

When we are trying to make investment advice more accessible and affordable, I do not see any sense in driving up costs and compliance effort by, in effect, forcing employers to select and monitor two advisors instead of just one.

Finally, the substitute creates huge problems with ERISA's remedy structure and would subject employers to a stream of unfair and costly lawsuits by reversing the burden of proof and dramatically increasing ERISA's already intimidating remedies provisions. The substitute also erodes ERISA's careful preemption which gives employers legal certainty and clarity amongst our 50 States.

The underlying bill is meant to make very minor change to ERISA to allow employers to offer investment advice to their employees. H.R. 2269 works within the existing ERISA structure to do this without affecting ERISA's important protections or modifying the flexibility that courts have to fashion appropriate remedies within ERISA.

Amending ERISA's remedy structure will likely have unintended consequences on all ERISA claims. And before significantly changing ERISA's structure, we should look at the remedies offered in more detail. ERISA's current remedies structure permits courts to flexibly fashion appropriate remedies, including attorneys' fees, economic damages, disgorgement of profits, and banning advisors. Moreover, reversing the assumption of proof will not protect plan participants, but will only line the pockets of trial attorneys. So I urge my colleagues to vote against the substitutes for these reasons.

Put yourself in the place of an employer. Why would you offer investment advice to your workers if your litigation risks were so high that you might lose your entire business? Or in the place of an advisor, why would you even try to enter the investment advice market when, by doing so, would subject yourself to 50 different standards of litigation, 50 States under a standard of proof that guarantees you costly litigation, even if you have done nothing wrong?

H.R. 2269 effectively protects plan participants in a way that still makes employer-provided investment advice economically viable to employers and their employees. The fiduciary duty that it imposes on employers and advisers alike is the highest duty of loyalty in the law. Its disclosure requirements are actually more consumer friendly than the Andrews-Rangel substitute because it requires disclosure on an annual basis, or when there is a material change in disclosure. And it provides for the most vital consumer protection of all, a vibrant competitive marketplace, by opening the field to many of the most highly regarded investment advice firms in the country. The underlying bill reaches the right balance of increasing worker access to advice while safeguarding the interests

of the American workers without discouraging employers from offering any advice at all.

Mr. Speaker, the Andrews-Rangel substitute, I do not believe, will protect workers; and I do think it will discourage any employer from offering advice. This will not help workers that desperately need this kind of advice to try to increase their own retirement securities. So I urge my colleagues to oppose the substitute.

Mr. Speaker, I reserve the balance of my time.

Mr. ANDREWS. Mr. Speaker, I yield myself 30 seconds.

The liability provisions in this substitute do not impose new liability upon employers. What they do is impose new responsibility and liability upon advisors who breach their fiduciary duty.

And the employer-protection provisions in this substitute are essentially identical to those in the underlying bill.

Mr. Speaker, I yield 4 minutes to the gentleman from Washington (Mr. McDERMOTT), a member of the Committee on Ways and Means.

Mr. McDERMOTT. Mr. Speaker, I rise in support of the Andrews-Rangel substitute. I told a story earlier which sort of makes you wonder about why it is that the employee groups are not here saying this is such a good deal. Where is the AFL-CIO? Why are they not running in here? Why is the AARP not coming in here saying we want old folks to have this investment? Because the bill is not a good one, that is why.

Now, the substitute that has been offered, really deals with the four issues that we need to deal with: one is the disclosure of conflicts, and that has to be done in a way that people actually hear it and know what is going on. Under the disclosure requirements contained in this substitute, plan participants or beneficiaries under the plan would receive adequate disclosure of fees and other compensation that would be received by the advisor with respect to the product being recommended.

□ 1300

So they would know at the time they are getting this pitch, who is doing what.

Secondly, the qualification of advisors. We hear a lot of talk about banks are regulated. Yes, banks are regulated. But the fact is that under the Investors' Advisors Act, that is, the Federal law that controls advisors on money, banks are exempted. So all this talk about banks are regulated, blah, blah, blah, but not in this area. Our substitute closes that loophole.

