

HR 1988 WILL CAST A CHILL ON PROVIDING RETIREMENT SAVINGS ADVICE TO AMERICAN WORKERS

JUNE 23, 2009

The Committee on Education and Labor is scheduled to consider the 401(k) Fair Disclosure and Pension Security of 2009 on Wednesday, June 24. It is likely that HR 1988, The Conflicted Investment Advice Prohibition Act of 2009, will be incorporated into the broader legislation. The subcommittee on Health, Employment, Labor and Pensions reported a modified version of HR 1988 on June 16. The bill's author, Representative Rob Andrews, has stated that the modified bill exempts "pre-PPA (Pension Protection Act of 2006) independent advice arrangements" from the requirements of the bill and that he intended to preserve existing Department of Labor rulings on pre-PPA advice.

Unfortunately, the text of HR 1988 appears to be at odds with Representative Andrew's interpretation. While HR 1988 exempts pre-PPA advice that is provided under the "Sun America" or any other DOL Advisory Opinion, or prohibited transaction exemption ruling issued prior to the enactment of the PPA, it requires the Secretary of Labor to prescribe rules imposing new reporting and disclosure rules with respect to these advice products.

HR 1988 directs the Secretary to review each Advisory Opinion and prohibited transaction exemption to determine the extent to which each opinion and exemption "fails to adequately serve the interests of participants and beneficiaries and to be adequately protective of the rights of participants and beneficiaries." Because the Department of Labor applied existing law and took into account the interests of participants and beneficiaries when the original opinions and exemptions were granted, the inference could not be clearer – the legislation questions the validity of the Department's prior decisions.

The need for investment advice is well-documented. Congress can encourage the provision of advice by providing certainty that existing advice programs, which plans and participants rely on successfully, can continue. Mandating this type of directed review and rulemaking by the Department of Labor will place a cloud over advice that has been provided for decades to participants in employer provided retirement plans and may, depending on the results of the rulemaking, impose significant new costs on maintaining or instituting advice programs. Plan sponsors may reconsider if they should be offering advice; and those who do not offer advice will be loathe to add it to their retirement plans at this time. This concern will be

heightened because the bill's overall reach is to prohibit well-qualified firms from providing advice even when there is no financial conflict. The result is predictable – fewer plan participants will receive advice.

Under ERISA, anyone providing investment advice to a plan or its participants or beneficiaries is already a fiduciary and subject to the highest standards of duty. There is no evidence of a violation of these standards, and Representative Andrews has not presented evidence of any problems with the current system. HR 1988 is not necessary. By establishing new barriers for firms who are well-qualified to provide advice, it will result in fewer American workers, including baby-boomers approaching retirement, receiving critically important investment advice.

American Bankers Association

The Financial Services Roundtable

The Investment Company Institute

National Association of Manufacturers

Profit Sharing / 401k Council of America

Securities Industry and Financial Markets Association

Society for Human Resource Management

U.S. Chamber of Commerce