regulations issued under sections 206(g) and 303 of the Employee Retirement Income Security Act of 1974 and sections 430 and 436 of the Internal Revenue Code of 1986 effective no earlier than plan years beginning after December 31, 2009; and

(2) provide rules, for plan years beginning before the effective date of such final regulations, under which compliance with a reasonable interpretation of an applicable provision under section 206(g) or 303 of the Employee Retirement Income Security Act of 1974 or section 430 or 436 of the Internal Revenue Code of 1986 shall be treated as compliance with such provision.

#### **SEC. 303. CLARIFICATION OF TREATMENT OF EXPENSES.**

(a) AMENDMENTS TO ERISA.—

(1) IN GENERAL.—Clause (ii) of section 303(b)(1)(A) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1083(b)(1)(A)(ii)) is amended by striking “plan-related expenses” and inserting “plan-related administrative expenses”.

(2) CONFORMING AMENDMENT.—Subclause (II) of section 303(i)(2)(A)(i) of such Act (29 U.S.C. 1083(i)(2)(A)(i)(II)) is amended by striking “plan-related expenses” and inserting “plan-related administrative expenses”.

(b) AMENDMENTS TO IRC.—

(1) IN GENERAL.—Clause (ii) of section 430(b)(1)(A) of the Internal Revenue Code of 1986 (relating to target normal cost) is amended by striking “plan-related expenses” and inserting “plan-related administrative expenses”.

(2) CONFORMING AMENDMENT.—Subclause (II) of section 430(i)(2)(A)(i) of such Code is amended by striking “plan-related expenses” and inserting “plan-related administrative expenses”.

(c) EFFECTIVE DATE.—The amendments made by this section shall take effect as if included in the enactment of paragraphs (1)(A), (1)(F)(i), (2)(A), and (2)(F)(i) of

section 101(b) of the Worker, Retiree, and Employer Recovery Act of 2008 (Public Law 110-458; 122 Stat. 5093).

**SEC. 304. INFORMATION REPORTING.**

(a) **IN GENERAL.**—Paragraph (1) of section 4010(b) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1310(b)(1)) is amended to read as follows:

“(1) either of the following requirements are met:

“(A) the funding target attainment percentage (as defined in subsection (d)) at the end of the preceding plan year of a plan maintained by the contributing sponsor or any member of its controlled group is less than 80 percent; or

“(B) the aggregate unfunded vested benefits (as determined under section 4006(a)(3)(E)(iii)) of plans maintained by the contributing sponsor and the members of its controlled group exceed \$50,000,000 (disregarding plans with no unfunded vested benefits);”.

(b) **EFFECTIVE DATE.**—The amendment made by this section shall apply to years beginning after 2009.

**SEC. 305. 5-YEAR EXTENSION OF AUTOMATIC AMORTIZATION EXTENSION PERIOD FOR MULTI-EMPLOYER PLANS.**

(a) **ERISA AMENDMENTS.**—Section 304(d) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1084(d)) is amended—

(1) in paragraph (1)(A), by striking “5 years” and inserting “10 years”; and

(2) in paragraph (2)(A), by striking “10 years” and inserting “15 years”.

(b) **IRC AMENDMENTS.**—Section 431(d) of the Internal Revenue Code of 1986 (relating to extension of amortization periods for multiemployer plans) is amended—

(1) in paragraph (1)(A), by striking “5 years” and inserting “10 years”; and

(2) in paragraph (2)(A), by striking “10 years” and inserting “15 years”.

(c) **EFFECTIVE DATE.**—The amendments made by this section shall apply with respect to applications for extension filed on or after the date of the enactment of this Act.

**SEC. 306. PENSION PLAN MAINTAINED BY CHRISTIAN SCHOOLS INTERNATIONAL TREATED AS CHURCH PLAN.**

(a) **IN GENERAL.**—For purposes of title I of the Employee Retirement Income Security Act of 1974 and the Internal Revenue Code of 1986, any pension plan maintained by Christian Schools International as of January 1, 2009, shall be treated as a church plan within the meaning of section 3(33) of such Act and section 414(e) of such Code which is maintained by an organization described in section 3(33)(C)(ii)(II) of such Act and section 414(e)(3)(B)(ii) of such Code.

(b) **EFFECTIVE DATE.**—This section shall apply to plan years beginning on or after January 1, 2007.

**SEC. 307. SPECIAL RULE FOR DETERMINING ADEQUATE CONSIDERATION IN CONNECTION WITH THE PURCHASE AND SALE OF QUALIFYING EMPLOYER SECURITIES.**

(a) **IN GENERAL.**—Section 3(18) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002(18)) is amended—

(1) by redesignating clauses (i) and (ii) of subparagraph (A) as subclauses (I) and (II), respectively, and by redesignating subparagraphs (A) and (B) as clauses (i) and (ii), respectively;

(2) by inserting “(A)” after “(18)”; and

(3) by adding at the end the following new subparagraph:

“(B) In the case of a plan described in section 407(d)(3)(A) which was in existence on the date of the enactment of this Act, if the valuation set for the purchase or sale by the plan of a qualifying employer security (as defined in section 407(d)(5)) is set at a price which has not been found by the Secretary to be in violation of this Act and which is book value computed annually in accordance with generally accepted accounting principles and the provisions of the plan, and if the valuations set for all prior purchases or sales by the plan of qualifying employer securities have been consistently so priced, then all such valuations for qualifying employer securities shall be deemed to be adequate consideration within the meaning of subparagraph (A).”.

(b) **EFFECTIVE DATE.**—The amendments made by this section shall apply to purchases and sales of qualifying employer securities on or after September 2, 1974.

**SEC. 308. EXTENDED PERIOD FOR SINGLE-EMPLOYER DEFINED BENEFIT PLANS TO AMORTIZE THE SHORTFALL AMORTIZATION BASE FOR 2009 AND 2010.**

(a) **AMENDMENTS TO ERISA.**—

(1) **IN GENERAL.**—Paragraph (2) of section 303(c) of the Employee Retirement Income Security Act of 1974 is amended by adding at the end the following new subparagraph:

“(D) SPECIAL RULE FOR 2009 AND 2010.—In the case of the shortfall amortization base of the plan for any plan year beginning in 2009 or 2010 (hereafter in this subparagraph referred to as the ‘base year’)—

“(i) DETERMINATION OF INSTALLMENTS.—The shortfall amortization installments are—

“(I) in the case of the last 7 plan years in the 9-plan-year period beginning with the base year, the amounts necessary to amortize the shortfall amortization base of the plan for the base year in level annual installments over such last 7 plan years, and

“(II) in the case of the first 2 plan years in such 9-plan-year period, interest on such shortfall amortization base (determined as provided in subparagraph (C)).

“(ii) SHORTFALL INSTALLMENT.—The shortfall amortization installment for any plan year in the 9-plan-year period under clause (i) with respect to such shortfall amortization base is the annual installment determined under clause (i) for that year for that base.”

(2) CONFORMING AMENDMENT.—Paragraph (1) of section 303(c) of such Act is amended by striking “the shortfall amortization bases for such plan year and each of the 6 preceding plan years” and inserting “any shortfall amortization base which has not been fully amortized under this subsection”.

(b) EFFECTIVE DATE.—The amendments made by this section shall apply to plan years beginning after December 31, 2008.

#### PURPOSE

H.R. 2989, the 401(k) Fair Disclosure and Pension Security Act of 2009, has three complementary objectives. First, it improves the 401(k) retirement system and protects workers by requiring transparency and disclosure of fees, in a clear and understandable way, to employers and employees. Second, if workers receive investment advice, H.R. 2989 requires that the advice must be based on their needs, not the financial interest of those providing the advice. Third, H.R. 2989 makes modest, but important adjustments to pension funding requirements for single and multi-employer defined benefit plans. The recent economic recession has placed a strain on many defined benefit plans, and these modest adjustments will provide plan sponsors with temporary financial relief.

#### COMMITTEE ACTION INCLUDING LEGISLATIVE HISTORY AND VOTES IN COMMITTEE

##### 110TH CONGRESS

#### *Introduction of the “401(k) Fair Disclosure for Retirement Security Act of 2007”*

On July 26, 2007, Representative George Miller (D-CA), Chairman of the Committee on Education and Labor, introduced H.R. 3185 the 401(k) Fair Disclosure for Retirement Security Act of 2007. The bill focused on four areas: (1) requiring plan sponsors to disclose to participants how much each service associated with the plan is expected to cost and any possible conflicts of interest; (2) requiring advance notice of the investment options available, including at least one nationally recognized market-based index fund; (3) requiring that employees receive an annual benefit statement specifying the fees taken out of their retirement accounts in the previous plan year; and (4) establishing a DOL advisory council to issue an annual report on the state of American workers’ retirement security. H.R. 3185 has two cosponsors and was referred to the Committee on Education and Labor and the Subcommittee on Health, Employment, Labor and Pensions.

*Committee on Education and Labor full committee hearing*

On March 6, 2007, the Committee on Education and Labor held a full committee hearing entitled “Are Hidden 401(k) Fees Undermining Retirement Security?” Testifying at the hearing were: Barbara Bovbjerg, Director for Education, Workforce and Income Security Issues, GAO; Matthew Hutcheson, independent pension fiduciary; Stephen Butler, President and Founder, Pension Dynamics Corporation; and Robert Chambers, Esq., Partner, Helms, Mulliss & Wicker LLC and Chairman of the American Benefits Council.

*Committee on Education and Labor legislative hearing on H.R. 3185*

On October 4, 2007, the Committee on Education and Labor held a full committee legislative hearing on H.R. 3185, the 401(k) Fair Disclosure for Retirement Security Act of 2007. Witnesses included: Bradford P. Campbell, Assistant Secretary of Labor, Employee Benefits Security Administration, U.S. Department of Labor; David Certner, Director of Federal Affairs, AARP; Jon Chambers, Principal, Schultz, Collins, Lawson, Chambers, Inc.; Lew Minsky, senior attorney, Florida Power & Light Co.; Matthew H. Scanlan, Managing Director, Americas Institutional Business at Barclays Global Investors; and Tommy Thomasson, President and CEO, the Daily Access Corporation.

*Committee on Ways and Means hearing*

On October 30, 2007, the Ways and Means Committee held a hearing entitled “Hidden 401(k) Fees: How Disclosure Can Increase Retirement Security.” Three panels of witnesses testified before the Committee. The first panel included: Bradford Campbell, Assistant Secretary of Labor, Employee Benefits Security Administration; W. Thomas Reeder, Esq., Benefits Tax Counsel, the Office of Tax Policy in the U.S. Department of the Treasury; Andrew J. Donohue, Director of the Division of Investment Management, the U.S. Securities and Exchange Commission; and Barbara D. Bovbjerg, Director of Education, Workforce, and Income Security Issues, GAO. The second panel consisted of testimony from: Tommy Thomasson, President and CEO, DailyAccess Corporation; Harold L. Jackson, President and CEO, Buffalo Supply, Inc., on behalf of the U.S. Chamber of Commerce; Allison R. Klausner, Assistant General Counsel for Benefits, Honeywell International Inc., on behalf of the Americans Benefits Council; Lew Minsky, Senior Attorney, Florida Power & Light, on behalf of the ERISA Industry Committee; and Paul Schott Stevens, President and CEO, the Investment Company Institute. The third panel included: Bertram L. Scott, Executive Vice President for Strategy, Integration and Policy, TIAA-CREF; Mindy L. Harris, President, the National Association of Government Defined Contribution Administrators; David L. Wray, President, the Profit Sharing/ 401(k) Council of America; Lisa A. Tavares, Esq., Partner, Veneable Law Firm LLP; Norman P. Stein, professor, University of Alabama School of Law, on behalf of the Pension Rights Center; and David Certner, Director of Federal Affairs, AARP. Statements for the record were submitted by: the American Council of Life Insurers; Daniel Wintz of Omaha, Nebraska; Gerald and Judith Schneider; Kevin Powell; Massachusetts Mutual Life Insurance Company; Matthew D. Hutcheson, inde-

pendent pension fiduciary; South Carolina Retirement Systems; and Wayne H. Miller, Denali Fiduciary Management.

*Senate Special Committee on Aging hearing*

On October 24, 2007, the Senate Special Committee on Aging held a hearing on “Hidden 401(k) Fees: How Disclosure Can Increase Retirement Security.” The Committee heard testimony from: Barbara Bovbjerg, Director of Education, Workforce and Income Security Issues, GAO; Bradford Campbell, Assistant Secretary of Labor, the Employee Benefits Security Administration; Jeff Love, Director of Research, AARP; Mercer Bullard, assistant professor, University of Mississippi School of Law; Michael Kiley, President, Plan Administrators, Inc.; and Robert Chambers, Esq., Partner, Helms, Mulliss & Wicker LLC and Chairman of the American Benefits Council.

*Introduction of S. 2473, the Defined Contribution Fee Disclosure Act of 2007*

On December 13, 2007, Senator Tom Harkin (D–IA), along with Senator Herb Kohl (D–WI), introduced S. 2473, the Defined Contribution Fee Disclosure Act of 2007. The bill was referred to the Senate Committee on Health, Education, Labor, and Pensions (HELP). S. 2473 requires fee disclosure (actual charges or an estimate) by service providers to plan sponsors in the following categories: investment management; recordkeeping and administration; sales charges, including commissions and charges for advisory services; and an “other” category. Under the bill, service providers are also required to disclose any conflicts of interest. Fee disclosure and conflict-of-interest statements are to be provided annually or after substantive changes are made. Plan sponsors must provide information on investment options and upon request, plan participants can get information on fees charged their account on a quarterly basis.

*Committee on Education and Labor full committee markup on H.R. 3185*

On April 16, 2007, the Committee on Education and Labor met to mark up H.R. 3185. The following amendments were offered:

- Miller Amendment in the Nature of a Substitute: Chairman George Miller (D–CA) offered an amendment in the nature of a substitute. The Miller substitute made the following changes to H.R. 3185:
  - Changes the disclosure required to employers from a statement detailing up to 13 categories of fees and reduces it to 4 categories of fees—administrative fees, investment management fees, transaction based fees, and any other fees not included in the prior three categories.
  - Gives service providers flexibility to provide estimates based on the previous year’s experience.
  - Permits service providers who contract with other unaffiliated parties to rely on the information that they receive, if they have no reason to question the information provided.
  - Requires that workers be clearly told which charges are being paid by the worker and which charges are being paid by the employer.

- Permits employers to provide disclosure on an electronic basis provided workers have a convenient way to request paper disclosure.
- Specifies the penalties that the Secretary of Labor shall impose if the law is violated. The Secretary is provided authority to waive or reduce any penalty if the violation was made in good faith or would create financial hardship.
- McKeon Amendment in the Nature of a Substitute: Representative Howard “Buck” McKeon (R–CA) offered an amendment in the nature of a substitute providing that, in the case of “bundled services,” service providers could not be penalized for failure to break out the costs of a plan. This substitute was defeated on a vote of 19–25.
- Andrews Amendment: Health, Employment, Labor and Pensions (HELP) Subcommittee chairman offered an amendment striking the language in H.R. 3185 that mandates plan sponsors to offer an index fund option to participants. In its place, the amendment provides that those who choose to offer an index fund will not be liable for any losses due to investment decision-making responsibilities as provided under Section 404(c) of ERISA. The amendment was adopted by a vote of 25–19.
- Price Amendment: Representative Tom Price (R–GA) offered a second-degree amendment striking the provision for an index fund in its entirety. This amendment failed by a vote of 20–25.
- Davis Amendment: Representative Susan Davis (D–CA) offered an amendment to require the disclosure to participants of a market-based point of reference to use for making comparisons among different investment offerings and fees. After debate within the Committee, she withdrew the amendment.
- Price Amendment: Representative Tom Price (R–GA) offered a second amendment to add a provision requiring that any fee comparison chart provided under the bill include an investment performance comparison to the annual rate of return of the old-age, survivors, and disability program under Title II of the Social Security Act. Representative Price withdrew the amendment.
- Kline Amendment: Representative John Kline (R–MN) offered an amendment to allow a plan sponsor to satisfy its fiduciary obligation under ERISA by considering, with bundled services, the aggregate or total costs of a plan. Representative Kline withdrew the amendment.

H.R. 3185 was adopted as amended by a vote of 25–19, and the bill was favorably reported out of committee.

#### 111TH CONGRESS

*Health, Employment, Labor, and Pension Subcommittee hearing on  
“Retirement Security: The Importance of an Independent Investment Adviser”*

On March 24, 2009, the Health, Employment, Labor, and Pension Subcommittee held a hearing entitled, “Retirement Security: The Importance of an Independent Investment Adviser.” Testifying at the hearing were: Mercer Bullard, Associate Professor, University of Mississippi Law School; Ken Baker, Corporate Director of Human Resources, Applied Extrusion Technologies; Sherrie Grabot, CEO, GuidedChoice; and Dr. Charles Jeszeck, Assistant Director

for Education, Workforce, and Income Security Issues at the Government Accountability Office (GAO).

*Introduction of the “Conflicted Investment Advice Prohibition Act of 2009”*

On April 21, 2009, Representative Robert Andrews (D–NJ), chair of the Subcommittee on Health, Employment, Labor and Pensions, introduced H.R. 1988 the Conflicted Investment Advice Prohibition Act of 2009. The bill was co-sponsored by Representative George Miller (D–CA). This bill prohibits the provision of conflicted investment advice to plan participants. It does this by eliminating the economic incentive for an investment adviser to act on behalf of his best interests, instead of the participants. H.R. 1988 was referred to the Committee on Education and Labor and the Subcommittee on Health, Employment, Labor and Pensions.

*Introduction of the “401(k) Fair Disclosure for Retirement Security Act of 2009”*

On April 21, 2009, Representative George Miller (D–CA), Chairman of the Committee on Education and Labor, introduced H.R. 1984 the 401(k) Fair Disclosure for Retirement Security Act of 2009. The bill had eight co-sponsors. The bill amends Title I of the Employee Retirement Income Security Act of 1974 to provide special reporting and disclosure rules for individual account plans and to provide a minimum investment option requirement for such plans. H.R. 1984 was referred to the Committee on Education and Labor and the Subcommittee on Health, Employment, Labor and Pensions.

*Subcommittee on Health, Employment, Labor, and Pensions hearing of the “401(k) Fair Disclosure for Retirement Security Act of 2009”*

On April 22, 2009, the Subcommittee on Health, Employment, Labor, and Pensions held a hearing on “The 401(k) Fair Disclosure for Retirement Security Act of 2009”. Testifying at the hearing were: Mercer Bullard, Assistant Professor of Law, University of Mississippi, and Founder, Fund Democracy; Kristi Mitchem, Managing Director, US Defined Contribution Plans, Barclays; Alison Borland, Retirement Strategy Leader, Hewitt Associates; Julian Onorato, CEO, ExpertPlan, Inc.; Larry Goldbrum, Executive Vice President and General Counsel, The Spark Institute; and Robert Chambers, Esq., Chairman of the American Benefits Council and Partner at McGuire and Woods.

*Subcommittee on Health, Employment, Labor, and Pensions (HELP) markup hearing of “H.R. 1984, the 401(k) Fair Disclosure for Retirement Security Act of 2009, and H.R. 1988, the Conflicted Investment Advice Prohibition Act of 2009”*

On June 17, 2009, the HELP Subcommittee met to mark up H.R. 1984 and H.R. 1988. For H.R. 1988, the following amendments were offered:

- Andrews Amendment in the Nature of a Substitute: Subcommittee Chairman Andrews (D–NJ) offered an amendment in the nature of a substitute. The Andrews substitute made the following changes to H.R. 1988: (1) provides an exemption from the

specific requirements of the amendment for pre-Pension Protection Act (PPA) investment advice arrangements, subject to the review by the Department of Labor; (2) protects from liability the employers who prudently select an independent investment adviser, as defined by the bill, for their participants. This substitute passed by a voice vote.

- **McCarthy Amendment:** Representative Carolyn McCarthy (D-NY) offered an amendment in the nature of a substitute providing for financial literacy education. This substitute passed by a voice vote.

H.R. 1988, the Conflicted Investment Advice Prohibition Act of 2009 was ordered reported, as amended, to the Full Committee by a vote of 13 to 8.

For H.R. 1984, the 401(k) Fair Disclosure for Retirement Security Act of 2009, the following amendments were offered:

- **Andrews Amendment in the Nature of a Substitute:** Subcommittee Chairman Andrews (D-NJ) offered an amendment in the nature of a substitute. The Andrews substitute made the following changes to H.R. 1984:

Disclosures to Employers—

- The amendment changes the requirement for plan administrators to obtain service disclosure statements from service providers from 10 days prior to entering into a contract with a service provider to a reasonable period in advance of entering into a contract.

- The amendment allows the service provider, in providing a service disclosure statement to a new plan, to use estimates based on the plan's participants and beneficiaries instead of using a comparable plan with similar demographics.

- The amendment removes language that narrows a service provider's fiduciary duty of care and loyalty when disclosing information required under this bill.

- The amendment no longer requires the service provider to disclose to the plan administrator payments the service provider receives from the plan, or arrangements the service provider has with the plan.

- The amendment allows the service provider to use formulas, where appropriate, in disclosing payment arrangements to the plan administrator.

- The amendment requires the service provider to disclose arrangements whereby it may receive a benefit from offering participants affiliated products (cross-selling).

- The amendment removes the requirement that the Secretary issue a model service disclosure statement and instead requires the Secretary, as appropriate, to review the accuracy and sufficiency of service provider disclosure statements

- The amendment modifies the \$5,000 limitation provision such that it is based on a reasonable expectation of the value of the contract equaling or exceeding the \$5,000. In addition, the amendment removes the cost-of-living and rounding provisions pertaining to the \$5,000 limitation, allowing the Secretary to adjust the limitation as appropriate.

Initial Disclosure to Participants and Beneficiaries—

- The amendment changes the requirement for plan administrators to provide investment information in advance from 10

days prior to a reasonable time in advance of a participant's initial investment in a plan.

- The amendment requires that the plan fee comparison chart include language indicating that past performance does not guarantee future results.

- The amendment allows the Secretary to issue more than one model notice.

- The amendment allows the plan administrator, in providing notices to participants and beneficiaries in a new plan, to use reasonable estimates based on the plan's participants and beneficiaries instead of using a comparable plan with similar demographics.

Quarterly Disclosure to Participants and Beneficiaries—

- The amendment allows the plan administrator, in providing quarterly statements to participants and beneficiaries, to use reasonable assumptions which are to be included in the statement.

- The amendment allows the Secretary to issue more than one model quarterly benefit statement.

Enforcement—

- The amendment provides the Secretary with greater discretion in the issuance of penalties for non-compliance.

Minimum Investment Option—

- The amendment clarifies the definition of the minimum investment option and removes the requirement that the minimum investment option be designed such that it would likely meet a participant's retirement income needs.

Effective Dates—

- The amendment keeps the effective date at one year after enactment, but requires the secretary to issue regulations nine months after enactment.

H.R. 1984, the 401(k) Fair Disclosure for Retirement Security Act of 2009, was ordered reported, as amended, to the Full Committee by a vote of 13 to 8.

*Introduction of the "401(k) Fair Disclosure and Pension Security Act of 2009"*

On June 23, 2009, Representative George Miller (D-CA), Chairman of the Committee on Education and Labor, introduced H.R. 2989 the 401(k) Fair Disclosure and Pension Security Act of 2009. The bill was co-sponsored by Representative Robert Andrews (D-NJ). The bill amends the Employee Retirement Income Security Act of 1974 to provide special reporting and disclosure rules for individual account plans and to provide a minimum investment option requirement for such plans. It also amends such Act to provide for independent investment advice for participants and beneficiaries under individual account plans, and amends such Act as well as the Internal Revenue Code of 1986 to provide transitional relief under certain pension funding rules added by the Pension Protection Act of 2006. H.R. 2989 was referred to the Committee on Education and Labor and the Committee on Ways and Means.