Now, the ability to get some nonconflicted advice, investors should be able to have at least two, one that is selling something and someone who is not selling something.

The fourth area is the question of remedies. If someone sells us something, and most Americans do not

know what is going on in the stock market, if somebody says this is the thing to buy, and they know that it is about to take a dive, maybe they have even sold short. Who knows? I do not know that. Here is somebody that is gives me that advice. We close that possibility by the conflicted question, and then we give a remedy.

Mr. Speaker, to do any less than this is to say to people, yes, we are going to give Members another chance. Maybe Members can get it in the Senate or in the conference committee; or maybe we will pass a bill next year and fix this. This ought to be fixed right now. We have the opportunity. We know what the problems are.

We have the chairman suggesting he agrees with the gentleman from North Dakota (Mr. POMEROY). We should be able to do it. There is a real question here that we cannot do what we all agree from the chairman on down is the thing to do. I urge Members to vote for this Andrews-Rangel substitute, and then we will have a pretty good bill.

PERMISSION TO POSTPONE FURTHER CONSIDERATION OF H.R. 2269

Mr. FLETCHER. Mr. Speaker, I ask unanimous consent that during consideration of H.R. 2269 pursuant to House Resolution 288, notwithstanding the operation of the previous question, the Chair may postpone further consideration of the bill to a time designated by the Speaker on this legislative day.

The SPEAKER pro tempore (Mr. LAHOOD). Is there objection to the request of the gentleman from Kentucky?

There was no objection.

Mr. FLETCHER. Mr. Speaker, I yield 3 minutes to the gentleman from Texas (Mr. SAM JOHNSON).

(Mr. SAM JOHNSON of Texas asked and was given permission to revise and extend his remarks.)

Mr. SAM JOHNSON of Texas. Mr. Speaker, we talk about two advisors. I do not know how we keep both of them from being bad. As I mentioned, our measure removes the obstacles for employers to provide millions of workers professional investment advice.

The bill requires financial service providers to fully disclose their fees and any potential conflicts. In this bill's current form, we protect people from fly-by-night groups and scam artists looking to make a fast buck.

There are a number of safeguards that will protect workers and ensure that they receive investment advice on their 401(k) plans that is in their best interest. The pension fund managers at corporations and unions who make decisions about their defined benefit funds have access to professional portfolio managers. Now this bill will give rank and file the same protections.

The Democrat substitute will not help people. It will just add layers of bureaucracy and could prevent people from seeking advice. People value their

time, and they do not have time to seek and sift through paperwork and bureaucracy and two advisors. Importantly, our bill retains critical safeguards and includes new protections to guarantee that people receive sound investment advice. Since employees will work with a plan fiduciary advisor, people will be protected by State law, Federal law, as well as the SEC. People value their time, and they do not have time to sift through a whole bunch of new regulations. That is just wrong.

Mr. Speaker, I urge my colleagues to reject the Democrat substitute and pass H.R. 2269 the way it is.

Mr. ANDREWS. Mr. Speaker, I yield 3 minutes to the gentlewoman from California (Ms. WOOLSEY).

(Ms. WOOLSEY asked and was given permission to revise and extend her remarks.)

Ms. WOOLSEY. Mr. Speaker, as I said earlier, H.R. 2269 is a prime example of how a good idea can become a bad bill. Is it a good idea to make investment advice available to employees at the work site? Of course it is. But it is a bad idea to allow self-interested advisors, those who could benefit from the advice given, into the workplace. That is exactly what H.R. 2269 does.

Currently ERISA prohibits investment advisors from coming to a workplace to provide employees with investment advice if there is any reason to think that the advisor might benefit from recommending one investment over another. We must remember that ERISA was enacted to protect workers from abuses related to their benefits.

