

Pension lobbyists wary of investment advice change

Source: Pensions & Investments
Date: May 4, 2009



AP Photo/Mel Evans

Seeking change: Rep. Rob Andrews introduced the investment advice bill.

Legislation introduced by Rep. Rob Andrews, D-N.J., would dramatically revamp the ground rules for offering investment advice to participants in defined contribution plans.

The legislation also could invalidate the Department of Labor's 2001 SunAmerica advisory opinion, which cleared the way for DC plan service providers to offer advice to plan participants through an affiliated adviser using an independently developed computer model, lobbyists said.

Mr. Andrews, chairman of the House Health, Employment, Labor and Pensions Subcommittee, said the bill is needed to ensure that DC plan participants have access to untainted investment advice.

"During a time where American workers have already lost \$2 trillion in assets due to last year's market downturn, exposing their hard-earned retirement savings to greater risk by allowing advisers to offer them conflicted advice is irresponsible and imprudent," he said in an April 21 statement on the House floor.

Pension and financial industry lobbyists charged that the legislation, if enacted, would result in fewer DC plan participants receiving advice about their investment options.

"Adding additional regulatory requirements will increase compliance costs and result in fewer participants getting advice," said Ed Ferrigno, vice president of Washington affairs, Profit Sharing/401(k) Council of America, Chicago.

"This bill could reduce the number of participants getting advice," added Elizabeth Varley, managing director, government affairs, at the Securities Industry and Financial Markets Association, Washington.

But the bill, the Conflicted Investment Advice Prohibition Act of 2009, has the ringing support of the powerful AARP, Washington.

"We disagree with the industry's support of conflicted investment advice," said David Certner, AARP legislative policy director. "This bill would clarify and improve the law to ensure that individuals will get independent investment advice."

In his statement on the House floor, Mr. Andrews made clear his bill is targeted at killing a Bush administration regulation permitting mutual funds to offer direct one-on-one guidance, without using a computer model, through their own affiliates.

Mutual fund companies have been effectively barred from offering direct advice because of fears that participants might be steered to the companies' own investment offerings. But under the Bush regulation, which has been put on hold by the Obama administration, mutual fund employees would be able to offer one-on-one advice as long as the employees' compensation doesn't depend on the investment options selected by the plan participant, and the advice meets other key provisions (*Pensions & Investments*, Jan. 26).

Mr. Andrews' bill essentially would require mutual funds and other investment companies to offer advice through a computer program. Under the provisions of the bill, the fund company could design the computer software but it must be certified as unbiased by an independent third party. The software also would have to be checked annually to ensure that it remains unbiased, according to the bill.

It's unclear how big of an impact the bill would have on Financial Engines Inc., Palo Alto, Calif., and Ibbotson Associates Inc., Chicago, both of which use computer models to offer advice to participants, because the bill also opens the door for mutual companies to create their own computer models without outside help.

Under the second model of advice permitted by Mr. Andrews' bill, a plan would have to use an adviser who is completely independent and doesn't provide or manage investments for any DC plan. In addition, to qualify as independent under the bill, the adviser's compensation can't depend on the investment options selected, and compensation can't come from any entity affiliated with a fund that has DC plan assets.

"It will help independent investment advisers who are not affiliated with financial institutions that provide investment products," said R. Bradford Huss, senior adviser to the American Society of Pension Professionals & Actuaries government affairs committee and an ERISA attorney with the law firm Trucker Huss APC, San Francisco.

"The key intent of the bill is to help plan participants get unconflicted advice. ASPPA supports it because we feel this is the most appropriate way for participants to receive unconflicted investment advice," he added.

Pension and financial industry lobbyists are concerned that, along with slamming the door on the Bush administration's effort to loosen the advice regulations, Mr. Andrews' bill also could undermine existing advice arrangements offered under the DOL's SunAmerica advisory opinion.

Under the SunAmerica opinion, mutual funds can offer advice to plan participants when that advice is generated by a computer model created by an independent third party, such as Financial Engines or Ibbotson Associates.

"We like SunAmerica," said SIFMA's Ms. Varley. "This (bill) calls into question whether SunAmerica will be valid going forward."

"I'm not sure it was intended, but I find this bill troubling because it appears to invalidate 10 years of Labor Department advisory opinions on investment advice as well as prohibited transaction exemptions dating back to the enactment of ERISA," added Melanie Nussdorf, a partner in the law firm Steptoe & Johnson LLP, Washington.

However, Peng Chen, Ibbotson president, said he didn't believe the bill would affect the SunAmerica opinion. "I think these parameters mostly help clarify and promote independent advice and remove potential conflicts of interest," he said.

In addition, while Mr. Chen said the Andrews bill would permit mutual fund companies and other plan providers to create their own computer programs to advise plan participants, he believes most plans will continue to use independent third parties such as Ibbotson to generate their advice — both to save money and remove any appearance of conflict from their advice arrangements.

The bill has been referred to the House Education and Labor Committee.