*Committee on Education and Labor full committee markup hearing of "H.R. 2989, the 401(k) Fair Disclosure and Pension Security Act of 2009"*

On June 24, 2009, the House Education and Labor full committee met to markup H.R. 2989. The following amendments were offered:

- Amendment in the Nature of a Substitute: Chairman George Miller (D-CA) offered an amendment in the nature of a substitute. The Miller substitute made the following changes to H.R. 2989:

- Title I: Requires that the Plan Fee Comparison Chart also include appropriate benchmarks on investment return information for each investment option offered for the same periods; requires that the Secretary conduct a study on the appropriateness and impact of benchmarking investment fees and report to Congress on the results of the study within 180 days.

- Title II: Strikes a provision that would have curtailed the Secretary's discretion to review and modify certain related advisory opinions in light of the purpose of this bill; clarifies that an independent investment adviser must be a registered investment adviser or representative of a registered investment adviser under the Investment Adviser's Act of 1940; redefines a plan investment provider as a person (or anyone affiliated) that creates or manages any investment in which any individual account plan invests; requires that any computer model which must properly consider for fees in investment options and investment advisers are not favored over plan participants. Also allows the Secretary to promulgate additional criteria for a computer model that is in the best interest of participants; broadens the scope of the DOL study to include the effect of the department's financial literacy education efforts directed at the general public, not just workers.

- Title III: Allows a pension plan maintained by Christian Schools International to be treated as a church plan; allows a special rule for determining adequate consideration in connection with the purchase and sale of qualifying employer securities.

This substitute passed by a voice vote.

- Kline Amendment in the Nature of a Substitute: Representative John Kline (R-MN) offered an amendment to strike all of Title I and instead requires service providers to disclose to plan administrators of both defined contribution as well as defined benefit plans; service providers are required to disclose total compensation for the services rendered, and "bundled" arrangements are not required to disaggregate their compensation per service. Plan sponsors are also permitted to rely on the accuracy of the information disclosed by service providers, thus satisfying the fiduciary duty of plan sponsors. In the disclosure to participants, plan sponsors are not required to disclose their fees according to a standard typology, and no index fund as a minimum investment option is offered. This substitute was defeated on a vote of 18-26.

- Holt and Wu Amendment: Representatives Rush Holt (D-NJ) and David Wu (D-OR) offered an amendment to strike language that prevents a plan investment provider from also providing investment advice. This amendment was defeated on a vote of 21-25.

- **McKeon Amendment:** Representative Howard “Buck” McKeon (R–CA) offered an amendment providing that, in the case of “bundled services,” service providers could not be penalized for failure to break out the costs of a plan. This amendment was defeated on a vote of 18–28.

- **Guthrie Amendment:** Representative Brett Guthrie (R–KY) offered an amendment permitting an extended period for single-employer defined benefit plans to amortize their shortfall amortization base for 2009 and 2010. This amendment was passed by a voice vote.

- **Price Amendment:** Representative Tom Price (R–GA) offered an amendment striking the provision for an index fund as a minimum investment option requirement for plans. This amendment failed by a vote of 18–27.

- **Kline Amendment:** Representative John Kline (R–MN) offered an amendment that permits fiduciaries to rely on the accuracy of the disclosed information from service providers, for purposes of satisfying their fiduciary duties to the plan. This amendment failed by a vote of 18–28.

- **Kline Amendment:** Representative John Kline (R–MN) offered an amendment that allows GM and Chrysler vehicle dealerships which were required to close due to the restructuring proceedings to temporarily suspend their withdrawal liability payments. This amendment failed by a vote of 18–28.

H.R. 2989, the “401(k) Fair Disclosure and Pension Security Act of 2009” was ordered reported, as amended, to the House by a vote of 29 to 17.

#### SUMMARY

As reported, Title I of H.R. 2989 seeks to ensure that workers have the necessary information about their 401(k) plan to adequately invest their retirement assets, and employers must also have the information they need to fulfill their duty as prudent stewards of workers’ retirement funds.

Title I requires the disclosure of plan fees that may be assessed against workers’ accounts to employers. Within a reasonable period in advance of contracting for pension plan services, employers will receive a written statement describing those services to be provided and the total expected annual charges for services broken into four categories: (1) plan administration and recordkeeping; (2) transaction-based fees; (3) investment management; and (4) other (any changes not included above). Charges for services may be based on estimates from the previous year’s experience and shall be expressed in dollars, but also can be provided as a percent of total assets.

Title I also requires disclosure of plan fees to employees. Within a reasonable time in advance of a worker’s first contribution to an individual account, the worker will receive standardized information on the investment options in the plan. Workers will also receive a fee comparison chart comparing the investment returns and fees associated with each of the plan’s investment options. In addition, workers will receive a quarterly statement detailing contributions, earnings, fees, closing account balance and net return. All fees taken out of an account would be disclosed in one number, but the workers could request more detailed fee information from their

plan administrator. Small employers may provide annual statements.

The Department of Labor (DOL) is required to provide assistance to employers and workers in finding affordable investment options and understanding associated fees and services. DOL will annually survey compliance; issue model notices; issue penalties against any employers or service providers not providing required notices (the Secretary has discretion to lower or waive any penalties if in the interests of the workers); coordinate with the SEC and other agencies; and report to Congress on ways to simplify and improve pension plan reporting and disclosure.

Finally, if employers seek limited liability for their investment options, then the plan must offer at least one low-cost market-based index fund option.

Title II of H.R. 2989 ensures that workers and the retirement plans in which they invest have access to independent investment advice. This provision prohibits conflicted investment advisers from providing advice to employer-sponsored retirement account plans and plan participants.

Title II amends section 404(a) of ERISA by permitting employers to enter into investment advice arrangements for the plan and its participants only if the advisor qualifies as an "independent investment adviser" as that phrase is defined in this title. An independent investment adviser is a fiduciary of a self-directed plan. Furthermore, this title also provides an incentive for employers to offer independent investment advice to participants by providing a safe-harbor to those employers that prudently select and periodically review the independent investment adviser for their plan.

To qualify as an independent investment adviser as defined in this title, an adviser must be a registered investment adviser under the Investment Adviser's Act of 1940 or representative of such a registered investment adviser. The adviser cannot manage any investments in which plan assets of the individual account plan is invested. The adviser's compensation cannot be provided either directly or indirectly from any person that markets, sells or manages, or provides investments in which the assets of the plan are invested; or the adviser's compensation must follow the standard idea of "fee-leveling." The adviser provides advice after they establish a written arrangement that (a) deems the investment adviser a fiduciary of the plan; (b) requires the advice be provided only by registered representatives of the investment adviser and affiliates; (c) discloses any material or financial relationships with brokers, clients or affiliates that may pose conflicts of interests; (d) discloses all fees and compensation the adviser received and may receive in the future with respect to providing investment advice; and (e) annually discloses all fees and compensation made through advice.

Another way an entity would qualify as an independent investment adviser would be if the advice is provided entirely by use of a qualifying computer model. The computer model must be certified by an eligible investment expert and the model should be certified and audited annually. Entities using a computer model arrangement must also disclose additional information to participants, including fees, affiliation to investment options offered, and services offered to participants.

Title II would also expand educational outreach by the Department of Labor (DOL) to workers to include financial literacy with respect to investing for retirement and the management of debt.

Title III of H.R. 2989 provides temporary funding relief for single and multi-employer defined benefit plans which are unable to satisfy the funding requirements as delineated in the Pension Protection Act (PPA) due to the current economic recession. Single-employer defined benefit plans will be allowed to revoke a yield curve election made in the 2009 plan year for the plan year beginning in 2010 without approval; the effective date of the PPA regulations will not take effect until, at the earliest, years beginning after December 31, 2009; plan investment expenses shall be amortized over seven years; and the shortfall amortization period has been extended from seven to nine years. Plans which were under-funded in excess of \$50 million must submit actuarial and financial information to the PBGC. Finally, multi-employer defined benefit plans will be allowed to extend the automatic amortization extension period from 5 to 10 years with an additional 5 years available for IRS approval.

## COMMITTEE VIEWS

### OVERVIEW

During much of the twentieth century, two types of retirement income—Social Security and traditional employer-provided defined benefit plans—helped lift older Americans out of poverty and allowed them to maintain a decent standard of living during their retirement years. While traditional defined benefit plans currently cover 20 million active workers and 20 million retirees,<sup>1</sup> over the last two decades, more workers have begun participating in defined contribution plans, specifically 401(k) plans.

Today, 401(k) plans “represent the majority of all private pension plans.”<sup>2</sup> A 2005 study conducted by the Employee Benefits Research Institute (EBRI) reported that the number of 401(k) plan participants grew from under eight million in the mid-1980s to approximately 47 million by 2005.<sup>3</sup> In 2007, 50 million American workers were active 401(k) participants. Total 401(k) assets were valued at approximately 3 trillion dollars, representing 17 percent of all retirement assets at the end of 2007.<sup>4</sup>

There are some important differences between the traditional defined benefit plans and defined contribution or 401(k)-type plans. First, defined benefit plans guarantee a fixed level of lifetime monthly benefits for employees to be provided by the employer at retirement.<sup>5</sup> Second, the investment decisions in defined benefit plans are made by “qualified professionals subject to fiduciary

<sup>1</sup> Sarah Holden, Peter Brady & Michael Hadley, 401(k) Plans: A 25-Year Retrospective, Investment Company Institute Research Perspective, vol. 12, no. 2 (2006).

<sup>2</sup> Government Accountability Office, Private Pensions, Increased Reliance on 401(k) Plans Call for Better Information on Fees, GAO-07-530T (Mar. 2007) (hereinafter “GAO-07-530T”).

<sup>3</sup> Employee Benefits Research Institute, 401(k) Asset Allocation, Account Balances and Loan Activity in 2006 (August 2007). See also, AARP, Participants Awareness and Understanding of Fees, 1 (Jul. 2007); GAO-07-530T, supra note 2.

<sup>4</sup> Sarah Holden, Jack VanDerhei, Luis Alonso & Craig Copeland, 401(k) Plan Asset Allocation, Account Balances, and Loan Activity in 2007, Investment Company Institute Research Perspective, v.14, n.3 (2008).

<sup>5</sup> Government Accountability Office, Employer-Sponsored Health and Retirement Benefits, GAO-07-355, 11 (Mar. 2007).

standards of prudence and diversification.”<sup>6</sup> Employers must administer the benefits in compliance with federal law<sup>7</sup> and must keep the plans fully funded.<sup>8</sup> If assets decrease in value or a plan’s liabilities increase, it is the responsibility of the employer to make additional payments to the plan. The assets of the plan are exempt from creditors in the event the employer goes into bankruptcy and are insured up to a certain limit by the Pension Benefit Guaranty Corporation (PBGC).<sup>9</sup>

Unlike defined benefit plans where an employee is generally guaranteed a certain retirement income and the burden of the investment is on the employer, defined contribution plans place the burden of building a retirement nest egg entirely on the employee.<sup>10</sup> Due to this growth of participant-directed retirement account plans, more individuals than before are responsible for making informed investment decisions to ensure an adequate level of retirement benefits, and specific information about the plan and plan options has become more relevant to participants.

In particular, it has become critically important for participants to understand the fees that are charged against their 401(k) accounts. Fee disclosure reform for 401(k) plans has the potential to bring about substantial reductions in overall plan expenses for beneficiaries and strengthen the foundation of workers’ financial security in retirement. According to the GAO, a one percent difference in fees can result in an almost 20 percent decrease in retirement assets over time.<sup>11</sup> Employers can pass on all these fees to their employees. If employees do not know about these fees, then they cannot make the best retirement decisions.

The Committee on Education and Labor is committed to strengthening the retirement security of American workers. The “401(k) Fair Disclosure and Pension Security Act of 2009” is about ensuring that participants in 401(k) plans have better and easier-to-understand fee and expense information to help participants make more prudent investment decisions. It also ensures that participants receive investment advice from advisers who have the participant’s best interests in mind, not their own. Investment advice that is free from financial conflicts of interest is crucial for these individuals to make appropriate investment choices so that they have an adequate retirement income.

The Committee is also dedicated to ensuring the stability of defined benefit plans. Due to the recent economic recession, many companies face billions of dollars in defined benefit funding shortfalls and if no funding relief is provided, then they may have reallocate resources from capital investment, infrastructure, and their workforce. The “401(k) Fair Disclosure and Pension Security Act of 2009” also provides additional temporary funding relief for single and multi-employer defined benefit plans which are unable to satisfy the funding requirements as delineated in the Pension Protection Act (PPA).

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<sup>6</sup>Susan Stabile, *Freedom to Choose Unwisely: Congress’ Misguided Decision to Leave 401(k) Plan Participants to their Own Devices*, 11 *Cornell J.L. & Pub. Pol’y* 361 (2002).

<sup>7</sup>Patrick Purcell & Jennifer Staman, *Summary of the Employee Income Security Act*, Congressional Research Service, 7 (Apr. 2008).

<sup>8</sup>*Id.* at 8.

<sup>9</sup>*Id.* See also, Stabile, *supra* note 6, at 11.

<sup>10</sup>*Id.* at 4.

<sup>11</sup>GAO-07-530T, *supra* note 2, at 10.

## I. 401(k) Fee Disclosure

## FEES PAID ON 401(K) PLANS

Generally, retirement plan assets are invested by financial institutions, also known as service providers, hired by plan sponsors, often the employer offering the 401(k) plan. Fees are charged by the service provider or the various outside companies that the plan sponsor hires, and can be deducted from plan assets.<sup>12</sup> These services can include investment management (i.e., selecting and managing the securities included in a mutual fund); consulting and providing financial advice (i.e., selecting vendors for investment options or other services); plan administration or record keeping (i.e., tracking individual account contributions); custodial or trustee services for plan assets (i.e., holding the plan assets in a bank); and telephone or Web-based customer services for participants.

These fees for services are either “bundled” or “unbundled”. Bundled providers are typically large financial services companies whose primary business is selling investments. They bundle their proprietary investment products with affiliate-provided plan services into a package that is sold to plan sponsors. In contrast, unbundled or independent providers are primarily in the business of offering administrative services with a “universe” of unaffiliated, non-proprietary investment options. Bundled providers disclose the cost of the investments to the plan sponsor, but do not disaggregate the costs of the administrative services, whereas unbundled providers disclose both since the costs are paid to different providers.

How much each plan participant is charged in fees is generally conveyed as a ratio of the costs to the value of plan assets. A plan’s expense ratio can be affected by: (1) the entire value of plan assets; (2) the total number of participants; (3) the average account balance; and (4) the types of investments the plan offers.<sup>13</sup> In addition, the size of the plan often impacts the amount of fees paid by participants. Large employers are better able to spread the costs over more accounts and can usually negotiate lower costs as a result of the volume of assets that will be included in the plan. Smaller employers often pay higher fees as a result of having fewer accounts to distribute the costs with fewer assets.<sup>14</sup>

According to the Government Accountability Office (GAO), investment management and recordkeeping fees account for the majority of 401(k) plan fees,<sup>15</sup> with investment management fees accounting for the biggest portion of total fees.<sup>16</sup> For example, invest-

<sup>12</sup>Are Hidden 401(k) Fees Undermining Retirement Security?, hearing before the Committee on Education and Labor, 110th Cong., 1st Sess. (Mar. 6, 2007) (written testimony of Matthew D. Hutcheson) (hereinafter—Hutcheson Testimony). See also, Matthew D. Hutcheson, “Uncovering and Understanding Hidden Fees in Qualified Retirement Plans,” 15 Elder L.J. 323, 324 (2007). In his article, Hutcheson lists in order of their involvement those who could potentially receive payments, including: (1) the brokerage firm for clearing the trades of the fund; (2) the fund company for providing research services to shareholder; (3) the fund company for managing funds; (4) plans managed by insurance companies that could have extra costs embedded associated with mortality underwriting elements; (5) the clearing agent that clears and consolidates trades from multiple-institutions; (6) the custodian that holds funds in an account for the benefit of the trust; (7) the record keeper; (8) sales people, insurance agents and brokers for finder fees; (9) fiduciary investment advisers; (10) consultants; (11) peripheral companies; (12) CPA firms; (13) a plan with its own legal counsel; and (14) insurance premiums.

<sup>13</sup>Patrick Purcell, Retirement Savings Accounts: Fees, Expenses and Account Balances, Congressional Research Services (Oct. 2007).

<sup>14</sup>Id.

<sup>15</sup>GAO-07-530T, supra note 2, at 11.

<sup>16</sup>Id.

ment management fees may be paid to companies that manage a mutual fund for all services related to the fund's operation, including the selection of a mutual fund's portfolio, the fund's management, and the marketing of the fund and the compensation paid to brokers who sell the fund.<sup>17</sup> Investment management fees are typically borne by participants and "are usually charged as a fixed percentage of assets."<sup>18</sup>

Recordkeeping fees generally pay for the set-up and maintenance of the 401(k) plan and include activities such as, "enrolling plan participants, processing participant fund selections, preparing and mailing account statements and other related administrative activities."<sup>19</sup> Recordkeeping fees are different from investment fees in that they apply to the entire 401(k) plan versus the individual investment options<sup>20</sup> and may be "charged as a percentage of a participant's assets, a flat fee, or a combination of both."<sup>21</sup> Participants are increasingly bearing the cost of these fees.<sup>22</sup> As for the costs associated with transaction and other fees paid on a plan, these fees "generally constitute a much smaller percentage of the total plan fees."<sup>23</sup> However, when paid as a percentage of assets, these fees increase continually, even if costs and services do not increase.

The Employee Retirement Income Security Act of 1974 (ERISA), the federal statute which regulates pension plans, set fiduciary standards that require employee benefit plan funds be handled prudently and in the best interests of participants. It requires that those acting in a fiduciary capacity must "act in the exclusive interest of participants and beneficiaries—defraying reasonable expenses of administering the plan."<sup>24</sup> Pursuant to regulations,<sup>25</sup> DOL has construed the statute to require employers to monitor the reasonableness of the fees and expenses charged to participants.<sup>26</sup>

ERISA can shield the sponsor of a defined contribution plan from liability when participants or beneficiaries suffer losses that result from individual investment choices.<sup>27</sup> However, a plan fiduciary is not immunized from liability to the extent the fiduciary acted imprudently in offering investment options with excessive fees.<sup>28</sup> If a plan sponsor does not prudently negotiate fees and expenses, it retains liability for the plan's resulting loss.<sup>29</sup>

#### THE PROBLEM

Participants should consider fees when investing in a 401(k) plan because fees can significantly decrease retirement savings over the course of a career. As participants accrue earnings on their investments, they pay a number of fees, including expenses, commissions,

<sup>17</sup> Id.

<sup>18</sup> Id. at 13.

<sup>19</sup> Id. at 12.

<sup>20</sup> Id.

<sup>21</sup> Id. at 13.

<sup>22</sup> Id.

<sup>23</sup> Id.

<sup>24</sup> ERISA § 404(a)(1) (codified at 29 U.S.C. § 1104(a)(1)).

<sup>25</sup> 57 Fed. Reg. 46,922 (Oct. 13, 1992).

<sup>26</sup> Purcell, *supra* note 13, at 2.

<sup>27</sup> See ERISA § 404(c).

<sup>28</sup> Information Letter re: Qualified Plan Services, L.L.C., U.S. Dep't of Labor, Employee Benefits Security Admin. (Jul. 28, 1998), available online at <<http://www.dol.gov/ebsa/regs/ILs/il072898.html>>.

<sup>29</sup> Id.

or other charges associated with operating a 401(k) plan. According to the GAO, “401(k) plan fees can significantly decrease retirement savings over time,” and paying an additional 1 percentage point in fees will reduce an account’s ending balance after 20 years by 17 percent.<sup>30</sup>

As John Bogle, founder of the Vanguard Group, testified, “In investing, costs truly matter, and they matter even more when related to real (after inflation) returns. If the future real investment return on a balanced retirement account were, say, 4 percent per year . . . an annual cost of 2.0 percent would consume fully 50 percent of that annual return. Even worse, over an investment lifetime of, say, 50 years, those same costs would consume nearly 75 percent of the potential wealth accumulation. It is an ugly picture.”<sup>31</sup>

According to Matthew Hutcheson, an independent pension fiduciary who testified before the House Education and Labor Committee in March of 2007, the inherent problem with the 401(k) industry is that “[it is] a profit-oriented, non-fiduciary business model that creates unnecessary and costly services, sells them to plan sponsors as ‘valuable,’ charges additional and often hidden fees, and then fails to assume any responsibility for the poor investment performance that follow[s].”<sup>32</sup> Furthermore, “the profitability of the 401(k) industry depends upon the magnitude of the fees it can extract from plan assets and plan sponsors—not how well it protects and enhances the retirement security of plan participants.”<sup>33</sup>

#### *Employers do not understand fees*

Despite the fact that plan sponsors have a fiduciary obligation under ERISA to determine that fees and expenses are reasonable, many do not have a clear understanding of fees and expenses charged by service providers.<sup>34</sup> This is particularly true with small plans. According to Stephen Butler, the President of Pension Dynamics Corporation and an author and weekly financial columnist, “the greatest abuses are seen in the small company environment, where the average company owner is not a mutual fund or retirement plan expert . . . participants in many small company plans can be paying as much as 3 full percentage points—exactly 100 times [as in large company plans] for the same level of services.”<sup>35</sup> More expensive plans can annually cost participants 5 or more percent from their plan assets.<sup>36</sup>

In fact, some of the fees are not even known to the plan sponsor because they are paid directly by service providers. A mutual fund manager, for example, “will pay the broker who clears the trades within the fund itself. The costs associated with this arrangement

<sup>30</sup> GAO-07-530T, supra note 2.

<sup>31</sup> Strengthening Worker Retirement Security, hearing before the Committee on Education and Labor, 111th Cong., 1st Sess. (Feb. 24, 2009) (written testimony of John Bogle).

<sup>32</sup> Hutcheson Testimony, supra note 12.

<sup>33</sup> Id.

<sup>34</sup> H.R. 3185: the 401(k) Fair Disclosure for Retirement Security Act of 2007, hearing before the Committee on Education and Labor, 110th Cong., 1st Sess. (Oct. 4, 2007) (written testimony of Matthew Scanlon) (hereinafter “Scanlon Testimony”); H.R. 3185: the 401(k) Fair Disclosure for Retirement Security Act of 2007, hearing before the Committee on Education and Labor, 110th Cong., 1st Sess. (Oct. 4, 2007) (written testimony of Tommy Thomasson) (hereinafter “Thomasson Testimony”); Are Hidden 401(k) Fees Undermining Retirement Security?, hearing before the Committee on Education and Labor, 110th Cong., 1st Sess. (Mar. 6, 2007) (written testimony of Stephen Butler) (hereinafter “Butler Testimony”); Hutcheson Testimony supra note 12.

<sup>35</sup> Butler Testimony, supra note 34.

<sup>36</sup> Hutcheson, supra note 12, at 340.

are between the mutual fund and the broker and are not normally disclosed to the plan sponsor.”<sup>37</sup> While these costs go unknown to plan sponsors, as fiduciaries, they are required “to know the full amounts of all costs and expenses borne by the plan, even though such charges are paid from one third party to another.”<sup>38</sup>

*Lack of fee disclosure to employers*

The major obstacle is that the fee information a plan sponsor needs is difficult to obtain or compare.<sup>39</sup> According to Matthew Scanlon of Barclays Global Investors N.A., this information is difficult to ascertain because, “First, there are different investment vehicles . . . which have different structures, different compensation mechanisms and different terminology for what may be the same service. Second, it is more difficult to evaluate fees and expenses when fees for investment management are bundled with fees for administrative and related services,”<sup>40</sup> which is why they are often referred to as “hidden fees.”

Mr. Scanlon testified that it is a common practice for bundled service providers to offer plan sponsors arrangements that provide recordkeeping and administration services at “zero cost.” In addition, he noted that are “tens of thousands” of 401(k) plan sponsors that file annual reports (using the required Form 5500) with DOL, reporting no costs for recordkeeping and administration.<sup>41</sup> This is misleading, he continued, because these fees are not “free” but are being charged to participant accounts in the form of investment fees.<sup>42</sup> As a result of the current system, participants lose because plan sponsors are unable—and have no incentive—to evaluate recordkeeping and other administrative fees independently.<sup>43</sup>

Most commentators agree that it is not sufficient for plan sponsors in fulfilling their fiduciary duties to just understand the fees and expenses that are paid by plan sponsors or charged to participants’ accounts. To thoroughly evaluate all options and service providers, they must understand “how each service is compensated, directly or indirectly.”<sup>44</sup> Plan sponsors must follow prudent procedures when evaluating service providers and investment options. This prudent evaluation should include an “apples-to-apples” comparison of services provided and costs associated with those services. The only way to determine whether a fee for a service is reasonable is to compare it to a competitor’s fee for that same service.

