107TH CONGRESS } HOUSE OF REPRESENTATIVES { REPT. 107–262
1st Session } { Part 1

RETIREMENT SECURITY ADVICE ACT OF 2001

OCTOBER 31, 2001.—Ordered to be printed

Mr. BOEHNER, from the Committee on Education and the Workforce, submitted the following

R E P O R T

together with

MINORITY VIEWS

[To accompany H.R. 2269]

[Including cost estimate of the Congressional Budget Office]

The Committee on Education and the Workforce, to whom was referred the bill (H.R. 2269) to amend title I of the Employee Retirement Income Security Act of 1974 and the Internal Revenue Code of 1986 to promote the provision of retirement investment advice to workers managing their retirement income assets, 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.

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

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

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

(1) EXEMPTION FROM PROHIBITED TRANSACTIONS.—Section 408(b) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1108(b)) is amended by adding at the end the following new paragraph:

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

"(i) the investment of assets of the plan are subject to the direction of plan participants or beneficiaries,

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

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

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

"(i) the provision of the advice to the plan, participant, or beneficiary;

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

"(iii) the direct or indirect receipt of fees or other compensation by the fiduciary adviser or an affiliate thereof (or any employee, agent, or registered representative of the fiduciary adviser or affiliate) in connection with the provision of the advice or in connection with a sale, acquisition, or holding of a security or other property pursuant to the advice.".

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

"(g) REQUIREMENTS RELATING TO PROVISION OF INVESTMENT ADVICE BY FIDUCIARY ADVISERS.—

"(1) IN GENERAL.—The requirements of this subsection are met in connection with the provision of investment advice referred to in section 3(21)(A)(ii) provided to an employee benefit plan or a participant or beneficiary of an employee benefit plan by a fiduciary adviser with respect to the plan in connection with any sale, acquisition, or holding of a security or other property for purposes of investment of amounts held by the plan, if—

"(A) in the case of the initial provision of the advice with regard to the security or other property by the fiduciary adviser to the plan, participant, or beneficiary, the fiduciary adviser provides to the recipient of the advice, at a time reasonably contemporaneous with the initial provision of the advice, a written notification (which may consist of notification by means of electronic communication)—

"(i) 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,

"(ii) of any material affiliation or contractual relationship of the fiduciary adviser or affiliates thereof in the security or other property,

"(iii) of any limitation placed on the scope of the investment advice to be provided by the fiduciary adviser with respect to any such sale, acquisition, or holding of a security or other property,

"(iv) of the types of services provided by the fiduciary advisor in connection with the provision of investment advice by the fiduciary adviser, and

"(v) that the adviser is acting as a fiduciary of the plan in connection with the provision of the advice,

"(B) 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,

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

"(D) 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

"(E) 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.

"(2) STANDARDS FOR PRESENTATION OF INFORMATION.—The notification required to be provided to participants and beneficiaries under paragraph (1)(A) shall be written in a clear and conspicuous manner and in a manner calculated to be understood by the average plan participant and shall be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of the information required to be provided in the notification.

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

"(4) MAINTENANCE FOR 6 YEARS OF EVIDENCE OF COMPLIANCE.—A fiduciary adviser referred to in paragraph (1) who has provided advice referred to in such paragraph shall, for a period of not less than 6 years after the provision of the advice, maintain any records necessary for determining whether the requirements of the preceding provisions of this subsection and of subsection (b)(14) have been met. A transaction prohibited under section 406 shall not be considered to have occurred solely because the records are lost or destroyed prior to the end of the 6-year period due to circumstances beyond the control of the fiduciary adviser.

"(5) 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 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 arrangement require compliance by the fiduciary adviser with the requirements of this subsection, and

"(iii) the terms of the 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 arrangement for the provision of 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).

"(6) 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 by the person to the plan or to a participant or beneficiary 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 section 408(b)(4),

"(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 any of clauses (i) through (v) who satisfies the requirements of applicable insurance, banking, and securities laws relating to the provision of the advice.

"(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).".

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

(1) IN GENERAL.—Subsection (d) of section 4975 of the Internal Revenue Code of 1986 (relating to exemptions from tax on prohibited transactions) is amended—

(A) in paragraph (14), by striking "or" at the end;

(B) in paragraph (15), by striking the period at the end and inserting "; or"; and

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

"(16) If the requirements of subsection (f)(7) are met—

"(A) the provision of investment advice referred to in subsection (e)(3)(B) provided by a fiduciary adviser (as defined in subsection (f)(7)(C)(i)) to a plan or to a participant or beneficiary of a plan,

"(B) the sale, acquisition, or holding of securities or other property (including any extension of credit associated with the sale, acquisition, or holding of securities or other property) pursuant to such investment advice, and

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

(2) REQUIREMENTS.—Subsection (f) of such section 4975 (relating to other definitions and special rules) is amended by adding at the end the following new paragraph:

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

"(A) IN GENERAL.—The requirements of this paragraph are met in connection with the provision of advice referred to in subsection (e)(3)(B), provided to a plan or a participant or beneficiary of a plan by a fiduciary adviser with respect to such plan, in connection with any sale or acquisition of a security or other property for purposes of investment of amounts held by such plan, if—

"(i) in the case of the initial provision of such advice by such fiduciary adviser to such plan, participant, or beneficiary, the fiduciary adviser provides to the plan, participant, or beneficiary, at the time of or before the initial provision of such advice, a description, in writing or by means of electronic communication, of—

"(I) all fees or other compensation relating to such 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 such advice or in connection with such acquisition or sale,

"(II) any material affiliation or contractual relationship of the fiduciary adviser or affiliates thereof in such security or other property,

"(III) any limitation placed on the scope of the investment advice to be provided by the fiduciary adviser with respect to any such sale or acquisition, and

"(IV) the types of services offered by the fiduciary advisor in connection with the provision of investment advice by the fiduciary adviser,

"(ii) in the case of the initial or any subsequent provision of such advice to such plan, participant, or beneficiary, the fiduciary adviser, throughout the 1-year period following the provision of such advice, maintains the information described in subclauses (I) through (IV) of clause (i) in currently accurate form for availability, upon request and without charge, to the recipient of such advice,

"(iii) the fiduciary adviser provides appropriate disclosure, in connection with any such acquisition or sale, in accordance with all applicable securities laws,

"(iv) such acquisition or sale occurs solely at the discretion of the recipient of such advice,

"(v) the compensation received by the fiduciary adviser and affiliates thereof in connection with such acquisition or sale is reasonable, and

"(vi) the terms of such acquisition or sale are at least as favorable to such plan as an arm's length transaction would be.

"(B) MAINTENANCE OF RECORDS.—A fiduciary adviser referred to in subparagraph (A) who has provided advice referred to in such subparagraph shall, for a period of not less than 6 years after the provision of such advice, maintain any records necessary for determining whether the requirements of the preceding provisions of this subsection and of subsection (d)(16) have been met. A prohibited transaction described in subsection (c)(1) shall not be considered to have occurred solely because the records are lost or destroyed prior to the end of the 6-year period due to circumstances beyond the control of the fiduciary adviser.

"(C) DEFINITIONS.—For purposes of this paragraph and subsection (d)(16)—

"(i) 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 by such person to the plan or to a participant or beneficiary 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 (d)(4),

"(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 subclauses (I) through (IV), or

"(VI) an employee, agent, or registered representative of a person described in any of subclauses (I) through (V).

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

"(iii) REGISTERED REPRESENTATIVE.—The term 'registered representative' means a person described in section 3(a)(18) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(18)) or section 202(a)(17) of the Investment Advisers Act of 1940 (15 U.S.C. 80b–2(a)(17)).".

SEC. 3. EFFECTIVE DATE.

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

PURPOSE

The purpose of H.R. 2269 is to amend the Employee Retirement Income Security Act of 1974 and the Internal Revenue Code of 1986 to allow employers to provide workers with access to professional investment advice provided that the advisers disclose any fees or potential conflicts. H.R. 2269 establishes important safeguards to ensure that workers receive advice solely in their best interests.

COMMITTEE ACTION

106TH CONGRESS

The foundation for the legislation was laid in four hearings held by the Subcommittee on Employer-Employee Relations. The first hearing, held on February 15, 2000, was titled, "The Evolving Pension and Investment World after 25 Years of ERISA." The witnesses discussed the larger challenges facing the Employee Retirement Income Security Act (ERISA) and private pension plans now and in the future. The following individuals testified: Professor John H. Langbein, Chancellor Kent Professor of Law and Legal

History, Yale Law School; Mr. Michael S. Gordon, Esquire, from the law offices of Michael S. Gordon, Washington, DC; Dr. John B. Shoven, Charles R. Schwab Professor of Economics, Stanford University; and Dr. Teresa Ghiladrucci, Associate Professor of Economics at the University of Notre Dame.

The Subcommittee on Employer-Employee Relations held a two-day hearing on March 9 and 10, 2000. The hearings focused on proposals for reforming and modernizing ERISA. Testifying at the March 9th hearing were: Mr. W. Allen Reed, President, General Motors Investment Management Company, on behalf of the Committee on Investment of Employee Benefit Assets (CIEBA) of the Financial Executives Institute; Mr. Daniel P. O'Connell, Corporate Director for Employee Benefits and HR Systems, United Technologies Corporation, on behalf of the ERISA Industry Committee (ERIC); Mr. Damon Silvers, Associate General Counsel of the AFL-CIO; Professor Joseph A. Grundfest, William A. Franke Professor of Law and Business and co-founder of Financial Engines, Incorporated; Ms. Eula Ossofsky, President of the Board of Directors, the Older Women's League; and Ms. Margaret Raymond, Assistant General Counsel, Fidelity Investments, on behalf of the Investment Company Institute.

The following individuals testified before the Subcommittee on Employer-Employee Relations on March 10th: Mr. Kenneth S. Cohen, Senior Vice President and Deputy General Counsel of the Massachusetts Mutual Life Insurance Company, on behalf of the American Council of Life Insurers; Mr. Marc E. Lackritz, President, the Securities Industry Association; Mr. David Certner, Senior Coordinator, Department of Federal Affairs for the American Association of Retired Persons; Mr. Louis Colosimo, Managing Director, Morgan Stanley Dean Witter & Company, Incorporated, on behalf of the Bond Market Association; Mr. John Hotz, Deputy Director of the Pension Rights Center; and Ms. Deedra Walkey, Assistant General Counsel for the Frank Russell Company.

On April 4, 2000, the Subcommittee on Employer-Employee Relations held a hearing on "Modernizing ERISA to Promote Retirement Security." The following individuals testified: the Honorable Leslie Kramerich, Acting Assistant Secretary of Labor for Pension and Welfare Benefits, U.S. Department of Labor; and the Honorable David M. Strauss, Executive Director of the Pension Benefit Guaranty Corporation.

