

**AMENDMENT IN THE NATURE OF A SUBSTITUTE  
TO H.R. 2269, AS REPORTED  
OFFERED BY MR. ANDREWS OF NEW JERSEY AND  
MR. RANGEL OF NEW YORK**

Strike all after the enacting clause and insert the following:

**1 SECTION 1. SHORT TITLE.**

2 This Act may be cited as the “Retirement Security  
3 Advice Act of 2001”.

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

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

8 (1) IN GENERAL.—Subsection (d) of section  
9 4975 of the Internal Revenue Code of 1986 (relating  
10 to exemptions from tax on prohibited transactions)  
11 is amended by striking “or” at the end of paragraph  
12 (14), by striking the period at the end of paragraph  
13 (15) and inserting “; or”; and by adding at the end  
14 the following new paragraph:

15 “(16) any transaction described in subsection  
16 (f)(7)(A) in connection with the provision of invest-  
17 ment advice described in subsection (e)(3)(B), in  
18 any case in which—



1           “(A) the plan provides for individual ac-  
2 counts and permits a participant or beneficiary  
3 to exercise control over assets in his or her ac-  
4 count,

5           “(B) the advice is qualified investment ad-  
6 vice provided to a participant or beneficiary of  
7 the plan by a fiduciary adviser in connection  
8 with any sale, acquisition, or holding of a secu-  
9 rity or other property for purposes of invest-  
10 ment of plan assets, and

11           “(C) the requirements of subsection  
12 (f)(7)(B) are met in connection with each in-  
13 stance of the provision of the advice.”.

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

19           “(7) INVESTMENT ADVICE PROVIDED BY FIDU-  
20 CIARY ADVISERS.—

21           “(A) ALLOWABLE TRANSACTIONS.—The  
22 transactions described in this subsection, in  
23 connection with the provision of investment ad-  
24 vice by a fiduciary adviser, are the following:



1                   “(i) the provision of the advice to the  
2                   participant or beneficiary;

3                   “(ii) the sale, acquisition, or holding  
4                   of a security or other property (including  
5                   any lending of money or other extension of  
6                   credit associated with the sale, acquisition,  
7                   or holding of a security or other property)  
8                   pursuant to the advice; and

9                   “(iii) the direct or indirect receipt of  
10                  fees or other compensation by the fiduciary  
11                  adviser or an affiliate thereof (or any em-  
12                  ployee, agent, or registered representative  
13                  of the fiduciary adviser or affiliate) in con-  
14                  nection with the provision of the advice.

15                  “(B) REQUIREMENTS FOR EXEMPTION  
16                  FROM PROHIBITED TRANSACTIONS WITH RE-  
17                  SPECT TO PROVISION OF INVESTMENT AD-  
18                  VICE.—The requirements of this subparagraph  
19                  are met in connection with the provision of  
20                  qualified investment advice provided to a partic-  
21                  ipant or beneficiary of an employee benefit plan  
22                  by a fiduciary adviser with respect to the plan  
23                  in connection with any sale, acquisition, or  
24                  holding of a security or other property for pur-  
25                  poses of investment of amounts held by the



1 plan, if the requirements of the following  
2 clauses are met:

3 “(i) WRITTEN OR ELECTRONIC DIS-  
4 CLOSURES.—At a time contemporaneous  
5 with the provision of the advice in connec-  
6 tion with the sale, acquisition, or holding  
7 of the security or other property, the fidu-  
8 ciary adviser shall provide to the recipient  
9 of the advice a clear and conspicuous noti-  
10 fication, written (or by electronic means)  
11 in a manner to be reasonably understood  
12 by the average plan participant pursuant  
13 to regulations which shall be prescribed by  
14 the Secretary (including mathematical ex-  
15 amples), of the following:

16 “(I) INTERESTS HELD BY THE  
17 FIDUCIARY ADVISER.—Any interest of  
18 the fiduciary adviser in, or any affili-  
19 ation or contractual relationship of  
20 the fiduciary adviser (or affiliates  
21 thereof) with any third party having  
22 an interest in, the security or other  
23 property.

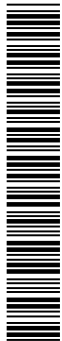
24 “(II) RELATED FEES OR COM-  
25 PENSATION IN CONNECTION WITH



1 THE PROVISION OF THE ADVICE.—All  
2 fees or other compensation relating to  
3 the advice (including fees or other  
4 compensation itemized with respect to  
5 each security or other property with  
6 respect to which the advice is pro-  
7 vided) that the fiduciary adviser (or  
8 any affiliate thereof) is to receive (in-  
9 cluding compensation provided by any  
10 third party) in connection with the  
11 provision of the advice or in connec-  
12 tion with the sale, acquisition, or hold-  
13 ing of the security or other property.