The bundled providers want to be exempt from adhering to uniform disclosure rules, but the uniform disclosure of fees is the only way the plan sponsor can effectively evaluate the retirement plan they will offer their workers. By breaking down plan fees into a small number of standard, simple categories, the plan sponsor will have the information necessary to satisfy their fiduciary duties.

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<sup>37</sup> Id.

<sup>38</sup> Id.

<sup>39</sup> Scanlon Testimony, supra note 34; see also, Thomasson Testimony, supra note 34, at 2 & 4 (“Disclosure is generally inconsistent and too often nonexistent [. . .] It will be virtually impossible for plan fiduciaries to determine the true costs for plan services provided through a bundled arrangement—”).

<sup>40</sup> Scanlon Testimony, supra note 34.

<sup>41</sup> Id.

<sup>42</sup> Id.

<sup>43</sup> Scanlon Testimony, supra note 34.

<sup>44</sup> Id.

*Undisclosed conflicts of interest*

Plan sponsors also do not have enough information to evaluate ongoing or potential conflicts of interest. A “bundled provider” will naturally want to sell a 401(k) plan with its own proprietary investments precisely because it will be able to keep all of its fees.<sup>45</sup> As Tommy Thomasson pointed out in his testimony to the House Education and Labor Committee, “it should not be presumed that plan fiduciaries and participants, especially those at small businesses, recognize and understand inherent conflicts of interest and their potential impact.”<sup>46</sup>

Revenue sharing agreements are “at the core of the issue of excessive and hidden fees.”<sup>47</sup> Revenue sharing occurs when an investment company splits a portion of what it earns with plan administrators, recordkeepers and other service providers.<sup>48</sup> These fees paid to third party administrators and brokers can cost participants between 1.5 to 5.75 percent of their assets annually with approximately one-third or more of these fees hidden.<sup>49</sup> According to Matthew Hutcheson, “that’s like a car dealer taking a \$10,000 commission on a \$30,000 vehicle.”<sup>50</sup> This practice creates serious conflicts of interest and an environment where it is difficult for employers and employees to truly understand the fees associated with the services.<sup>51</sup> Many plan sponsors are unwilling to admit that they do not know certain elements of their plan and this lack of knowledge puts participants and the plans sponsor at legal risk. Overall, revenue sharing agreements can have a significant impact on a retirement account.<sup>52</sup>

*Participants’ lack of access to easily understood information*

Participants need adequate information about the fees and expenses associated with their 401(k) plans. Without the data, they are unable to make decisions about what investments are the best for them,<sup>53</sup> including those that do not result in a reduction in their retirement assets over the long run.<sup>54</sup> However, participants typically do not have easy access to information about fees and expenses. Even when information is provided by their plan administrator, it is lost “within a sea of other technical and confusing language, which is often impossible to decipher.”<sup>55</sup> As a result, many 401(k) participants lack basic knowledge of the fees and expenses being charged against their accounts.<sup>56</sup>

As Professor Mercer Bullard explained in his testimony to the House Education and Labor Committee on April 22, 2009, the de-

<sup>45</sup>Thomasson Testimony, supra note 34.

<sup>46</sup>Id.

<sup>47</sup>Hutcheson, supra note 12, at 328.

<sup>48</sup>Anne Kates Smith, *Shedding Light on 401(k) Fees*, Kiplinger’s Personal Finance (Feb. 2007).

<sup>49</sup>John F. Wasik, *401(k) Fees Are Still Exorbitant Buried Secrets*, Bloomberg.com (Aug. 25, 2007), available online at <<http://www.bloomberg.com/apps/news?pid=20601039&sid=an13g70hwYis>>.

<sup>50</sup>Hutcheson, supra note 12 at 328.

<sup>51</sup>Id.

<sup>52</sup>Id.

<sup>53</sup>Thomasson Testimony, supra note 34, at 7.

<sup>54</sup>Butler Testimony, supra note 34. Butler suggests that excessive fees can reduce retirement investments by as much as 20 percent.

<sup>55</sup>Id at 8.

<sup>56</sup>H.R. 3185: the 401(k) Fair Disclosure for Retirement Security Act of 2007, hearing before the Committee on Education and Labor, 110th Cong., 1st Sess. (Oct. 4, 2007) (written testimony of David Certner) at 6, (hereinafter “Certner Testimony”).

livery vehicle used for fee disclosure plays a critical role in determining whether the disclosure to participants is effective or not. Currently, fees are disclosed in an “investor-unfriendly” way—fees for plan administration are required to be disclosed only in the Form 5500, where the fees are disclosed as a dollar amount, as opposed to a percentage of assets. But the Form 5500 is not required to be regularly provided to beneficiaries or participants (although participants can request it).<sup>57</sup>

In addition, even though employers generally provide participants with a prospectus, a document that describes the basic expenses of the plan, basic fee information for each investment option is not provided in the same place as plan fees, no hypothetical or comparative fee information is provided at all, and no fee information is provided that is specific to a participant’s account. Further, a prospectus is often hard to read, does not list or clearly identify all of the plan fees. Investor-specific information is contained only in the quarterly statement and is generally the only document investors read. Overall, if a participant needed to calculate their total fees, they would have to request the Form 5500, refer to their prospectus, ask for a statement of additional information, and seek out comparative data on their own to put their total fees in context.

If the goal is to inform the participants of the fees they incur, then fees must be presented in a document that beneficiaries are likely to read, in a standardized format, and must be presented in a manner that makes it easy for participants to understand how their fees compare to fees charged by comparable plans and investment options. The information for participants should be in a “readily understandable” and comparable format and contain “all the information that the participants need to make an informed choice among the investment options offered to them.”<sup>58</sup> Without this information, it is difficult for participants to make prudent investment decisions, and service providers and others in the financial industry will continue to “count on participant ignorance to generate revenue.”<sup>59</sup>

#### INVESTMENT OF 401(K) ASSETS

One of the goals of H.R. 2989 is to make sure that participants keep as much of their investment returns as possible in order to ensure financial security in retirement, thus participants must be allowed to choose lower-cost, passively-managed investment options. Employers should not be allowed to force participants to assume active management risk by offering only actively-managed investment options. Already 70 percent of 401(k) plans offer at least one index fund<sup>60</sup> as an investment choice.<sup>61</sup> It can be argued that the remaining 30 percent of employers are not fulfilling their fiduciary duty in selecting their catalog of investments and excluding lower-cost passively-managed investment options. Under any “rea-

<sup>57</sup> 401(k) Fair Disclosure for Retirement Security Act of 2009, hearing before Health, Employment, Labor, and Pensions Subcommittee of the Committee on Education and Labor, 111th Cong., 1st Sess. (Apr. 22, 2009) (written testimony of Mercer Bullard) (hereinafter “Bullard Testimony I”).

<sup>58</sup> *Id.* See also, Scanlon Testimony, *supra* note 34.

<sup>59</sup> Hutcheson Testimony, *supra* note 12, at 6.

<sup>60</sup> Indexing is a passive form of fund management that matches the market’s performance.

<sup>61</sup> Profit Sharing/401(k) Council of America, 51st Annual Survey of Profit Sharing and 401(k) Plans: Reflecting 2007 Plan Experience (2008).

sonable understanding of a fiduciary standard, requiring that plan participants assume active management risk, and the burden of higher fees, violates an employer's fiduciary duty to the plan and its participants."<sup>62</sup>

Paying lower fees is not the only reason why plan sponsors should offer passively-managed investment options to their participants. Studies have found that passively-managed funds, such as index funds investments consistently outperform actively-managed investments.<sup>63</sup> For example, in 2006, *The Journal of Financial Planning* published a study that compared the performance of actively-managed stock mutual funds with indexed funds over 20 years. It found that most actively-managed funds underperformed the "respective passive strategy." And it is widely accepted that actively-managed funds cannot, as a group, outperform the marketplace after taking fees into account.<sup>64</sup>

Renowned financial experts and journalists also agree on the investment strategy of passively-managed funds. Warren Buffet has stated that "most investors will find that the best way to own common stocks is through an index fund that charges minimal fees."<sup>65</sup> Arthur Levitt, former chairman of the SEC agrees: "The fund industry's dirty little secret: most actively managed funds never do as well as their benchmark."<sup>66</sup> As does Jason Zweig, a senior writer for *Money Magazine*: "Over the long-term the superiority of indexing is a mathematical certainty," and Jonathan Clements, senior writer for *The Wall Street Journal*: "Four years ago I was a fan of index funds. Today I am a true believer."<sup>67</sup>

#### CONCLUSION

The 401(k) Fair Disclosure and Pension Security Act takes significant steps towards ensuring that plan participants and beneficiaries will have the fee information they need to make informed decisions about their retirement savings. This Act will also ensure that service providers must provide plan sponsors with the information they need when making and assessing their retirement plan decisions.

H.R. 2989 accomplishes these goals by requiring that service providers provide plan administrators with a description of the services provided and the total expected annual fees for those services "unbundled" into the following categories: investment management, plan administration and recordkeeping, transaction-based fees, and any other charges not included. The Act also requires full disclosure of conflict of interest payments that may benefit the provider, not the participant.

This Act requires the disclosure of all fee information to participants in a plan summary, which also includes essential non-fee in-

<sup>62</sup> Bullard Testimony I, *supra* note 37.

<sup>63</sup> See Mark Hulbert, *Strategies: The Index Funds Win Again*, N.Y. Times, BU5 (N.Y. Ed.) (Feb. 21, 2009); Chris Arnold, *Yale Money Whiz Shares Tips on Growing A Nest Egg*, Morning Edition, National Public Radio (Apr. 3, 2008), available online at <<http://www.npr.org/templates/story/story.php?storyId=89324244>>; Nicolas Bollen & Jeffrey Busse, *Short-Term Persistence in Mutual Fund Performance*, 18 *Rev. Fin. Studies* 569 (2005), Mark Carhart, *On Persistence of Mutual Fund Performance*, 52 *J. Fin.* 57 (1997); Burton Malkiel, *Returns from Investing in Mutual Funds 1971-1991*, 50 *J. Fin.* 549 (1995).

<sup>64</sup> Bullard Testimony I, *supra* note 57.

<sup>65</sup> Thomas P. McGuigan, *The Difficulty of Selecting Superior Mutual Fund Performance*, 19 *J. Fin. Planning* 50 (Feb. 2006).

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

formation that beneficiaries need to evaluate the plan (including a fee comparison chart of investment options), and in the quarterly account statements. All fees taken out of the account will be disclosed in one number and in dollars, rather than percentages of assets, to facilitate the participant's understanding of the fee estimate.

Finally, H.R. 2989 will prevent plan sponsors from limiting participants to actively-managed investment options, thereby requiring them to pay higher fees and assume greater risk of market underperformance. For employers who desire limited liability, they must offer at least one low-cost passively-managed fund as an investment option to their participants.

## II. Prohibition of Conflicted Investment Advice

### OVERVIEW

As previously mentioned, one of the byproducts of the shift from the defined benefit to defined contribution plans has been the placement of the burden on workers, rather than employers, to ensure their own secure retirement. The majority of Americans, of course, are not experts on how to appropriately invest their retirement savings. To address this problem, many plans now make some measure of investment advice available to participants.

Employers, however, fear liability for providing advice to their employees. Some in the financial services industry view reducing this liability risk as essential to expanding advice to participants. Nonetheless, employers must still exercise reasonable care in selecting advisers for their employees. ERISA generally prohibits conflicts of interest, therefore employers should not be protected from liability when they provide their workers with conflicted advice that benefits the advisers, not the participants.<sup>68</sup>

In March 2009, the GAO testified before the Subcommittee on Health, Employment, Labor, and Pensions and explained how conflicts of interest can affect participants in private pension plans, and makes it difficult for plan fiduciaries to fulfill their duty to act solely in the best interests of the participants.<sup>69</sup> Their analysis mainly focused on defined benefit plans because less information exists on the extent or nature of conflicts of interests in the defined contribution world. The GAO found that plans who utilized advisers who did not disclose significant conflicts of interest were more strongly associated with lower annual rates of return than those plans which used advisers who did disclose their conflicts of interest. This study suggested the importance of detecting the presence of conflicts among investment advisers in defined benefit plans.

Nonetheless, since the investment risk is borne largely by the individual participant in defined contribution plans, the GAO cautioned that conflicts of interest in defined contribution plans could result in higher fees or other outcomes that could lower investment returns for participants. Furthermore, given the complexity of business arrangements and the proliferation of pension consulting

<sup>68</sup>The Importance of an Independent Investment Adviser, hearing before Health, Employment, Labor, and Pensions Subcommittee of the Committee on Education and Labor, 111th Cong., 1st Sess. (Mar. 24, 2009) (written testimony of Mercer Bullard) (hereinafter "Bullard Testimony II").

<sup>69</sup>GAO-09-503T, supra note 2.

work, there are plenty of opportunities for business arrangements to go undisclosed. Problems may occur when pension consultants or other companies providing services to a plan also receive compensation from other service providers. By not disclosing these arrangements, service providers may be steering plan sponsors and participants towards investments or services that may not be in the best interest of participants.

Unfortunately, the Bush Administration became increasingly permissive regarding the provision of conflicted advice over the past decade. The codification of the DOL positions in the Pension Protection Act (PPA), which created exemptions from the conflicted advice prohibition in ERISA, coupled with the past administration's misinterpretation and expansion of the Act, ignores circumstances in which advisers steer unsophisticated workers to investment products that maximize advisers' compensation or the advisers' employers' bottom line, rather than products that would best help participants achieve financial security in retirement.<sup>70</sup>

Allowing profit-motivated conflicted advice to overtake the marketplace also serves to suppress the market for truly independent investment advice. According to Professor Mercer Bullard of the University of Mississippi Law School, retirement plan providers bundle their investment products, "unbiased" computer models, and individualized financial advice in one single package. In other words, the provider offers the conflicted advice as part of the bundled deal. Investment advisers who provide truly independent guidance must then charge a separate fee. Service providers, then, will claim paying the independent adviser is unnecessary because so-called investment advice is already included in the package. The bundled providers will argue that the participant would then pay twice for advice—once in the bundled package and another time as a separate service. The participant will have no knowledge that the bundled advice is conflicted and the adviser may be recommending products with higher fees. Well-intentioned employers may be dissuaded from paying (or passing on to their employees) for this advice that the provider promises is unnecessary. Less sophisticated employers will rely on the conflicted advice exemption without regard for their employees. And participants all too often will be limited to these conflicted recommendations that result in higher fees and lower investment returns.

#### THE EROSION OF THE PROHIBITED TRANSACTION PROVISIONS IN ERISA

ERISA classifies an individual who exercises discretion over any aspect of a plan or provides advice to participants as fiduciaries. ERISA fiduciaries are generally prohibited from receiving additional compensation from plan product providers. The prohibited transaction provisions of ERISA are generally designed to prevent plan fiduciaries from being paid by parties on both sides of a plan transaction. If a plan fiduciary receives a fee for providing investment advice to participants, then the fiduciary cannot be compensated in connection with products that the fiduciary recommends. This prohibition is violated when a plan fiduciary advises participants to invest in a way that results, directly or indirectly, in additional compensation to that fiduciary.

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<sup>70</sup>Id.

The erosion of these statutory protections began with the advisory opinion on Frost Bank that allowed a plan fiduciary who sponsored the plan investment products to receive additional compensation for advising participants as long as the additional compensation was applied to offset the other compensation the fiduciary received from the plan.<sup>71</sup> The erosion continued with the Sunamerica advisory opinion in 2001 that permitted a plan fiduciary to receive additional compensation for providing investment advice to participants without any offsetting of fees, as long as the advice is generated from a computer model designed by an independent third party.<sup>72</sup> According to Professor Mercer Bullard, “This restriction [to use a third party computer model] in Sunamerica provides little protection against advisers’ making recommendations that are designed to further their best interests rather than the best interests of the participants.”<sup>73</sup>

The Pension Protection Act (PPA) and additional Bush Administration positions helped expand the advisory opinions. The PPA exempts two types of “eligible investment advice arrangements” from ERISA’s prohibited transaction provisions:

- an adviser’s fees do not vary depending on the basis of any investment option selected (also known as fee-leveling);
- a computer model, developed under an investment advice program which meets the requirements of PPA section 601(a), is used in connection with the provision of investment advice by a fiduciary adviser to a participant.

#### FEE-LEVELING

PPA allows a fiduciary to be compensated for providing investment advice to participants as long as there is “fee-leveling.” This seems logical on the surface—if the products will all result in the same compensation to the adviser, then he has no motivation to recommend one over the other. However, as indicated in a letter from the Consumer Federation of America and Fund Democracy to the Department of Labor, there are other incentives for advisers to recommend particular investment fund offerings.<sup>74</sup>

Some of these incentives were developed as a result of the Bush Administration’s class exemption which permits not only an adviser’s affiliates, but also the adviser’s employer to receive greater fees as a result of the adviser’s investment option recommendations. The final class exemption clarified that the fee-leveling arrangement was limited only to the compensation received by the employee, agent, or registered representative of the firm providing advice to the participant—not the compensation that the fiduciary adviser received which employs the agent or representative who is providing the actual advice. The Obama Administration put these final class exemptions on hold.

In other words, a “proper” investment advice arrangement could be where an adviser’s employer is paid on a sliding scale based on the profits generated by the investment options the adviser rec-

<sup>71</sup> See U.S. Dept. of Labor Advisory Op. 97-15A (May 22, 1997).

<sup>72</sup> See U.S. Dept. of Labor Advisory Op. 2001-9A (Dec. 14, 2001).

<sup>73</sup> Bullard Testimony II, *supra* note 68.

<sup>74</sup> Mercer Bullard & Barbara Roper, Consumer Federation of America & Fund Democracy, Oct. 6, 2008, Ltr. in Response to U.S. Dept of Labor Notice of Proposed Rulemaking (73 Fed. Reg. 49,896 (Aug. 22, 2008)), available online at <<http://www.dol.gov/ebsa/pdf/cmt-10070811.pdf>>.

ommended to the participant, the employer's executives and the adviser's immediate supervisor is also paid bonuses, but the adviser must be paid a fixed salary.

In the mutual fund industry, adviser's employers have found ways to reward the advisers for recommending investment options that maximize the employer's and its executive's profits. Advisers can be rewarded for providing conflicted advice through stock options, positive evaluations, pay raises, and other means that cannot be easily traced back to the adviser's recommendation of investment options—but that produce conflicted advice. By limiting the scope of the "fee-leveling" arrangement, conflicted investment advice is allowed to proceed.<sup>75</sup> It is a reasonable assumption to make that the ways identified by the mutual fund industry to circumvent the "fee-leveling" rule will also be similarly practiced in the retirement plan domain. Investment advice provided according to the "fee-leveling" provision cannot eliminate advisers' incentives to increase their company or affiliates' profits.

According to Professor Mercer Bullard,

The only way to achieve reasonable assurance that an adviser will not have an economic incentive to recommend higher-fee investment options to participants is to require that the maximum possible economic separation of the adviser's employer from the affiliate that sponsors the options. The structure of the compensation must be segregated from the economic performance of any affiliate whose fees vary depending on the investment option selected. Even this approach is inadequate as the industry's ingenuity will find ways to incentivize advisers to favor higher-fee options. So the only way to eliminate an adviser's financial incentive to favor his affiliate's higher-fee options is through the repeal of the statutory exemption.<sup>76</sup>

To truly prevent participants from receiving conflicted advice, an adviser's compensation must be completely unaffected by the economic performance of the affiliate that provides that investment option, regardless of whether the fees for different investment options are "level."

#### COMPUTER MODEL EXEMPTION

PPA also permits conflicted advisers to be compensated for providing advice to participants as long as the adviser uses a computer model under an investment advice program that satisfy certain requirements as delineated in PPA. Fee-leveling is effectively circumvented because advisers are allowed to accept greater compensation if participants opt for one investment fund versus another, as long as the recommendation was generated by an approved computer model.

Under these conditions, advisers may make recommendations designed to serve their employer or affiliates' interests rather than the participants' interests. For example, an affiliate's equity fund may have higher expense ratios and generate higher levels of profitability than its bond funds. The adviser would have greater incen-

<sup>75</sup> Bullard Testimony II, *supra* note 68.

<sup>76</sup> *Id.*

tive to recommend the equity instead of the bond funds because he knows he could be paid higher fees. Nothing in the computer model exemption in PPA prohibits the adviser from receiving higher fees for steering a participant towards a particular fund, within the context of a computer model-generated recommendation.

In fact, these models do not even have to be developed by an independent party, as required under the Department's Sunamerica advisory opinion. Under PPA, these computer models can be developed by the very people who stand to benefit from the "freedom" the model provides to the adviser to make conflicted recommendations to participants. The adviser would not be prohibited in any way to receive greater compensation as a result of the computer model recommending actively-managed funds instead of passive-managed funds, because the actively-managed funds would be more profitable to the adviser.

Finally, the investor protections of the computer model exemption in PPA are not sufficient to prevent abuses. It requires that the basis for the advice provided be explained to the participant and documented, including an explanation as to why the advice includes an option with higher fees than other options. The problem is that the adviser only needs to explain and document that the higher fee option is expected to generate greater returns after accounting for the greater fees, but the disclosure and documentation provision is practically unenforceable. It is incredibly difficult to prove that a preference for a higher fee investment option actually resulted from the motivation to receive to greater compensation from this higher-fee option. In addition, the disclosure and explanation requirement is only triggered at the time that the conflicted advice is provided. Once the relationship between the adviser and participant is underway, a level of trust and dependent is established, which is negate any subsequent cautionary conflict disclosure.<sup>77</sup>

#### CONCLUSION

H.R. 2989 makes critical progress to prevent the provision of conflicted investment advice. It helps restore the ERISA prohibition against self-interested investment advisers from providing advice to participants. It also helps close the door opened by PPA which exposed millions of workers to conflicted advice, and facilitates participants' access to independent advice.

First, this Act defines an independent investment adviser as a fiduciary, thereby requiring that the adviser act in the best interest of plan participants and generally prohibiting them from giving advice that results in additional compensation (indirectly or directly) to the adviser.

Second, this Act allows for the provision of independent advice to happen in two different ways. First, this adviser must be a registered investment adviser under the Investment Adviser's Act of 1940 or a registered representative of the adviser. But most importantly, the adviser also cannot be the plan investment provider or an affiliate of the investment provider. In other words, the adviser cannot sell investment products to a participant and then be permitted to provide "independent" advice to the same participant.

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<sup>77</sup>Id.

This provision creates an economic separation between the adviser and the investment provider or affiliate, thereby ensuring that the adviser does not have an incentive to push certain products onto participants. The fees or compensation that the adviser receives cannot be given by anyone who sells, markets, or provides investments in which the plan assets of the individual account plan are invested, or the fees that the adviser receives for recommending investment options do not vary (fee-leveling). And finally, the adviser must disclose all potential conflicts of interest with other parties, and then disclose the fees that the adviser and their affiliates receive.

The other way an adviser can provide independent advice is through a computer model. The computer model must, among other things, incorporate generally-accepted investment theories that take into account the historic returns of different asset classes, utilize objective criteria to design an asset allocation for the participant, account for the fees associated with each investment option, utilize relevant information about the participant to structure the model to fit their needs and risk tolerance and investment preferences, and must not favor investment options in which the investment provider has a material or contractual relationship with the adviser. The operator of the computer model also must not behave in a way that benefits the operator (or her affiliates or anyone with whom she has a material or contractual relationship with) at the expense of the plan participants and beneficiaries. The computer model must be certified by an eligible investment expert and must undergo annual audits.

This Act also strengthens the consumer protections of the computer model exemption. Before running the computer model, the operator must disclose to the plan sponsor and participants receiving the advice the terms of the advice arrangement, the types of services offered, all fees and compensation related to the advice, and generally any relationships the adviser has that may lead to a conflict of interest.