With H.R. 2269, we will allow investment sales folks onto the work premises under the guise of the employers' endorsement without protecting the workers significantly, or at least enough to make sure that they are in good hands when they have heard the advice.

Fortunately, we have an alternative to H.R. 2269, and that is the Andrews substitute. We do not need to wait for employees to be bilked by some scam artist to make H.R. 2269. We can pass the Andrews amendment and then we have a good bill.

The Andrews substitute starts with the same good idea of bringing investment advisors to the workplace, but the Andrews substitute includes strict standards to protect employees from receiving tainted advice. The Andrews substitute requires meaningful disclosure of the advisors' affiliations in a way that is easily understandable to all employees, and it allows employees to meet with an independent advisor if there is a conflict of interest.

The Andrews substitute keeps the good idea of making investment advice available to employees at the workplace, but it builds on the protections in current laws that employees need and must depend on. The Andrews substitute is a win-win for employees, and I urge my colleagues to support it as the correct and safe way to provide investment advice at the workplace.

Mr. FLETCHER. Mr. Speaker, I yield 3 minutes to the gentleman from North Carolina (Mr. BALLENGER).

Mr. BALLENGER. Mr. Speaker, as an employer with employees who have 401(k) plans back home, I am pleased that the House is voting on a bill to ensure professional investment advice for rank-and-file workers and their individual needs.

I urge my colleagues to reject the Andrews-Rangel substitute which would, in fact, reduce the number of employers and financial advisors willing to offer their advice to employees. This is just the opposite of what the worker needs at a time when they are nervous about their retirement assets. It is just more government regulation.

The substitute is bad because it increases the cost for advisory services by requiring two fiduciary advisors as options. It undermines the current ERISA remedies, and erodes the preemption statute, and adds more Federal regulation in areas already regulated by Federal and State entities, areas in which the Department of Labor has no expertise. And it reverses the burden of proof in lawsuits against employers and financial advisors which surely will attract our friends, the trial lawyers. It will reduce the number of employers that are willing to have a 401(k) plan.

Mr. Speaker, it is important that my colleagues support the bipartisan Boehner bill endorsed by Labor, Commerce, Department of Treasury, along with the National Association of Manufacturers and the National Rural Electric Coop. These groups speak for a great many of the employers and employees in my district, and I support the Boehner bill as a much-needed update of the current law.

This bill gives protection and access to today's employees who seek investment advice to maximize their retirement savings. The primary focus of this act is to give participants advice solely in their best interest. The bill achieves this by including strict disclosure requirements, with sanctions, to inform plan participants about any potential fees or conflicts of interest in what average investors have today.

Most important, workers will have full control over their investment decisions. I urge the House to reject the substitute amendment and pass the Boehner bill today.

Mr. ANDREWS. Mr. Speaker, I reserve the balance of my time.

Mr. FLETCHER. Mr. Speaker, I yield such time as he may consume to the gentleman from Georgia (Mr. ISAKSON).

Mr. ISAKSON. Mr. Speaker, the intentions of the gentleman from New Jersey (Mr. ANDREWS) in the substitute are as noble as the intentions of the authors of the underlying bill, but I happen to favor the underlying bill for a couple of reasons that, hopefully, Members will listen closely to.

To be against the underlying bill and for the substitute, Members have to presume we cannot trust employees or

IRA-SEP beneficiaries, independent contractors, to have information and then make a decision.

Secondly, and most importantly, Members need to understand that most Americans today, unlike 25 years ago, are going to need to depend on 401(k)s, IRA-SEPs or other self-directed plans for their retirement. I ran as a trustee of a 401(k) plan for my company for 22 years, offered an IRA-SEP plan for the 800 contractors we had.

I understand the firewall that prohibits the employer from giving any advice and the limited amount of advice that becomes accessible to either IRA-SEP or 401(k) beneficiaries.

It is wrong to presume that an employer would intentionally, willfully or wantfully allow bad advice to come to their employees. To the contrary, it is the security blanket which binds those people to the company. In this time when we are needing the best information possible, we should trust our employees to be able to allow access for their employees and independent contractors to credible, competent financial advice.