On June 26, 2000, Representative John A. Boehner, then Chairman of the Subcommittee on Employer-Employee Relations, introduced H.R. 4747, the Retirement Security Advice Act of 2000. On July 19, 2000, the Subcommittee on Employer-Employee Relations ordered H.R. 4747 favorably reported, as amended, by voice vote. There was no further action taken on the legislation prior to the conclusion of the 106th Congress.

107TH CONGRESS

On June 21, 2001, Representative John A. Boehner, Chairman of the Committee on Education and the Workforce, introduced H.R. 2269. On July 17, 2001, the Subcommittee on Employer-Employee Relations held a hearing on the bill. Testifying before the Subcommittee were: the Honorable Ann L. Combs, Assistant Secretary for Pension and Welfare Benefits, U.S. Department of Labor; Ms.

Betty Shepard, Human Resources Administrator, Mohawk Industries, Inc.; Mr. Damon Silvers, Associate General Counsel, AFL-CIO; Mr. Richard A. Hiller, Vice President, Western Division, of TIAA-CREF; Mr. Joseph Perkins, Immediate Past Present of the American Association for Retired Persons; and Mr. Jon Breyfogle, Principal, The Groom Law Group, on behalf of the American Council of Life Insurers.

On August 2, 2001, the Subcommittee on Employer-Employee Relations approved H.R. 2269, without amendment, by voice vote and ordered the bill favorably reported to the Full Committee. On October 3, 2001, the Committee on Education and the Workforce approved H.R. 2269, as amended, by voice vote and ordered the bill favorably reported by a roll call vote of 29–17.

Committee Statement and Views

A. BACKGROUND AND NEED FOR LEGISLATION

The Employee Retirement Income Security Act ("ERISA")[1] was enacted in 1974 to provide a safe, honest and efficient structure for protecting pension benefits for America's private sector employees. ERISA federalized the field of pension law, creating federal standards and remedies, Department of Labor oversight, and federal court jurisdiction. As demonstrated at a number of bipartisan hearings held by the Subcommittee on Employer-Employee Relations during the 106th Congress, ERISA has been largely successful in protecting the integrity of privately managed pension plans. This, the Subcommittee learned, was particularly true for "defined benefit" plans that provide its participants a certain benefit after a set number of years of service.

Defined benefit plans were the norm in 1974. Since then, the pension world has changed significantly, with a dramatic shift toward "defined contribution" plans which allow workers and their employers to contribute assets to individual accounts and then, within a range of options determined by the plan sponsor, choose how to invest that money. Since 1974, the number of workers covered by a defined contribution plan has increased 250 percent, from 12 to 42 million. The testimony provided at the Subcommittee's hearings showed that the explosive growth of defined contribution plans has left employees with the responsibility for investment decisions that many are ill equipped to make.

That concern is even clearer now, with the decline of many high-technology stocks and greater volatility in the financial markets. Despite the obvious benefits of equity investment, for the first time since the inception of the 401(k) program, total 401(k) assets declined in 2000. This decline was due in large part to volatile equity markets, but the lack of available investment advice exacerbated the problem. The average 401(k) participant balance dropped to $41,919 in 2000 from $46,740 in 1999.

Testimony at the hearings focused on two aspects of ERISA. First, employers are discouraged from offering investment advice as a benefit because they could potentially be liable for specific trading losses—even if the advice was reasonable. Second, ERISA's prohibited transaction rules significantly reduce competition, con-

[1] U.S.C. § 1001, et seq.

sumer-responsiveness, and choice in the employer-provided investment advice market by prohibiting the vast majority of investment advice firms from providing expert advice in the ERISA market.

In testimony before the Subcommittee, Professor John Langbein, Chancellor Kent Professor of Law and Legal History at the Yale Law School and author of Pension and Employee Benefit Law (Foundation Press), discussed the growth of defined contribution plans and the related problems in ERISA:

> [A]lmost all new plan formation is taking the form of defined contribution plans, especially IRC 401(k) plans. "From 1984 to 1993, the number of 401(k) plans increased by almost 900 percent, from 17,303 to 154,527 plans. By 1993, 401(k) plans represented almost one quarter (24 percent) of all private defined contribution plans and included 52 percent of all active private pension plan participants." In 1993, 27 percent of all private plan assets, and 58 percent of all private DC plan assets, were in 401(k) plans. In that year, 45 percent of all private pension plan contributions went to 401(k) plans.[2]

Professor Langbein also pointed out that the differences between defined benefit and defined contribution plans create an advice gap for defined contribution plans:

> In a defined benefit plan, the responsibility for setting investment policy rests with the employer's financial officers and their expert advisers. By contrast, in a 401(k) plan it is the employees (who often have no financial sophistication) who make important elections about how to invest their individual accounts. It has been learned that most employees who direct their own investments tend in the aggregate to be too cautious in locating themselves on the risk/return curve. They hold too little equity in the early decades of the employment career, when most financial experts recommend higher concentrations of equity. The danger is that their accounts will not experience the investment grown that is needed to fund an adequate retirement.
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> Employers and investment intermediaries would like to assist employees to make the most of their retirement saving, but they fear liability as fiduciaries if employees should buy into what turns out to be a down market. Existing law allows employers and others to provide employees with vague so-called "education" about the investment process and about the particular investment choices available, without becoming ERISA fiduciaries* * * But ERISA section 3(21)(A)(ii) treats the giving of "investment advice" as a fiduciary function. An employer who arranges for financial professionals to deliver the tailored financial advice that individual employees need risks being deemed an ERISA fiduciary.

[2] Hearing on "The Evolving Pension and Investment World After 25 Years of ERISA" before the Subcommittee on Employer-Employee Relations, Committee on Education and the Workforce, U.S. House of Representatives, 106th Congress, Second Session, Serial No. 106–87, p. 46 (citations omitted).

> The result is that ERISA has been read to insist that individual workers by the millions should become investment experts. It has not happened, it cannot happen, and it is causing workers to be less well invested than if employers and investment intermediaries were allowed to guide the individual employee on the asset allocation appropriate to his or her place in the life cycle, family circumstances, and other assets.[3]

Kenneth S. Combs, Senior Vice President and Deputy General Counsel of Massachusetts Mutual Life Insurance Company echoed Professor Langbein's concerns about the changing marketplace:

> Over the past 25 years there also has been a dynamic change in the types of investment vehicles and services offered by financial institutions in the 401(k) plan and IRA market. One major change has been the proliferation of thousands of mutual funds offering a wide range of investment styles. In addition, insurance companies and banks have originated a variety of new "stable value" investment options for defined contribution plans that provide principal and interest guarantees for participant account balances and supplement the traditional guaranteed investment contracts (GICs) offered by insurance companies.
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> The development of these investment vehicles offers plan sponsors and plan participants an unprecedented range of investment alternatives in the defined contribution plan and IRA marketplace. It is now common for participants to be able to direct their own investments among multiple mutual funds and a stable value option within their 401(k) or 403(b) plan. Indeed, some plans are now offering participants the opportunity to invest in a nearly limitless variety of mutual funds and individual securities through "brokerage windows."
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> In our view, the shift to defined contribution plans and participant-directed investing creates one of the fundamental challenges for the private retirement system. Plan sponsors and participants increasingly require investment-related services. Services provided by financial institutions to 401(k)-type plans and IRA participants have developed to include participant education, asset allocation assistance, and increasingly, specific investment advice. The development of these services is critical to ensuring that defined contribution plan and IRA assets are invested wisely and in ways that will provide a significant benefit to plan participants. The law should be structured to encourage the efficient delivery of such services.[4]

Ann L. Combs, Assistant Secretary for Pension and Welfare Benefits at the U.S. Department of Labor, expressed similar concern that workers need additional tools to create retirement security for themselves:

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[3] Ibid., p. 47.

[4] Hearing on "A More Secure Retirement for Workers: Proposals for ERISA Reform" before the Subcommittee on Employer-Employee Relations, Committee on Education and the Workforce, U.S. House of Representatives, 106th Congress, Second Session, Serial No. 106–95, p. 430.

> Today's 401(k) type plan participant faces choices and challenges unknown to the participant of 20 years ago. Indeed, many are afforded the virtually unlimited opportunity to invest—through open brokerage accounts—in almost any security available in the marketplace.
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> It is no longer only financial professionals that need to know the principles of investment and asset allocation. Now that plan participants have been put in charge of investing the assets in their own accounts, they must be provided with the means for making appropriate decisions. These decisions will determine to a great extent, the returns earned by their accounts, and, therefore, their security and standard of living during retirement.
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> Many employees simply are not sophisticated enough when it comes to risk/return strategies, asset allocation and other such investment tools. Further, many do not have the inclination, the time or the expertise to follow investment trends and market movements in today's fast paced global economy. As you know, today's workers lead busy lives, and many desire professional assistance with these critically important retirement decisions.
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> The Department sought to address this need by providing guidance in 1996 concerning the distinction between investment education and investment advice. The distinction being that investment advice gives rise to fiduciary responsibility under ERISA, while the provision of investment education does not. The 1996 interpretive bulletin provides guidance to investment advisers and employers showing how to provide educational investment information and analysis to participants without becoming a fiduciary under ERISA. However, in view of what is at stake, many 401(k) plan participants, even with investment education tools available, desire personally tailored advice. Investment education, while important, is simply not enough.[5]

The Committee heard repeatedly that the current regulatory structure was insufficient to meet these demands. As Marc E. Lackritz, President of the Securities Industry Association testified:

> The Department has struggled with various iterations of investment advice exemptions but would be the first to recognize that none have been totally successful in achieving the industry's objective to ensure that advice will be a reality. All of the exemptions that have been issued thus far have been based on a relatively high advice fee to accommodate the internal vehicle fee offsets, which the Department has traditionally required, or on the presence of an independent fiduciary to give asset allocation advice. Neither of these constructs is ideal. * * * Modern technology has created the ability to provide useful, objective investment advice based on neutral and impartial computer models and programs. Many plan sponsors, however,

[5] Hearing on H.R. 2269, "Retirement Security Advice Act," before the Subcommittee on Employer-Employee Relations, Committee on Education and the Workforce, U.S. House of Representatives, 107th Congress, First Session, July 17, 2001 (to be published).