Finally, the use of the computer model protects the fiduciary adviser from liability when the computer model only provides advice and the participant authorizes the use of the program. But nothing in this provision exempts a plan sponsor or fiduciary from any of the requirements necessary for the prudent selection of an independent investment adviser.

### III. Defined Benefit Funding Relief

The effect of the current economic downturn on retirement plans has caused a great deal of concern. One company recently reported that at the end of 2008, the stress in the financial markets led to a \$409 billion deficit in defined benefit pension plan funding for the plans of S&P 500 companies. This report indicated that this deficit will negatively affect corporate earnings in 2009.<sup>78</sup> Due in part to the large investment losses in pension plans and other retirement accounts, in December of 2008, Congress unanimously enacted H.R. 7327, the Worker, Retiree, and Employer Recovery Act of 2008 (WREERA). Among other things, WREERA provides some temporary

<sup>78</sup>Michael W. Wyand, Funding Deficit of \$409 Billion is Due to Financial Market 'Chaos,' Mercer Says, BNA Pension and Benefits Daily (Jan. 8, 2009).

relief from certain funding requirements that may be difficult for single and multi-employer defined benefit pension plans to meet due to current economic conditions.<sup>79</sup>

Even after the enactment of WRERA, many companies face obligations for 2009 that are significantly higher than the amounts required in 2008—in fact, some of the burdens are larger than projected. In addition, the dramatic fall in interest rates at the end of 2008 had the adverse effect on the funding levels that had been anticipated earlier, thereby exacerbating the funding crisis brought on by the worst six-month equity performance since the Great Depression. As these obligations increase, companies' cash reserves have shrunk along with their ability to borrow. The result is that companies may have to consider plan freezes, the suspension of 401(k) matching contributions, contributions of assets other than cash, and layoffs because of these funding obligations.

Therefore, the "401(k) Fair Disclosure and Pension Security Act of 2009" includes several defined benefit funding relief provisions. For single-employer plans, the provisions in H.R. 2989 include permitting companies which use the spot yield curve for 2009 to be able to elect to use the segment rates for 2010; revising the effective date of the Internal Revenue Service funding regulations to apply to plan years beginning after December 31, 2009; and clarifying the term "target normal cost" to exclude plan investment expenses. An amendment offered by Representative Guthrie (R-KY) would add the "two plus seven" provision, under which employers would be required for two years to pay interest on their plans' 2008 losses to prevent the plans' shortfall from growing, but seven-year amortization of those losses would not commence until the expiration of those two years. For multi-employer plans, H.R. 2989 will extend the amortization extension period from five to ten years with an additional five years for IRS approval.

## SECTION-BY-SECTION ANALYSIS

### TITLE I: 401(K) FAIR DISCLOSURE FOR RETIREMENT

Section 101: Provides that Part 1 of subtitle B of title I of ERISA is amended to include the following new section.

Section 111(a): Provides for special reporting and disclosure rules for individual account plans. Specifically, service providers must disclose to employers who sponsor individual account plans the services necessary for the establishment or operation of the plan.

Section 111(a)(1): The plan administrator may not enter into a contract or arrangement with a service provider unless the plan administrator receives a written service disclosure statement, reasonably in advance of the contract, that includes the services the plan will receive and the total annual charges.

Section 111(a)(2): The service disclosure statement must allocate charges according to these categories: administration and record-keeping; transaction-based charges; investment management; and other charges.

Section 111(a)(3): Investment management, and administration and recordkeeping charges must be presented in dollar amounts,

<sup>79</sup>Jennifer Staman, *The Worker, Retiree, and Employer Recovery Act of 2008 (WRERA): An Overview*, Congressional Research Service (Jan. 29, 2009).

but, in addition to the dollar amounts, they may also be presented as a percentage of assets. Transaction-based charges may be presented as either dollar amounts or percentages of assets.

Section 111(a)(4): Reasonable estimates of the charges are required.

Section 111(a)(5): Service providers must also disclose of potential conflicts of interest by requiring disclosure of any benefit (such as payments or credits) the service provider may receive pursuant to a contract with the plan, excepting payments from the plan itself.

Section 111(a)(6): The service disclosure statement must include a description of the differences in the share price of mutual fund shares within the plan and outside the plan, along with an explanation of such differences.

Section 111(a)(7): A service provider who offers services as a bundle with one charge to describe the manner, extent and the amount must disclose the way in which the service provider obtains consideration (payment) for such services.

Section 111(a)(8): The Secretary is required to review the accuracy and sufficiency of service disclosure statements, as necessary.

Section 111(a)(9): Service providers must provide the service disclosure statement on an annual basis.

Section 111(a)(10): The service disclosure statement requirement is limited to contracts that are not expected to exceed \$5,000, but the Secretary is allowed to adjust that amount as appropriate.

Section 111(a)(11): The service disclosure statement requirements do not affect the existing fiduciary duties of service providers and plan administrators.

Section 111(b): Disclosure to Participants and Beneficiaries

Section 111(b)(1): The plan administrator must provide participants and beneficiaries with a notice of investment options in a reasonable time before an initial investment, or before a material change in investment options.

Section 111(b)(2): The required notice must include clear language describing the charges, by type, to be paid by participants or beneficiaries; details of each investment option; and a plan fee comparison chart including all investment options.

Section 111(b)(3): The plan fee comparison chart must be in clear language and include actual charges that may be charged in dollar terms or as a formula, as appropriate. The chart must explain the method for determining charges and include examples. The charges in the chart must be categorized as asset-based charges specific to investment, not investment, and administrative and transaction-based charges. The chart must also indicate the extent to which any charge is for investment management, recordkeeping and administrative services, transactions, and any other services. The chart must also include historical return information for the previous year, five years and ten years.

Section 111(b)(4): The Secretary may prescribe one or more model notices for employers.

Section 111(b)(5): The plan administrator is allowed to include reasonable and representative estimates for any amounts or percentages included in the notice, but required that any estimates be disclosed as such in the notice along with a description of the assumptions used in making the estimates.

Section 111(c): The disclosure may be provided electronically but written disclosures must be made available without undue burden.

Section 111(d): The Secretary shall prescribe regulations for disclosing information related to any investment option.

Section 111(e): Definitions of charge, service, contract or arrangement, service provider, and regulations

Section 2(b): Quarterly Benefit Statements.

Subparagraph C: The plan administrator is required to provide a quarterly pension benefit statement for each account that must include the following: starting balance; contributions (separate for employee and employer); gains and losses; charges in actual dollars or estimated dollars; other charges; ending balance; asset allocation, by amount and percentage; and how to obtain most current information required to be included in the plan fee comparison chart

Subparagraph D: Allows the plan administrator to also provide historical return and risk, information for each investment option and estimates on contribution levels necessary to achieve retirement security.

Subparagraph E: Allows the plan administrator to include reasonable and representative estimates for any amounts or percentages included in the notice along with a description of the assumptions used to make such estimates.

Subparagraph F: Requires the Secretary to prescribe one or more model statements.

Subparagraph G: Allows plans with 100 or fewer participants and beneficiaries to provide an annual pension benefit statement rather than a quarterly statement.

Subsection (d): Requires the Secretary to provide employers with 100 or fewer employees educational assistance, compliance materials, and services related to the selection of plan investment options.

Subsection (e): Requires the Secretary to provide participants and beneficiaries assistance by answering any questions or addressing problems.

Subsection (f): Allows for disclosure to be provided electronically but requires that written disclosures be made available without undue burden.

Subsection (g): Definitions of charge, service provider, regulations.

Section 2(c), Paragraph 11(A): The Secretary may assess a service provider a civil penalty up to \$1,000 per day, subject to a limit of 10 percent of the amount involved, for violating service statement disclosure requirements.

Paragraph 11(B): The Secretary may assess a plan administrator a civil penalty up to \$1,000 per day for violating participant and beneficiary disclosure requirements.

Paragraph 11(C): Each violation for any single participant, beneficiary, or plan administrator is treated as a separate violation.

Section 2(d): Conforming Amendment.

Section 2(e): Requirements for disclosures to plan administrators by service providers are effective on year after enactment; requirements for disclosures to participants and beneficiaries by plan administrators are effective on year after enactment; and requires the Secretary to issue final regulations not later than 270 days after

enactment and holds that any good faith effort to comply will be treated as compliant.

Section 3(a): Requires plans seeking safe harbor liability protection under ERISA to offer an investment option that is sufficiently similar to a passively managed index fund that is representative of the U.S. equity market or bond market.

Section 3(b): Conforming Amendment.

Section 3(c): The minimum investment option requirement is effective one year after enactment. Requires the Secretary to issue final regulations not later than 270 days after enactment and holds that any good faith effort to comply will be treated as compliant.

Section 4: Enforcement Coordination and Review by the Department of Labor.

Section 4(a): Requires the Secretary to notify the appropriate regulatory authority when the Secretary determines that a service provider has engaged in a pattern or practice of noncompliance and the Secretary is required to take appropriate action. In addition, upon making such a determination, the Secretary is required to provide the offending service provider an opportunity for an administrative hearing prior to dissemination of their identity. Requires the Secretary to audit a representative sample of covered plans to determine compliance and report the results to House Committee on Education and Labor and Senate Committee on HELP.

Section 4(b): Requires the Secretary, as soon as practicable to review reporting and disclosure requirements of ERISA and related PPA provisions; and requires the Secretary, within 18 months of enactment and in consultation with the Treasury, to report recommendations to Congress on ways to improve reporting and disclosure requirements.

## TITLE II: PROHIBITION OF CONFLICTED INVESTMENT ADVICE

Section 202(a): Defines an independent investment adviser of a self-directed plan as a fiduciary of the plan who meets the requirements outlined in subparagraphs (B) or (C).

Subparagraph B: An investment adviser must meet the following requirements:

- (i) an adviser must be either (I) a person registered as an investment adviser under the Investment Adviser Act of 1940 or a person registered under law of domicile state; or (II) a registered representative of the registered investment adviser described in (I);
- (ii) an adviser cannot be the investment provider and or an affiliate of the investment provider;
- (iii) the fees from investment advice and any compensation of an investment adviser under the plan, directly or indirectly, either (I) may not be received from a person or persons that market, sell, manage or provide any investments in which plan assets of any individual account plan are invested; or (II) must not vary depending on the investment option and instead should be calculated on: (aa) a flat-dollar basis; (bb) a flat percentage of total plan assets basis; (cc) a flat or sliding scale percentage of the assets in a participant's or beneficiary's account; or (dd) a per-participant basis;
- (iv) an adviser must provide a written statement in advance of entering into an agreement to provide investment advice to participants which: (I) establishes their fiduciary status; and (II) requires

the adviser under a computer model arrangement to be either a registered representative or an affiliate of the investment adviser who established the model; (III) discloses to the plan sponsor any material, financial, referral, or other relationship or arrangement with a money manager, broker, other client, or service provider of the plan that creates or may create a conflict of interests; (IV) provides plan participants with a written statement certifying disclosure of all fees and other compensation they and their affiliates anticipate receiving in the first year to the plan sponsor as well as document the expressed authorization of the arrangement by the plan sponsor; (V) provides annual disclosure of fees after entering into an agreement; and (VI) provides terms of the investment advice arrangement to participants and beneficiaries.

Subparagraph C: Requirements for Investment Advice Rendered in a Computer Model and Investment Adviser Arrangement.

(C) An adviser that provides advice under an investment advice computer program to participants and beneficiaries in an individual account plan must meet the following requirements:

(i) An adviser must be either (I) a person registered as an investment adviser under the Investment Adviser Act of 1940 or a person registered under law of domicile state, or a person who is a registered representative of such adviser; or (II) an insurance company regulated by State law; or (III) a person registered as a broker or dealer under the Securities Exchange Act of 1934; or (IV) an affiliate of any person or persons previously mentioned in this section; or (V) an employee, agent or registered representative of a person previously mentioned in this section who satisfies the requirements of applicable insurance, banking, and securities law with respect to investment advice.

(ii) The investment advice computer program used to provide advice must: (I) apply generally accepted investment theories that take into account the historic returns of different asset classes over defined periods of time; (II) utilize 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) use an objective criteria to provide asset allocation; (IV) operate in a manner not biased towards investment options offered by the investment adviser; (V) take into account all investment options under the plan as to how the account should be balanced and is not weighted with respect to any investment option; (VI) operate so that it does not, directly or indirectly, benefit the investment adviser, their affiliates or any person with a material affiliation or contractual relationship with the adviser at the expense of plan participants and beneficiaries; (VII) take into account the fees associated with each investment option; and (VIII) conform to other requirements prescribed by the Secretary to ensure that it operates in the best interest of plan participants and beneficiaries.

(iii)(I) An eligible investment expert must certify that the computer program meets the requirements of clause (ii) before the model is utilized to provide advice; (II) if there are material modifications to the computer model, the program must be recertified; and (III) an eligible investment expert is defined as a person that (aa) meets requirements prescribed by the Secretary; and (bb) does

not have any material affiliation or contractual relationship with any investment adviser or their affiliates.

(iv) The adviser is protected from fiduciary liability if (I) the computer model is the only entity providing advice; and (II) the plan participant or beneficiary authorized the use of the program to provide advice.

(v) The authorization of the computer program is required by a plan fiduciary other than (I) the person offering the program; (II) the plan investment provider and; (III) any affiliates of either one of persons mentioned in the previous clauses of this section.

(vi) Annual audits are required of computer programs other than the ones referred to in clause (ii) which have been certified for compliance in clause (iii), and must be conducted by persons independent of the investment options under the plan.

(vii) Before providing the advice, advisers must provide written disclosure of: (aa) the role any party that may have a material or contractual relationship with the adviser in the development of the computer program and in the selection of the investment options; (bb) all fees or compensation that the adviser may receive; (cc) any material affiliation or contractual relationship the adviser may have in the security or property; (dd) the manner in which the information related to the participant which is provided in the program will be used; (ee) the types of services provided by the adviser in connection to the provision of advice; (ff) the participant may separately arrange the provision of advice by another adviser who could have no material affiliation with and could receive no fees or compensation related to the security or property; and at all times, the adviser must maintain the accuracy of the information to the recipient of the advice.

(viii) The adviser must be in compliance with other applicable securities law disclosure standards and requirements.

(ix) The adviser must (I) present information with respect to the computer program advice arrangement in a manner that is written clearly and in a way such that the average plan participant can understand; and (II) provide the Secretary with the authority to issue a model form of disclosure of fees and other compensation.

(x) The adviser must maintain, for no less than 6 years, all records necessary to verify compliance of requirements outlined in this section, and an adviser whose records were destroyed or lost due to circumstances beyond the control of the adviser is not considered a failure of compliance.

Subparagraph D: Definitions for an affiliate, registered representative, plan investment provider, and fees and other compensation.

Section 202(b): Amends Section 404(a) of ERISA and outlines the fiduciary duties with respect to the provision of investment advice.

Section 202(b)(1): Permits the plan sponsor to only appoint, contract with, or arrange for an independent investment adviser (as defined under the bill) to provide advice to the plan or the participants or beneficiaries of the plan and; requires the independent investment adviser to provide advance written notification of; (i) past performance and historical rates of return of the investment options available under the plan with comparisons of such options to relevant benchmarks; and (ii) status as a fiduciary of the plan with respect to investment advice. The plan sponsor must maintain

their fiduciary duty in the prudent selection of an arrangement for the provision of investment advice to the plan's participants as well as the periodic review of the adviser. This does not preclude the use of plan assets to pay for reasonable expenses in providing investment advice.

Section 202(b)(2)(a): Requires the Secretary to issue a Report to Congress regarding whether advisory opinions or exceptions fail to adequately serve the interests of participants and beneficiaries as well as adequately protect their rights.

Section 202(b)(2)(b): Submit the report to each Member of Congress describing to the extent of any such failure by any such Advisory Opinion or exception.

Section 202(c): Conforming Amendment to Section 408 of the Pension Protection Act.

Section 202(d): Provides authority to the Secretary to deem an investment advice arrangement compliant to the requirements of the Act despite the receipt of a de minimus amount of compensation.

Section 202(e): The effective date is one year after the enactment of the Act.

Section 203: Expansion of outreach to promote retirement income savings to include promotion of education on financial literacy with respect to investment for retirement.

The Secretaries of Labor, Education, and Treasury shall establish a program to help workers and the general public better understand the importance of personal finance and saving for retirement, in addition to educating them about debt obligations and the effect debt may have with respect to savings for retirement. Employers are also required to assist in the attainment of these goals with respect to their employees. The Secretary of Labor shall conduct a study to determine the effect of this program with recommendations provided to the Congress.

#### TITLE III: TRANSITIONAL FUNDING RELIEF FOR DEFINED BENEFIT PLANS

Section 301: This provision allows single-employer defined benefit plans that elect the spot yield curve for 2009 to elect the smoothed yield curve for 2010 and thereafter.

Section 302: For single-employer defined benefit plans, the PPA funding regulations would not take effect until, at the earliest, years beginning after December 31, 2009.

Section 303: This provision would clarify that investment expenses are to be amortized over seven years, like investment losses, for single-employer defined benefit plans.

Section 304: Under this provision, the reporting requirement for single-employer plans would revert back to pre-PPA law, thus requiring plans which were under-funded in excess of \$50 million to submit actuarial and financial information to the Pension Benefit Guaranty Corporation

Section 305: This provision extends the automatic amortization extension period from 5 to 10 years with an additional 5 years available for IRS approval, only for multi-employer defined benefit plans.

Section 306: This provision allows the pension plan maintained by Christian Schools International to be treated as a church plan.

Section 307: This provision allows for a special rule for determining adequate consideration in connection with the purchase and sale of qualifying employer securities.

Section 308: This provision extends the period for single-employer defined benefit plans to amortize the shortfall amortization base for 2009 and 2010.

#### EXPLANATION OF AMENDMENTS

The amendments are explained in the body of this report.

#### APPLICATION OF LAW TO THE LEGISLATIVE BRANCH

Section 102(b)(3) of Public Law 104–1 requires a description of the application of this bill to the legislative branch. This bill amends the Employee Retirement Income Security Act (ERISA), with conforming amendments to the tax code, to provide a variety of stronger protections for participants in retirement plans covered by that Act. Since ERISA excludes governmental plans, the bill does not apply to legislative branch employees. As public employees, legislative branch employees are eligible to participate in the Federal Employee Retirement System. Legislative branch employees may be among the beneficiaries of the bill's provisions promoting greater financial literacy for the public in general.

#### REGULATORY IMPACT STATEMENT

The Committee has determined that the bill will have only a minor impact on the regulatory burden.

#### UNFUNDED MANDATE STATEMENT

Section 423 of the Congressional Budget and Impoundment Control Act (as amended by Section 101(a)(2) of the Unfunded Mandates Reform Act, P.L. 104–4) requires a statement of whether the provisions of the reported bill include unfunded mandates.

The CBO letter will address this issue.

#### EARMARK STATEMENT

The bill does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9(d), 9(e) or 9(f) of rule XXI, except for a provision allowing pension plans maintained by Christian Schools International to be treated as church plans, which was a request submitted by Representative Ehlers of the Committee.

#### ROLL CALL

## COMMITTEE ON EDUCATION AND LABOR

ROLL CALL: 1                      BILL: H.R. 2989                      DATE: 6/24/2009  
 AMENDMENT NUMBER: 2                      FAILED: 18 AYES / 26 NOES  
 SPONSOR/AMENDMENT: KLINE / SUBSTITUTE AMENDMENT

MEMBER	AYE	NO	PRESENT	NOT VOTING
Mr. MILLER, Chairman		X		
Mr. KILDEE, Vice Chairman		X		
Mr. PAYNE				X
Mr. ANDREWS		X		
Mr. SCOTT		X		
Ms. WOOLSEY		X		
Mr. HINOJOSA				X
Mrs. McCARTHY		X		
Mr. TIERNEY		X		
Mr. KUCINICH		X		
Mr. WU		X		
Mr. HOLT		X		
Mrs. DAVIS		X		
Mr. GRIJALVA		X		
Mr. TIMOTHY BISHOP		X		
Mr. SESTAK		X		
Mr. LOEBSACK		X		
Ms. HIRONO		X		
Mr. ALTMIRE		X		
Mr. HARE		X		
Ms. CLARKE		X		
Mr. COURTNEY		X		
Ms. SHEA-PORTER				X
Ms. FUDGE		X		
Mr. POLIS		X		
Mr. TONKO		X		
Mr. PIERLUISI		X		
Mr. SABLAN		X		
Ms. TITUS		X		
<i>vacancy</i>				
Mr. KLINE, Senior Republican Member	X			
Mr. PETRI	X			
Mr. McKEON	X			
Mr. HOEKSTRA	X			
Mr. CASTLE	X			
Mr. SOUDER	X			
Mr. EHLERS	X			
Mrs. BIGGERT	X			
Mr. PLATTS	X			
Mr. WILSON	X			
Mrs. McMORRIS RODGERS	X			
Mr. PRICE				X
Mr. ROB BISHOP	X			
Mr. GUTHRIE	X			
Mr. CASSIDY	X			
Mr. McCLINTOCK	X			
Mr. HUNTER	X			
Mr. ROE	X			
Mr. THOMPSON	X			
<b>TOTALS</b>	<b>18</b>	<b>26</b>		<b>4</b>

## COMMITTEE ON EDUCATION AND LABOR

ROLL CALL: 2                      BILL: H.R. 2989                      DATE: 6/24/2009  
 AMENDMENT NUMBER: 3                      FAILED: 21 AYES / 25 NOES  
 SPONSOR/AMENDMENT: HOLT / WU / WELL-QUALIFIED, NON-CONFLICTED  
 ADVISORS PROVIDE INDIVIDUAL INVESTMENT ADVICE

MEMBER	AYE	NO	PRESENT	NOT VOTING
Mr. MILLER, Chairman		X		
Mr. KILDEE, Vice Chairman		X		
Mr. PAYNE		X		
Mr. ANDREWS		X		
Mr. SCOTT		X		
Ms. WOOLSEY		X		
Mr. HINOJOSA		X		
Mrs. McCARTHY		X		
Mr. TIERNEY		X		
Mr. KUCINICH		X		
Mr. WU	X			
Mr. HOLT	X			
Mrs. DAVIS		X		
Mr. GRIJALVA		X		
Mr. TIMOTHY BISHOP		X		
Mr. SESTAK		X		
Mr. LOEBSACK		X		
Ms. HIRONO		X		
Mr. ALTMIRE	X			
Mr. HARE		X		
Ms. CLARKE		X		
Mr. COURTNEY		X		
Ms. SHEA-PORTER				X
Ms. FUDGE		X		
Mr. POLIS	X			
Mr. TONKO		X		
Mr. PIERLUISI		X		
Mr. SABLAN		X		
Ms. TITUS		X		
<i>vacancy</i>				
Mr. KLINE, Senior Republican Member	X			
Mr. PETRI		X		
Mr. McKEON	X			
Mr. HOEKSTRA	X			
Mr. CASTLE	X			
Mr. SOUDER	X			
Mr. EHLERS	X			
Mrs. BIGGERT	X			
Mr. PLATTS	X			
Mr. WILSON	X			
Mrs. McMORRIS RODGERS	X			
Mr. PRICE				X
Mr. ROB BISHOP	X			
Mr. GUTHRIE	X			
Mr. CASSIDY	X			
Mr. McCLINTOCK	X			
Mr. HUNTER	X			
Mr. ROE	X			
Mr. THOMPSON	X			
<b>TOTALS</b>	<b>21</b>	<b>25</b>		<b>2</b>

## COMMITTEE ON EDUCATION AND LABOR

ROLL CALL: 3 BILL: H.R. 2989 DATE: 6/24/2009  
 AMENDMENT NUMBER: 4 FAILED: 18 AYES / 28 NOES  
 SPONSOR/AMENDMENT: McKEON / STRIKE THE REQUIREMENT THAT  
 PROVIDERS "UNBUNDLE" AND DISCLOSE FEES FOR INDIVIDUAL CATEGORIES  
 OF EXPENSES