In the substitute, Members trust the Department of Labor to determine who can give the right advice. In the underlying bill, Members trust the employer, whose most valued asset is their employees, to be able to offer credible advice through advisors to their employees and independent contractors.

Mr. Speaker, I urge Members to adopt the underlying bill and reject the substitute.

Mr. FLETCHER. Mr. Speaker, I yield 2 minutes to the gentleman from Indiana (Mr. SOUDER).

(Mr. SOUDER asked and was given permission to revise and extend his remarks.)

Mr. SOUDER. Mr. Speaker, I rise in opposition to the motion to recommit of the gentleman from New Jersey (Mr. ANDREWS). I understand some of his concerns and share some of the gentleman's concerns, but I wanted to speak because overall this is a very strong bill. It is one that we need to pass.

I believe that some of the comments that have been made here in this debate have been inappropriate and indeed anticapitalist and antibusiness. To argue that workers should not get financial advice or to argue that businesses are somehow going to trick their employees or bring in charlatans is in many ways beyond the pale of debate here in Congress.

Quite frankly, some advice may be bad; but much of the advice out in the financial world is bad right now. Employees, at present, can go to the Internet and get all sorts of mail at home that has no anchor. No employer is completely infallible. No employer can bring in somebody who is going to give perfect advice that everybody is going to get rich from.

□ 1315

But I would say that most employers in America are not like Samuel Insull from the 1900s. Give me a break.

Most employers know that if they brought in somebody with a conflict of interest, that would be out there and informed at their plant immediately. If they had somebody who was a charlatan ripping off, you would have all sorts of contract negotiation problems, not to mention that if it is a smaller company that is not unionized, the people probably have their kids go to school in the same place, they eat in the same restaurants, they live in the same town. To imply that employers are somehow likely to want to rip off their employees or give them bad advice at a time when this would be a way to help them and improve their relations with their own workforce is absurd.

The problem is that our law is arcane. It has been out of date for a number of years. As more and more employees in America have flexibility, they need to have the same advice that the management is getting, that the business leaders are getting and we should not discriminate against employees.

Mr. ANDREWS. Mr. Speaker, I yield 2½ minutes to the gentleman from Tennessee (Mr. FORD).

Mr. FORD. Mr. Speaker, I am a little disappointed that we are actually in the midst of having this debate today before actually completing work on an aviation security bill and before completing work on a stimulus package for people all across this great Nation. Hopefully, the encouraging news we have heard today about progress being made on that bill will not only give assurance or perhaps provide a vehicle for us to pass something before we leave here but provide the American people with some comfort as they prepare to travel on the busiest holiday of the year.

I rise today, Mr. Speaker, with a lot of disappointment about the package that has come before the House and with great concern. I rise to support the gentleman from New Jersey (Mr. ANDREWS), who has worked so tirelessly with Members on both sides of the aisle to find some sort of agreement acceptable, one that would balance the needs of advisors with investors. I might add that the Andrews substitute achieves the twin goals of investor education and choice far better than the base bill. The substitute offered by the gentleman from New Jersey presents the best opportunity, particularly in my eyes and I am sure many even on the other side, to achieve these goals.

First, the Andrews substitute would ensure that individuals were aware of all potential conflicts by requiring that the disclosure be contemporaneous with each occasion on which advice is rendered, something all of us should be for. Although most advisors would act professionally and be up front, as we would say, this provision would prevent an unscrupulous firm from burying one line of disclosure boiler plate in a 10-page document filled with legalese.

Second, the substitute would ensure that the advice is provided by qualified, licensed and regulated professionals. This provision would simply ensure that the advice is at least as good as they promised it to be. I have heard my friends on the other side talk about this, and why we do not guarantee this and mandate this is beyond me.

