

**MEMO# 13674**

June 25, 2001

# **REPRESENTATIVE BOEHNER REINTRODUCES INVESTMENT ADVICE BILL**

[13674] June 25, 2001 TO: PENSION COMMITTEE No. 40-01 INVESTMENT ADVICE AD HOC COMMITTEE No. 2-01 RE: REPRESENTATIVE BOEHNER REINTRODUCES INVESTMENT ADVICE BILL On June 21, 2001, Representative John Boehner (R-OH), Chairman of the House Committee on Education and the Workforce, introduced H.R. 2269, the "Retirement Security Advice Act of 2001" (the "Bill"). The Bill was introduced with 18 cosponsors. The Bill is substantively identical to H.R. 4747, the investment advice bill introduced by Representative Boehner last year and approved by the House Subcommittee on Employer-Employee Relations in July 2000.<sup>1</sup> As you are aware, the Bill largely adopts the approach proposed by the Institute.<sup>2</sup> The Bill would provide a statutory exemption from ERISA's prohibited transaction rules for the provision of investment advice and related transactions. Under the exemption, "fiduciary advisers," who by definition would be ERISA fiduciaries, would be permitted to provide investment advice to employee benefit plans and participants and beneficiaries of such plans. I. Scope of Exemption Under the Bill, the statutory exemption would permit (i) "the provision of investment advice referred to in section 3(21)(A)(ii) provided by a fiduciary adviser . . . to an employee benefit plan or to a participant or beneficiary of an employee benefit plan," (ii) "the sale, acquisition, or holding of securities or other property (including any lending of money or other extension of credit associated with the sale, acquisition, or holding of securities or other property) pursuant to such investment 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 1 See Institute Memorandum to Pension Committee No. 51-00 and Ad Hoc Committee on Investment Advice, dated July 20, 2000. See also Institute Memorandum to Pension Committee No. 43-00 and Ad Hoc Committee on Investment Advice, dated June 27, 2000 (description of H.R. 4747 as introduced by Rep. John Boehner). 2 See Institute Memorandum to Pension Committee No. 19-00 and Pension Operations Advisory Committee No. 18-00, dated March 17, 2000 (Institute Testimony to House Subcommittee on Employer-Employee Relations on ERISA Reform). See also Institute Memorandum to Pension Committee No. 17-00 and Ad Hoc Committee on Investment Advice, dated February 23, 2000 (Institute proposal on investment advice). 2such investment advice." The Bill includes a parallel exemption under the Internal Revenue Code from the Code's prohibited transaction rules. II. Definition of "Fiduciary Adviser" The Bill would define "fiduciary adviser" as "a person who is a fiduciary of the plan by reason of the provision of investment advice" and who qualifies as one of the following entities: • a registered investment adviser under the Investment Advisers Act of 1940 or applicable state law, • a bank or similar

financial institution “referred to in section 408(b)(4)” of ERISA, • an insurance company qualified to do business under the laws of a state, • a registered broker or dealer under the Securities Exchange Act of 1934, • an affiliate, “as defined in section 2(a)(3) of the Investment Company Act of 1940,” of these qualifying institutions, or • an employee, agent, or registered representative, as “described in section 3(a)(18) of the Securities Exchange Act of 1934 or section 202(a)(17) of the Investment Advisers Act of 1940,” of the qualifying institutions.

III. Exemption Conditions To qualify under the statutory exemption, the fiduciary adviser would be required to satisfy the following conditions.

A. Disclosure Requirements. At the time of or before the initial provision of investment advice, the fiduciary adviser must provide to the recipient of the advice “a clear and conspicuous description” of the following: • “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 the acquisition or sale of securities or other property, • “any material affiliation or contractual relationship” of the fiduciary adviser or its affiliates in such security or other property, • “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 • “the types of services offered by the fiduciary adviser in connection with the provision of investment advice.” This description may be provided in writing, “including by means of electronic communication.” In addition, during the 1-year period following the provision of advice or any subsequent provision of advice, the fiduciary adviser would be required to maintain the information described above in “currently accurate form for availability, upon request and without charge, to the recipient of such advice.” Furthermore, the fiduciary adviser must provide appropriate disclosures in accordance with all applicable securities laws.

3B. Direction of Advice Recipient. Any sale or acquisition of a security or other property relating to the advice must occur “solely at the direction of the recipient of such advice.”

C. Reasonable Compensation. The compensation received by the fiduciary adviser and its affiliates “in connection with such acquisition or sale” must be “reasonable.”

D. Arm’s Length Transaction. The terms of the acquisition or sale must be “at least as favorable to such plan as an arm’s length transaction would be.”

E. Recordkeeping Requirement. The fiduciary adviser must maintain for a period of at least 6 years after the provision of advice any records necessary for determining whether the requirements of the statutory exemption were met. However, a prohibited transaction would not be considered to have occurred solely because such records are lost or destroyed prior to the end of the 6-year period due to circumstances beyond the control of the fiduciary adviser.

IV. Clarification of Employer Role The Bill would clarify the extent of a plan sponsor’s responsibilities under ERISA if it engages a “fiduciary adviser” to provide advice under this exemption. Specifically, under the Bill, a “plan sponsor or other person who is a fiduciary” would not be treated as failing to meet the requirements of Part 4 of ERISA (which includes the fiduciary duties under ERISA section 404) “solely by reason of the provision of investment advice . . . (or solely by reason of contracting for or otherwise arranging for the provision of such investment 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, and (ii) the terms of the arrangement require the fiduciary adviser to comply with the requirements of the statutory exemption. Furthermore, the plan sponsor or other fiduciary would have no duty to “monitor the specific investment advice given by the fiduciary adviser to any particular recipient of such advice.” The “plan sponsor or other person who is a fiduciary,” however, would be responsible for the “prudent selection and periodic review of a fiduciary adviser” that it has engaged.

V. Use of Plan Assets The Bill would clarify that plan assets may be used to pay for “reasonable expenses in providing investment advice referred to in section 3(21)(A)(ii)” of ERISA.

VI. Effective Date The Bill would apply to investment advice provided on or after

January 1, 2002. 4Copies of the Institute's press release regarding the Bill, a press release by the House Committee on Education and the Workforce, and the text of the Bill are attached. Thomas T. Kim Assistant Counsel Attachments Attachment no. 1 (in .pdf format)

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