MEMBER	AYE	NO	PRESENT	NOT VOTING
Mr. MILLER, Chairman		X		
Mr. KILDEE, Vice Chairman		X		
Mr. PAYNE		X		
Mr. ANDREWS		X		
Mr. SCOTT		X		
Ms. WOOLSEY		X		
Mr. HINOJOSA		X		
Mrs. McCARTHY		X		
Mr. TIERNEY		X		
Mr. KUCINICH		X		
Mr. WU		X		
Mr. HOLT		X		
Mrs. DAVIS		X		
Mr. GRIJALVA		X		
Mr. TIMOTHY BISHOP		X		
Mr. SESTAK		X		
Mr. LOEBSACK		X		
Ms. HIRONO		X		
Mr. ALTMIRE		X		
Mr. HARE		X		
Ms. CLARKE		X		
Mr. COURTNEY		X		
Ms. SHEA-PORTER				X
Ms. FUDGE		X		
Mr. POLIS		X		
Mr. TONKO		X		
Mr. PIERLUISI		X		
Mr. SABLAN		X		
Ms. TITUS		X		
<i>vacancy</i>				
Mr. KLINE, Senior Republican Member	X			
Mr. PETRI	X			
Mr. McKEON	X			
Mr. HOEKSTRA	X			
Mr. CASTLE	X			
Mr. SOUDER	X			
Mr. EHLERS	X			
Mrs. BIGGERT	X			
Mr. PLATTS	X			
Mr. WILSON	X			
Mrs. McMORRIS RODGERS	X			
Mr. PRICE				X
Mr. ROB BISHOP	X			
Mr. GUTHRIE	X			
Mr. CASSIDY	X			
Mr. McCLINTOCK	X			
Mr. HUNTER	X			
Mr. ROE	X			
Mr. THOMPSON	X			
<b>TOTALS</b>	<b>18</b>	<b>28</b>		<b>2</b>

**COMMITTEE ON EDUCATION AND LABOR**

ROLL CALL: 4                      BILL: H.R. 2989                      DATE: 6/24/2009  
 AMENDMENT NUMBER: 7                      FAILED: 18 AYES / 27 NOES  
 SPONSOR/AMENDMENT: PRICE / STRIKE REQUIREMENT OF MANDATED  
 INVESTMENT OPTION (INDEX FUND)

MEMBER	AYE	NO	PRESENT	NOT VOTING
Mr. MILLER, Chairman		X		
Mr. KILDEE, Vice Chairman		X		
Mr. PAYNE		X		
Mr. ANDREWS		X		
Mr. SCOTT		X		
Ms. WOOLSEY		X		
Mr. HINOJOSA		X		
Mrs. McCARTHY				X
Mr. TIERNEY		X		
Mr. KUCINICH		X		
Mr. WU		X		
Mr. HOLT		X		
Mrs. DAVIS		X		
Mr. GRIJALVA		X		
Mr. TIMOTHY BISHOP		X		
Mr. SESTAK		X		
Mr. LOEBSACK		X		
Ms. HIRONO		X		
Mr. ALTMIRE	X			
Mr. HARE		X		
Ms. CLARKE		X		
Mr. COURTNEY		X		
Ms. SHEA-PORTER				X
Ms. FUDGE		X		
Mr. POLIS		X		
Mr. TONKO		X		
Mr. PIERLUISI		X		
Mr. SABLAN		X		
Ms. TITUS		X		
<i>vacancy</i>				
Mr. KLINE, Senior Republican Member	X			
Mr. PETRI		X		
Mr. McKEON	X			
Mr. HOEKSTRA	X			
Mr. CASTLE	X			
Mr. SOUDER	X			
Mr. EHLERS	X			
Mrs. BIGGERT	X			
Mr. PLATTS	X			
Mr. WILSON	X			
Mrs. McMORRIS RODGERS	X			
Mr. PRICE				X
Mr. ROB BISHOP	X			
Mr. GUTHRIE	X			
Mr. CASSIDY	X			
Mr. McCLINTOCK	X			
Mr. HUNTER	X			
Mr. ROE	X			
Mr. THOMPSON	X			
<b>TOTALS</b>	<b>18</b>	<b>27</b>		<b>3</b>

## COMMITTEE ON EDUCATION AND LABOR

ROLL CALL: 5                      BILL: H.R. 2989                      DATE: 6/24/2009  
 AMENDMENT NUMBER: 8                      FAILED: 18 AYES / 28 NOES  
 SPONSOR/AMENDMENT: KLINE / FIDUCIARY LIABILITY PROTECTION

MEMBER	AYE	NO	PRESENT	NOT VOTING
Mr. MILLER, Chairman		X		
Mr. KILDEE, Vice Chairman		X		
Mr. PAYNE		X		
Mr. ANDREWS		X		
Mr. SCOTT		X		
Ms. WOOLSEY		X		
Mr. HINOJOSA		X		
Mrs. McCARTHY		X		
Mr. TIERNEY		X		
Mr. KUCINICH		X		
Mr. WU		X		
Mr. HOLT		X		
Mrs. DAVIS		X		
Mr. GRIJALVA		X		
Mr. TIMOTHY BISHOP		X		
Mr. SESTAK		X		
Mr. LOEBSACK		X		
Ms. HIRONO		X		
Mr. ALTMIRE		X		
Mr. HARE		X		
Ms. CLARKE		X		
Mr. COURTNEY		X		
Ms. SHEA-PORTER				X
Ms. FUDGE		X		
Mr. POLIS		X		
Mr. TONKO		X		
Mr. PIERLUISI		X		
Mr. SABLAN		X		
Ms. TITUS		X		
<i>vacancy</i>				
Mr. KLINE, Senior Republican Member	X			
Mr. PETRI	X			
Mr. McKEON	X			
Mr. HOEKSTRA	X			
Mr. CASTLE	X			
Mr. SOUDER	X			
Mr. EHLERS	X			
Mrs. BIGGERT	X			
Mr. PLATTS	X			
Mr. WILSON	X			
Mrs. McMORRIS RODGERS	X			
Mr. PRICE				X
Mr. ROB BISHOP	X			
Mr. GUTHRIE	X			
Mr. CASSIDY	X			
Mr. McCLINTOCK	X			
Mr. HUNTER	X			
Mr. ROE	X			
Mr. THOMPSON	X			
<b>TOTALS</b>	<b>18</b>	<b>28</b>		<b>2</b>

## COMMITTEE ON EDUCATION AND LABOR

ROLL CALL: 6                      BILL: H.R. 2989                      DATE: 6/24/2009  
 AMENDMENT NUMBER: 9                      FAILED: 18 AYES / 28 NOES  
 SPONSOR/AMENDMENT: KLINE / AUTO INDUSTRY WITHDRAWAL LIABILITY

MEMBER	AYE	NO	PRESENT	NOT VOTING
Mr. MILLER, Chairman		X		
Mr. KILDEE, Vice Chairman		X		
Mr. PAYNE		X		
Mr. ANDREWS		X		
Mr. SCOTT		X		
Ms. WOOLSEY		X		
Mr. HINOJOSA		X		
Mrs. McCARTHY		X		
Mr. TIERNEY		X		
Mr. KUCINICH		X		
Mr. WU		X		
Mr. HOLT		X		
Mrs. DAVIS		X		
Mr. GRIJALVA		X		
Mr. TIMOTHY BISHOP		X		
Mr. SESTAK		X		
Mr. LOEBSACK		X		
Ms. HIRONO		X		
Mr. ALTMIRE		X		
Mr. HARE		X		
Ms. CLARKE		X		
Mr. COURTNEY		X		
Ms. SHEA-PORTER				X
Ms. FUDGE		X		
Mr. POLIS		X		
Mr. TONKO		X		
Mr. PIERLUISI		X		
Mr. SABLAN		X		
Ms. TITUS		X		
<i>vacancy</i>				
Mr. KLINE, Senior Republican Member	X			
Mr. PETRI	X			
Mr. McKEON	X			
Mr. HOEKSTRA	X			
Mr. CASTLE	X			
Mr. SOUDER	X			
Mr. EHLERS	X			
Mrs. BIGGERT	X			
Mr. PLATTS	X			
Mr. WILSON	X			
Mrs. McMORRIS RODGERS	X			
Mr. PRICE				X
Mr. ROB BISHOP	X			
Mr. GUTHRIE	X			
Mr. CASSIDY	X			
Mr. McCLINTOCK	X			
Mr. HUNTER	X			
Mr. ROE	X			
Mr. THOMPSON	X			
<b>TOTALS</b>	<b>18</b>	<b>28</b>		<b>2</b>

## COMMITTEE ON EDUCATION AND LABOR

ROLL CALL: 7                      BILL: H.R. 2989                      DATE: 6/24/2009  
 AMENDMENT NUMBER:                      PASSED: 29 AYES / 17 NOES  
 SPONSOR/AMENDMENT: ANDREWS / MOTION TO FAVORABLY REPORT THE  
 BILL, AS AMENDED, TO THE HOUSE

MEMBER	AYE	NO	PRESENT	NOT VOTING
Mr. MILLER, Chairman	X			
Mr. KILDEE, Vice Chairman	X			
Mr. PAYNE	X			
Mr. ANDREWS	X			
Mr. SCOTT	X			
Ms. WOOLSEY	X			
Mr. HINOJOSA	X			
Mrs. McCARTHY	X			
Mr. TIERNEY	X			
Mr. KUCINICH	X			
Mr. WU	X			
Mr. HOLT	X			
Mrs. DAVIS	X			
Mr. GRIJALVA	X			
Mr. TIMOTHY BISHOP	X			
Mr. SESTAK	X			
Mr. LOEBSACK	X			
Ms. HIRONO	X			
Mr. ALTMIRE	X			
Mr. HARE	X			
Ms. CLARKE	X			
Mr. COURTNEY	X			
Ms. SHEA-PORTER				X
Ms. FUDGE	X			
Mr. POLIS	X			
Mr. TONKO	X			
Mr. PIERLUISI	X			
Mr. SABLAN	X			
Ms. TITUS	X			
<i>vacancy</i>				
Mr. KLINE, Senior Republican Member		X		
Mr. PETRI	X			
Mr. McKEON		X		
Mr. HOEKSTRA		X		
Mr. CASTLE		X		
Mr. SOUDER		X		
Mr. EHLERS		X		
Mrs. BIGGERT		X		
Mr. PLATTS		X		
Mr. WILSON		X		
Mrs. McMORRIS RODGERS		X		
Mr. PRICE				X
Mr. ROB BISHOP		X		
Mr. GUTHRIE		X		
Mr. CASSIDY		X		
Mr. McClINTOCK		X		
Mr. HUNTER		X		
Mr. ROE		X		
Mr. THOMPSON		X		
<b>TOTALS</b>	<b>29</b>	<b>17</b>		<b>2</b>

STATEMENT OF OVERSIGHT FINDINGS AND RECOMMENDATIONS OF  
THE COMMITTEE

In compliance with clause 3(c)(1) of rule XIII and clause 2(b)(1) of rule X of the Rules of the House of Representatives, the Committee's oversight findings and recommendations are reflected in the body of this report.

NEW BUDGET AUTHORITY AND CBO COST ESTIMATE

With respect to the requirements of clause 3(c)(2) of rule XIII of the House of Representatives and section 308(a) of the Congressional Budget Act of 1974 and with respect to requirements of 3(c)(3) of rule XIII of the House of Representatives and section 402 of the Congressional Budget Act of 1974, the Committee has received the following estimate for H.R. 980 from the Director of the Congressional Budget Office:

U.S. CONGRESS,  
CONGRESSIONAL BUDGET OFFICE,  
*Washington, DC, July 31, 2009.*

Hon. GEORGE MILLER,  
*Chairman, Committee on Education and Labor,  
House of Representatives, Washington, DC.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 2989, the 401(k) Fair Disclosure and Pension Security Act of 2009.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Sheila Dacey.

Sincerely,

DOUGLAS W. ELMENDORF, *Director.*

Enclosure.

*H.R. 2989—401(k) Fair Disclosure and Pension Security Act of 2009*

Summary: H.R. 2989 would amend the Employee Retirement Income Security Act of 1974 (ERISA) and the Internal Revenue Code. Specifically, the bill would give plans more flexibility in how they calculate pension liabilities in 2009 and temporarily extend the time plans have to make up funding shortfalls. In addition, it would require administrators of 401(k) plans to disclose additional information to beneficiaries and plan participants, and require that firms that provide investment advice to employees give advice that is independent and free of any conflict of interest.

CBO and the Joint Committee on Taxation (JCT) estimate that enacting H.R. 2989 would increase federal revenues by \$7.2 billion over the 2009–2019 period. CBO estimates the bill would reduce direct spending by \$2.8 billion over the same period. On balance, those changes would reduce deficits by \$10.0 billion through 2019. In addition, CBO estimates that implementing the bill would require additional discretionary funding with a total cost of \$55 million over the 2010–2019 period, assuming appropriation of the necessary amounts.

JCT and CBO have determined that H.R. 2989 contains no intergovernmental mandates as defined in the Unfunded Mandates Reform Act (UMRA). JCT and CBO have determined that the bill contains private-sector mandates. CBO has determined that the

nontax provisions would impose private-sector mandates on plan sponsors of defined contribution and defined benefit retirement plans subject to ERISA and providers of services to defined contribution retirement plans subject to ERISA. Because detailed information about existing industry practices is not available, and because it is uncertain how some provisions of the bill would be implemented, CBO cannot determine whether the costs of those mandates would exceed the annual threshold defined in UMRA for private-sector mandates (\$139 million in 2009, adjusted annually for inflation). JCT has not determined whether the costs of the mandates in the tax provisions would exceed the private-sector threshold established in UMRA.

Estimated cost to the Federal Government: The estimated budgetary impact of H.R. 2989 is shown in the following table. The costs of this legislation fall within budget function 600 (income security).

	By fiscal year in millions of dollars—												
	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2009– 2014	2009– 2019
<b>CHANGES IN REVENUES</b>													
On-Budget .....	301	3,263	3,411	2,676	1,563	1,135	984	-5	-2,028	-2,746	-1,363	12,349	7,191
Off-Budget .....	0	190	337	325	215	172	159	-36	-475	-606	-280	1,239	1
Total .....	301	3,453	3,748	3,001	1,778	1,307	1,143	-41	-12,503	-3,352	-1,643	13,588	7,192
<b>CHANGES IN DIRECT SPENDING</b>													
<b>PBGC Premiums</b>													
Estimated Budget Authority .....	0	-125	-375	-525	-525	-475	-400	-250	-150	0	0	-2,025	-2,825
Estimated Outlays .....	0	-125	-375	-525	-525	-475	-400	-250	-150	0	0	-2,025	-2,825
<b>NET IMPACT ON THE DEFICIT FROM REVENUES AND DIRECT SPENDING<sup>1</sup></b>													
On-Budget .....	-301	-3,388	-3,786	-3,201	-2,088	-1,610	-1,384	-245	1,878	2,746	1,363	14,374	-10,016
Off-Budget .....	0	-190	-337	-325	-215	-172	-159	36	475	606	280	-1,239	-1
Total .....	-301	-3,578	-4,123	-3,526	-2,303	-1,782	-1,543	-209	2,353	3,352	1,643	-15,613	-10,017
<b>CHANGES IN SPENDING SUBJECT TO APPROPRIATION</b>													
Estimated Authorization Level .....	0	2	6	6	6	6	6	6	6	6	6	6	26
Estimated Outlays .....	0	*	7	6	6	6	6	6	6	6	6	6	25

<sup>1</sup> Positive numbers indicate increases in the deficit, and negative numbers indicate reductions in the deficit.  
 Note: PBGC = Pension Benefit Guaranty Corporation; \* = less than \$500,000.

Basis of estimate: For this estimate, CBO assumes that H.R. 2989 will be enacted by October 1, 2009, that the estimated authorization amounts will be appropriated by the beginning of each fiscal year, and that outlays will follow the historical spending rates for similar activities.

*Direct spending and revenues*

The bill would relax the funding requirements in the Pension Protection Act of 2006 for defined benefit pension plans operated by single employer. Under current law, plan sponsors are required to make minimum contributions to their plans for years in which the value of the plan's assets falls short of the present value of the plan's accrued benefits. Those minimum contributions include annual payments needed to amortize any such shortfalls over the next seven years. The bill would permit plan sponsors with funding shortfalls in 2009 and 2010 to delay for two years the seven-year amortization period and contribute only the interest on such shortfall during the two-year delay. Additionally, the bill would allow plan sponsors who had elected to use certain interest rates when calculating their minimum required contributions for the 2009 plan year to revoke that election for subsequent plan years. Under current law, that revocation would require the consent of the Secretary of the Treasury.

Revenues. The bill would allow plan sponsors to forgo some contributions to their plans, though some of those contributions would be made in later years. This would reduce the amount of tax-deductible contributions firms make to their pension plans. Thus, JCT estimates that the bill would increase revenues by \$13.6 billion over the 2009–2014 period and \$7.2 billion over the 2009–2019 period. (Off-budget revenues would increase by \$1.2 billion over the 2010–2014 period and \$1 million over the 2010–2019 period, with no impact in 2009.)

H.R. 2989 would impose new penalties on plan administrators who fail to meet the reporting requirements of the bill in a timely manner. Enacting the legislation could increase the collections of civil penalties. (Civil fines are recorded as revenues.) CBO estimates that any new collections would not be significant because of the relatively small number of cases likely to be affected.

Direct Spending. The bill also would allow sponsors to make smaller contributions to their pension plans, reducing the level of funding of the plans. Sponsors must pay a variable-rate premium to the Pension Benefit Guaranty Corporation (PBGC) of \$9 for every \$1,000 of underfunding in the plan. Based on information provided by PBGC, CBO estimates that H.R. 2989 would increase premium receipts by about \$2.8 billion over the 2010–2019 period. Such premium receipts are a credit against direct spending; thus, the increase in collections would decrease net direct spending.

The provisions of H.R. 2989 could have other effects on PBGC's costs, but the direction and magnitude of those effects is uncertain. On the one hand, the bill would reduce sponsors' contributions, improve their financial position, and make it less likely that they would become bankrupt in the near term. Thus, the bill might reduce the number of plans that the PBGC takes over, which would decrease future costs. On the other hand, the lower contributions

could mean that the underfunding for plans that do become the responsibility of PBGC would be greater, thus adding to agency costs.

*Spending subject to appropriation*

H.R. 2989 would give the Department of Labor (DOL) new responsibilities to implement and enforce the provisions of the bill. It would require that DOL establish a program to promote financial literacy and provide support for small businesses in selecting service providers and finding affordable investment options. In addition, the bill would require DOL to annually audit a sampling of individual account plans for compliance and maintain a list of service providers who do not meet the requirements of the bill. CBO estimates that those requirements would result in insignificant costs to the department in fiscal year 2010, but would cost \$6 million annually over the 2011–2019 period.

The legislation also would require the Secretary of Labor to conduct studies within 18 months on the effectiveness of several provisions of the bill. Specifically, the department would study the effectiveness of government efforts to promote financial literacy and the requirements to include benchmarks in information reported to plan beneficiaries. Also, the Secretary would review the reporting and disclosure requirements of ERISA and the Pension Protection Act of 2006 and make recommendations to the Congress to simplify and clarify disclosures to plan participants. Based on information provided by DOL, CBO estimates that conducting the studies and preparing the reports would cost about \$2 million over the 2010–2011 period.

Intergovernmental and private-sector impact:

*Intergovernmental mandates*

JCT and CBO have determined that H.R. 2989 contains no intergovernmental mandates as defined in the Unfunded Mandates Reform Act. State, local, and tribal governments would be exempt from the bill's new requirements governing defined contribution plans under ERISA.

*Private-sector mandates*

JCT and CBO have determined that the bill contains private-sector mandates as defined in UMRA.

**Tax Provisions.** JCT has determined that a tax provision of the bill contains a private-sector mandate by extending the period for single-employer defined benefits plans to amortize the shortfall amortization base for 2009 and 2010. JCT has not determined whether the costs of that mandate would exceed the private-sector threshold established in UMRA (\$139 million in 2009, adjusted annually for inflation).

**Nontax Provisions.** CBO has determined that the nontax provisions would impose private-sector mandates on plan sponsors of defined contribution and defined benefit retirement plans subject to ERISA and providers of services to defined contribution retirement plans subject to ERISA. Because detailed information about existing industry practices is not available, and because it is uncertain how some provisions of the bill would be implemented, CBO cannot determine whether the costs of those mandates would exceed the

annual threshold defined in UMRA for private-sector mandates (\$139 million in 2009, adjusted annually for inflation).

*Required Disclosure to Plan Administrators.* The bill would impose new requirements on service providers and administrators of defined contribution retirement plans if annual charges for services to the plan are expected to equal or exceed \$5,000. Before entering into a contract for services, a service provider would be required to supply the plan's administrator with a written statement, to be updated at least annually over the life of the contract, describing the services to be provided and the expected annual charges for such services. In addition, the description would disclose financial relationships and any arrangements for free or discounted services by the service provider.

To comply with the mandate, service providers would need to break down broad service charges into the categories required by the bill, which might require them to update information systems or develop new methods of compiling the information. If a service provider bundles services from other service providers, it would need to collect the necessary information from each of those service providers and produce a custom report, including reports for each participant, that combines that information for the defined contribution plan with which it has a contract.

The business practices involved in providing services to defined contribution plans and methods for reporting fees vary greatly among service providers and across plans; therefore, the cost of the mandate would vary among different service providers. In addition, some service providers already disclose the required information or already have the infrastructure and data necessary for providing that information, although the extent to which they provide such information currently is unclear. Finally, the cost of this mandate would depend on how the provisions of this bill would be implemented—for example, how the Department of Labor would interpret what constitutes a reasonable allocation and estimate of charges. As a result of those uncertainties, CBO cannot estimate the costs of this mandate.

*Required Disclosures to Plan Participants.* The bill also would require plan administrators, for those defined contribution plans that permit participants to exercise control over their account's assets, to provide participants with additional information about their investment options before they make their elections and to provide additional information in their quarterly benefits statements about account balances and fees deducted from their accounts. CBO has determined that this mandate would fall on the sponsor of the defined contribution plan, because plan administrators perform services on behalf of the plan sponsor. CBO is unable to estimate the cost of this mandate because it does not have information on the cost to produce and distribute the additional disclosures and it does not have information on how that cost might be shared between the plan sponsor, the plan participants, and the service providers. The direct cost of the mandate would be the part borne by the plan sponsor.

*Limitations on the Provision of Investment Advice.* The bill would prohibit providers of investment services to defined contribution plans from supplying investment advice to those plans and would impose new requirements on other service providers that supply in-

vestment advice to plans. Some of the business transactions that would be prohibited under the bill would be permitted under the Department of Labor's final rules pertaining to investment advice, which are scheduled to become effective on November 18, 2009. CBO has determined that there would be a cost, which would be equal to the profit lost as a result of not engaging in those transactions, to service providers who potentially would provide such investment advice. Due to uncertainty about what new business would develop for providers of investment advice under the new rules, CBO cannot estimate the costs of this mandate to those service providers.

*Required Reporting to the Pension Benefit Guarantee Corporations.* The bill would require contributing plan sponsors of defined benefit retirement plans to provide the PBGC with any records, documents and financial statements relevant to determining the liabilities and assets of the plan if the aggregate benefits of the plan that are vested but unfunded exceed \$50 million. CBO estimates that the cost of this mandate would not exceed the annual threshold defined in UMRA.

Estimate prepared by: Federal Spending: Sheila Dacey; Federal Revenues: Zachary Epstein; Impact on State, Local, and Tribal Governments: Lisa Ramirez-Branum; Impact on the Private Sector: Patrick Bernhardt.

Estimate approved by: Peter H. Fontaine, Assistant Director for Budget Analysis.

#### STATEMENT OF GENERAL PERFORMANCE GOALS AND OBJECTIVES

In accordance with clause 3(c) of House rule XIII, the goal of the bill is to improve the 401(k) retirement system and protect workers by requiring transparency and disclosure of fees, in a clear and understandable way, to employers and employees; require that investment advice provided to employees is based on their needs, not the financial interest of those providing the advice; and provide temporary financial relief in the midst of the current economic downturn for single and multi-employer defined benefit plans.

#### CONSTITUTIONAL AUTHORITY STATEMENT

Under clause 3(d)(1) of House rule XIII, the Committee must include a statement citing the specific powers granted to Congress in the Constitution to enact the law proposed by this bill. The Committee believes that the amendments made by this bill, which amend the Employee Retirement Income Security Act, with conforming amendments to the tax code, are within Congress' authority under Article I, section 8, clause 1 and 3.