14 “(III) ONGOING FEES OR COM-  
15 PENSATION IN CONNECTION WITH  
16 THE SECURITY OR PROPERTY IN-  
17 VOLVED.—All fees or other compensa-  
18 tion that the fiduciary adviser (or any  
19 affiliate thereof) is to receive, on an  
20 ongoing basis, in connection with any  
21 security or other property with respect  
22 to which the fiduciary adviser gives  
23 the advice.

24 “(IV) APPLICABLE LIMITATIONS  
25 ON SCOPE OF ADVICE.—Any limita-



1                   tion placed (in accordance with the re-  
 2                   quirements of this subsection) on the  
 3                   scope of the advice to be provided by  
 4                   the fiduciary adviser with respect to  
 5                   the sale, acquisition, or holding of the  
 6                   security or other property.

7                   “(V) TYPES OF SERVICES GEN-  
 8                   ERALLY OFFERED.—The types of  
 9                   services offered by the fiduciary ad-  
 10                  viser in connection with the provision  
 11                  of qualified investment advice by the  
 12                  fiduciary adviser.

13                  “(VI) FIDUCIARY STATUS OF  
 14                  THE FIDUCIARY ADVISER.—That the  
 15                  fiduciary advisor is a fiduciary of the  
 16                  plan.

17                  “(ii) DISCLOSURE BY FIDUCIARY AD-  
 18                  VISER IN ACCORDANCE WITH APPLICABLE  
 19                  SECURITIES LAWS.—The fiduciary adviser  
 20                  shall provide appropriate disclosure, in  
 21                  connection with the sale, acquisition, or  
 22                  holding of the security or other property,  
 23                  in accordance with all applicable securities  
 24                  laws.



1                   “(iii) TRANSACTION OCCURRING SOLE-  
2                   LY AT DIRECTION OF RECIPIENT OF AD-  
3                   VICE.—The sale, acquisition, or holding of  
4                   the security or other property shall occur  
5                   solely at the direction of the recipient of  
6                   the advice.

7                   “(iv) REASONABLE COMPENSATION.—  
8                   The compensation received by the fiduciary  
9                   adviser and affiliates thereof in connection  
10                  with the sale, acquisition, or holding of the  
11                  security or other property shall be reason-  
12                  able.

13                  “(v) ARM’S LENGTH TRANSACTION.—  
14                  The terms of the sale, acquisition, or hold-  
15                  ing of the security or other property shall  
16                  be at least as favorable to the plan as an  
17                  arm’s length transaction would be.

18                  “(C) CONTINUED AVAILABILITY OF INFOR-  
19                  MATION FOR AT LEAST 1 YEAR.—The require-  
20                  ments of subparagraph (B)(i) shall be deemed  
21                  not to have been met in connection with the ini-  
22                  tial or any subsequent provision of advice de-  
23                  scribed in subparagraph (B) if, at any time  
24                  during the 1-year period following the provision  
25                  of the advice, the fiduciary adviser fails to



1 maintain the information described in sub-  
2 clauses (I) through (IV) of subparagraph (B)(i)  
3 in currently accurate form or to make the infor-  
4 mation available, upon request and without  
5 charge, to the recipient of the advice.

6 “(D) EVIDENCE OF COMPLIANCE MAIN-  
7 TAINED FOR AT LEAST 6 YEARS.—A fiduciary  
8 adviser referred to in subparagraph (B) who  
9 has provided advice referred to in such subpara-  
10 graph shall, for a period of not less than 6  
11 years after the provision of the advice, maintain  
12 any records necessary for determining whether  
13 the requirements of the preceding provisions of  
14 this paragraph and of subsection (d)(16) have  
15 been met. A transaction prohibited under sub-  
16 section (c)(1) shall not be considered to have  
17 occurred solely because the records are lost or  
18 destroyed prior to the end of the 6-year period  
19 due to circumstances beyond the control of the  
20 fiduciary adviser.

21 “(E) MODEL DISCLOSURE FORMS.—The  
22 Secretary shall prescribe regulations setting  
23 forth model disclosure forms to assist fiduciary  
24 advisers in complying with the disclosure re-  
25 quirements of under this paragraph.





1           “(F) ANNUAL REVIEWS BY THE SEC-  
2           RETARY.—The Secretary shall conduct annual  
3           reviews of randomly selected fiduciary advisers  
4           providing qualified investment advice to partici-  
5           pants and beneficiaries. In the case of each re-  
6           view, the Secretary shall review the following:

7                   “(i) COMPLIANCE BY ADVICE COM-  
8                   PUTER MODELS WITH REASONABLE IN-  
9                   VESTMENT METHODOLOGIES.—The extent  
10                  to which advice computer models employed  
11                  by the fiduciary adviser comply with rea-  
12                  sonable investment methodologies.

13                  “(ii) COMPLIANCE WITH DISCLOSURE  
14                  REQUIREMENTS.—The extent to which dis-  
15                  closures provided by the fiduciary adviser  
16                  have complied with the requirements of  
17                  this subsection.

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

22                  “(iv) EXTENT OF REPORTED COM-  
23                  PLAINTS.—The extent to which complaints  
24                  to relevant agencies have been made in  
25                  connection with the provision of the advice.



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

3 “(G) DUTY OF CONFLICTED FIDUCIARY  
4 ADVISER TO PROVIDE FOR ALTERNATIVE INDE-  
5 PENDENT ADVICE.—

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

11 “(I) has an interest in the secu-  
12 rity or other property, or

13 “(II) has an affiliation or con-  
14 tractual relationship with any third  
15 party that has an interest in the secu-  
16 rity or other property,

17 the requirements of subparagraph (B)  
18 shall be treated as not met in connection  
19 with the advice unless the fiduciary adviser  
20 has arranged, as an alternative to the ad-  
21 vice that would otherwise be provided by  
22 the fiduciary advisor, for qualified invest-  
23 ment advice with respect to the security or  
24 other property provided by at least one al-



1           ternative investment adviser meeting the  
2           requirements of clause (ii).

3                   “(ii) INDEPENDENCE AND QUALIFICA-  
4           TIONS OF ALTERNATIVE INVESTMENT AD-  
5           VISER.—Any alternative investment adviser  
6           whose qualified investment advice is ar-  
7           ranged for by a fiduciary adviser pursuant  
8           to clause (i)—

9                           “(I) shall have no material inter-  
10           est in, and no material affiliation or  
11           contractual relationship with any third  
12           party having a material interest in,  
13           the security or other property with re-  
14           spect to which the investment adviser  
15           is providing the advice, and

16                           “(II) shall meet the requirements  
17           of a fiduciary adviser under subpara-  
18           graph (H)(ii) and (iii), except that an  
19           alternative investment adviser may  
20           not be a fiduciary of the plan other  
21           than in connection with the provision  
22           of the advice.

23                           “(iii) SCOPE AND FEES OF ALTER-  
24           NATIVE INVESTMENT ADVICE.—Any quali-  
25           fied investment advice provided pursuant



1 to this subparagraph by an alternative in-  
2 vestment adviser shall be of the same type  
3 and scope, and provided under the same  
4 terms and conditions (including no addi-  
5 tional charge to the participant or bene-  
6 ficiary), as apply with respect to the quali-  
7 fied investment advice to be provided by  
8 the fiduciary adviser.

9 “(H) FIDUCIARY ADVISER DEFINED.—For  
10 purposes of this paragraph and subsection  
11 (d)(16)—

12 “(i) IN GENERAL.—The term ‘fidu-  
13 ciary adviser’ means, with respect to a  
14 plan, a person who—

15 “(I) is a fiduciary of the plan by  
16 reason of the provision of qualified in-  
17 vestment advice by such person to a  
18 participant or beneficiary,

19 “(II) meets the qualifications of  
20 clause (ii), and

21 “(III) meets the additional re-  
22 quirements of clause (iii).

23 “(ii) QUALIFICATIONS.—A person  
24 meets the qualifications of this clause if  
25 such person—



1           “(I) is registered as an invest-  
2           ment adviser under the Investment  
3           Advisers Act of 1940 (15 U.S.C. 80b-  
4           1 et seq.),

5           “(II) if not registered as an in-  
6           vestment adviser under such Act by  
7           reason of section 203A(a)(1) of such  
8           Act (15 U.S.C. 80b-3a(a)(1)), is reg-  
9           istered under the laws of the State in  
10          which the fiduciary maintains its prin-  
11          cipal office and place of business, and,  
12          at the time the fiduciary last filed the  
13          registration form most recently filed  
14          by the fiduciary with such State in  
15          order to maintain the fiduciary’s reg-  
16          istration under the laws of such State,  
17          also filed a copy of such form with the  
18          Secretary,

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

22          “(IV) is a bank or similar finan-  
23          cial institution referred to in sub-  
24          section (d)(4),



1                   “(V) is an insurance company  
2                   qualified to do business under the  
3                   laws of a State, or

4                   “(VI) is any other comparable  
5                   qualified entity which satisfies such  
6                   criteria as the Secretary determines  
7                   appropriate consistent with the pur-  
8                   pose of this subsection.