> want more personal interaction. Participants have questions and concerns. Their uncertainty can often be effectively flushed out in face to face conversations. Questionnaire answers are often an overstatement or understatement of how the participant really feels in terms of risk. Any solution, either administrative or statutory, needs to be geared to the realities of participant decision-making.[6]

There were numerous employers who testified that they wanted to, but could not provide investment advice services for their employees. As Betty Shepard, the Human Resources Administrator for Mohawk Industries, Inc., testified:

> Despite our significant efforts to provide the necessary tools for employees to make investment decisions, they continue to look to us to provide specific investment advice. Due to the substantial fiduciary liability associated with the delivery of specific advice under current law, we do not offer * * * advice on investment choices to our employees. While Internet-based services can assist many plan sponsors, we do not feel that this will adequately address our employees' needs, as the majority of our employees do not have access to the Internet at home or at work.
>
> [O]ur employees invest predominately in either stable value funds that may not keep up with inflation, or they are heavily weighted in stocks which will have a greater risk for loss of principal. We continue to provide education in the form of face-to-face meetings and mailings to the employees' homes, *but this is not meeting employees' needs and does not satisfy their requests or concerns.* (emphasis added) [7]

In addition, W. Allen Reed, CIEBA Chairman & President of General Motors Investment Management Company testified:

> [I]nvestment education alone is not sufficient. Many plan participants are asking for more guidance—they want to be told how to apply the general financial and investment concepts to their particular situations. What they desire is the type of assistance that would constitute "investment advice" under ERISA.
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> The issue is not whether there is a need for such advice—the need seems to be there—but rather how best to provide it. The employer community is not well situated to do so. Many employers lack the expertise and the resources to provide one-on-one investment advisory service to plan participants.[8]
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> CIEBA urges Congress and the Department of Labor to find a way for participants to be able to seek their own advisers with minimal involvement from the plan sponsor. The plan sponsor then will not be reluctant to make the

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[6] Hearing on "A More Secure Retirement for Worker: Proposals for ERISA REform" before the Subcommittee on Employer-Employee Relations, Committee on Education and the Workforce, U.S. House of Representatives, 106th Congress, Second Session, Serial No. 106–95, p. 463.

[7] Ibid.

[8] Hearing on "A More Secure Retirement for Workers: Proposals for ERISA Reform" before the Subcommittee on Employer-Employee Relations, Committee on Education and the Workforce, U.S. House of Representatives, 106th Congress, Second Session, Serial No. 106–95, p. 38.

advisory services available because it would be protected from liability, while the participants would be able to obtain advice tailored to their personal financial situations.[9]

B. LEGISLATION

The fiduciary responsibility provisions under Title I of ERISA[10] protect plans and participants by imposing special duties and obligations on "fiduciaries" with respect to plans. Under section 3(21),[11] a person who renders investment advice for a fee is a fiduciary with respect to the advice provided. Section 404[12] requires that plan fiduciaries carry out their responsibilities prudently, act solely in the interest of plan participants, diversify plan investments, and administer the plan consistent with plan documents. These rules are rooted in the common law of trusts, and have proved flexible and responsive to changes in the retirement plan and investment markets.

ERISA departs from the law of trusts, however, by adding a series of prohibited transaction rules (section 406) that create significant obstacles for plan sponsors and service providers to make a full range of investment options and services available to plan participants and beneficiaries. Specifically, section 406(a)[13] includes a list of transactions between a plan and a "party in interest" that are prohibited. Such transactions include a sale of property, a loan or lease, or the provision of services. Virtually any transaction could fall within one of these broad categories.

In addition to the party-in-interest transactions described in section 406(a), section 406(b)[14] includes general prohibitions against a fiduciary engaging in transactions between the plan and the fiduciary. In particular, section 406(b)(1)[15] prohibits a fiduciary from dealing with the assets of the plan in his or her own interest or for his or her own account. Under the Department of Labor's guidance, a fiduciary may be guilty of self-dealing if it acts in a transaction in which it might affect the timing or amount of its own compensation or cause fees to be paid to it from a third party.[16] As a result, fiduciaries might violate section 406(b) merely by acting in a transaction in which they have a financial interest, even when the fiduciary's acts are nonetheless beneficial to and in the interests of the plan or its participants.[17]

Importantly, transactions in violation of section 406 could give rise to an annual 15 percent excise tax penalty under section 4975 of the Code (or a 5 percent civil penalty under section 502(i) of ERISA where transactions involve welfare plans). Fiduciaries can be assessed this penalty for per se violations even if there is no showing of harm or loss to the plan.

The Department of Labor has adopted the view that a person giving investment advice will violate section 406(b) where the ad-

[9] Ibid.
[10] 29 U.S.C. § 1001 et seq.
[11] 29 U.S.C. § 1002(21).
[12] 29 U.S.C. § 1104.
[13] 29 U.S.C. § 1106(a).
[14] 29 U.S.C. § 1106(b).
[15] 29 U.S.C. § 1106(b)(1).
[16] 29 C.F.R. § 2550.408b–2(e)(1).
[17] The Committee notes, however, that a number of courts have not agreed with the Department of Labor's per se *Missouri Bank*, 948 F.2D 660 (10th Cir. 1991; *Brock* v. *Citizens Bank of Clovis*, 841 F.2d 344 (10th Cir. 1988); *Evans* v. *Bexley*, 750 F.2d 1498 (7th Cir. 1985).

viser receives fees in connection with the investment decision (e.g., the fiduciary receives different fees from various mutual funds).[18] Using its authority to issue administrative exemptions under section 408(a),[19] the Department of Labor has granted a few limited exemptions for advisory programs where fees paid to the adviser from affiliated or unaffiliated mutual funds are totally offset against fees the plan otherwise pays. These exemptions, however, generally require the adviser charge a fee for services and then offset that fee against other costs.[20] The specific exemption also creates rigid pricing structures that are difficult to adjust to changing market conditions. Additionally, it is time consuming and costly for advisers to obtain these specific limited exemptions and the standards for obtaining them are far from clear. Moreover, the terms of these exemptions generally are confusing for the plan participant to understand and are also an enhanced cost to the plan. Under the current structure, employers and financial institutions are discouraged from providing investment advice, plan participants and beneficiaries are deprived of the opportunity to take advantage of such advice, and the costs of services directly charged to the plans—charges that are typically passed through to the plan participants and beneficiaries—have been raised.

H.R. 2269's exemption to the prohibited transaction rules

H.R. 2269 amends ERISA and the Internal Revenue Code to permit the provision of investment advice to plan participants and beneficiaries, the purchase or sale of assets pursuant to the investment advice and the direct or indirect receipt of fees in connection with providing the advice. The bill is intended to enable regulated financial institutions that provide investment options and administrative and other services to employee benefit plans also to provide investment advisory services directly to plans, participants and beneficiaries desiring these services.

In order to nurture a dynamic, competitive, and consumer-responsive market for employer-provided investment advice, H.R. 2269 seeks to give providers, sponsors, and participants flexibility within which to be innovative while protecting participants through strong and clear expressions of the adviser's overarching fiduciary duty—the highest duty of loyalty known to the law [21]—and through rigorous but practical disclosures of any potential conflicts of interest.

The bill establishes a new statutory exemption from ERISA's prohibited transaction rules for certain comprehensively regulated entities to provide advice services to plan fiduciaries or plan participants ("fiduciary advisers"). The Committee intends the exemption to specifically provide relief from both the party in interest restrictions (section 406(a)) and conflict of interest rules (section 406(b)) and is therefore broader than the Department of Labor has construed other statutory exemptions.[22]

H.R. 2269 covers three broad categories of transactions entered into in connection with the provision of investment advice: (1) the

[18] See DOL Adv. Op. 97–15 (May 16, 1997).
[19] 29 U.S.C. § 1108(a).
[20] See, e.g., PTE 97–12, 62 Fed. Reg. 7275 (Feb. 19, 1997).
[21] See, e.g., *Donovan* v. *Bierwith,* 680 F.2d 263, 272 n.8 (2d Cir. 1982).
[22] Compare with 29 C.F.R. 2550.408b–2(a) (limiting relief of section 408(b)(2) to transaction described in section 406(a)).

service of providing investment advice, (2) the sale, acquisition, and holding of securities or other property, and (3) the direct or indirect receipt of compensation or any fees associated with the provision of advice. The exemption covers any acquisition, holding or sale of securities and other assets, such as insurance contracts or real estate, acquisitions or sales on an "in-kind" basis, acquisitions or sales on either an agency or principal basis, and it covers extensions of credit and loans associated with such transactions (including the settlement of such transactions). The exemption also provides relief for any compensation and fees received by reason of the provision of advice, including fees paid in connection with a fiduciary adviser's affiliated mutual funds or unaffiliated mutual funds (including fees paid under a plan adopted in accordance with Rule 12b–1 under the Investment Company Act of 1940), commissions, and other compensation received in connection with transactions covered by the exemption (e.g., spreads received in connection with principal transactions).

H.R. 2269 applies only to plans where the investment of assets of the plan is subject to the direction of plan participants or beneficiaries. (The companion amendments to section 4975 of the Internal Revenue Code cover both defined contribution plans as well as individual retirement accounts, which are generally not subject to Title I of ERISA.) The Committee specifically intends the exemption to be available with respect to participant directed plans qualifying under section 404(c) of ERISA, as well as other plans that do not qualify under section 404(c) that are subject to participant direction.

The Committee intends the exemption to cover advice provided to both the plan and participants. With respect to "plan level advice," fiduciary advisers may make recommendations to plan fiduciaries in connection with the selection of the investment options made available to participants, as well as offer ongoing advice with respect to monitoring the performance of existing investment options and recommending changes to the plan's investment options. The Committee believes that it is critical that advice be made available to plan fiduciaries who select the investments offered to participants so that the underlying set of investment choices available to the plan participants represent a diversified and appropriate set of investment options. With respect to "participant level advice," the bill permits fiduciary advisers to make specific investment recommendations to participants taking into account their individual circumstances. The exemption is not available to defined benefit plans, welfare benefit plans and defined contribution plans that are not participant directed.

Opponents of the bill have argued that there should be no exemption to the prohibited transaction rule, but if there is one, fiduciary advisers should be required to offer an unaffiliated adviser along with the fiduciary adviser's services. The Committee believes that this proposal is untenable. As an initial matter, it should be noted that the purported "conflict" the adviser has is the conflict that any investment adviser would have that an individual hired on their own because any individual investment adviser would have funds to sell. The Committee believes that requiring fiduciary advisers to provide two advisers, one being a so-called independent adviser, would significantly increase costs and administration without providing any additional protections for workers. The Committee also observes that under the opponent's scheme, the so-called independent adviser could become conflicted by their association with the fiduciary adviser. The Committee believes that workers will only receive the investment advice they need if the system for delivering that advice is simple, practical, and in-step with the business world while delivering a quality product. In addition, the Committee believes that the bill sufficiently protects workers through its disclosure and other substantive requirements, as well as the application of ERISA fiduciary rules and civil remedies.

