



NASAA

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March 20, 2006

The Honorable Michael B. Enzi  
379A Russell Senate Office Building  
Washington, DC 20510

RE: H.R. 2830 – the Pension Security and Transparency Act of 2005/Pension Protection Act of 2005

Dear Senator Enzi:

The North American Securities Administrators Association<sup>1</sup> is concerned over two provisions in H. R. 2830, the Pension Protection Act of 2005, that would diminish current protections afforded to investors who are saving for their financial futures. By way of background, the responsibilities of NASAA members include regulatory authority over investment advisers whose assets under management are less than \$25 million, and all investment adviser representatives of state and federal investment advisers.

### **Definition of Plan Asset Vehicle**

Section 305(g) in H.R. 2830 has the potential to weaken investor protections of pension plan participants invested in hedge funds. This provision would significantly loosen the current ERISA rules that make hedge funds and their managers “trustees” pursuant to ERISA if more than 25% of the fund’s assets are pension assets. H.R. 2830 raises this limit to 50% of funds assets by revising the definition of “plan assets” in Section 305(g).

It is vitally important to protect the assets held in private pension funds. Liberalizing the fiduciary standards that apply to managers of pension assets is the wrong response to current problems of underfunded pensions, poor pension investment performance and possible fraud in connection with many pensions.

Hedge funds lack the transparency and liquidity of publicly registered mutual funds or publicly traded stocks. Federal pension law should not create an incentive for pension assets to be concentrated in lightly regulated and non-transparent vehicles like hedge funds.

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<sup>1</sup> The oldest international organization devoted to investor protection, the North American Securities Administrators Association, Inc., was organized in 1919. Its membership consists of the securities administrators in the 50 states, the District of Columbia, the U.S. Virgin Islands, Canada, Mexico and Puerto Rico. NASAA is the voice of securities agencies responsible for grass-roots investor protection and efficient capital formation.

Pension plan assets must be handled with special caution because they represent an irreplaceable nest egg for many small investors. Current ERISA rules draw a sensible line by allowing a hedge fund to include a certain level of pension assets (up to 25% of the hedge fund's assets) without imposing ERISA trustee responsibilities on the fund.

If a hedge fund includes more than 25% pension assets, it is appropriate that the hedge fund should be treated like any other manager of pension assets, and be subject to the ERISA trustee requirements. In order to protect the interests of retirees, we urge the conferees **not** to include this language, which does not appear in the Senate version, in the final bill.

### **Investment Advice**

NASAA shares your goal of making it easier for employees to obtain professional advice on investment choices in their 401(k) plans. Having said that, we are concerned that Section 601 in the House version of H.R. 2830 eliminates the conflict of interest provisions in current law that prohibit firms whose funds are among the employees investment choices from also advising plan members about which funds to choose. Section 601 would replace ERISA's prohibition on conflicts of interest with a disclosure model that we believe is inadequate to protect the retirement savings of plan participants. Simply put, the House language would allow investment firms to offer advice to participants in 401(k) plans even if the firms' mutual funds are among employees' investment choices. We are not convinced that disclosure alone would prevent an investment firm from recommending their own funds even if a competitor offered a better choice.

NASAA believes that the investment advice provisions of S. 1783, the Pension Security and Transparency Act of 2005, contain heightened protections for investors. They would maintain the existing prohibition on direct advice from fund firms, but would allow employers to hire registered investment advisers and broker-dealers to advise employees about their plans. Sections 802 and 803 provide a safe harbor for employers from liability related to the specific investment advice offered to their employees as long as they make a good faith effort to designate and monitor qualified advisers who provide plan participants with independent investment advice. This is a sensible approach that will provide increased access to investment advice for plan participants and liability protection for employers.

Thank you for considering the views of NASAA. Please do not hesitate to contact me, or Deborah House, NASAA's Director of Policy, if we may be of assistance during your deliberations on these issues.

Sincerely,

A handwritten signature in black ink, appearing to read 'Patricia D. Struck', with a long horizontal stroke extending to the right.

Patricia D. Struck  
NASAA President  
Wisconsin Securities Administrator