9                   “(iii) ADDITIONAL REQUIREMENTS  
10                  WITH RESPECT TO CERTAIN EMPLOYEES  
11                  OR OTHER AGENTS OF CERTAIN ADVIS-  
12                  ERS.—A person meets the additional re-  
13                  quirements of this clause if every indi-  
14                  vidual who is employed (or otherwise com-  
15                  pensated) by such person and whose scope  
16                  of duties includes the provision of qualified  
17                  investment advice on behalf of such person  
18                  to any participant or beneficiary is—

19                         “(I) a registered representative of  
20                         such person,

21                         “(II) an individual described in  
22                         subclause (I), (II), or (III) of clause  
23                         (ii), or

24                         “(III) such other comparable  
25                         qualified individual who satisfies such



1 criteria as the Secretary determines  
 2 appropriate consistent with the pur-  
 3 pose of this subsection.

4 “(I) ADDITIONAL DEFINITIONS.—For pur-  
 5 poses of this paragraph and subsection  
 6 (d)(16)—

7 “(i) QUALIFIED INVESTMENT AD-  
 8 VICE.—The term ‘qualified investment ad-  
 9 vice’ means, in connection with a partici-  
 10 pant or beneficiary, investment advice re-  
 11 ferred to in subsection (e)(3)(B) which—

12 “(I) consists of an individualized  
 13 recommendation to the participant or  
 14 beneficiary with respect to the pur-  
 15 chase, sale, or retention of securities  
 16 or other property for the individual  
 17 account of the participant or bene-  
 18 ficiary, in accordance with generally  
 19 accepted investment management  
 20 principles, and

21 “(II) takes into account all in-  
 22 vestment options under the plan.

23 “(ii) REGISTERED REPRESENTA-  
 24 TIVE.—The term ‘registered representa-  
 25 tive’ of another entity means a person de-



1           scribed in section 3(a)(18) of the Securi-  
2           ties Exchange Act of 1934 (15 U.S.C.  
3           78c(a)(18)) (substituting such entity for  
4           the broker or dealer referred to in such  
5           section) or a person described in section  
6           202(a)(17) of the Investment Advisers Act  
7           of 1940 (15 U.S.C. 80b-2(a)(17)) (sub-  
8           stituting such entity for the investment ad-  
9           viser referred to in such section).”.

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

12           (A) by striking “PERSON.—In” and insert-  
13           ing “PERSON.—

14           “(1) IN GENERAL.—In”, and moving the text 2  
15           ems to the right, and

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

18           “(2) ASSUMPTION OF LIABILITY.—If a court  
19           determines that a fiduciary advisor has breached his  
20           fiduciary responsibility as a result of a failure to  
21           meet the requirements of subparagraph (B), (C),  
22           (D), or (G) of subsection (e)(7), then, notwith-  
23           standing any other provision of this title or the Em-  
24           ployee Retirement Income Security Act of 1974, the  
25           fiduciary advisor shall be liable for any monetary





1 losses suffered by a participant or beneficiary as a  
2 result of such breach.”.

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

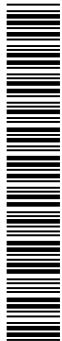
5 (1) IN GENERAL.—Section 408(b) of the Em-  
6 ployee Retirement Income Security Act of 1974 (29  
7 U.S.C. 1108(b)) is amended by adding at the end  
8 the following new paragraph:

9 “(14)(A) Any transaction described in subpara-  
10 graph (B) in connection with the provision of invest-  
11 ment advice described in section 3(21)(A)(ii), in any  
12 case in which—

13 “(i) the plan provides for individual ac-  
14 counts and permits a participant or beneficiary  
15 to exercise control over assets in his or her ac-  
16 count,

17 “(ii) the advice is qualified investment ad-  
18 vice provided to a participant or beneficiary of  
19 the plan by a fiduciary adviser in connection  
20 with any sale, acquisition, or holding of a secu-  
21 rity or other property for purposes of invest-  
22 ment of plan assets, and

23 “(iii) the requirements of subsection (g)  
24 are met in connection with each instance of the  
25 provision of the advice.



1           “(B) The transactions described in this sub-  
2 paragraph are the following:

3           “(i) the provision of the advice to the par-  
4 ticipant or beneficiary;

5           “(ii) the sale, acquisition, or holding of a  
6 security or other property (including any lend-  
7 ing of money or other extension of credit associ-  
8 ated with the sale, acquisition, or holding of a  
9 security or other property) pursuant to the ad-  
10 vice; and

11           “(iii) the direct or indirect receipt of fees  
12 or other compensation by the fiduciary adviser  
13 or an affiliate thereof (or any employee, agent,  
14 or registered representative of the fiduciary ad-  
15 viser or affiliate) in connection with the provi-  
16 sion of the advice.”.

17           (2) REQUIREMENTS.—Section 408 of such Act  
18 is amended further by adding at the end the fol-  
19 lowing new subsection:

20           “(g) REQUIREMENTS FOR EXEMPTION FROM PRO-  
21 HIBITED TRANSACTIONS WITH RESPECT TO PROVISION  
22 OF INVESTMENT ADVICE.—

23           “(1) IN GENERAL.—The requirements of this  
24 subsection are met in connection with the provision  
25 of qualified investment advice provided to a partici-



1       pant or beneficiary of an employee benefit plan by  
2       a fiduciary adviser with respect to the plan in con-  
3       nection with any sale, acquisition, or holding of a se-  
4       curity or other property for purposes of investment  
5       of amounts held by the plan, if the requirements of  
6       the following subparagraphs are met:

7               “(A) WRITTEN DISCLOSURES.—At a time  
8               contemporaneous with the provision of the ad-  
9               vice in connection with the sale, acquisition, or  
10              holding of the security or other property, the fi-  
11              duciary adviser shall provide to the recipient of  
12              the advice a clear and conspicuous notification,  
13              written in a manner to be reasonably under-  
14              stood by the average plan participant pursuant  
15              to regulations which shall be prescribed by the  
16              Secretary (including mathematical examples), of  
17              the following:

18               “(i) INTERESTS HELD BY THE FIDU-  
19               CIARY ADVISER.—Any interest of the fidu-  
20               ciary adviser in, or any affiliation or con-  
21               tractual relationship of the fiduciary ad-  
22               viser (or affiliates thereof) with any third  
23               party having an interest in, the security or  
24               other property.



1                   “(ii) RELATED FEES OR COMPENSA-  
2                   TION IN CONNECTION WITH THE PROVI-  
3                   SION OF THE ADVICE.—All fees or other  
4                   compensation relating to the advice (in-  
5                   cluding fees or other compensation  
6                   itemized with respect to each security or  
7                   other property with respect to which the  
8                   advice is provided) that the fiduciary ad-  
9                   viser (or any affiliate thereof) is to receive  
10                  (including compensation provided by any  
11                  third party) in connection with the provi-  
12                  sion of the advice or in connection with the  
13                  sale, acquisition, or holding of the security  
14                  or other property.

15                  “(iii) ONGOING FEES OR COMPENSA-  
16                  TION IN CONNECTION WITH THE SECURITY  
17                  OR PROPERTY INVOLVED.—All fees or  
18                  other compensation that the fiduciary ad-  
19                  viser (or any affiliate thereof) is to receive,  
20                  on an ongoing basis, in connection with  
21                  any security or other property with respect  
22                  to which the fiduciary adviser gives the ad-  
23                  vice.

24                  “(iv) APPLICABLE LIMITATIONS ON  
25                  SCOPE OF ADVICE.—Any limitation placed



1 (in accordance with the requirements of  
2 this subsection) on the scope of the advice  
3 to be provided by the fiduciary adviser with  
4 respect to the sale, acquisition, or holding  
5 of the security or other property.

6 “(v) TYPES OF SERVICES GENERALLY  
7 OFFERED.—The types of services offered  
8 by the fiduciary adviser in connection with  
9 the provision of qualified investment advice  
10 by the fiduciary adviser.

11 “(vi) FIDUCIARY STATUS OF THE FI-  
12 DUCIARY ADVISER.—That the fiduciary ad-  
13 visor is a fiduciary of the plan.

14 “(B) DISCLOSURE BY FIDUCIARY ADVISER  
15 IN ACCORDANCE WITH APPLICABLE SECURITIES  
16 LAWS.—The fiduciary adviser shall provide ap-  
17 propriate disclosure, in connection with any the  
18 sale, acquisition, or holding of the security or  
19 other property, in accordance with all applicable  
20 securities laws.

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



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

6           “(F) ARM’S LENGTH TRANSACTION.—The  
7           terms of the sale, acquisition, or holding of the  
8           security or other property shall be at least as  
9           favorable to the plan as an arm’s length trans-  
10          action would be.

11          “(2) CONTINUED AVAILABILITY OF INFORMA-  
12          TION FOR AT LEAST 1 YEAR.—The requirements of  
13          paragraph (1)(A) shall be deemed not to have been  
14          met in connection with the initial or any subsequent  
15          provision of advice described in paragraph (1) if, at  
16          any time during the 1-year period following the pro-  
17          vision of the advice, the fiduciary adviser fails to  
18          maintain the information described in clauses (i)  
19          through (iv) of subparagraph (A) in currently accu-  
20          rate form or to make the information available, upon  
21          request and without charge, to the recipient of the  
22          advice.

23          “(3) EVIDENCE OF COMPLIANCE MAINTAINED  
24          FOR AT LEAST 6 YEARS.—A fiduciary adviser re-  
25          ferred to in paragraph (1) who has provided advice



1 referred to in such paragraph shall, for a period of  
2 not less than 6 years after the provision of the ad-  
3 vice, maintain any records necessary for determining  
4 whether the requirements of the preceding provisions  
5 of this subsection and of subsection (b)(14) have  
6 been met. A transaction prohibited under section  
7 406 shall not be considered to have occurred solely  
8 because the records are lost or destroyed prior to the  
9 end of the 6-year period due to circumstances be-  
10 yond the control of the fiduciary adviser.