Opponents have also argued that even if a limited exemption were adopted, there is no meaningful remedy for breach of fiduciary duty under ERISA. As demonstrated by 25 years of remedies under ERISA, the fiduciary liability can be significant and can include large civil fines as well as criminal penalties.[23] Indeed, the Committee wrote in its report about the original ERISA bill:

> The enforcement provisions have been designed specifically to provide both the Secretary [of Labor] and participants and beneficiaries with broad remedies for redressing or preventing violations of the Act. The intent of the Committee is to provide the full range of legal and equitable remedies available in both state and federal courts and to remove jurisdictional and procedural obstacles which in the past appear to have hampered effective enforcement of fiduciary responsibilities under state law for recovery of benefits due to participants.[24]

The remedies under ERISA are significant and meaningful and the Committee believes that they should be preserved.

Fiduciary advisers

The exemption under H.R. 2269 is available only to "fiduciary advisers," which are regulated institutions that give investment advice to plan fiduciaries and plan participants. The bill defines a "fiduciary adviser" to mean registered investment advisers (under federal or state law as applicable), banks, insurance companies, and registered broker dealers, all of whom are comprehensively regulated by the states and/or the federal government. (Thus, persons eligible for the exemption are the same persons that are generally eligible under section 3(38) of ERISA[25] to serve as investment managers for plans.) In addition, the exemption is specifically structured to cover transactions with affiliates of these regulated institutions, as well as the transactions involving the employees, agents, and registered representatives of both the financial institution and its affiliates.

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[23] 29 U.S.C. § 1109, §§ 1131–32. See also, *Ream* v. *Frey,* 107 F.3d 147, 152–53 (3d Cir. 1997) (allowing plaintiff to recover for losses to his 401(k) account); *Varity Corp.* v. *Howe,* 36 F.3d 746 (8th Cir. 1994) (plaintiffs were entitled to "restitution for benefits of which they were deprived" and were awarded the amount of their past-due benefit); *Strom* v. *Goldman, Sachs & Co.,* 202 F.3d 138, 147–48 (2d Cir. 1999) (insured's widow was entitled to recover the benefits she should have received under the plan); *Beck* v. *Levering,* 947 F.2d 639, 641–42 (2d Cir. 1991), cert. denied, 504 U.S. 1054 (1993) upholding permanent injunction requiring compliance with ERISA); *Martin* v. *Feilen,* 965 F.2d 660, 673 (8th Cir. 1992), cert. denied, 506 U.S. 1054 (1993) (holding that it was an abuse of discretion for district court not to issue injunction barring individuals against service as a fiduciary or service provider).

[24] H.R. Rep. No. 93–533, 93d Cong., 2d Sess., reprinted in 3 U.S.C.C.A.N. 4639, 4655 (1974).

[25] 29 U.S.C. § 1002(38).

The intent of the definition of fiduciary advisers is to make the exemption broadly available to regulated financial institutions and to provide such institutions with the flexibility to determine how advisory services can be provided efficiently through affiliated investment advisers, broker dealers, banks and insurance companies and any of the individuals that provide advisory services on their behalf.

Additionally, the Committee intends that the term "fiduciary adviser" be consistent with existing insurance, banking, and securities laws. The Committee intends existing state and federal law to continue to govern the qualifications and actions of the entities subject to the exemption, and as a condition of the exemption, persons who act on behalf of such entities (employees, agents, registered representatives) must be in compliance with the applicable laws that already regulate their provision of advice. However, the Committee believes that these existing laws, coupled with ERISA's high standards of fiduciary conduct and liability and the provisions under H.R. 2269 will provide a sufficient framework to protect consumers without requiring additional regulation under ERISA or by the Department of Labor.

Opponents of H.R. 2269 have raised concerns that the definition of fiduciary adviser does not provide sufficient assurance of qualified investment advisers. These concerns are unfounded. The bill's definition of a fiduciary adviser in this bill is based on the definition of "investment manager" that has existed in ERISA since 1974 and has worked well. By definition, investment managers are given discretionary authority to manage entire ERISA portfolios and, thus, such persons exercise considerably more control over plan assets than persons who provide advice who are subject to this bill. There has been no showing that persons who are qualified to act as investment managers—including banks, insurance companies and investment advisers—are not also qualified to act as investment advisers. Opponents of this bill have suggested that there should be additional qualification standards created either under the bill or by the Department of Labor. Additional standards would be unnecessary and prohibitive. First, federal and state banking, insurance, and securities laws already regulate the entities that are allowed to provide investment advice under the bill. To add an additional layer of ERISA regulation on top of the existing comprehensive statutory schemes would create potential conflicts between laws and create an unduly burdensome regulatory framework. Second, the plan sponsor has a duty to prudently select an investment adviser, which would include reviewing the qualification of the investment adviser who will advise the plan and its participants. Moreover, if an entity is hired as the fiduciary adviser for a plan, that entity is responsible as a fiduciary for providing an individual adviser who is capable of, and trained to, provide high quality advice for the plan in question and its participants.

Requirements

In order for the exemption under H.R. 2269 to apply, the following conditions must be met: (1) the advice provider must qualify as a specified, regulated entity under the "fiduciary adviser" definition; (2) specified disclosures must be provided to the advice recipient; (3) any sale or acquisition pursuant to the investment advice must occur solely at the direction of the advice recipient; (4) the terms of the transaction must be at least as favorable as an arm's length transaction would be, and the compensation received by the fiduciary adviser and its affiliates in connection with a sale or acquisition of a security or other property resulting from the advice provided must be reasonable; and (5) the fiduciary adviser must comply with a six-year record keeping requirement. Each requirement is discussed in detail below.

Disclosure

The bill requires any fiduciary adviser to inform plan participants and beneficiaries about five aspects of their relationship before providing advice. Fiduciary advisers must disclose in writing: (1) the fees or other compensation that the fiduciary adviser and its affiliates receive relating to the provision of the investment advice or a resulting sale or acquisition of assets; (2) any material affiliation or contractual relation of the fiduciary adviser to any asset recommended, purchased or sold; (3) any limitation placed on the fiduciary's ability to provide advice; (4) the types of advisory services provided; and (5) that the adviser is acting as a fiduciary of the plan in connection with the provision of advice.

The requirement to disclose any material affiliations or contractual relationship of the fiduciary adviser or its affiliate with a security or other property (that is the subject of the investment advice) is intended to identify material conflicts of interest arising from the provision of the advice. Under this requirement, therefore, the fiduciary adviser is required to disclose those interests that could affect the exercise of a fiduciary adviser's judgment when providing investment advice.

Additionally, the requirement to disclose any limitation on the scope of investment advice provided is intended to identify clearly the scope of the advisory program. Thus, if the investment advice offered is based on the fiduciary adviser's consideration of only a subset of the investment options available under a plan, the fiduciary adviser must disclose this limitation. For instance, if the advisory service does not address the purchase, sale or retention of employer stock, the limitation must be disclosed.

The requirement that the fiduciary adviser disclose that it acts as a fiduciary is intended to specify that the adviser will be a fiduciary for purposes of the advice given, but not for all aspects of the plan. It is similarly understood that the fiduciary adviser acts as a fiduciary only with respect to those persons—the plan or its participants—who receive advice; they do not have a fiduciary relationship with respect to participants who elect not to receive advice. Fiduciary advisers are, of course, subject to the duties of loyalty and prudence set forth in section 404 of ERISA in connection with the advice they provide. It is the Committee's understanding, however, that a fiduciary adviser (or its affiliates) would not fail to meet the requirements of ERISA section 404 solely by reason of their provision of advice which is the subject of the exemption, and their direct or indirect receipt of fees or compensation as a result of the provision of investment advice. In addition, in requiring that the fiduciary adviser disclose that it acts as a fiduciary with respect to the investment advice it provides, the bill does not alter the definition of investment advice set forth in section 3(21) of ERISA and the Department of Labor's regulations.

Opponents to the bill have argued that disclosure should be made each and every time a plan participant or beneficiary seeks advice. The Committee has sought to make the disclosure such that participants receive significant information in a way and at a time when it will be meaningful to the participant. To require disclosure every single time advice is sought, regardless of how minimal, would undermine that meaning and potentially make the disclosure just another piece of paper the participant receives and discards. If the participant desires a disclosure at any time, he or she may request one and the fiduciary adviser will provide it free of charge. This makes the information available to the participant without decreasing the significance of the initial disclosure.

Timing

The bill requires that "in the case of the initial provision of the advice with regard to a security or other property" the fiduciary adviser will provide a notice making certain disclosures to the recipient of the advice. The disclosure must be "reasonably contemporaneous" with the initial provision of advice. In addition, the information included in the notice must be kept up to date for a one-year period following the provision of the advice.

Under these requirements, it is generally expected that the disclosure will be given at the time of or shortly before the advice is provided. However, the exemption contemplates that the notice may be provided shortly after the time of advice, where the nature of advice medium limits the ability to provide notice at the time of advice. Thus, where advice is provided via a telephone call center, the fiduciary adviser may comply with the "reasonably contemporaneous" time requirement by sending the notice (in written or electronic form) to the plan or participant shortly after the provision of advice. In addition, a fiduciary adviser does not have to affirmatively provide added notice to plans or participants every time advice is provided. Instead, the adviser must make the initial disclosure, and then maintain the notice in an up-to-date form and provide a new notice without charge upon the request of the plan fiduciary or participant.

Presentation

The statutory exemption requires that the fiduciary adviser provide to advice recipients clear and conspicuous written or electronic disclosures, written in a manner designed to be understood by the average plan participant. The phrase "clear and conspicuous manner and in a manner calculated to be understood by the average plan participant" is intended to mean that the disclosures are reasonably understandable to plan participants and designed to call to their attention the nature and significance of the information being provided. This requirement, however, does not mandate the use of any particular technique for making the disclosure clear and conspicuous, and each fiduciary adviser retains the flexibility to decide how best to comply with this requirement.

Furthermore, the disclosure requirements are intended to be consistent with those required under applicable securities laws. Accordingly, it is intended that the disclosure provisions be construed in a manner that assures consistency between the statutory exemption and existing securities laws, including rules that govern the timing of required disclosures and the sufficiency of forms of disclosure.

Disclosure required by securities laws

In addition to the disclosures required above, the bill requires that fiduciary advisers must make any disclosures required by applicable securities laws. The Committee does not intend for this to supplant the fiduciary advisor's obligation to follow other state and federal laws and regulations.

The recipient of the advice directs the assets of the plan

The bill requires that the transactions to acquire or sell securities or other property occur solely at the direction of the recipient of the advice (i.e., either the participant or an appropriate plan fiduciary). It is generally expected that this standard will be met where, under the contract or other arrangement governing the provision of advisory services, a participant or plan fiduciary has the authority to accept or reject the specific investment recommendations made by the fiduciary adviser and the fiduciary adviser does not, in fact, exercise discretion in making the investment decision on behalf of the participant or plan. This condition does not require that the fiduciary adviser obtain written agreement by the participant or plan prior to each transaction for which advice has been provided. In addition, it is understood that an advice recipient may give an ongoing direction to rebalance or make limited adjustments, on a periodic basis, to a plan or participant's portfolio pursuant to pre-established guidelines. Ongoing directions of this type would satisfy the requirement.