Finally, as the gentleman from New Jersey said so well in his opening statement, the substitute empowers consumers to make a choice should they determine that a potential conflict necessitates declining that advice, meaning, as the gentleman from New Jersey said, that the advisor would have to consent to providing the investor a different advisor if he or she so chose.

Any Member with misgivings about the scope of this bill should carefully consider the serious implications uncovered in a series of hearings held this past year. I would urge a "yes" vote on the substitute. I have not made my mind up on final passage, but I would certainly urge a "yes" vote on the Andrews substitute.

Mr. ANDREWS. Mr. Speaker, I yield myself such time as I may consume.

The arguments we have heard against the substitute that the gentleman from New York (Mr. RANGEL) and I have put forward essentially boil down to two arguments: one is that employers would get sued if the substitute were adopted; and the second is that investment advice would be too expensive for investment advice firms to give if the substitute were adopted. Each of these arguments is incorrect.

Liability protection provisions in this substitute are essentially identical for employers as those that are in the base bill. If an employer does not engage in any independent act of negligence or illegality, the employer is not liable under the substitute, as is the case in the base bill. In fact, the substitute adds provisions, adds protections to employers which do not exist under present law to provide a safe harbor for employers who hire investment advisors. So the argument that this somehow is going to unleash a flood of litigation against employers is reminiscent of the similar false point made under the patients' bill of rights debate and it is equally wrong.

The second argument that somehow or another the expense that is going to be imposed upon advisor firms is going to preclude them from giving advice is equally wrong. It is not very expensive to tell an employee that there is somewhere else he or she can go to get advice. It took me about 4 seconds to say it. It would not take much longer for the advisor to say it, either. It is not very expensive to say to an investor that before you put your money in this fund, you ought to know that I as your advisor make more money if you put the money in the fund than if you do not. It took me about 4 seconds to say it, and it would take about 4 seconds

for the advisor to say it as well. The additional cost that would be imposed upon investment advice firms I am sure would be gladly borne by those firms in order to win the commissions which they rightfully earn by giving the advice in the first place.

Our substitute, I believe, covers the key grounds. It says that a conflicted advisor must give full, timely and understandable disclosure. It says that every person giving advice, not most people giving advice but every person giving advice must be duly qualified and accountable to lose his or her license if they breach their fiduciary duty.

It says that every person receiving advice from a conflicted advisor must know that there are other choices to whom the person can turn that are not conflicted. And it says that if a fiduciary duty is breached, if bad advice is given and a pensioner or worker suffers, there is somewhere to go to be made whole, not to get back most of what you lost or some of what you lost but to get back all of what you lost if your advisor has broken the law.

Our substitute deserves the support of Members on both sides of the aisle. We respectfully ask its adoption.

Mr. Speaker, I yield back the balance of my time.

Mr. FLETCHER. Mr. Speaker, I yield myself such time as I may consume.

As we come to the close of this debate on the substitute, certainly we appreciate the work of the gentleman from New Jersey and the, I think, attempt to certainly make sure that we protect workers as they get advice on their investments.

As we have seen over the last number of years, and as I recall owning a business and providing retirement plans for my employees, there has been a substantial shift from what we call defined benefits to defined contributions, to the 401(k)s and 403(b)s and other such accounts. It becomes imperative with that shift that we allow advice to be made to the employees and that we do it in such a way where it is efficient, where it does not drive up the administrative cost, and where the employees can be assured that there is the appropriate accountability.

The gentleman from Ohio (Mr. BOEHNER), the chairman of this committee, has worked for over 6 years; and I think he has put together an excellent, balanced bill which meets those requirements. It certainly provides an ability for employers to continue to offer good retirement plans of the defined contribution sort. It also provides the ability for them to offer advice so that their employees can make the best investment and have the most money when they retire at the end of their work livelihood. It additionally provides for great accountability. There is a disclosure that must be made if there are conflicts of interest.