11 “(4) MODEL DISCLOSURE FORMS.—The Sec-  
12 retary shall prescribe regulations setting forth model  
13 disclosure forms to assist fiduciary advisers in com-  
14 plying with the disclosure requirements of under this  
15 subsection.

16 “(5) EXEMPTION FOR EMPLOYERS CON-  
17 TRACTING FOR QUALIFIED INVESTMENT ADVICE.—

18 “(A) RELIANCE ON CONTRACTUAL AR-  
19 RANGEMENTS.—Subject to subparagraph (B), a  
20 plan sponsor or other person who is a fiduciary  
21 (other than a fiduciary adviser) shall not be  
22 treated as failing to meet the requirements of  
23 this part solely by reason of the provision of  
24 qualified investment advice (or solely by reason

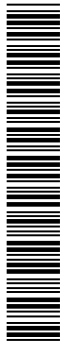


1 of contracting for or otherwise arranging for  
2 the provision of the investment advice), if—

3 “(i) the advice is provided by a fidu-  
4 ciary adviser pursuant to an arrangement  
5 between the plan sponsor or other fidu-  
6 ciary and the fiduciary adviser for the pro-  
7 vision by the fiduciary adviser of qualified  
8 investment advice, and

9 “(ii) the terms of the arrangement re-  
10 quire compliance by the fiduciary adviser  
11 with the requirements of this subsection.

12 “(B) CONTINUED DUTY FOR EMPLOYER TO  
13 PRUDENTLY SELECT AND REVIEW FIDUCIARY  
14 ADVISERS.—Nothing in subparagraph (A) shall  
15 be construed to exempt a plan sponsor or other  
16 person who is a fiduciary from any requirement  
17 of this part for the prudent selection and peri-  
18 odic review of a fiduciary adviser with whom  
19 the plan sponsor or other person enters into an  
20 arrangement for the provision of qualified in-  
21 vestment advice. The plan sponsor or other per-  
22 son who is a fiduciary shall not be liable under  
23 this part with respect to the specific qualified  
24 investment advice given by the fiduciary adviser  
25 to any particular recipient of the advice. Pursu-





1 ant to regulations which shall be prescribed by  
2 the Secretary, the fiduciary adviser shall pro-  
3 vide appropriate disclosures to the plan sponsor  
4 to enable the plan sponsor to fulfill its fiduciary  
5 responsibilities under this part. In connection  
6 with the provision of the advice by a fiduciary  
7 adviser on an ongoing basis, such regulations  
8 shall provide for such disclosures on at least an  
9 annual basis.

10 “(C) PLAN ASSETS MAY BE USED TO PAY  
11 REASONABLE EXPENSES.—Nothing in this part  
12 shall be construed to preclude the use of plan  
13 assets to pay for reasonable expenses in pro-  
14 viding qualified investment advice.

15 “(6) ANNUAL REVIEWS BY THE SECRETARY.—  
16 The Secretary shall conduct annual reviews of ran-  
17 domly selected fiduciary advisers providing qualified  
18 investment advice to participants and beneficiaries.  
19 In the case of each review, the Secretary shall review  
20 the following:

21 “(A) COMPLIANCE BY ADVICE COMPUTER  
22 MODELS WITH GENERALLY ACCEPTED INVEST-  
23 MENT MANAGEMENT PRINCIPLES.—The extent  
24 to which advice computer models employed by



1 the fiduciary adviser comply with generally ac-  
2 cepted investment management principles.

3 “(B) COMPLIANCE WITH DISCLOSURE RE-  
4 QUIREMENTS.—The extent to which disclosures  
5 provided by the fiduciary adviser have complied  
6 with the requirements of this subsection.

7 “(C) EXTENT OF VIOLATIONS.—The ex-  
8 tent to which any violations of fiduciary duties  
9 have occurred in connection with the provision  
10 of the advice.

11 “(D) EXTENT OF REPORTED COM-  
12 PLAINTS.—The extent to which complaints to  
13 relevant agencies have been made in connection  
14 with the provision of the advice.