The fiduciary adviser's compensation must be reasonable

The bill requires that the compensation received by a fiduciary adviser or affiliate from a sale or acquisition of a security or other property as a result of the provision of investment advice be reasonable. It is expected that the "reasonableness" and "arm's length" standards will be determined objectively with reference to the price and terms available to a plan in a competitive marketplace. The bill does not otherwise regulate the fees that a fiduciary adviser may receive. Therefore, the bill does not require the "leveling" or "offset" of fees received by the fiduciary adviser or affiliates against any fees that would otherwise be paid to such person. In this respect, the bill has a different approach than that adopted by the Department of Labor in issuing individual exemptions for similar advisory services.[26] As such, H.R. 2269 does not require a fiduciary adviser or its affiliate to receive the same or substantially the same fees, direct or indirect, from each of the investment options available under a plan.

Furthermore, this requirement is not intended to require a review of the costs associated with a specific investment product available under a plan, including the investment management and other fees inherent in the nature of the investment product, particularly in light of current ERISA fiduciary standards that require

[26] Compare with PTE 97–12. 62 Fed. Reg. 7275 (Feb. 19, 1997).

plan fiduciaries to select and periodically review the investment options made available to plan participants. For example, the requirement is not intended to apply to fees and costs associated with the investment management and operation of mutual funds, for which fees are disclosed in the fund's prospectus and by law are identical to those charged to the general public.

Terms must be at least as favorable as arm's length transaction

The terms of the sale, acquisition, or holding must be as least as favorable to the plan as a transaction made at arm's length would be. This determination should be made objectively with reference to the price and terms available in a competitive marketplace.

The fiduciary adviser must maintain the disclosure information

The fiduciary adviser is required to keep the information disclosed to the plan participant or beneficiary for one year following the provision of advice. The fiduciary adviser must also make a currently accurate form of the disclosure available to plan participants or beneficiaries at their request without charge. The Committee intends that plan participants or beneficiaries should have access to the disclosure information while being advised by a fiduciary adviser.

Additionally, the fiduciary adviser is required to keep any records necessary to determine whether the requirements for this exemption have been met for six years following the provision of advice. It is understood that a fiduciary adviser may use electronic media to maintain and store records under the bill's record keeping requirements.

Exemption for plan sponsor and other fiduciaries

The bill ensures that plan sponsors and other plan fiduciaries that arrange for the provision of advice by fiduciary advisers shall not be liable under ERISA's fiduciary or prohibited transaction rules for the specific investment advice given by the fiduciary adviser. Under H.R. 2269, the advice must be pursuant to an arrangement (e.g., contract) between the plan sponsor or other fiduciary and the fiduciary adviser, the arrangement must require that the fiduciary adviser comply with the conditions of the exemption and the fiduciary adviser must make a written acknowledgment that it is a plan fiduciary with respect to the advice provided. H.R. 2269 makes clear that the plan sponsor and other plan fiduciaries retain the general duty under section 404 of ERISA to prudently select and monitor the overall services and performance of the fiduciary adviser, but need not monitor the provision of specific investment advice. Of course, where a participant arranges directly with a fiduciary adviser, and the plan sponsor does not take part in arranging for the provision of the advisory service to the participant, such requirements are not applicable. In such circumstances, it is expected that the plan sponsor would not be liable for the selection and monitoring of the fiduciary adviser.

The Committee notes that H.R. 2269 limits the liability of the plan sponsor or other fiduciary does not provide liability protection to the fiduciary adviser for the advice provided. Fiduciary advisers who enter into contracts with the plan sponsor or another plan fiduciary are, of course, subject to potential liability for the advice they give. However, the exemption would permit fiduciary advisers to provide advisory services to participants and beneficiaries of participant directed plans sponsored by the fiduciary adviser or its affiliates (or IRAs established with such institutions that are not ERISA-covered plans). Thus, the decision by a fiduciary adviser to retain itself to provide services to its own plan participants, and the ongoing provision of advice, is subject to relief under the exemption. In this regard, the exemption is consistent with the intent of Congress and the policy of the Department of Labor under which, subject to the protections of ERISA's general fiduciary standards of conduct, institutions should not have to obtain investment options and services for their own plans from third parties.[27]

In all circumstances, however, the Committee emphasizes that the selection of the fiduciary adviser, and provision of services by the fiduciary adviser, with respect to the adviser's own plan must always be made consistent with the general fiduciary standards of section 404 of ERISA.

Payment of fees

Finally, H.R. 2269 clarifies that plan assets may be used to pay reasonable expenses in providing investment advice to plan participants and beneficiaries.

Conclusion

H.R. 2269 is a critically important measure that gives workers the tools they need to help them make sound investment decisions with their retirement dollars. It will be good for employers who are seeking ways of retaining skilled and motivated workers, and it provides an important benefit to workers, as well. If we want to truly maximize retirement security opportunities, access to high-quality investment advice is critical. H.R. 2269 will open up the access to that investment advice while protecting workers with some of the most rigorous safeguards under the law.

The pension and investment world has changed dramatically in the 25 years since the passage of ERISA. It is time to modernize ERISA so that it reflects the financial realities of the new economy.

SUMMARY

ERISA creates barriers that currently prevent employers and investment intermediaries from providing individualized investment advice to workers. Arcane and highly complex ERISA rules severely limit the ability of service providers (such as mutual funds, banks, or insurers) to provide investment advice to workers in the plans they service.

H.R. 2269 addresses this issue by allowing employers to provide their workers with access to professional investment advice as a benefit as long as advisers fully disclose any fees or potential conflicts. It also includes significant safeguards to ensure that workers receive advice solely in their best interests.

H.R. 2269 clarifies that employers are not responsible for the individual advice given by professional advisers to individual partici-

[27] Compare with 29 U.S.C. § 1108(b)(4) (bank investments); 29 U.S.C. § 1108(b)(5) (insurance contracts); PTE 77–3, 42 Fed. Reg. 18734 (April 8, 1977) (mutual funds); PTE 79–41, 44 Fed. Reg. 46365 (Aug. 7, 1979) (expanding section 408(b)(5) for certain insurance company affiliates).

pants, removing the barrier to employers contracting with advice providers and their workers. Under current law, employers are discouraged from providing this benefit because liability issues are ambiguous and employers may be held liable for specific advice that is provided to their employees. Under the bill, employers will remain responsible under ERISA fiduciary rules for the prudent selection and periodic review of any investment advisor and the advice given to employees.

H.R. 2269 protects workers from potential abuses. The measure permits investment service firms to provide investment advice about all investment products, including their own as long as they disclose any fees or potential conflicts. Investment advice may only be offered by "fiduciary advisers"—entities that are fully regulated by applicable banking, insurance, and securities regulations (such as registered investment advisers, registered broker dealers, insurance companies, and banks). This ensures that individuals who provide advice will be as qualified as those who are allowed to be investment managers under ERISA. Fiduciary advisers acknowledge in writing that they are fiduciaries twice: once to the plan sponsor and once to the plan participant.

Under the "fiduciary duty" requirement, investment advisers will be personally liable for any failure to act solely in the interest of the worker, including civil and criminal enforcement by the Department of Labor. This is the highest form of financial responsibility an investment advisor can be held to under the law. In addition, existing federal and state laws that regulate individual industries will continue to apply.

ERISA's fiduciary duty applies to both the employer's selection of the advisor and the advice it provides. This duty requires that advisers act prudently and solely in the interests of participants. As a result, H.R. 2269 makes it illegal for an advisor to act on a conflict of interest; moreover, the Department of Labor is authorized to seek both criminal and civil penalties in such a case. For example, an advisor could not advise a participant to invest in a mutual fund just because the advisor receives a higher commission on the fund.

In order to provide advice under the bill, investment service firms must disclose any fees or potential conflicts. The bill requires that disclosure be in plain language for the average plan participant to understand. In addition, the disclosure must also be "reasonably contemporaneous" with the advice so that employees receive the disclosure when they receive advice.

Comprehensive disclosure will inform participants of any financial interest advisers may have, the nature of the advisor's affiliation (if any) with the available investment options, and any limits that may be placed on the advisor's ability to provide advice. These types of disclosure obligations, along with fiduciary duties, have worked well in regulating the conduct of advisers under federal securities laws for more than 60 years.

Lastly, H.R. 2269 does not require any employer to contract with an investment advisor and no employee is under any obligation to accept or follow any advice. Workers will have full control over their investment decisions, not the advisor.

The Retirement Security Advice Act will empower workers with the information they need to make the most of the retirement savings and investment opportunities afforded them by today's 401(k)-type plans. This legislation will foster a competitive, dynamic investment advice marketplace that serves worker needs but also establish a strong, protective framework that safeguards their interests.

SECTION-BY-SECTION ANALYSIS

Section 1. Short title

"Retirement Security Advice Act of 2001."

Section 2. Prohibited transaction exemption for the provision of investment advice

The bill provides a statutory exemption from the prohibited transaction rules of the Employee Retirement Income Security Act (ERISA) and the Internal Revenue Code (a new § 408(b)(14) of ERISA and a new § 4975(d)(14) of the IRC) for: (1) the provision of investment advice regarding plan assets subject to the direction of plan participants and beneficiaries plan to a plan, its participants and beneficiaries, (2) the sale, acquisition, or holding of securities or other property pursuant to such investment advice, and (3) the direct or indirect receipt of fees or other compensation in connection with providing the advice.

In order to qualify for the exemption, an entity must be a "fiduciary adviser" and must meet a series of detailed requirements. The bill defines the following regulated entities to qualify as fiduciary advisers: registered investment advisers, banks, insurance companies, registered broker-dealers, and the affiliates, employees, agents, or registered representatives of those entities who satisfy the requirements of the applicable insurance, banking and securities laws with respect to the provision of such advice.

The fiduciary adviser, at a time reasonably contemporaneous with the initial delivery of investment advice on a security or other property, must provide a clear and conspicuous written (including electronic) disclosure of: (1) the fees or other compensation that the fiduciary adviser and its affiliates receive relating to the provision of investment advice or a resulting sale or acquisition of securities or other property (including from third parties), (2) any interest of the fiduciary adviser (and its affiliates) in any security or other property recommended, purchased or sold, (3) any limitation placed on the fiduciary's ability to provide advice, (4) the advisory services offered, and (5) that the adviser is acting as a fiduciary of the plan in connection with the provision of such advice; and (6) any information required to be disclosed under applicable securities laws. This disclosure must be written in a way that the average plan participant could understand the information. This material must be maintained in currently accurate form.

Any investment advice provided to participants or beneficiaries may be implemented (through a purchase or sale of securities or other property) only at their direction.