#### COMMITTEE ESTIMATE

Clause 3(d)(2) of House rule XIII requires an estimate and a comparison of the costs that would be incurred in carrying out this bill. However, clause 3(d)(3)(B) of that rule provides that this requirement does not apply when the Committee has included in its report a timely submitted cost estimate of the bill prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of House rule XIII, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

**EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974**

SHORT TITLE AND TABLE OF CONTENTS

SECTION 1. This Act may be cited as the “Employee Retirement Income Security Act of 1974”.

TABLE OF CONTENTS

\* \* \* \* \*

TITLE I—PROTECTION OF EMPLOYEE BENEFIT RIGHTS

\* \* \* \* \*

Subtitle B—Regulatory Provisions

PART 1—REPORTING AND DISCLOSURE

\* \* \* \* \*

**[Sec. 111. Repeal and effective date.]**

*Sec. 111. Special reporting and disclosure rules for individual account plans.*

*Sec. 112. Repeal and effective date.*

\* \* \* \* \*

TITLE I—PROTECTION OF EMPLOYEE BENEFIT RIGHTS

SUBTITLE A—GENERAL PROVISIONS

\* \* \* \* \*

DEFINITIONS

SEC. 3. For purposes of this title:

(1) \* \* \*

\* \* \* \* \*

(18)(A) The term “adequate consideration” when used in part 4 of subtitle B means **[(A)]** (i) in the case of a security for which there is a generally recognized market, either **[(i)]** (I) the price of the security prevailing on a national securities exchange which is registered under section 6 of the Securities Exchange Act of 1934, or **[(ii)]** (II) if the security is not traded on such a national securities exchange, a price not less favorable to the plan than the offering price for the security as established by the current bid and asked prices quoted by persons independent of the issuer and of any party in interest; and **[(B)]** (ii) in the case of an asset other than a security for which there is a generally recognized market, the fair market value of the asset as determined in good faith by the trustee or named fiduciary pursuant to the terms of the plan and in accordance with regulations promulgated by the Secretary.

*(B) In the case of a plan described in section 407(d)(3)(A) which was in existence on the date of the enactment of this Act, if the valuation set for the purchase or sale by the plan of a qualifying em-*

ployer security (as defined in section 407(d)(5)) is set at a price which has not been found by the Secretary to be in violation of this Act and which is book value computed annually in accordance with generally accepted accounting principles and the provisions of the plan, and if the valuations set for all prior purchases or sales by the plan of qualifying employer securities have been consistently so priced, then all such valuations for qualifying employer securities shall be deemed to be adequate consideration within the meaning of subparagraph (A).

- \* \* \* \* \*
- (43) **INDEPENDENT INVESTMENT ADVISER.**—
- (A) **IN GENERAL.**—The term “independent investment adviser” means, with respect to an individual account plan that permits a participant or beneficiary to direct the investment of assets in their individual account, a person who—
- (i) is a fiduciary of the plan by reason of the provision of investment advice referred to in section 3(21)(A)(ii) by the person to the plan or a participant or beneficiary of the plan (irrespective of the manner in which such advice is provided or the extent to which such advice is based on a computer model), and
  - (ii) meets the requirements of either subparagraph (B) or (C).
- (B) **REQUIREMENTS APPLICABLE TO INVESTMENT ADVISER.**—An investment adviser meets the requirements of this subparagraph, if—
- (i) such adviser is—
    - (I) registered as an investment adviser under the Investment Advisers Act of 1940 (15 U.S.C. 80b–1 et seq.) or under the laws of the State in which the adviser maintains its principal office and place of business, or
    - (II) 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 of a person described in subclause (I),
  - (ii) such adviser is not the plan investment provider,
  - (iii) the fees or other compensation received, directly or indirectly, by such adviser (and any affiliate thereof) with respect to the provision of investment advice to any individual account plan or the participants or beneficiaries of such a plan either—
    - (I) are not received from any person or persons (or anyone affiliated with such persons) that market, sell, manage or provide investments in which plan assets of the individual account plan are invested, or
    - (II) do not vary depending on the basis of any investment option selected, and are calculated pursuant to one or more of the following bases—
      - (aa) a flat-dollar basis,
      - (bb) a flat percentage of total plan assets basis,

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

(dd) a per-participant or per-beneficiary account basis, and

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

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

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

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

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

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

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

(C) **ADVICE PROVIDED TO PARTICIPANTS AND BENEFICIARIES UNDER AN INVESTMENT ADVICE COMPUTER PROGRAM MEETING 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 computer 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 computer program is provided pursuant to a computer model that—*

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

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

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

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

*(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,*

*(VI) operates so that it does not, directly or indirectly, in any manner act to benefit the investment adviser (or any affiliate of the adviser or any person with a material affiliation or contractual relationship with the adviser) at the expense of plan participants and beneficiaries,*

*(VII) takes into account the fees associated with each investment option, and*

(VIII) conforms to such other requirements as shall be prescribed by the Secretary to ensure that it operates in the best interest of plan participants and beneficiaries.

(iii) CERTIFICATION.—

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

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

(III) ELIGIBLE INVESTMENT EXPERT.—For purposes of this clause, the term “eligible investment expert” means any person—

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

(bb) does not have any material affiliation or contractual relationship with any investment adviser or a related person 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 that is a plan investment provider with respect to the plan, and

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

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

(I) conducts an annual audit of the program other than the computer model referred to in clause (ii) which is certified pursuant to clause (iii)

for compliance with the requirements of this subparagraph, and

(II) following completion of the annual audit, issues a written report to the fiduciary who authorized use of the program which presents its specific findings regarding compliance of the program with the requirements of this subsection.

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

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

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

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

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

(cc) of any material affiliation or contractual relationship of the investment adviser or affiliates thereof in the security or other property,

(dd) of the manner, and under what circumstances, any information relating to the participant or beneficiary which is provided under the program will be used or disclosed,

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

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

(II) at all times during the provision of advisory services to the participant or beneficiary, the investment adviser—

(aa) maintains the information described in subclause (I) in accurate form and in the manner described in clause (ix),

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

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

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

(viii) **OTHER CONDITIONS.**—The requirements of this clause are met with respect to the program, if—

(I) the investment adviser provides appropriate disclosure, in connection with the sale, acquisition, or holding of the security or other property with respect to which the investment advice is provided under the program, in accordance with all applicable securities laws,

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

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

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

(ix) **STANDARDS FOR PRESENTATION OF INFORMATION.**—

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

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

(x) **MAINTENANCE FOR 6 YEARS OF EVIDENCE OF COMPLIANCE.**—The requirements of this clause are met with respect to the program if the investment adviser who provides advice under the program maintains, for a period of not less than 6 years after the provision of the

advice, any records necessary for determining whether the requirements of the preceding provisions of this subparagraph and of subsection (b)(14) have been met. A failure to meet the requirements of this clause shall not be considered to have occurred solely because the records are lost or destroyed prior to the end of the 6-year period due to circumstances beyond the control of the investment adviser.

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

(i) AFFILIATE.—The term “affiliate” means, in connection with any other person, any person directly or indirectly (through one or more intermediaries) controlling, controlled by, or under common control with such other person, or any officer, director, agent, or employee of, or partner with, such other person.

(ii) REGISTERED REPRESENTATIVE.—The term “registered representative” of another entity means a person described in section 3(a)(18) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(18)) (substituting the entity for the broker or dealer referred to in such section) or a person described in section 202(a)(17) of the Investment Advisers Act of 1940 (15 U.S.C. 80b-2(a)(17)) (substituting the entity for the investment adviser referred to in such section).

(iii) PLAN INVESTMENT PROVIDER.—The term “plan investment provider” means any person (or any person affiliated with such person) that creates or manages any investment in which any individual account plan invests. Such term does not include—

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

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

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

(iv) FEES OR OTHER COMPENSATION.—The term “fees or other compensation” includes money or any other thing of monetary value (for example, gifts, awards, and trips) received, or to be received, 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.*

\* \* \* \* \*

SUBTITLE B—REGULATORY PROVISIONS

PART 1—REPORTING AND DISCLOSURE

\* \* \* \* \*

REPORTING OF PARTICIPANT'S BENEFIT RIGHTS

SEC. 105. (a) REQUIREMENTS TO PROVIDE PENSION BENEFIT STATEMENTS.—

(1) \* \* \*

(2) STATEMENTS.—

(A) \* \* \*

(B) ADDITIONAL INFORMATION.—In the case of an individual account plan, any pension benefit statement under clause (i) or (ii) of paragraph (1)(A) shall include—

(i) \* \* \*

(ii) in the case of a pension benefit statement under paragraph (1)(A)(i)—

(I) \* \* \*

(II) an explanation, written in a manner calculated to be understood by the average plan participant, of the importance, for the long-term retirement security of participants and beneficiaries, of a well-balanced and diversified investment portfolio, including a statement of the risk that holding more than 20 percent of a portfolio in the security of one entity (such as employer securities) may not be adequately **[diversified, and]** *diversified*,

(III) a notice directing the participant or beneficiary to the Internet website of the Department of Labor for sources of information on individual investing and diversification**[.]**, and

(IV) *with respect to the portion of a participant's account for which the participant has the right to direct the investment of assets, the information described in subparagraph (C).*

(C) PERIODIC ACCOUNT INFORMATION FOR PARTICIPANTS AND BENEFICIARIES.—*For purposes of subparagraph (B)(ii)(IV), the information described in this subparagraph consists of the following, indicating the portion of each amount described in clauses (i) through (vii) attributable to*

each investment option elected in connection with the participant's account:

- (i) the starting balance of the participant's account,
- (ii) contributions made during the quarter, itemizing separately totals for employer and totals for employee contributions,
- (iii) investment earnings or losses on the account balance during the quarter (if any),
- (iv) actual or estimated charges (within the meaning of section 111(e)(1)) which reduce the account during the quarter, expressed in dollars or, if estimated, such estimated dollar charges as are derived from an expense ratio (which may be expressed as a specific date estimate based on reasonable assumptions stated in the disclosure (such as the previous year's expense ratio).
- (v) any other direct charges to the participant or beneficiary in connection with the participant's account,
- (vi) the ending balance of the account,
- (vii) the participant's asset allocation to each investment option, expressed as an amount and as a percentage, and
- (viii) how to obtain the most recently updated version of the plan fee comparison chart prepared for purposes of section 111(b)(3).

(D) **OTHER INFORMATION.**—The plan administrator may include in the quarterly pension benefit statement information relating to the historical return and risk of each investment option and the estimated amount that the participant needs to contribute each month or year so as to retire at retirement age (as defined in section 216(l) of the Social Security Act).

(E) **ESTIMATIONS.**—For purposes of making the disclosure of actual charges or percentages as required under this paragraph, the plan administrator may provide a reasonable and representative estimate of such charges or percentages and shall indicate any such estimate as being such an estimate. Any such estimate shall be based on reasonable assumptions included in the statement (such as the previous year's experience).

(F) **MODEL STATEMENTS.**—The Secretary shall prescribe one or more model pension benefit statements that may be used for purposes of satisfying the requirements of subparagraphs (B)(ii) and (C).

(G) **ANNUAL COMPLIANCE FOR SMALL PLANS AND WITH RESPECT TO CERTAIN INFORMATION.**—In the case of a plan providing for investment as described in paragraph (1)(A)(i)—

- (i) if the plan has 100 or fewer participants and beneficiaries, the plan may provide the pension benefit statement under paragraph (1) on an annual rather than a quarterly basis, and
- (ii) the plan may comply with the requirements of subparagraph (B)(ii)(IV) on an annual rather than a quarterly basis.

**[(C)] (H) ALTERNATIVE NOTICE.**—The requirements of subparagraph (A)(i)(II) are met if, at least annually and in accordance with requirements of the Secretary, the plan—

(i) \* \* \*

\* \* \* \* \*

(d) **ASSISTANCE TO SMALL EMPLOYERS.**—The Secretary shall make available to employers with 100 or fewer employees—

(1) educational and compliance materials designed to assist such employers in selecting and monitoring service providers for individual account plans which permit a participant or beneficiary to exercise control over the assets in the account of the participant or beneficiary, investment options under such plans, and charges relating to such options, and

(2) services designed to assist such employers in finding and understanding affordable investment options for such plans and in comparing the investment performance of, and charges for, such options on an ongoing basis against appropriate benchmarks or other appropriate measures.

(e) **ASSISTANCE TO PLAN SPONSORS AND PLAN PARTICIPANTS AND BENEFICIARIES.**—The Secretary shall provide assistance to plan sponsors of individual account plans and participants and beneficiaries under such plans with any questions or problems regarding compliance with the requirements of this section.

(f) **ELECTRONIC MEDIA.**—Any disclosure required under this section may be provided through an electronic medium under such rules as shall be prescribed by the Secretary not later than 1 year after the date of the enactment of the 401(k) Fair Disclosure and Pension Security Act of 2009. Such rules shall be similar to those applicable under the Internal Revenue Code of 1986 with respect to notices to participants in pension plans. The Secretary shall regularly modify such rules as appropriate to take into account new developments, including new forms of electronic media, and to fairly take into consideration the interests of plan sponsors, service providers, and participants. The rules prescribed by the Secretary pursuant to this subsection shall provide for a method for the typical participant or beneficiary to obtain without undue burden any such disclosure in writing on paper in lieu of receipt through an electronic medium.

(g) **DEFINITIONS.**—For purposes of this section—

(1) **CHARGE.**—The term “charge” means, in connection with any service provided to a plan or any financial product provided to the plan in which plan assets are to be invested, any fee, credit, or other compensation charged or paid for such service or product, including money and any other thing of monetary value to be received by the provider of the service or product, or its affiliate, in connection with the service or product.

(2) **SERVICE PROVIDER.**—The terms “service provider” and “provider” mean, in connection with a service (as defined in section 111(e)(2)), a person directly or indirectly providing such service.

(3) **REGULATIONS.**—The Secretary shall provide by regulation such definitions of other terms used in this section as the Secretary determines appropriate.

\* \* \* \* \*

**SEC. 111. SPECIAL REPORTING AND DISCLOSURE RULES FOR INDIVIDUAL ACCOUNT PLANS.**

(a) **DISCLOSURE TO EMPLOYERS SPONSORING INDIVIDUAL ACCOUNT PLANS REGARDING SERVICES NECESSARY FOR ESTABLISHMENT OR OPERATION OF PLANS.—**

(1) **SERVICE DISCLOSURE STATEMENT.—***The plan administrator of an individual account plan (or any other plan official with contracting authority under the terms of the plan) may not enter into a contract or arrangement for services to the plan (including, for purposes of this section, the offering of any investment option to the plan) unless such plan administrator or other official has received, reasonably in advance of entering into the contract or arrangement, a single written statement from the service provider which—*

*(A) specifies such services for the plan that will be provided in connection with the contract or arrangement, and*

*(B) provides the expected total annual charges for such services for the plan that will be provided in connection with the contract or arrangement, including a reasonable allocation of such total annual charges among all relevant component charges specified in paragraph (2) (regardless of how the charges are actually assessed).*

*The description of the services and specification of the charges for the services shall be displayed prominently in the written statement and shall be presented in a format which is understandable to the typical plan administrator.*

(2) **MINIMUM ALLOCATION REQUIREMENTS.—***The allocation required under paragraph (1)(B) in connection with the services provided under each contract or arrangement shall specify component charges (to the extent such services for the plan are provided under the contract or arrangement) as follows:*

*(A) charges for administration and recordkeeping,*

*(B) transaction based charges,*

*(C) charges for investment management, and*

*(D) all such charges not described in subparagraph (A), (B), or (C).*

*The Secretary may by regulation provide for the appropriate allocation of component charges among the categories of charges provided in subparagraphs (A), (B), (C), and (D).*

(3) **PRESENTATION OF CHARGES.—***The total charges described in paragraph (2)(A) and the total charges described in paragraph (2)(C) shall each be presented in the written statement as an aggregate total dollar amount, and, in addition, each of such total charges may also be presented as a percentage of assets. The charges described in paragraph (2)(B) shall be itemized separately as dollar amounts or as percentages of the applicable base amounts.*

(4) **ESTIMATIONS.—***For purposes of providing the statement required under this subsection in connection with any service, the service provider may provide a reasonable and representative estimate of the charges required to be specified under paragraph (1)(B) and shall indicate any such estimate as being such an estimate. Any such estimate shall be based on reasonable assumptions specified in the statement (which shall include the previous year's experience of the plan or, in the case of a new*

plan, a reasonable estimate, taking into account the plan's participants and beneficiaries).

(5) *DISCLOSURE OF FINANCIAL RELATIONSHIPS.*—

(A) *IN GENERAL.*—The statement required under paragraph (1) shall include a written disclosure of—

- (i) any payment to be provided (or the amount representing the value of any services to be provided) to the service provider (or any affiliate thereof) from any entity other than the plan or the accounts of participants or beneficiaries pursuant to, or in connection with, the contract or arrangement described in paragraph (1) and the amount and type of any payment to be made or credit to be received for such services (irrespective of whether the service provider (or affiliate thereof) or other person providing such services is affiliated or unaffiliated with the plan, the plan sponsor, the plan administrator, or any other plan official), and
- (ii) such other similar arrangements benefitting the service provider (or any affiliate thereof) as may be specified by the Secretary.

In any case in which the contract or arrangement described in paragraph (1) provides for the payments described in clause (i) in terms of a formula, the requirements of such clause may be met by specifying the formula to be used in connection with such payments and describing the application of such formula.

(B) *INCLUSIONS.*—

(i) *IN GENERAL.*—Disclosures described under subparagraph (A)(ii) shall include the extent to which the service provider (or any affiliate thereof) may benefit from the offering of its own proprietary investment products or those of third parties, including (but not limited to) cross-selling of affiliated products or services to the plan sponsor or participants.

(ii) *APPLICABLE PROHIBITED TRANSACTION EXEMPTION.*—Disclosures under this paragraph may include a description of any applicable prohibited transaction exemption under section 408 related to the services described in the statement required under paragraph (1).

(6) *DISCLOSURE OF IMPACT OF SHARE CLASSES.*—The statement required under paragraph (1) shall, to the extent applicable, disclose that the share prices of certain mutual fund investments that are available to the plan may be different from the share prices outside of the plan due to the existence of different share classes and provide the basis for these differences.

(7) *DISCLOSURE OF CERTAIN ARRANGEMENTS IN CONNECTION WITH FREE OR DISCOUNTED SERVICES OR REIMBURSEMENTS BY SERVICE PROVIDERS.*—In any case in which services are provided to the plan, or to the plan sponsor in connection with the plan, by any service provider without explicit charge or for charges set at a discounted rate or subject to rebate, the statement required under paragraph (1) shall specify the manner in which, the extent to which, and the amount by which consideration is otherwise obtained by the service provider (or any affil-

iate thereof), the plan, or the plan sponsor for such services, directly or indirectly, by means of any charges against the plan.

(8) *REVIEW BY THE SECRETARY.*—The Secretary shall, from time to time as determined appropriate by the Secretary, review the accuracy and sufficiency of statements provided pursuant to this subsection.

(9) *UPDATING.*—Each service provider shall provide to the plan administrator an updated written statement described in paragraph (1) describing any material change in the information included in the statement provided pursuant to paragraph (1) as soon as is reasonable after the occurrence of the change is known. Such an updated written statement, or, in the case of a plan year in which no material change in the information included in the statement provided pursuant to paragraph (1) has occurred, a written statement setting forth such fact, shall be provided by the service provider not less often than annually.

(10) *LIMITATIONS.*—

(A) *DOLLAR LIMITATION.*—

(i) *IN GENERAL.*—The requirements of this subsection shall apply with respect to any contract or arrangement for services provided during any plan year only if the total charged for such services under such contract or arrangement is reasonably expected to equal or exceed \$5,000.

(ii) *ADJUSTMENTS BY THE SECRETARY.*—The Secretary may by regulation adjust the dollar amount specified in this subparagraph to a lesser amount for small plans and to a greater amount for other plans and provide for appropriate annual adjustments in such adjusted amounts

(B) *GENERAL APPLICABILITY OF REQUIREMENTS WITH RESPECT TO SERVICES.*—Nothing in this subsection shall be construed to require any service provider to provide any service with respect to any particular plan sponsor.

(11) *SATISFACTION OF FIDUCIARY RULES.*—Nothing in the preceding provisions of this subsection affects the obligations of fiduciaries under part 4 of this subtitle.

(b) *DISCLOSURES TO PARTICIPANTS AND BENEFICIARIES.*—

(1) *ADVANCE NOTICE OF AVAILABLE INVESTMENT OPTIONS.*—The plan administrator of an individual account plan that permits participants or beneficiaries to direct the investment of assets in their individual accounts shall provide to the participant or beneficiary notice of the investment options available for election under the plan before a reasonable period prior to—

(A) the earliest date provided for under the plan for the participant's initial investment of any contribution made on behalf of such participant, and

(B) the effective date of any material change in investment options.

In the case of a plan that provides for immediate eligibility or that contains an automatic contribution arrangement (as defined in subparagraphs (A) and (B) of section 514(e)(2)), the notice required under subparagraph (A) may be provided within any reasonable period prior to such initial investment. With respect to any notice required under this paragraph, the Secretary

shall prescribe regulations creating specific requirements for periods of advance notice to be treated as reasonable under this paragraph (of not less than 10 days) in circumstances similar to those described in section 101(i)(2)(C), and such notice may be combined with any similar notice that may be required under section 404(c)(5) or under this section.

(2) *INFORMATION INCLUDED IN NOTICE.*—The notice required under paragraph (1) shall—

(A) include a prominent statement, in language presented in a manner which is easily understandable by the typical participant, indicating which components of the charges (both direct and indirect) for each investment option are payable by the participant or beneficiary and how such components are to be paid,

(B) set forth, with respect to each available investment option—

(i) the name of the option,

(ii) information effectively describing the investment objectives of the option (such as a description of a broadly recognized asset class),

(iii) the risk level associated with the option,

(iv) whether the option is diversified among various classes of assets so as to minimize the risk of large losses or should be combined with other options so as to obtain such diversification,

(v) whether the investment option is actively managed or passively managed in relation to an index and the difference between active management and passive management,

(vi) where, and the manner in which, additional plan-specific, option-specific, and generally available investment information regarding the option may be obtained, and

(vii) a statement explaining that investment options should not be evaluated solely on the basis of the charges for each option but should also be based on careful consideration of other key factors, including the risk level of the option, the investment objectives of the option, the principal investment strategies of the option, and historical returns of the option, and

(C) include a plan fee comparison chart, relating to the charges described in paragraph (3) in connection with all investment options available under the plan, as provided in paragraph (3).

(3) *PLAN FEE COMPARISON CHART.*—

(A) *IN GENERAL.*—

(i) *IN GENERAL.*—The notice provided under this subsection shall include a plan fee comparison chart consisting of a comparison of actual service and investment charges (including, for purposes of this clause, charges for the offering of an investment option) that will or could be assessed against the account of the participant or beneficiary with respect to the plan year. The plan fee comparison chart shall be presented in a manner which is easily understood by the typical par-

participant and include such information as the Secretary determines necessary to permit participants and beneficiaries to assess the services for which charges will or could be assessed against the account.

(ii) *FORM.*—For purposes of this paragraph, the potential service charges shall be provided in the form of a dollar amount or as a formula (such as a percentage of assets), as appropriate. The form of the potential service charges shall be presented in a manner which is easily understandable by the typical participant, including examples that demonstrate how the charges will be assessed against the account of the participant or beneficiary.

(B) *CATEGORIZATION OF CHARGES.*—The plan fee comparison chart shall provide information in relation to the following categories of charges that will or could be assessed against the account of the participant or beneficiary:

(i) *ASSET-BASED CHARGES SPECIFIC TO INVESTMENT.*—Charges that vary depending on the investment options selected by the participant or beneficiary, including expense ratios and investment-specific asset-based charges. The information relating to such charges shall include a statement noting any charges for 1 or more investment options which pay for services other than investment management.

(ii) *ASSET-BASED CHARGES NOT SPECIFIC TO INVESTMENT.*—Charges that are assessed as a percentage of the total assets in the account of the participant or beneficiary, regardless of the investment option selected.