15 Any proprietary information obtained by the Sec-  
16 retary shall be treated as confidential.

17 “(7) DUTY OF CONFLICTED FIDUCIARY AD-  
18 VISER TO PROVIDE FOR ALTERNATIVE INDE-  
19 PENDENT ADVICE.—

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



1 “(i) has an interest in the security or  
2 other property, or

3 “(ii) has an affiliation or contractual  
4 relationship with any third party that has  
5 an interest in the security or other prop-  
6 erty,

7 the requirements of paragraph (1) shall be  
8 treated as not met in connection with the advice  
9 unless the fiduciary adviser has arranged, as an  
10 alternative to the advice that would otherwise  
11 be provided by the fiduciary advisor, for quali-  
12 fied investment advice with respect to the secu-  
13 rity or other property provided by at least one  
14 alternative investment adviser meeting the re-  
15 quirements of subparagraph (B).

16 “(B) INDEPENDENCE AND QUALIFICA-  
17 TIONS OF ALTERNATIVE INVESTMENT AD-  
18 VISER.—Any alternative investment adviser  
19 whose qualified investment advice is arranged  
20 for by a fiduciary adviser pursuant to subpara-  
21 graph (A)—

22 “(i) shall have no material interest in,  
23 and no material affiliation or contractual  
24 relationship with any third party having a  
25 material interest in, the security or other



1 property with respect to which the invest-  
2 ment adviser is providing the advice, and

3 “(ii) shall meet the requirements of a  
4 fiduciary adviser under paragraph (7)(A),  
5 except that an alternative investment ad-  
6 viser may not be a fiduciary of the plan  
7 other than in connection with the provision  
8 of the advice.

9 “(C) SCOPE AND FEES OF ALTERNATIVE  
10 INVESTMENT ADVICE.—Any qualified invest-  
11 ment advice provided pursuant to this para-  
12 graph by an alternative investment adviser shall  
13 be of the same type and scope, and provided  
14 under the same terms and conditions (including  
15 no additional charge to the participant or bene-  
16 ficiary), as apply with respect to the qualified  
17 investment advice to be provided by the fidu-  
18 ciary adviser.

19 “(8) FIDUCIARY ADVISER DEFINED.—For pur-  
20 poses of this subsection and subsection (b)(14)—

21 “(A) IN GENERAL.—The term ‘fiduciary  
22 adviser’ means, with respect to a plan, a  
23 person—

24 “(i) who is a fiduciary of the plan by  
25 reason of the provision of qualified invest-



1                   ment advice by such person to a partici-  
2                   pant or beneficiary,

3                   “(ii) who—

4                   “(I) is registered as an invest-  
5                   ment adviser under the Investment  
6                   Advisers Act of 1940 (15 U.S.C. 80b-  
7                   1 et seq.),

8                   “(II) if not registered as an in-  
9                   vestment adviser under such Act by  
10                  reason of section 203A(a)(1) of such  
11                  Act (15 U.S.C. 80b-3a(a)(1)), is reg-  
12                  istered under the laws of the State in  
13                  which the fiduciary maintains its prin-  
14                  cipal office and place of business, and,  
15                  at the time the fiduciary last filed the  
16                  registration form most recently filed  
17                  by the fiduciary with such State in  
18                  order to maintain the fiduciary’s reg-  
19                  istration under the laws of such State,  
20                  also filed a copy of such form with the  
21                  Secretary,

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



1                   “(IV) is a bank or similar finan-  
2                   cial institution referred to in section  
3                   408(b)(4),

4                   “(V) is an insurance company  
5                   qualified to do business under the  
6                   laws of a State, or

7                   “(VI) is any other comparable  
8                   entity which satisfies such criteria as  
9                   the Secretary determines appropriate,  
10                  and

11                  “(iii) who is an entity meeting the re-  
12                  quirements of subparagraph (B).

13                  “(B) ADDITIONAL REQUIREMENTS WITH  
14                  RESPECT TO CERTAIN EMPLOYEES OR OTHER  
15                  AGENTS OF CERTAIN ADVISERS.—The require-  
16                  ments of this subparagraph are met if every in-  
17                  dividual who is employed (or otherwise com-  
18                  pensated) by a person described subparagraph  
19                  (A)(ii) and whose scope of duties includes the  
20                  provision of qualified investment advice on be-  
21                  half of such person to any participant or bene-  
22                  ficiary is—

23                  “(i) a registered representative of  
24                  such person,



1           “(ii) an individual described in sub-  
2           clause (I), (II), or (III) of subparagraph  
3           (A)(ii), or

4           “(iii) such other comparable qualified  
5           individual as may be designated in regula-  
6           tions of the Secretary.

7           “(9) ADDITIONAL DEFINITIONS.—For purposes  
8           of this subsection and subsection (b)(14)—

9           “(A) QUALIFIED INVESTMENT ADVICE.—  
10          The term ‘qualified investment advice’ means,  
11          in connection with a participant or beneficiary,  
12          investment advice referred to in section  
13          3(21)(A)(ii) which—

14               “(i) consists of an individualized rec-  
15               ommendation to the participant or bene-  
16               ficiary with respect to the purchase, sale,  
17               or retention of securities or other property  
18               for the individual account of the partici-  
19               pant or beneficiary, in accordance with  
20               generally accepted investment management  
21               principles, and

22               “(ii) takes into account all investment  
23               options under the plan.