The terms of the transaction must be at least as favorable to the plan as an arm's length transaction would be, and the compensation received by the fiduciary adviser (and its affiliates) in connection with any transaction must be reasonable. The fiduciary adviser must also provide a written acknowledgement that it is acting as a fiduciary of the plan to the plan sponsor.

Fiduciary advisers must comply with a six-year record-keeping requirement (for records necessary to determine whether the conditions of the exemption have been met).

A plan sponsor or other fiduciary that arranges for a fiduciary adviser to provide investment advice to participants and beneficiaries has no duty to monitor the specific investment advice given by the fiduciary adviser to any particular recipient of advice. The plan sponsor or other fiduciary retains the duty of prudent selection and periodic review of the fiduciary adviser. The fiduciary adviser must acknowledge in writing to the plan sponsor that it is acting as a fiduciary of the plan with respect to the advice provided. Plan assets may be used to pay for the expenses of providing investment advice to participants and beneficiaries.

Section 3. Effective date

The provisions of H.R. 2269 shall apply with respect to advice provided on or after January 1, 2002.

EXPLANATION OF AMENDMENTS

The provisions of the substitute are explained in this report.

COMMITTEE ON EDUCATION AND THE WORKFORCE

ROLL CALL 1 **BILL** H.R. 2269 **DATE** October 3, 2001
AMENDMENT NUMBER 2 **DEFEATED** 20 – 20
SPONSOR/AMENDMENT Mr. Andrews / Amendment in the Nature of a Substitute

MEMBER	AYE	NO	PRESENT	NOT VOTING
Mr. BOEHNER, Chairman		X		
Mr. PETRI, Vice Chairman		X		
Mrs. ROUKEMA		X		
Mr. BALLENGER		X		
Mr. HOEKSTRA		X		
Mr. McKEON				X
Mr. CASTLE		X		
Mr. JOHNSON		X		
Mr. GREENWOOD				X
Mr. GRAHAM		X		
Mr. SOUDER		X		
Mr. NORWOOD				X
Mr. SCHAFFER				X
Mr. UPTON				X
Mr. HILLEARY		X		
Mr. EHLERS		X		
Mr. TANCREDO				X
Mr. FLETCHER		X		
Mr. DEMINT		X		
Mr. ISAKSON		X		
Mr. GOODLATTE		X		
Mrs. BIGGERT		X		
Mr. PLATTS				X
Mr. TIBERI		X		
Mr. KELLER		X		
Mr. OSBORNE		X		
Mr. CULBERSON		X		
Mr. MILLER	X			
Mr. KILDEE	X			
Mr. OWENS	X			
Mr. PAYNE	X			
Mrs. MINK	X			
Mr. ANDREWS	X			
Mr. ROEMER	X			
Mr. SCOTT	X			
Ms. WOOLSEY	X			
Ms. RIVERS	X			
Mr. HINOJOSA				X
Mrs. McCARTHY	X			
Mr. TIERNEY	X			
Mr. KIND				X
Ms. SANCHEZ	X			
Mr. FORD	X			
Mr. KUCINICH	X			
Mr. WU	X			
Mr. HOLT	X			
Ms. SOLIS	X			
Ms. DAVIS	X			
Ms. McCOLLUM	X			
TOTALS	20	20		9

COMMITTEE ON EDUCATION AND THE WORKFORCE

ROLL CALL 2 **BILL** H.R. 2269 **DATE** October 3, 2001

H.R. 2269 was ordered favorably reported as amended by a vote of 29 – 17

SPONSOR/AMENDMENT Mr. Petri / motion to report the bill to the House with an amendment in the nature of a substitute and with the recommendation that the bill as amended do pass

MEMBER	AYE	NO	PRESENT	NOT VOTING
Mr. BOEHNER, Chairman	X			
Mr. PETRI, Vice Chairman	X			
Mrs. ROUKEMA	X			
Mr. BALLENGER	X			
Mr. HOEKSTRA	X			
Mr. McKEON	X			
Mr. CASTLE	X			
Mr. JOHNSON	X			
Mr. GREENWOOD	X			
Mr. GRAHAM	X			
Mr. SOUDER	X			
Mr. NORWOOD				X
Mr. SCHAFFER	X			
Mr. UPTON				X
Mr. HILLEARY	X			
Mr. EHLERS	X			
Mr. TANCREDO	X			
Mr. FLETCHER	X			
Mr. DEMINT	X			
Mr. ISAKSON	X			
Mr. GOODLATTE	X			
Mrs. BIGGERT	X			
Mr. PLATTS	X			
Mr. TIBERI	X			
Mr. KELLER	X			
Mr. OSBORNE	X			
Mr. CULBERSON	X			
Mr. MILLER		X		
Mr. KILDEE		X		
Mr. OWENS		X		
Mr. PAYNE		X		
Mrs. MINK		X		
Mr. ANDREWS		X		
Mr. ROEMER		X		
Mr. SCOTT		X		
Ms. WOOLSEY		X		
Ms. RIVERS		X		
Mr. HINOJOSA				X
Mrs. McCARTHY	X			
Mr. TIERNEY		X		
Mr. KIND		X		
Ms. SANCHEZ		X		
Mr. FORD		X		
Mr. KUCINICH		X		
Mr. WU	X			
Mr. HOLT	X			
Ms. SOLIS		X		
Ms. DAVIS	X			
Ms. McCOLLUM		X		
TOTALS	29	17		3

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 allows employers to provide workers access to professional investment advice provided that the advisers disclose any fees or potential conflicts through amendments to the Employee Retirement Income Security Act (ERISA). 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.

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.

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. This bill allows employers to provide workers access to professional investment advice provided that the advisers disclose any fees or potential conflicts through amendments to the Employee Retirement Income Security Act (ERISA). As such, the bill does not contain any unfunded mandates.

Budget Authority and Congressional Budget Office 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 cost estimate for H.R. 2269 from the Director of the Congressional Budget Office:

U.S. Congress,
Congressional Budget Office,
Washington, DC, October 9, 2001.

Hon. John A. Boehner,
Chairman, Committee on Education and the Workforce,
House of Representatives, Washington, DC.

Dear Mr. Chairman: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 2269, the Retirement Security Advice Act of 2001.

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

Sincerely,

Barry B. Anderson
(For Dan L. Crippen, Director).

Enclosure.

H.R. 2269—Retirement Security Advice Act of 2001

H.R. 2269 would amend the Employee Retirement Income Security Act of 1974 (ERISA) and the Internal Revenue Code so that employer-sponsored retirement plans may provide plan participants with direct access to fiduciary advisers. Under current law, employers may not provide participants in their retirement plans with direct access to financial advisers for the purpose of providing individual investment advice. The Congressional Budget Office and the Joint Committee on Taxation estimate that H.R. 2269 would have a negligible effect on federal spending and revenues. Because H.R. 2269 would affect receipts, pay-as-you-go procedures would apply to the bill.

In modifying provisions of ERISA and the Internal Revenue Code, the legislation also would establish certain requirements that must be followed by advisers who are provided by plan sponsors. H.R. 2269 would require that fiduciary advisers must disclose to employees all fees, as well as any financial holdings or potential conflicts that could affect their investment advice. Fees collected though such advice would not be subject to the excise taxes imposed by section 4975 of the Internal Revenue Code. The bill would also require advisers to act in the best financial interest of the employee and to maintain records related to such advice for at least six years. Finally, the bill states that employers would not be legally or financially responsible for the investment advice given to its employees.

H.R. 2269 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would not affect the budgets of state, local, or tribal governments.

The CBO staff contact for this estimate is Geoffrey Gerhardt. The estimate was approved by Peter H. Fontaine, Deputy Assistant Director for Budget Analysis.

Statement of General Performance Goals and Objectives

In accordance with clause (3)(c) of House Rule XIII, the goals of H.R. 2269 to allow employers to provide workers access to professional investment advice provided that the advisers disclose any fees or potential conflicts through amendments to the Employee Retirement Income Security Act (ERISA). The Committee expects the Department of Labor to implement the changes to the law in accordance with these stated goals.

Constitutional Authority Statement

Under clause 3(d)(1) of rule XIII of the Rules of the House of Representatives, the Committee must include a statement citing the specific powers granted to Congress in the Constitution to enact the law proposed by H.R. 2269. The Employee Retirement Income Security Act (ERISA) has been determined by the federal courts to be within Congress' Constitutional authority. In *Commercial Mortgage Insurance, Inc.* v. *Citizens National Bank of Dallas,* 526 F. Supp. 510 (N.D. Tex. 1981), the court held that Congress legitimately concluded that employee benefit plans so affected interstate commerce as to be within the scope of Congressional powers under Article 1, Section 8, Clause 3 of the Constitution of the United States. In *Murphy* v. *WalMart Associates' Group Health Plan,* 928 F. Supp. 700 (E.D. Tex 1996), the court upheld the preemption provisions of ERISA. Because H.R. 2269 modifies but does not extend the federal regulation of pensions, the Committee believes that the Act falls within the same scope of Congressional authority as ERISA.

COMMITTEE ESTIMATE

Clause 3(d)(2) of rule XIII of the Rules of the House of Representatives requires an estimate and a comparison by the Committee of the costs that would be incurred in carrying out H.R. 2269. 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 rule XIII of the Rules of the House of Representatives, 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):

SECTION 408 OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974

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

(i) the investment of assets of the plan are subject to the direction of plan participants or beneficiaries,

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

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

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

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

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

(iii) the direct or indirect receipt of fees or other compensation by the fiduciary adviser or an affiliate thereof (or any employee, agent, or registered representative of the fiduciary adviser or affiliate) in connection with the provision of the advice or in connection with a sale, acquisition, or holding of a security or other property pursuant to the advice.

* * * * * * *

(g) REQUIREMENTS RELATING TO PROVISION OF INVESTMENT ADVICE BY FIDUCIARY ADVISERS.—

(1) IN GENERAL.—The requirements of this subsection are met in connection with the provision of investment advice referred to in section 3(21)(A)(ii) provided to an employee benefit plan or a participant or beneficiary of an employee benefit plan by a fiduciary adviser with respect to the plan in connection with any sale, acquisition, or holding of a security or other property for purposes of investment of amounts held by the plan, if—

(A) in the case of the initial provision of the advice with regard to the security or other property by the fiduciary adviser to the plan, participant, or beneficiary, the fiduciary adviser provides to the recipient of the advice, at a time reasonably contemporaneous with the initial provision of the advice, a written notification (which may consist of notification by means of electronic communication)—

(i) 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,

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

(iii) of any limitation placed on the scope of the investment advice to be provided by the fiduciary adviser with respect to any such sale, acquisition, or holding of a security or other property,

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

(v) that the adviser is acting as a fiduciary of the plan in connection with the provision of the advice,

(B) 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,

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

(D) 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

(E) 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.