I think the difference we see between these two bills is the balance, of how

much are we going to go toward trying to, what I would say build a box that is padded so no one gets themselves bruised. In a world where we have freedom here, people are going to make mistakes. That is part of what freedom is about. How much are we going to restrict that freedom in order to try to make sure that we protect individuals? There needs to be a balance that is struck, and I think the substitute goes too far. It does not allow the freedom that will encourage businesses to offer the kind of advice that is needed. It will restrict in the long run the ability, and there are differences in the liability sections, there are some very vague portions here where the liability not only to the fiduciary advisor but, as it says on page 33, or any other party with respect to whom a material affiliation or contractual relationship of the fiduciary advisor resulted in a violation of that section, certainly that could include, in the vagueness of it, the employer and possibly any other person. So I think it does open up a substantial liability and some vagueness which makes that liability unpredictable. The bill we are looking at, the base bill, has strong accountability.

When you talk about getting advice from someone, I was even thinking that all the advice that we get in whatever purchases we make, and I go back to the individual who offers me advice on buying suits, a guy named Harlan Logan. He is in Lexington, Kentucky. I know every suit I buy from Harlan Logan, he is going to make money. He should make money. He should be able to make a good, honest living for doing what he says. But that does not keep him from giving me good advice on what he is saying to me, and that is clearly disclosed. In the bill we have here, that conflict of interest, as you call it, is disclosed. It is disclosed at request. It is mandated to be disclosed on an annual basis initially and if there are any significant changes.

I think the substitute bill here, the amendment, really impedes the ability of employers to do what the purpose of this bill intends to do and that is provide employees with good advice and to make sure that they have a good retirement plan.

I would encourage Members to vote against that bill.

Mr. Speaker, I yield the balance of my time to the gentleman from Ohio (Mr. BOEHNER).

Mr. BOEHNER. I thank the gentleman for yielding time.

Mr. Speaker, I want to thank the gentleman from Kentucky (Mr. FLETCHER) for his work on this bill and the gentleman from Texas (Mr. SAM JOHNSON) and all of the work that they have put into it over the last several years. I want to thank the gentleman from New Jersey (Mr. ANDREWS), who has worked closely with me as we have developed this bill. Obviously it does not have as many protections as he would like at this point in time. But as I have pledged to him over the years,

we will continue to work through this process.

We have got a strong bipartisan bill. We have added new protections or at least have an agreement to add some additional protections based on a colloquy I had with the gentleman from North Dakota (Mr. POMEROY). But I think all of us know that the substitute that we have before us just goes way too far. While it is well meaning and well intended, expanding litigation in our country is not going to create an environment for employers or their advisors to want to give investment advice which I believe the substitute does. The extra regulatory burdens that are contained in the substitute will again discourage employers and their advisors from engaging in making sure that the American workers get the kind of investment advice they need if they are going to increase their retirement security.

Why is this investment advice so sorely needed? Because we have got all kinds of problems out there, with people who are underinvested in their self-directed accounts, having their money in low-yield instruments for long periods of time when we know that over a course of 10, 20, 30 years, equities would provide a much greater return and much greater retirement security.

On the other end of the spectrum, we know that we have got employees who are overinvested in one sector or another and we have seen this happen, especially in the technology sector, when people were overinvested in that industry and what has happened to their self-directed accounts over the last 18 months to 2 years.

□ 1330

So we know investment advice is necessary.

We heard the gentleman from Kentucky (Mr. FLETCHER) talk about the advice that he got from his tailor. Let us say that an employee today outside of his employment with his own savings, his or her own money, if they want to go to a broker, a mutual fund, and they ask for advice, guess what? They get all kinds of advice. Why? Because outside of ERISA, outside of an employer-provided plan, there is plenty of advice.

What we are trying to do here is make sure that those same employees within the employer plan have the same kind of access to that advice that they have outside of the employer's plan.

So, Mr. Speaker, I would ask my colleagues to vote no on the Andrews-Rangel substitute and to support final passage.

Mr. FLETCHER. Mr. