

# United States Senate

WASHINGTON, DC 20510-3704

March 16, 2006

The Honorable Charles Grassley, Chairman  
The Honorable Max Baucus, Ranking Member  
Senate Committee on Finance  
219 Dirksen Senate Office Building  
Washington, DC 20510

Dear Chairman Grassley and Ranking Member Baucus:

I write to applaud your leadership on the Senate passage of the Pension Security and Transparency Act of 2005 (S. 1783). I also want to thank you for including in the bill provisions and issues from the retirement bill that Senator Conrad and I introduced (S. 1359), such as automatic enrollment, the safest available annuity provision, clarification of the treatment of Tribal governments and the treatment of excess contributions. These provisions, in combination with the other provisions of S. 1783, will help create a fairer, more efficient private retirement plan system and will lead to greater retirement security for millions of Americans.

As you move to conference on S. 1783, I ask that you consider important refinements of some of the above provisions. First, I understand that certain retirement plans not covered by ERISA – specifically, church plans and certain section 403(b) plans maintained by tax-exempt organizations – will not be able to use the automatic enrollment provision to the fullest extent. The bill amends ERISA to preempt state laws that may prohibit automatic contribution arrangements. However, non-ERISA plans do not benefit from this preemption and therefore would remain subject to any applicable state law restrictions. In addition, the bill's fiduciary protection for default investments applies to fiduciary liabilities that may arise under ERISA. Any fiduciary duties applicable to non-ERISA plans originate from sources other than ERISA, and as a result, these plans could continue to be subject to fiduciary risks in choosing a default investment. I share the goal of extending automatic enrollment provisions to all participants. Accordingly, I ask that you broaden the scope of these provisions in conference so that they apply outside of ERISA as well to church plans and non-ERISA 403(b) plans maintained by tax-exempt organizations.

I also am concerned about the ability of companies to use the automatic contribution trust safe harbor. It is extremely common for plans to base contributions on "base pay", *i.e.*, regular pay without overtime, bonuses or other special pay. Unfortunately, most of these plans will not be able to use the bill's automatic contribution trust safe harbor. This is because the plans will not know until after the end of the year whether it is permissible to use base pay under the safe harbor. And if it is not permissible, the safe harbor becomes unavailable. Companies will not adopt the automatic contribution trust safe harbor design unless they know they can qualify for the safe harbor. Therefore, I ask that you address this problem regarding the automatic contribution trust safe harbor - - and the existing nondiscrimination safe harbors – by facilitating

the use of base pay under the safe harbors. This will make the bill's provision more widely available to plans across the country.

I also ask that you include legislative history regarding the safest available annuity provision. This proposal directs the Secretary of Labor to clarify the fiduciary duties applicable in choosing annuity options available under a defined contribution plan. It is important that the Secretary be given a clear indication that the level of fiduciary scrutiny in this regard be comparable to the level applicable in choosing investment options under a defined contribution plan.

Finally, S. 1783 contains a provision directing the Secretary of Labor to establish a federal interagency task force on older workers. This task force would be required to identify disincentives to work in current pension law and develop legislative and regulatory proposals to address such deterrents. The portion of our population that is over the age of 65 will grow significantly over the next few years. Therefore, to avoid future labor shortages and a "brain drain" of experienced talent, it is critical that we develop policies that encourage older Americans to stay in the workforce longer. A coordinated effort through an interagency task force focusing on pension law is an important first step. Therefore, I ask that you ensure that the provision creating a federal task force on older workers is in the final pension bill.

Thank you again for your leadership in the Senate passage of a bill that will enhance retirement security for millions of Americans.

Warm Regards,

A handwritten signature in black ink, appearing to read "G. H. Smith", with a long horizontal flourish extending to the right.

Gordon H. Smith  
United States Senate