(2) STANDARDS FOR PRESENTATION OF INFORMATION.—The notification required to be provided to participants and beneficiaries under paragraph (1)(A) shall be written in a clear and conspicuous manner and in a manner calculated to be understood by the average plan participant and shall be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of the information required to be provided in the notification.

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

(4) MAINTENANCE FOR 6 YEARS OF EVIDENCE OF COMPLIANCE.—A fiduciary adviser referred to in paragraph (1) who has provided advice referred to in such paragraph shall, for a period of not less than 6 years after the provision of the advice, maintain any records necessary for determining whether the requirements of the preceding provisions of this subsection and of subsection (b)(14) have been met. A transaction prohibited under section 406 shall not be considered to have occurred solely because the records are lost or destroyed prior to the end of the 6-year period due to circumstances beyond the control of the fiduciary adviser.

(5) 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 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 arrangement require compliance by the fiduciary adviser with the requirements of this subsection, and

(iii) the terms of the 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 pru-

dent selection and periodic review of a fiduciary adviser with whom the plan sponsor or other person enters into an arrangement for the provision of 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).

(6) 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 by the person to the plan or to a participant or beneficiary 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 section 408(b)(4),

(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 any of clauses (i) through (v) who satisfies the requirements of applicable insurance, banking, and securities laws relating to the provision of the advice.

(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).

* * * * * * *

SECTION 4975 OF THE INTERNAL REVENUE CODE OF 1986

SEC. 4975. TAX ON PROHIBITED TRANSACTIONS.

(a) * * *

* * * * * * *

(d) EXEMPTIONS.—Except as provided in subsection (f)(6), the prohibitions provided in subsection (c) shall not apply to—

(1) * * *

* * * * * * *

(14) any transaction required or permitted under part 1 of subtitle E of title IV or section 4223 of the Employee Retirement Income Security Act of 1974, but this paragraph shall not apply with respect to the application of subsection (c)(1) (E) or (F); **[**or**]**

(15) a merger of multiemployer plans, or the transfer of assets or liabilities between multiemployer plans, determined by the Pension Benefit Guaranty Corporation to meet the requirements of section 4231 of such Act, but this paragraph shall not apply with respect to the application of subsection (c)(1) (E) or (F)**[**.**]***; or*

(16) If the requirements of subsection (f)(7) are met—

(A) the provision of investment advice referred to in subsection (e)(3)(B) provided by a fiduciary adviser (as defined in subsection (f)(7)(C)(i)) to a plan or to a participant or beneficiary of a plan,

(B) the sale, acquisition, or holding of securities or other property (including any extension of credit associated with the sale, acquisition, or holding of securities or other property) pursuant to such investment advice, and

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

* * * * * * *

(f) OTHER DEFINITIONS AND SPECIAL RULES.—For purposes of this section—

(1) * * *

* * * * * * *

(7) REQUIREMENTS FOR EXEMPTION FOR INVESTMENT ADVICE PROVIDED BY FIDUCIARY ADVISERS.—

(A) IN GENERAL.—The requirements of this paragraph are met in connection with the provision of advice referred to in subsection (e)(3)(B), provided to a plan or a participant or beneficiary of a plan by a fiduciary adviser with respect to such plan, in connection with any sale or acquisition of a security or other property for purposes of investment of amounts held by such plan, if—

(i) in the case of the initial provision of such advice by such fiduciary adviser to such plan, participant, or beneficiary, the fiduciary adviser provides to the plan, participant, or beneficiary, at the time of or before the

initial provision of such advice, a description, in writing or by means of electronic communication, of—

(I) all fees or other compensation relating to such 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 such advice or in connection with such acquisition or sale,

(II) any material affiliation or contractual relationship of the fiduciary adviser or affiliates thereof in such security or other property,

(III) any limitation placed on the scope of the investment advice to be provided by the fiduciary adviser with respect to any such sale or acquisition, and

(IV) the types of services offered by the fiduciary advisor in connection with the provision of investment advice by the fiduciary adviser,

(ii) in the case of the initial or any subsequent provision of such advice to such plan, participant, or beneficiary, the fiduciary adviser, throughout the 1-year period following the provision of such advice, maintains the information described in subclauses (I) through (IV) of clause (i) in currently accurate form for availability, upon request and without charge, to the recipient of such advice,

(iii) the fiduciary adviser provides appropriate disclosure, in connection with any such acquisition or sale, in accordance with all applicable securities laws,

(iv) such acquisition or sale occurs solely at the discretion of the recipient of such advice,

(v) the compensation received by the fiduciary adviser and affiliates thereof in connection with such acquisition or sale is reasonable, and

(vi) the terms of such acquisition or sale are at least as favorable to such plan as an arm's length transaction would be.

(B) MAINTENANCE OF RECORDS.—A fiduciary adviser referred to in subparagraph (A) who has provided advice referred to in such subparagraph shall, for a period of not less than 6 years after the provision of such advice, maintain any records necessary for determining whether the requirements of the preceding provisions of this subsection and of subsection (d)(16) have been met. A prohibited transaction described in subsection (c)(1) shall not be considered to have occurred solely because the records are lost or destroyed prior to the end of the 6-year period due to circumstances beyond the control of the fiduciary adviser.

(C) DEFINITIONS.—For purposes of this paragraph and subsection (d)(16)—

(i) 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 by such person to the plan or to a participant or beneficiary 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 (d)(4),

(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 subclauses (I) through (IV), or

(VI) an employee, agent, or registered representative of a person described in any of subclauses (I) through (V).

(ii) AFFILIATE.—The term "affiliate" means an affiliated person, as defined in section 2(a)(3) of the Investment Company Act of 1940 (15 U.S.C. 80a–2(a)(3)).

(iii) REGISTERED REPRESENTATIVE.—The term "registered representative" means a person described in section 3(a)(18) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(18)) or section 202(a)(17) of the Investment Advisers Act of 1940 (15 U.S.C. 80b–2(a)(17)).

* * * * * * *

MINORITY VIEWS

We agree with the majority that our pension system should enable pension plan participants and beneficiaries to obtain qualified investment advice when they seek it. Unfortunately, we do not have agreement with the majority as to the conditions under which individuals could receive self-interested investment advice. The majority has made some modifications to the introduced bill to improve the worker protections in H.R. 2269. However, we believe there remain four areas in which the bill must be strengthened: (1) minimum advisor qualifications, (2) meaningful disclosure, (3) access to independent advice, and (4) appropriate remedies for advisor breach of duty. The substitute offered at Committee by Subcommittee on Employer-Employee Relations ranking member Andrews addressed each of these remaining concerns. Both H.R. 2269 and the Andrews substitute make clear that employers would not liable for the advice provided and that advisors are to be treated as fiduciaries under ERISA (the Employee Retirement Income Security Act). We urge the majority to continue to modify the bill as noted below to ensure that the interests of pension plan participants and beneficiaries are adequately protected.

Background

Approximately 42 million workers have what are known as participant directed pension accounts in which they may direct their own contributions among three or more investments. Many workers have told their employers and others that they would like more guidance as to how to invest their pension monies. Many employers have responded to these requests and there is a growing market in the provision of investment education and advice. According to the Deloitte & Touche 2001 Annual 401(k) Benchmarking Survey, 60% of employers offer investment advice. In 1999, the Institute of Management and Administration reported that 49% of surveyed pension plans providing advice used a single bundled provider. Fifty-one percent used different outside parties. Employers not providing education or advice have cited their reasons as lack of interest, cost, or fear of liability if imprudent advice is provided.

The financial services industry is very interested in providing additional levels of education and advice to pension plan participants. The industry would like to provide a comprehensive set of services to individuals and develop long-term relationships involving some or all of an individual's assets and savings. In fact, it should be noted, this legislation has been advanced not by the groups who represent pension plan participants, but by the industry that would benefit from it. The leading participant/worker representatives strongly oppose this legislation (AARP, AFL–CIO, Consumers Federation, Pension Rights Center).

The financial services industry has by and large been providing either investment education and/or advice to pension plans and participants. Education generally can be provided with few restrictions and advice also may be provided if there is no conflict of interest. There is a fairly well developed market of independent advisors and most of the large financial investment firms have contracted with independent firms to provide advice. MPower, an independent provider, has found that at least 65% of participants receive advice from firms using independent advisors. The only groups that remain restricted are those firms that wish to provide specific investment advice on their own products where they receive different fees for each investment selected.

A fundamental premise of our pension law is that one may not exercise discretionary authority to manage or administer assets in which one has a financial or other conflict of interest. There are limited statutory and regulatory exemptions to this rule for cases determined to be in the interest of participants and beneficiaries. These strict protections generally have been an important component of our pension system ensuring that trillions of dollars are invested solely to provide retirement income to millions of workers and their families.

Some members of the minority believe that a general prohibited transaction exemption should not be granted. They believe that the potential for fraud and abuse is too great. It would be too easy for a financial advisor to steer individuals to the investments that earn him or her the highest fees. Even a 1% shift in investments could yield investment managers millions or billions of dollars, would significantly reduce retirement earnings, and be extremely hard to prove and remedy in court. There have been numerous recent investigations and reports that have alleged or documented widespread conflicts of interest in the financial services industry. At a time when growing numbers of workers must depend on their employer pension savings to supplement inadequate Social Security benefits, it is believed that we should not take the risk that needed savings will be reduced or jeopardized.

But, a larger group of minority members is willing to support an exemption for conflicted advisors provided sufficient worker protections are provided. We appreciate the willingness of the majority to seriously consider our concerns and the steps they have taken so far to strengthen the protections of H.R. 2269. We believe there remain four areas in which H.R. 2269 requires additional modifications: (1) minimum qualifications for investment advisors, (2) meaningful disclosure, (3) availability of independent advice, and (4) meaningful remedies for fiduciary breach of duty.

(1) Minimum qualifications for investment advisors

H.R. 2269 does not set minimum standards for investment advisors qualified under the Act. The bill permits regulated industries to provide advice, i.e., banks, insurance companies and securities firms. However, the bill does not set any standards for their employees who provide advice. Unqualified advisors would be permitted to provide advice. It also permits the affiliates of named entities to qualify as advisors. The bill would allow an employee, agent or registered representative of an otherwise qualified entity to give advice as long as they satisfy existing securities, banking or insurance laws relating to advice. In areas where there are not federal or state standards for investment advisors any employee could act as an advisor.

The Andrews substitute would make clear that the employees of the firm offering investment advice meet minimum competency and supervision standards. The substitute limits coverage of affiliates and allows individuals who actually are regulated under existing law to provide advice. The substitute also allows registered representatives of the regulated entity to provide advice as long as they qualify under the Securities and Exchange Act section 3(a)(18) and Investment Adviser Act section 202(a)(17). Under such, a registered representative must be a partner, officer, or director, or a person that is controlled by such a qualified individual. The banking industry has a similar qualification standard that we believe would meet our criteria for designation by the Secretary of Labor.

However, it does not appear that such a standard exists in the insurance industry. Insurance companies are regulated by the states and there is no standard qualification for insurance agents. In California, for example, an agent must pass a written examination prepared and administered by the state department of insurance. However, in Washington state, an agent only need meet the following qualifications (1) be at least eighteen years of age, (2) be a resident of and actually reside in the state, and (3) be trustworthy and competent. We believe the insurance industry is fully able to develop minimum standards to ensure that its employees are able to provide advice. We would not dictate a standard to them or any other industry that does not have advice qualifications standards, but instead authorize the Secretary of Labor to determine when an industry's advisors have met sufficient competency standards. While we recognize that this would require some industries to develop qualification standards, we have been assured that it can be accomplished without undue effort. We believe this additional modification is necessary to ensure that only trained qualified persons may provide investment advice affecting the retirement security of millions of workers.

(2) Meaningful disclosure

We appreciate the efforts of the majority to improve the adequacy of the disclosure provided under the bill. We believe several additional modifications are necessary to ensure that disclosure is adequate and meaningful to the average individual. The Andrews substitute provided for a Department of Labor (DOL) model disclosure notification form. Anyone who has ever purchased a stock or invested in a mutual fund knows how complicated and voluminous currently provided securities forms are. The average individual needs a simple yet meaningful disclosure. The Departments of Labor and Treasury have been extremely successful in developing model forms for spousal consent, divorce decrees (QDROs), and mental health parity compliance. These models, even when not required, quickly become the industry standard for disclosure of information.

A DOL model disclosure form would ensure that all information is similarly provided. It also would help ensure that advisors are required to provide disclosure for each investment option in which they or their firm have a financial or other interest. The current wording of H.R. 2269 is not specific enough to make clear that the disclosure must separately disclose the fees or other compensation received for each and every investment option. It would be very easy for different advisors to selectively interpret the current wording.

In fact, the majority states in its views that it intends for disclosure to be a flexible standard that each advisor would be able to interpret. This is a prescription for failure. Financial concepts and terminology are confusing enough to the average individual, compound that with conflicts of interest, and participants are certain to be misled. The proponents of H.R. 2269 claim that disclosure is the cure to an otherwise fatal conflict. But, in order to seriously consider permitting potential conflicts of interest, it is essential that disclosure to participants be honest, straightforward, and meet universal criteria.

The majority also makes some reference to its intent that the disclosure requirements under the bill should be consistent with those under securities law, including in timing and sufficiency. This was never discussed at committee and thus, its application has not been documented. We believe further documentation would be necessary before securities and ERISA disclosure could be harmonized. Especially since it is our understanding that the disclosure required by the bill is not identical to or as broad as is required under similar securities law provisions.

Further, the provision permitting a one-time disclosure needs to be strengthened. The bill provides only for contemporaneous disclosure at the initial provision of the advice. All subsequent times no matter how long after the initial disclosure would not require additional disclosure. Perhaps disclosure every single time advice is provided would be overly burdensome. But, the alternative of a one-time disclosure is clearly insufficient. Particularly, when a financial relationship could extend up to 30 or 40 years.

Also, permitting plans to provide disclosure electronically is troublesome, especially if provided after advice is delivered. We understand the desires of industry to make financial transactions as easy and paper free as possible, but sometimes written documentation is required to protect both sides. At a minimum, electronic disclosure should be consistent with Labor and Treasury regulations that permit individuals to request written documentation.

(3) Availability of independent advice

The issue that most divides us is the issue of the option to receive independent advice. if this issue is really about enabling individuals to receive quality investment advice, then they should be able to select their advisors. An individual's choice should not be solely to accept conflicted advice or decline advice. This does not serve the interests of participants and beneficiaries.

The financial services industry claims they cannot accept a "choice" system because it would be duplicative and more costly. But, choice does not mean that individuals would get two advisors. It means some will choose one and others another. Some market efficiency may be lost to the conflicted firm, but to the extent financial service firms want to tie their products together that is not in the best interests of participants and consumers and raises antitrust concerns.

As to the cost issue, the costs here are minimal. Most large financial service firms offer investment advice without charge as part of their one charge pension administration fee. Even the firms that only provide advice charge less than $50 per person per year for their services. The key type of advice being offered is a computer model that given certain personal information will make recommendations about how to allocate retirement contributions among the pension plan's investment options. There may also be group seminars on retirement investing, assorted brochures and emails, and the availability of a counselors, by telephone or in person. Personal detailed advice usually is only provided for a separate specific fee, often in the hundreds of dollars. Further, advice usually is paid by the plan (the participants' money) or by the participants.

The majority also notes the possibility that independent advisors also could become conflicted. We share the majority's concern that this could happen. However, the fact that the independent firms do not sell their own investment funds and do not earn differential fees for products recommended is a significant protection. Also, the independent firm's relationship would be similar to that of a accountant and other plan service providers whom service providers contract with or a widespread basis. The Andrews substitute would require the Department of Labor to annually review advisors on a sample basis. It also would ensure that the Secretary of Labor sample the accuracy of advisors disclosures, advice provided, complaints, and computer model formulas to ensure that participants are protected. We would welcome other recommendations from the majority and others to minimize potential for conflicts or other abuses.

The Andrews substitute provides that whenever a conflicted advisor offers advice that an independent advisor also is available. This would allow plan participants and beneficiaries to have a choice in selecting an advisor and increase the likelihood that individuals will trust and follow that advice. It is a low cost alternative that makes the need for investment advice meaningful.

(4) Meaningful remedies for fiduciary breach of duty

Finally, there is the issue of meaningful remedies for an advisor's breach of fiduciary duty. As the majority notes in its report, ERISA was written at a time when the predominant form of pension plan was a defined benefit plan and the plan, not individuals, had accounts and decision-making authority. Also, as the majority notes the intention of the drafters of ERISA was to make available a broad concept of trust law remedies, equitable and legal. The majority tries to note a few cases in which participants have received what might be considered reasonable recourse through monetary restitution of the benefit lost, not money damages for economic losses. But, the majority failed to cite the greater volume of cases in which the courts have either held that ERISA is unclear on available remedies or does not provide an adequate remedy.

Twenty-five years after a the enactment of ERISA, the courts remain unresolved as to what damages are permitted under ERISA because the words of ERISA do not match either its intent or legislative history. In fact, two days before the Committee mark-up of H.R. 2269 the Sixth Circuit decided in *Helfrich* v. *PNC Bank,* that a 401(k) participant could not recover for the monies he lost because the plan administrator failed to transfer his pension funds into higher earning mutual funds, and instead his pension account was placed in lower earning money market funds (2001 FED Ap. 0348P (6th Cir.). the majority also mentions the availability of civil finds and criminal penalties, but both are rarely awarded or pursued.

As the Department to floor stated last year in its letter opposing the bill, the * * *" Act would effectively leave retirement plan participants and beneficiaries vulnerable to bad and, in some cases, conflicted investment advice with little or no meaningful recourse if they rely on it." The Department also expressed concern that under the bill advisers might not be subject to state law remedies for the advice they provide to plans or participants and an ERISA cause of action would be difficult.

Under ERISA's main section on breach of fiduciary duty (section 409), if a fiduciary breaches its duty to a plan (note not a participant), the plan may bring a civil action to recover monies lost and require the disgorgement of any profits made by the breach. In addition, the plan may ask the court and in the court's discretion it may bar the fiduciary from further action as a fiduciary. Because section 409 does not provide a right to individuals, the courts also have interpreted section 502(a)(3) as a catchall providing that permits actions for breach of fiduciary duty, but with recovery limited to equitable relief.

There are several weaknesses in existing ERISA legal remedies. First, ERISa's specific cause of action for breach of fiduciary duty only provides for recovery to the plan, not to an individual. Second, ERISA provides that any individual may receive attorney's fees if he or she wins his or her case. There are several circuits in which individuals may not recover attorney's fees unless they are seeking to benefit a class of individuals beyond themselves. And there are circuits in which courts will not award fees for certain court expenses or expert witness costs. For these reasons, it can be extremely hard to find an ERISA plaintiffs' attorney because many will not take the risk of not being paid for their work. ERISA cases are not generally contingency fee cases as few attorneys can be recompensed on recovery of a $300 average monthly pension benefit. For many year the committee has advocated for a standard similar to our civil rights laws. Individuals should be awarded prevailing plaintiff's attorney's fees and court expenses.

Third, ERISA has been interpreted by the courts not to permit money damages. The courts have generally interpreted the concepts of "restitution" and "equitable" in a narrow manner only permitting punishment of the wrongdoer, but not redress to his victim. Therefore, it an individual has to sell his or her house at a loss or borrow money and pay high interest fees because they are wrongfully denied their pension, a court will not award compensation for these economic losses. Or if 401(k) pension monies are improperly put in a lower interest earning account, lost earnings may not be recovered. As the majority notes, under traditional trust law and as intended by the drafters of ERISA, such money damages were intended. We welcome the majority's now documented support for this change. If the majority would add the addition of these words to H.R. 2269, the likelihood of democratic support for the bill would be assured.

Finally, the bill needs to be clear on the use of mandatory arbitration and viability of existing state law remedies. Mandatory arbitration of pension and welfare benefit disputes has not been commonplace under ERISA, but is widespread in the securities industry. The minority has asked the majority and industry groups for clarification of their understanding of whether mandatory arbitration would be permissible and has not received a response. This is a growing area of concern in all areas of employment law. Since the Supreme Court held in *Circuit City* v. *Adams* earlier this year that the Federal Arbitration Act applies to all employment contracts, it appears that Congress must be more specific in stating under what conditions its intends arbitration and other forms of non-judicial dispute resolution to apply (532 US 105). Individuals should never be allowed to waive their judicial rights other than in a knowing, voluntary, and post-dispute manner. Congress must also be clear on the applicable of state laws. ERISA generally preempts state laws regulating employee benefits, but exempts other federal laws and state securities laws. H.R. 2269 should be clear that remedies available under federal and state securities laws are not preempted by these amendments.

The Andrews substitute would provide for meaningful remedies for violations of the law. If an advisor breaches his or her fiduciary duty to act solely and prudently in the interests of plan participants, a prevailing plaintiff would be able to recover attorneys' fees and expenses, economic damages and disgorgement of any profits. The substitute also makes clear that both parties must agree to arbitration of any disputes and that state law remedies continue to apply.

In conclusion, H.R. 2269 requires significant additional modification before it can be enacted into law. The supporters of the bill are correct that workers need access to competent investment advice. The challenge is to craft pension law amendments that permit employers and financial service firms to provide non-biased advice services solely in the interests of workers and their families.

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