(iii) *ADMINISTRATIVE AND TRANSACTION-BASED CHARGES.*—Administration and transaction-based charges, including fees charged to participants to cover plan administration, compliance, and recordkeeping costs, plan loan origination fees, possible redemption fees, and possible surrender charges, that are not assessed as a percentage of the total assets in the account and are either automatically deducted each year or result from certain transactions engaged in by the participant or beneficiary.

(iv) *OTHER CHARGES.*—Any other charges which may be deducted from participants' or beneficiaries' accounts and which are not described in clauses (i), (ii), and (iii).

(C) *DESCRIPTION OF PURPOSE FOR CHARGES.*—The notice shall indicate the extent to which each charge is for investment management, transactions, plan administration and recordkeeping, or other identified services.

(D) *FEES AND HISTORICAL RETURNS.*—In connection with each investment option listed in the plan fee comparison chart, the chart shall also include, as determined periodically by the Secretary in consultation with the Securities and Exchange Commission, appropriate and consistent benchmarks, indices, or other points of comparison that may be used by beneficiaries to compare each investment option's historical returns, net of fees and expenses, for the

previous year, 5 years, and 10 years (or for the period since inception, if shorter) as shown in the chart pursuant to this paragraph, including a separate point of comparison with respect to each such time period.

(4) **MODEL NOTICES.**—The Secretary shall prescribe one or more model notices that may be used for purposes of satisfying the requirements of this subsection, including model plan fee comparison charts.

(5) **ESTIMATIONS.**—For purposes of providing the notice required under this subsection, the plan administrator may provide a reasonable and representative estimate for any charges or percentages disclosed under paragraph (2) or (3) and shall indicate any such estimate as being such an estimate. Any such estimate shall be based on reasonable assumptions stated in the notice (such as the previous year's experience or, in the case of a new plan, a reasonable estimate, taking into account the plan's participants and beneficiaries).

(c) **ELECTRONIC MEDIA.**—Any disclosure required under this section may be provided through an electronic medium under such rules as shall be prescribed by the Secretary not later than 1 year after the date of the enactment of the 401(k) Fair Disclosure and Pension Security Act of 2009. Such rules shall be similar to those applicable under the Internal Revenue Code of 1986 with respect to notices to participants in pension plans. The Secretary shall regularly modify such rules as appropriate to take into account new developments, including new forms of electronic media, and to fairly take into consideration the interests of plan sponsors, service providers, and participants. The rules prescribed by the Secretary pursuant to this subsection shall provide for a method for the typical participant or beneficiary to obtain without undue burden any such disclosure in writing on paper in lieu of receipt through an electronic medium.

(d) **REGULATIONS REGARDING CERTAIN PRODUCTS.**—The Secretary may by regulation identify certain types of investment options, such as an option that provides a guaranteed rate of return and that does not identify specific fees, and prescribe alternative disclosures of cost and performance measures that correspond to the particular circumstances of such options.

(e) **DEFINITIONS.**—For purposes of this section—

(1) **CHARGE.**—The term “charge” means, in connection with any service provided to a plan or any financial product provided to the plan in which plan assets are to be invested, any fee, credit, or other compensation charged or paid for such service or product, including money and any other thing of monetary value to be received by the provider of the service or product, or its affiliate, in connection with the service or product.

(2) **SERVICE.**—The term “service” means, in connection with a plan, a service provided directly or indirectly to, or with respect to, the plan or a service provided directly or indirectly in connection with a financial product in which plan assets are to be invested.

(3) **CONTRACT OR ARRANGEMENT.**—The term “contract or arrangement” means, in connection with any 2 or more parties, any contract or arrangement entered into between or among such parties, and any extension or renewal thereof.

(4) *SERVICE PROVIDER.*—The terms “service provider” and “provider” mean, in connection with a service, a person directly or indirectly providing such service.

(5) *REGULATIONS.*—The Secretary shall provide by regulation such definitions of other terms used in this section as the Secretary determines appropriate.

REPEAL AND EFFECTIVE DATE

SEC. [111.] 112. (a) \* \* \*

\* \* \* \* \*

PART 3—FUNDING

\* \* \* \* \*

**SEC. 303. MINIMUM FUNDING STANDARDS FOR SINGLE-EMPLOYER DEFINED BENEFIT PENSION PLANS.**

(a) \* \* \*

(b) **TARGET NORMAL COST.**—For purposes of this section:

(1) **IN GENERAL.**—Except as provided in subsection (i)(2) with respect to plans in at-risk status, the term “target normal cost” means, for any plan year, the excess of—

(A) the sum of—

(i) \* \* \*

(ii) the amount of [plan-related expenses] *plan-related administrative expenses* expected to be paid from plan assets during the plan year, over

\* \* \* \* \*

(c) **SHORTFALL AMORTIZATION CHARGE.**—

(1) **IN GENERAL.**—For purposes of this section, the shortfall amortization charge for a plan for any plan year is the aggregate total (not less than zero) of the shortfall amortization installments for such plan year with respect to [the shortfall amortization bases for such plan year and each of the 6 preceding plan years] *any shortfall amortization base which has not been fully amortized under this subsection.*

(2) **SHORTFALL AMORTIZATION INSTALLMENT.**—For purposes of paragraph (1)—

(A) \* \* \*

\* \* \* \* \*

(D) *SPECIAL RULE FOR 2009 AND 2010.*—In the case of the shortfall amortization base of the plan for any plan year beginning in 2009 or 2010 (hereafter in this subparagraph referred to as the “base year”)—

(i) *DETERMINATION OF INSTALLMENTS.*—The shortfall amortization installments are—

(I) in the case of the last 7 plan years in the 9-plan-year period beginning with the base year, the amounts necessary to amortize the shortfall amortization base of the plan for the base year in level annual installments over such last 7 plan years, and

(II) in the case of the first 2 plan years in such 9-plan-year period, interest on such shortfall amor-

tization base (determined as provided in subparagraph (C)).

(ii) *SHORTFALL INSTALLMENT.*—The shortfall amortization installment for any plan year in the 9-plan-year period under clause (i) with respect to such shortfall amortization base is the annual installment determined under clause (i) for that year for that base.

\* \* \* \* \*

(h) ACTUARIAL ASSUMPTIONS AND METHODS.—

(1) \* \* \*

(2) INTEREST RATES.—

(A) \* \* \*

\* \* \* \* \*

(D) CORPORATE BOND YIELD CURVE.—For purposes of this paragraph—

(i) \* \* \*

(ii) *ELECTION TO USE YIELD CURVE.*—Solely for purposes of determining the minimum required contribution under this section, the plan sponsor may, in lieu of the segment rates determined under subparagraph (C), elect to use interest rates under the corporate bond yield curve. For purposes of the preceding sentence such curve shall be determined without regard to the 24-month averaging described in clause (i). **【Such election, once made, may be revoked only with the consent of the Secretary of the Treasury.】** *Such election, once made, may be revoked only with the consent of the Secretary, except that any election in effect for a plan with respect to a plan year beginning in 2009 may be revoked for the plan year beginning in 2010 without such consent.*

\* \* \* \* \*

(i) SPECIAL RULES FOR AT-RISK PLANS.—

(1) \* \* \*

(2) *TARGET NORMAL COST OF AT-RISK PLANS.*—In the case of a plan which is in at-risk status for a plan year, the target normal cost of the plan for such plan year shall be equal to the sum of—

(A) the excess of—

(i) the sum of—

(I) \* \* \*

(II) the amount of **【plan-related expenses】** *plan-related administrative expenses* expected to be paid from plan assets during the plan year, over

\* \* \* \* \*

MINIMUM FUNDING STANDARDS FOR MULTIEMPLOYER PLANS

SEC. 304. (a) \* \* \*

\* \* \* \* \*

(d) EXTENSION OF AMORTIZATION PERIODS FOR MULTIEMPLOYER PLANS.—

(1) AUTOMATIC EXTENSION UPON APPLICATION BY CERTAIN PLANS.—

(A) IN GENERAL.—If the plan sponsor of a multiemployer plan—

(i) \* \* \*

\* \* \* \* \*

the Secretary of the Treasury shall extend the amortization period for the period of time (not in excess of **5 years** *10 years*) specified in the application. Such extension shall be in addition to any extension under paragraph (2).

\* \* \* \* \*

(2) ALTERNATIVE EXTENSION.—

(A) IN GENERAL.—If the plan sponsor of a multiemployer plan submits to the Secretary of the Treasury an application for an extension of the period of years required to amortize any unfunded liability described in any clause of subsection (b)(2)(B) or described in subsection (b)(4), the Secretary of the Treasury may extend the amortization period for a period of time (not in excess of **10 years** *15 years* reduced by the number of years of any extension under paragraph (1) with respect to such unfunded liability) if the Secretary of the Treasury makes the determination described in subparagraph (B). Such extension shall be in addition to any extension under paragraph (1).

\* \* \* \* \*

PART 4—FIDUCIARY RESPONSIBILITY

\* \* \* \* \*

FIDUCIARY DUTIES

SEC. 404. (a)(1) \* \* \*

\* \* \* \* \*

(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)).*

(B) *The independent investment adviser providing investment advice to a plan or to a participant or beneficiary shall provide, before a reasonable period prior to the initial provision of the advice, a written notification—*

(i) *of the past performance and historical rates of return of the investment options available with respect to the plan and comparisons of such 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 selection 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), except that any such requirement shall not be construed to preclude reasonable reliance by the plan sponsor or other person on the representation of any person that such person making the representation meets the requirements of section 3(43)(A). The plan sponsor and any other person who is a fiduciary (other than the independent investment adviser) 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 and shall not be liable under this title for any loss, or by reason of any breach, which results from such specific investment advice given by the independent investment adviser.*

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

\* \* \* \* \*

(c)(1)(A) In the case of a pension plan which provides for individual accounts and permits a participant or beneficiary to exercise control over assets in his account, if a participant or beneficiary exercises control over the assets in his account (as determined under regulations of the Secretary)—

(i) \* \* \*

(ii) no person who is otherwise a fiduciary shall be liable under this part for any loss, or by reason of any breach, which results from such participant's or beneficiary's exercise of control, *except as provided in section 404(c)(6) and except that this clause shall not apply in connection with such participant or beneficiary for any blackout period during which the ability of such participant or beneficiary to direct the investment of the assets in his or her account is suspended by a plan sponsor or fiduciary.*

\* \* \* \* \*

(6) **MINIMUM INVESTMENT OPTION REQUIREMENT FOR INDIVIDUAL ACCOUNT PLANS.**—*Paragraph (1)(A)(ii) shall not apply in connection with any individual account plan which permits a participant or beneficiary to exercise control over the assets in the account of the participant or beneficiary unless the plan includes at least one investment option—*

*(A) which is a passively managed investment with a portfolio of securities that is designed to be representative of the United States investable equity market (including representation of small, mid, and large cap stocks) or the United States investment grade bond market (including Treasury, agency, non-agency, and corporate issues), or a combination thereof, and*

*(B) which is described in the terms of the plan as offered without any endorsement of the Government or the plan sponsor.*

*An investment shall not fail to satisfy the requirements of subparagraph (A) in connection with either market described in subparagraph (A) solely by reason of a failure to invest in all or substantially all equities or bonds (as applicable) in such market, if the methodology used to select the equities or bonds*

*is designed to approximate in a reasonable manner the broad experience of such market.*

\* \* \* \* \*

EXEMPTIONS FROM PROHIBITED TRANSACTIONS

SEC. 408. (a) \* \* \*

(b) The prohibitions provided in section 406 shall not apply to any of the following transactions:

(1) \* \* \*

\* \* \* \* \*

(14) Any transaction in connection with the provision of investment advice described in section 3(21)(A)(ii) to a participant or beneficiary of an individual account plan that permits such participant or beneficiary to direct the investment of assets in their individual account, if—

(A) \* \* \*

[(B) the requirements of subsection (g) are met.]

*(B) the investment advice is provided by an independent investment adviser (as defined in section 3(43)).*

\* \* \* \* \*

[(g) PROVISION OF INVESTMENT ADVICE TO PARTICIPANT AND BENEFICIARIES.—

[(1) IN GENERAL.—The prohibitions provided in section 406 shall not apply to transactions described in subsection (b)(14) if the investment advice provided by a fiduciary adviser is provided under an eligible investment advice arrangement.

[(2) ELIGIBLE INVESTMENT ADVICE ARRANGEMENT.—For purposes of this subsection, the term “eligible investment advice arrangement” means an arrangement—

[(A) which either—

[(i) provides that any fees (including any commission or other compensation) received by the fiduciary adviser for investment advice or with respect to the sale, holding, or acquisition of any security or other property for purposes of investment of plan assets do not vary depending on the basis of any investment option selected, or

[(ii) uses a computer model under an investment advice program meeting the requirements of paragraph (3) in connection with the provision of investment advice by a fiduciary adviser to a participant or beneficiary, and

[(B) with respect to which the requirements of paragraph (4), (5), (6), (7), (8), and (9) are met.

[(3) INVESTMENT ADVICE PROGRAM USING COMPUTER MODEL.—

[(A) IN GENERAL.—An investment advice program meets the requirements of this paragraph if the requirements of subparagraphs (B), (C), and (D) are met.

[(B) COMPUTER MODEL.—The requirements of this subparagraph 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 fiduciary adviser or a person with a material affiliation or contractual relationship with the fiduciary 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.

[(C) CERTIFICATION.—

[(i) IN GENERAL.—The requirements of this subparagraph are met with respect to any investment advice 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 subparagraph (B).

[(ii) RENEWAL OF CERTIFICATIONS.—If, as determined under regulations prescribed by the Secretary, there are material modifications to a computer model, the requirements of this subparagraph are met only if a certification described in clause (i) is obtained with respect to the computer model as so modified.

[(iii) ELIGIBLE INVESTMENT EXPERT.—The term “eligible investment expert” means any person—

[(I) which meets such requirements as the Secretary may provide, and

[(II) 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).

[(D) EXCLUSIVITY OF RECOMMENDATION.—The requirements of this subparagraph are met with respect to any investment advice program if—

[(i) the only investment advice provided under the program is the advice generated by the computer model described in subparagraph (B), and

[(ii) any transaction described in subsection (b)(14)(A)(ii) occurs solely at the direction of the participant or beneficiary.

Nothing in the preceding sentence shall preclude the participant or beneficiary from requesting investment advice other than that described in subparagraph (A), but only if

such request has not been solicited by any person connected with carrying out the arrangement.

[(4) EXPRESS AUTHORIZATION BY SEPARATE FIDUCIARY.—The requirements of this paragraph are met with respect to an arrangement if the arrangement is expressly authorized by a plan fiduciary other than the person offering the investment advice program, any person providing investment options under the plan, or any affiliate of either.

[(5) ANNUAL AUDIT.—The requirements of this paragraph are met if an independent auditor, who has appropriate technical training or experience and proficiency and so represents in writing—

[(A) conducts an annual audit of the arrangement for compliance with the requirements of this subsection, and

[(B) following completion of the annual audit, issues a written report to the fiduciary who authorized use of the arrangement which presents its specific findings regarding compliance of the arrangement with the requirements of this subsection.

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

[(6) DISCLOSURE.—The requirements of this paragraph are met if—

[(A) the fiduciary adviser provides to a participant or a beneficiary before the initial provision of the investment advice with regard to any security or other property offered as an investment option, a written notification (which may consist of notification by means of electronic communication)—

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

[(ii) of the past performance and historical rates of return of the investment options available under the plan,

[(iii) of all fees or other compensation relating to the advice 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,

[(iv) of any material affiliation or contractual relationship of the fiduciary adviser or affiliates thereof in the security or other property,

[(v) the manner, and under what circumstances, any participant or beneficiary information provided under the arrangement will be used or disclosed,

[(vi) of the types of services provided by the fiduciary adviser in connection with the provision of investment advice by the fiduciary adviser,

[(vii) that the adviser is acting as a fiduciary of the plan in connection with the provision of the advice, and

[(viii) 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 receive no fees or other compensation in connection with the security or other property, and

[(B) at all times during the provision of advisory services to the participant or beneficiary, the fiduciary adviser—

[(i) maintains the information described in subparagraph (A) in accurate form and in the manner described in paragraph (8),

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

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

[(iv) 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.

[(7) OTHER CONDITIONS.—The requirements of this paragraph are met if—

[(A) the fiduciary adviser provides appropriate disclosure, in connection with the sale, acquisition, or holding of the security or other property, in accordance with all applicable securities laws,

[(B) the sale, acquisition, or holding occurs solely at the direction of the recipient of the advice,

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

[(D) 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.

[(8) STANDARDS FOR PRESENTATION OF INFORMATION.—

[(A) IN GENERAL.—The requirements of this paragraph are met if the notification required to be provided to participants and beneficiaries under paragraph (6)(A) is written in a clear and conspicuous manner and in a manner calculated to be understood by the average plan participant and is sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of the information required to be provided in the notification.

[(B) 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 paragraph (6)(A)(iii) which meets the requirements of subparagraph (A).

**[(9) MAINTENANCE FOR 6 YEARS OF EVIDENCE OF COMPLIANCE.—**The requirements of this paragraph are met if a fiduciary adviser who has provided advice referred to in paragraph (1) 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 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.

**[(10) EXEMPTION FOR PLAN SPONSOR AND CERTAIN OTHER FIDUCIARIES.—**

**[(A) IN GENERAL.—**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 investment advice referred to in section 3(21)(A)(ii) (or solely by reason of contracting for or otherwise arranging for the provision of the advice), if—

**[(i)** the advice is provided by a fiduciary adviser pursuant to an eligible investment advice arrangement between the plan sponsor or other fiduciary and the fiduciary adviser for the provision by the fiduciary adviser of investment advice referred to in such section,

**[(ii)** the terms of the eligible investment advice arrangement require compliance by the fiduciary adviser with the requirements of this subsection, and

**[(iii)** the terms of the eligible investment advice arrangement include a written acknowledgment by the fiduciary adviser that the fiduciary adviser is a fiduciary of the plan with respect to the provision of the advice.

**[(B) CONTINUED DUTY OF PRUDENT SELECTION OF ADVISER AND PERIODIC REVIEW.—**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 eligible investment advice 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 fiduciary adviser to any particular recipient of the advice.

**[(C) AVAILABILITY OF PLAN ASSETS FOR PAYMENT FOR ADVICE.—**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).

**[(11) DEFINITIONS.—**For purposes of this subsection and subsection (b)(14)—

**[(A) FIDUCIARY ADVISER.—**The term “fiduciary adviser” means, with respect to a plan, 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 a participant or beneficiary of the plan and who 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 fiduciary maintains its principal office and place of business,

【(ii) a bank or similar financial institution referred to in subsection (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 advice 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,

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

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

【(v) an affiliate of a person described in any of clauses (i) through (iv), or

【(vi) an employee, agent, or registered representative of a person described in clauses (i) through (v) who satisfies the requirements of applicable insurance, banking, and securities laws relating to the provision of the advice.

For purposes of this part, a person who develops the computer model described in paragraph (3)(B) or markets the investment advice program or computer model shall be treated as 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) to a participant or beneficiary and shall be treated as a fiduciary adviser for purposes of this subsection and subsection (b)(14), except that the Secretary may prescribe rules under which only 1 fiduciary adviser may elect to be treated as a fiduciary with respect to the plan.

【(B) AFFILIATE.—The term “affiliate” of another entity means an affiliated person of the 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 the entity for the broker or dealer referred to in such section) or a person described in section 202(a)(17) of the Investment Advisers Act of 1940 (15 U.S.C. 80b-2(a)(17)) (substituting the entity for the investment adviser referred to in such section).】

PART 5—ADMINISTRATION AND ENFORCEMENT

\* \* \* \* \*

CIVIL ENFORCEMENT

SEC. 502. (a) A civil action may be brought—

(1) \* \* \*

\* \* \* \* \*

(6) by the Secretary to collect any civil penalty [under paragraph (2), (4), (5), (6), (7), (8), or (9) of subsection (c)] under paragraph (2), (4), (5), (6), (7), (8), (9), (10), or (11) of subsection (c) or under subsection (i) or (l);

\* \* \* \* \*

(c)(1) \* \* \*

\* \* \* \* \*

(11)(A) *In the case of any violation of section 111(a) by a service provider (as defined in section 111(e)(4)), the service provider may be assessed by the Secretary a civil penalty of up to \$1,000 a day with respect to each such violation from the date of the initial violation until the date on which such violation is corrected, subject to a total maximum penalty of 10 percent of the amount involved, as determined by the Secretary.*

(B) *Any plan administrator with respect to a plan who fails or refuses to provide a statement to participants and beneficiaries in accordance with section 105(a)(2)(B)(ii) or 111(b) may be assessed by the Secretary a civil penalty of up to \$100 a day from the date of the failure or refusal to the date on which such statement or notice is so provided.*

(C) *For purposes of this paragraph, each violation with respect to any single participant, beneficiary, or plan administrator shall be treated as a separate violation.*

[(10)] (12) The Secretary and the Secretary of Health and Human Services shall maintain such ongoing consultation as may be necessary and appropriate to coordinate enforcement under this subsection with enforcement under section 1144(c)(8) of the Social Security Act.

\* \* \* \* \*

(n) ENFORCEMENT COORDINATION OF CERTAIN DISCLOSURE REQUIREMENTS AND REVIEW BY THE DEPARTMENT OF LABOR.—

(1) IN GENERAL.—

(A) NOTIFICATION AND ACTION.—*The Secretary shall notify the applicable regulatory authority in any case in which the Secretary determines that a service provider is engaged in a pattern or practice that precludes compliance by plan administrators with section 111. The Secretary shall, in consultation with the applicable authority, take such timely enforcement action under this title as is necessary to assure that such pattern or practice ceases and desists and assess any appropriate penalties.*

(B) DISSEMINATION.—*The Secretary shall widely disseminate to employee pension benefit plans covered by this title and their participants and beneficiaries the identity of any service providers with respect to such plans found to be en-*

*gaged in any pattern or practice described in subparagraph (A) with the intent to preclude compliance by plan administrators with section 111 and the particulars of such pattern or practice. Prior to the dissemination of the identity of any service providers identified and determined by the Secretary to be engaged in such a pattern or practice, such service provider shall receive a notice of intent to disseminate, an opportunity to request an administrative hearing, and a timely appeal to the Secretary.*

*(2) ANNUAL AUDIT OF REPRESENTATIVE SAMPLING OF INDIVIDUAL ACCOUNT PLANS.—The Secretary shall annually audit a representative sampling of individual account plans covered by this title to determine compliance with the requirements of section 111. The Secretary shall annually report the results of such audit and any related recommendations of the Secretary to the Committee on Education and Labor of the House of Representatives and the Committee on Health, Education, Labor, and Pensions of the Senate.*

\* \* \* \* \*

OUTREACH TO PROMOTE RETIREMENT INCOME SAVINGS

SEC. 516. (a) \* \* \*

*(b) METHODS.—The Secretary shall carry out the requirements of subsection (a) by means which shall ensure effective communication to the public, including publication of public service announcements, public meetings, creation of educational materials, promotion of education in financial literacy with respect to investment for retirement as provided in subsection (e), and establishment of a site on the Internet.*

\* \* \* \* \*

*(e) PROMOTION OF EDUCATION IN FINANCIAL LITERACY WITH RESPECT TO INVESTMENT FOR RETIREMENT.—The Secretary, in consultation with the Secretary of Education and the Secretary of the Treasury, shall establish a program under which—*

*(1) employees and the general public are provided with information and materials—*

*(A) informing them about resources available for attaining financial literacy with respect to investment for retirement,*

*(B) effectively educating them about the importance of, and appropriate techniques with respect to, personal finance, saving for retirement, and choosing independent investment advisers when managing their accounts under individual account plans, and*

*(C) effectively educating them about debt obligations, the relationship of debt to savings, and the potential consequences of debt with respect to saving for retirement,*

*(2) employers are enlisted to participate in such program so as to assist in the attainment of the goals described in subparagraphs (A), (B), and (C) of paragraph (1) with respect to their employees, and*

*(3) appropriate standards of financial literacy of employees and the general public with respect to investment for retirement*

*are developed and published for utilization under such program.*

**[(e)] (f) COORDINATION.**—The Secretary shall coordinate the outreach program under this section with similar efforts undertaken by other public and private entities.