24           “(B) AFFILIATE.—The term ‘affiliate’ of  
25           another entity means an affiliated person of



1 such entity (as defined in section 2(a)(3) of the  
2 Investment Company Act of 1940 (15 U.S.C.  
3 80a-2(a)(3))).

4 “(C) REGISTERED REPRESENTATIVE.—  
5 The term ‘registered representative’ of another  
6 entity means a person described in section  
7 3(a)(18) of the Securities Exchange Act of  
8 1934 (15 U.S.C. 78c(a)(18)) (substituting such  
9 entity for the broker or dealer referred to in  
10 such section) or a person described in section  
11 202(a)(17) of the Investment Advisers Act of  
12 1940 (15 U.S.C. 80b-2(a)(17)) (substituting  
13 such entity for the investment adviser referred  
14 to in such section).”.

15 (c) ENFORCEMENT.—

16 (1) LIABILITY FOR BREACH.—

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

21 “(c)(1) In any case in which the provision by a fidu-  
22 ciary adviser of qualified investment advice to a partici-  
23 pant or beneficiary regarding any security or other prop-  
24 erty consists of a breach described in subsection (a), the  
25 fiduciary adviser shall be personally liable to make good





1 to the individual account of the participant or beneficiary  
2 any losses to the individual account resulting from the  
3 breach, and to restore to the individual account any profits  
4 of the fiduciary adviser which have been made through use  
5 of assets of the individual account by—

6 “(A) the fiduciary adviser, or

7 “(B) any other party with respect to whom a  
8 material affiliation or contractual relationship of the  
9 fiduciary adviser resulted in a violation of section  
10 408(g)(1)(A) in connection with the advice.

11 “(2) In the case of any action under this title by a  
12 participant or beneficiary against a fiduciary adviser for  
13 relief under this subsection in connection with the provi-  
14 sion of any qualified investment advice—

15 “(A) if the participant or beneficiary shows that  
16 the fiduciary adviser had any interest in, or had any  
17 affiliation or contractual relationship with a third  
18 party having an interest in, the security or other  
19 property, there shall be a presumption (rebuttable by  
20 a preponderance of the evidence) that the fiduciary  
21 adviser failed to meet the requirements of subpara-  
22 graphs (A) and (B) of section 404(a)(1) in connec-  
23 tion with the provision of the advice, and

24 “(B) the dispute may be settled by arbitration,  
25 but only pursuant to terms and conditions estab-



1 lished by agreement entered into voluntarily by both  
2 parties after the commencement of the dispute.

3 “(3) For purposes of this subsection, the terms ‘fidu-  
4 ciary adviser’ and ‘qualified investment advice’ shall have  
5 the meanings provided such terms in subparagraphs (A)  
6 and (B), respectively, of section 406(g)(7).”.

7 (B) LIMITATION ON EXEMPTION FROM LI-  
8 ABILITY.—Section 404(c) of such Act (29  
9 U.S.C. 1104(c)) is amended—

10 (i) by redesignating paragraph (2) as  
11 paragraph (3) (and by adjusting the  
12 margination of such paragraph to full  
13 measure and adjusting the margination of  
14 subparagraphs (A) through (B) thereof ac-  
15 cordingly); and

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

18 “(2)(A) In any case in which—

19 “(i) a participant or beneficiary exercises con-  
20 trol over the assets in his or her account by means  
21 of a sale, acquisition, or holding of a security or  
22 other property with regard to which qualified invest-  
23 ment advice was provided by a fiduciary adviser, and



1           “(ii) any transaction in connection with the ex-  
2           ercise of such control is not a prohibited transaction  
3           solely by reason of section 408(b)(14),  
4           paragraph (1) shall not apply with respect to the fiduciary  
5           adviser in connection with the provision of the advice.

6           “(B) For purposes of this subsection, the terms ‘fidu-  
7           ciary adviser’ and ‘qualified investment advice’ shall have  
8           the meanings provided such terms in subparagraphs (A)  
9           and (B), respectively, of section 408(g)(7).”.

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

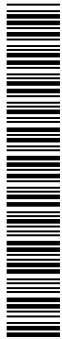
12                   (A) in paragraph (1), by inserting “or (3)”  
13                   after “paragraph (2)”; and

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

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

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

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



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

3 “(9) Nothing in this title shall be construed to super-  
4 sede any State action for fraud against a fiduciary adviser  
5 for any act or failure to act by the fiduciary adviser consti-  
6 tuting a violation of section 409(c).”.

7 **SEC. 3. EFFECTIVE DATE.**

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