\* \* \* \* \*

**TITLE IV—PLAN TERMINATION INSURANCE**

**SUBTITLE A—PENSION BENEFIT GUARANTY CORPORATION**

\* \* \* \* \*

**SEC. 4010. AUTHORITY TO REQUIRE CERTAIN INFORMATION.**

(a) \* \* \*

(b) **PERSONS REQUIRED TO PROVIDE INFORMATION.**—The persons covered by subsection (a) are each contributing sponsor, and each member of a contributing sponsor’s controlled group, of a single-employer plan covered by this title, if—

**[(1) the funding target attainment percentage (as defined in subsection (d)) at the end of the preceding plan year of a plan maintained by the contributing sponsor or any member of its controlled group is less than 80 percent;]**

*(1) either of the following requirements are met:*

*(A) the funding target attainment percentage (as defined in subsection (d)) at the end of the preceding plan year of a plan maintained by the contributing sponsor or any member of its controlled group is less than 80 percent; or*

*(B) the aggregate unfunded vested benefits (as determined under section 4006(a)(3)(E)(iii)) of plans maintained by the contributing sponsor and the members of its controlled group exceed \$50,000,000 (disregarding plans with no unfunded vested benefits);*

\* \* \* \* \*

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**INTERNAL REVENUE CODE OF 1986**

**Subtitle A—Income Taxes**

\* \* \* \* \*

**CHAPTER 1—NORMAL TAXES AND SURTAXES**

\* \* \* \* \*

**Subchapter D—Deferred Compensation, Etc**

\* \* \* \* \*

**PART III—RULES RELATING TO MINIMUM FUNDING STANDARDS AND BENEFIT LIMITATIONS**

\* \* \* \* \*

**Subpart A—Minimum Funding Standards for Pension Plans**

\* \* \* \* \*

**SEC. 430. MINIMUM FUNDING STANDARDS FOR SINGLE-EMPLOYER DEFINED BENEFIT PENSION PLANS.**

(a) \* \* \*

(b) TARGET NORMAL COST.—For purposes of this section:

(1) IN GENERAL.—Except as provided in subsection (i)(2) with respect to plans in at-risk status, the term “target normal cost” means, for any plan year, the excess of—

(A) the sum of—

(i) \* \* \*

(ii) the amount of [plan-related expenses] *plan-related administrative expenses* expected to be paid from plan assets during the plan year, over (B) the amount of mandatory employee contributions expected to be made during the plan year.

\* \* \* \* \*

(h) ACTUARIAL ASSUMPTIONS AND METHODS.—

(1) \* \* \*

(2) INTEREST RATES.—

(A) \* \* \*

\* \* \* \* \*

(D) CORPORATE BOND YIELD CURVE.—For purposes of this paragraph—

(i) \* \* \*

(ii) ELECTION TO USE YIELD CURVE.—Solely for purposes of determining the minimum required contribution under this section, the plan sponsor may, in lieu of the segment rates determined under subparagraph (C), elect to use interest rates under the corporate bond yield curve. For purposes of the preceding sentence such curve shall be determined without regard to the 24-month averaging described in clause (i). [Such election, once made, may be revoked only with the consent of the Secretary.] *Such election, once made, may be revoked only with the consent of the Secretary, except that any election in effect for a plan with respect to a plan year beginning in 2009 may be revoked for the plan year beginning in 2010 without such consent.*

\* \* \* \* \*

(i) SPECIAL RULES FOR AT-RISK PLANS.—

(1) \* \* \*

(2) TARGET NORMAL COST OF AT-RISK PLANS.—In the case of a plan which is in at-risk status for a plan year, the target normal cost of the plan for such plan year shall be equal to the sum of—

(A) the excess of—

(i) the sum of—

(I) \* \* \*

(II) the amount of [plan-related expenses] *plan-related administrative expenses* expected to be paid from plan assets during the plan year, over

(ii) the amount of mandatory employee contributions expected to be made during the plan year, plus",

\* \* \* \* \*

SEC. 431. MINIMUM FUNDING STANDARDS FOR MULTIEMPLOYER PLANS.

(a) \* \* \*

\* \* \* \* \*

(d) EXTENSION OF AMORTIZATION PERIODS FOR MULTIEMPLOYER PLANS.—

(1) AUTOMATIC EXTENSION UPON APPLICATION BY CERTAIN PLANS.—

(A) IN GENERAL.—If the plan sponsor of a multiemployer plan—

(i) \* \* \*

\* \* \* \* \*

the Secretary shall extend the amortization period for the period of time (not in excess of **5 years** *10 years*) specified in the application. Such extension shall be in addition to any extension under paragraph (2).

\* \* \* \* \*

(2) ALTERNATIVE EXTENSION.—

(A) IN GENERAL.—If the plan sponsor of a multiemployer plan submits to the Secretary an application for an extension of the period of years required to amortize any unfunded liability described in any clause of subsection (b)(2)(B) or described in subsection (b)(4), the Secretary may extend the amortization period for a period of time (not in excess of **10 years** *15 years* reduced by the number of years of any extension under paragraph (1) with respect to such unfunded liability) if the Secretary makes the determination described in subparagraph (B). Such extension shall be in addition to any extension under paragraph (1).

\* \* \* \* \*

COMMITTEE CORRESPONDENCE

None.

## MINORITY VIEWS

### INTRODUCTION

Committee Republicans agree that all workers should be provided with a secure retirement. As policymakers, we should be doing all that we can to encourage retirement security, and in particular increased savings, whether in private savings accounts such as IRAs, or through contributions to defined-contribution pension plans such as 401(k) plans. Indeed, in recent years, Committee Republicans have led efforts to overhaul and strengthen our nation's defined benefit pension system, while expanding participation and protections for participants in defined contribution pension plans.

In addressing the question of whether legislation is necessary at this time to reform our nation's pension disclosure laws, Committee Republicans bear in mind a number of "first principles." Foremost, we should do no harm, and not take action that will discourage retirement savings or individual investment. Second, we must be mindful that if we are to impose excessive burdens on plan sponsors (typically, employers) those burdens may threaten to push plan sponsors out of our voluntary system; alternately, the increased costs of disclosure will likely be shifted to participants. Third, we can agree increasing meaningful disclosure to pension plan participants and sponsors is a worthy goal; that said, simply overloading participants with information—or worse, providing information out of context which may lead participants to make poor investment choices—serves no one's purpose, and in fact may harm the very individuals that well-meaning "disclosure" legislation is intended to protect. Finally, we are committed to ensuring that plan participants of all incomes have access to quality investment advice in the workplace, at a time when they so desperately need and want it.

Measured against these principles, H.R. 2989, as reported from the Committee on Education and Labor, fails to meet the mark. For these reasons, and as set forth more fully below, Committee Republicans oppose the bill.

### TITLE I: 401(K) FEE DISCLOSURE

On June 17, 2009, the Subcommittee on Health, Employment, Labor, and Pensions marked up H.R. 1984, the "401(k) Fair Disclosure for Retirement Security Act of 2009," and ordered the bill reported to the full Committee on Education and Labor on a party-line vote. The substance of H.R. 1984 was embodied in Title I of H.R. 2989.

In general, Committee Republicans are concerned that in too many instances H.R. 2989 focuses on (and, indeed, mandates) the *quantity* of information provided to plan participants and sponsors without regard to the *quality* of the information disclosed. In keep-

ing with guiding principles, Committee Republicans are deeply concerned that this misplaced focus will result in greater costs to plans (and, ultimately, participants), while serving only to further bury participants in paper rather than provide the concise and meaningful disclosure they deserve and need. As a result, rather than participants making more fully-educated investment choices, H.R. 2989 threatens to lead participants to make poor choices, or to overemphasize one factor (fees) over other equally important ones (risk, and perhaps most important, return).

Equally troubling, the bill as reported by the Committee includes a number of substantive provisions which are not likely to result in the disclosure of meaningful and helpful information. Indeed, much of the bill simply appears to represent Congress choosing one business model over another: core provisions of the bill mandate the contents of all employers' pension plans, in stark contrast to the historical model of a voluntary pension system envisioned by the Employee Retirement Income Security Act of 1974 (ERISA). Other provisions heavily favor one service model over another.

#### *Mandating investment options*

As reported, H.R. 2989 mandates that any employer offering a 401(k) plan to its employees is required, under ERISA, to include a "passively managed investment" option for employee investments, if the plan seeks to avail itself of fiduciary liability protection under section 404(c) of ERISA.

Section 404(c) generally requires, as a condition of its liability protection for plan sponsors, only that a plan offers three options for investment and quarterly trading. The protections provided by section 404(c) are crucial, because without them, plan fiduciaries are potentially liable for every investment decision made by a participant. As a result, most plans insist on compliance with this section, and recordkeeping services and investment options are designed accordingly. Requiring that plans offer an index fund as a condition of 404(c) liability protection is plainly a back-door mandate and simply dresses the wolf in sheep's clothing.<sup>1</sup>

For these reasons, Representative Tom Price offered at markup an amendment which would have eliminated this mandate in its entirety. Although the Price Amendment garnered bipartisan support, it was rejected by the full Committee on a vote of 18 to 27. As a result, H.R. 2989 would compel plans to offer an index fund as an investment option. This means that Congress would take the unprecedented step of "blessing" one investment over another. Committee Republicans—with bipartisan support—believe that putting a federal "rubber stamp" on a particular investment choice is not only an inappropriate departure from the longstanding framework of ERISA, but a dangerous overreach that could encourage workers to select an investment strategy that may not best meet their needs.

Finally, this provision represents the first step down the road of Congress dictating specific investment choices or pension vehicles,

<sup>1</sup>Moreover, it leads to perverse outcomes: By way of example, under H.R. 2989, an employer which offers its employees only three funds, with trading once per quarter, would be protected from liability under ERISA, while one that provides 20 well-diversified funds and daily trading would not have similar protection.

as Congressional whim and fancy favor. Whether this is done as a direct mandate or an indirect mandate as a condition of liability protection, it is an equally dangerous proposition, and one that must be rejected.

*Mandating arbitrary and meaningless “disclosure”*

Among its most troubling provisions, the legislation reported by the Committee would too often require disclosure of (and severely penalize service providers for failing to disclose) information that simply may not exist. Indeed, to avoid this outcome, H.R. 2989 is likely to lead service providers to “disclose” arbitrary and meaningless information in the interest of meeting an ill-conceived Congressional mandate.

In today’s marketplace, many pension plan service providers offer, and many plans choose to purchase, investment packages which provide a range of products and services, such as investment management, consulting, administration, and recordkeeping, for one price. Since these services are provided as a package, there are no separate charges or actual payments for single or component services—indeed, the “cost” of a particular individual service may not even exist. Notwithstanding this fact, H.R. 2989 would require a plan service provider to break out (or, equally as likely, “create”) a “cost” for every single service or component of a service package, even where that service was not offered for sale on an individual basis.

In this way, H.R. 2989 would result in the “creation” of prices for services that are not sold individually, and service providers would be subjected to steep fines for the failure to disclose what may essentially amount to fabricated information. Service providers who provide a bundled “all-in” package of services would be forced to break out costs for services they otherwise would not sell individually. This will, by necessity, result in the creation of arbitrary and artificial numbers. Indeed, at bottom, this provision of H.R. 2989 appears to be little more than Congress choosing to support one business model and sector (independent recordkeeping and unbundled service providers) over another (bundled financial services providers). For that reason alone it should be rejected.

Moreover, Committee Republicans believe that disclosure of artificial or arbitrary numbers will not help plan fiduciaries discharge their duties under ERISA. For that reason, Representative Howard P. “Buck” McKeon offered at markup an amendment which would have provided that nothing under the bill would require a service provider to specify a component charge for a particular service where that provider was not willing to sell that individual service to a plan as a separate item. Put more simply, the McKeon Amendment would have maintained a level playing field, while ensuring that plan sponsors were provided meaningful, rather than arbitrary, information. These merits notwithstanding, the McKeon Amendment was rejected on a straight party-line vote.

*Increased burdens, but a lack of meaningful fiduciary relief*

H.R. 2989 imposes substantial new disclosure requirements on plan service providers, requiring them to report various fees, including those for administrative and investment management serv-

ices. Disclosure of the newly required information is made primarily to plan sponsors and fiduciaries, who are then under a duty to evaluate this information. Even though H.R. 2989 imposes these new obligations, however, it fails to provide plan sponsors and fiduciaries with adequate liability protections, too often leaving them exposed to increased cost and liability. As noted above, these costs would likely be borne by plan participants themselves; alternately, they may serve to drive some sponsors out of the business of offering 401(k) plans. Committee Republicans are troubled by both of these possible outcomes.

At markup, Senior Republican Member John Kline offered an amendment which would have afforded these plan sponsors much-needed fiduciary relief. At its core, the Kline Amendment recognized that if Congress is to impose an array of new mandates and requirements on plan sponsors, these sponsors should be shielded from liability if they meet these requirements.

The Kline Amendment would have reduced the costs that would likely be experienced by plan sponsors and participants in two ways. First, it made clear that, as under current law, plans may purchase services on a “bundled” basis without breaching their fiduciary duty. Equally as important, the Kline Amendment would have provided that plan sponsors who review and consider the extensive new disclosures from service providers required under H.R. 2989 would be shielded from liability. In simpler terms, under the Kline Amendment, plan sponsors who perform their Congressionally-mandated due diligence would have been shielded from liability arising from claims that they allegedly breached their fiduciary duties.

The Kline Amendment was supported by many in the plan sponsor community, including the Profit Sharing Council of America, which represents over 1,200 plan sponsors providing 401(k) plans to more than six million participants. This fact notwithstanding, the Kline Amendment was rejected on a party-line vote.

#### *Republican alternative*

Recognizing that the goal of Title I of H.R. 2989 was to provide meaningful disclosure of fees and fee information to 401(k) plan sponsors and participants, at markup, Senior Republican Member John Kline offered a comprehensive alternative to Title I. The Kline Substitute would have provided for increased transparency and disclosure without raising the serious policy concerns of H.R. 2989.

Under the Kline Substitute, employers would have the information they need to select and monitor plan service providers. The Substitute would have required service providers to disclose the services they provided and all direct and indirect compensation they would receive in connection with these services, regardless of service delivery model or pricing structure. Additionally, the Kline Substitute would have required that participants receive key information on each investment option available to them, including investment objective, risks, historical return, and fees, and information on any other fees that will be imposed on their account.

Unlike H.R. 2989, the Kline Substitute would not have mandated any particular investment options in plans, but instead would have

provided plan fiduciaries, who already have the duty to make prudent decisions on behalf of participants, the information they need to make informed decisions about the investment menu appropriate for the needs of their work force. Also unlike H.R. 2989, the Kline Substitute would not have favored particular business models by requiring that fees be placed into arbitrary categories, instead requiring that plan fiduciaries receive from service providers disclosure of the total compensation (direct and indirect) that a service provider will receive. Finally, in contrast to H.R. 2989, the Kline Amendment would have provided service providers and plan fiduciaries with protection against frivolous lawsuits by ensuring the information disclosed is meaningful and allowing service providers and plan fiduciaries to rely on information provided to them by firms regulated under other federal and state laws.

In short, the Kline Substitute provided for robust disclosure of meaningful information to both plan sponsors and plan participants, while keeping the federal government out of the business of dictating investment models, or favoring one business segment over another. These merits notwithstanding, the amendment was rejected on a party-line vote.

#### TITLE II: INVESTMENT ADVICE

In August 2006, Congress enacted the most sweeping reform of our nation's pension laws in several decades, the "Pension Protection Act of 2006" or "PPA." A key provision of the PPA was its provision allowing workers access to face-to-face, personally-tailored professional investment advice.

More specifically, the PPA provided that ERISA's prohibited transaction restrictions will not apply to transactions involving investment advice if such advice is provided by a fiduciary adviser pursuant to an "eligible investment advice arrangement." An "eligible investment advice arrangement" is defined as an arrangement that either: (a) provides that any fees (including any commission or other compensation) received by the fiduciary adviser for investment advice or with respect to the sale, holding, or acquisition of any security or other property for purposes of investment of plan assets do not vary depending on the basis of any investment option selected; or (b) uses a computer model under an investment advice program meeting specified statutory requirements in connection with the provision of investment advice by a fiduciary adviser to a participant or beneficiary.

In addition, to be considered an "eligible investment advice arrangement," an arrangement must meet other requirements identified in PPA, including: (a) the express authorization of the arrangement by a plan fiduciary other than the person offering the investment advice program, any person providing investment options under the plan, or any affiliate of either; (b) the performance of an annual audit of the arrangement by an independent auditor; (c) compliance with various disclosure requirements; (d) the writing of participant notifications in a clear and conspicuous manner; and (e) the maintenance of records showing compliance for not less than six years.

On June 17, 2009, the Subcommittee on Health, Employment, Labor, and Pensions marked up H.R. 1988, the "Conflicted Invest-

ment Advice Prohibition Act of 2009,” and ordered the bill reported to the full Committee on Education and Labor on a party-line vote. The substance of H.R. 1988 was embodied in Title II of H.R. 2989.

Title II of H.R. 2989 effectively strips the important reforms contained in PPA from the law, and instead would allow only “independent” investment advice to be provided in the workplace through “independent investment advisors”—in general, entities with no other role with respect to the plan. This would significantly limit the investment advice available to workers, due to the limited number of available “independent” advisors and higher fees. Indeed, it bears note that employers already have the option to provide workers access to independent advisors. However, the cost of obtaining independent investment advice is prohibitive to many employers. Simply put, H.R. 2989 will result in fewer investment advice programs in the workplace, and fewer workers and participants receiving this much-needed advice.

If H.R. 2989 simply eliminated the PPA’s pro-participant advice provisions, that would be cause enough for concern. The bill as reported from the full Committee goes far further than that, however, stripping pre-PPA law which has been relied upon for years by employers to provide some investment advice to plan participants. Specifically, the bill would eliminate the ability of employers to rely upon long-standing DOL Advisory Opinions as well as individual DOL exemptions to provide their employees with “non-biased” investment advice based on models developed and controlled by independent third parties.

Moreover, between the subcommittee mark-up of H.R. 1988 and full committee mark-up of H.R. 2989, the section of the legislation which allowed a bank trust department to provide advice (if they meet the other criteria of the legislation) was removed. The current language only allows for a registered investment adviser to be an independent adviser. Banks and trust companies currently provide investment advice to 401(k) plan participants where the bank or trust company has no connection to the assets. The omission of language allowing bank trust departments to continue to provide this advice will result in even less independent investment advice provided to 401(k) plan participants.

Committee Republicans remain committed to ensuring that quality investment advice is available to plan participants. In light of the historic financial downturn of the last year, these provisions are more critically needed than ever before. Title II of H.R. 2989 would dramatically limit investment advice at the worst possible moment; for that reason, Committee Republicans oppose this legislation whether stand-alone or as contained in H.R. 2989.

#### TITLE III: DEFINED BENEFIT PLAN FUNDING RELIEF

The historic economic downturn of 2008, which continues today, has wreaked unexpected havoc on defined benefit pension plan sponsors. The dramatic losses incurred as a result of this crisis translate, in turn, to exponentially increased (and unexpected) funding requirements for plan sponsors. In today’s economy, in too many instances this translates into plan sponsors being forced to choose between funding long term pension liabilities for the future, or maintaining jobs and facilities today.

Recognizing these facts, Title III of H.R. 2989 contains a number of provisions providing limited relief to defined benefit plan sponsors (both single- and multi-employer). The provisions contained within Title III are, by and large, unobjectionable, although far limited in scope.<sup>2</sup>

Committee Republicans acknowledge the unexpected and dramatic effect the financial downturn has had on plan sponsors, and stand ready to provide targeted, limited assistance to these plans. Indeed, earlier this year, House Republican Leadership introduced a comprehensive package of pension reforms designed to address the effect of the financial downturn on both defined benefit and defined contribution plans, allow Americans to more quickly rebuild their 401(k) savings, and provide needed temporary relief for defined-benefit plan sponsors.<sup>3</sup>

At the markup of H.R. 2989, Representative Brett Guthrie offered an amendment drawn from the Republican Leadership package and designed to provide real relief to plan sponsors. As offered, the Guthrie Amendment would have done three things: (a) allowed defined benefit plan sponsors an additional two years over which to amortize plan losses; (b) allow for the payment of interest on losses only for the next two years; and (c) extended the range in which sponsors are allowed to “smooth” their losses for the next two years. After discussion in Committee, Representative Guthrie withdrew his amendment, and offered a modified version embodying the amortization and interest provisions only ((a) and (b)). The Guthrie Amendment was adopted by the Committee by voice vote.

In addition to the Guthrie Amendment, Senior Republican Member Kline offered a targeted amendment designed to address pension plan liability in a very specific context: namely, withdrawal liability faced by certain automotive dealerships which are being shut down in connection with the restructuring of the automobile industry by the federal government.

Throughout the earlier part of this year, two of the country’s largest automakers, Chrysler and General Motors, appear to have negotiated their reorganizations in concert with President Obama’s Presidential Task Force on the Auto Industry. The precise role of the federal government, and the Task Force, in shaping these reorganizations is yet unclear. What is clear, however, is that many auto dealerships being closed pursuant to these reorganizations are, in turn facing withdrawal liability to multiemployer pension plans totaling millions of dollars.

The Kline Amendment sought information as to the nature of these closings, and in particular any analysis or assessment of the multiemployer pension plan withdrawal liability which may be triggered as a result of them. The Kline Amendment would have sus-

<sup>2</sup>One notable exception is section 304 of H.R. 2989, which strikes a revision contained in the PPA relating to Pension Benefit Guaranty Corporation (PBGC) reporting requirements. In 2006, the PPA amended these requirements to require plans to file detailed financial information with the PBGC if their plan was less than 80 percent funded (prior law required reporting where a plan of any size was underfunded more than \$50 million—a significant sum for a small plan, but a near-pittance for a multi-billion dollar plan). Section 304 of H.R. 2789 restores pre-PPA law, and the \$50 million threshold. At best, the rationale for this is unclear—one is hard-pressed to deem a billion-dollar plan that is 95 percent funded, but facing a longterm shortfall of \$51 million, as in any significant funding difficulty. More to the point, in no way can this expanded reporting requirement be considered “relief” for defined benefit plan sponsors.

<sup>3</sup>See H.R. 2021, the “Savings Recovery Act of 2009.”

pending the imposition or collection of any such liability until a date certain after the President's Task Force reported on these matters to Congress. The Kline Amendment would not have waived this liability, or passed it on to the federal government, but merely sought to provide Congress with necessary information, and the time to act on it if it so chose. Despite its narrow, common-sense approach, the Kline Amendment was rejected on a party-line vote.

At markup, Committee Chairman Miller expressed his intention to expand Title III of the bill going forward, and expand upon the relief provisions contained therein. Committee Republicans stand ready to work with the Majority toward providing timely and effective relief for plan sponsors, while still maintaining critical pension protections for workers and retirees. Committee Republicans are also hopeful that the Majority will turn its attention to the particular pension issues facing auto dealerships closed as a result of the federal government's unprecedented involvement in reshaping the auto industry, and stand ready to work to obtain a fair and equitable outcome for all parties involved.

#### CONCLUSION

Committee Republicans endorse meaningful disclosure to plan sponsors and participants, while recognizing the need to promote investment and retirement savings. Committee Republicans are also committed to ensuring that quality investment advice is made available to the millions of 401(k) plan participants who desperately need and want it. While perhaps well-intentioned, H.R. 2989 fails to meet these goals. For all of the foregoing reasons, we respectfully oppose enactment of H.R. 2989 as reported from the Committee on Education and Labor.

JOHN KLINE.  
 HOWARD BUCK MCKEON.  
 PETE HOEKSTRA.  
 MARK SOUDER.  
 JUDY BIGGERT.  
 TODD R. PLATTS.  
 JOE WILSON.  
 CATHY McMORRIS RODGERS.  
 THOMAS PRICE.  
 ROB BISHOP.  
 BRETT GUTHRIE.  
 DUNCAN HUNTER.  
 DAVID P. ROE.  
 GLENN THOMPSON.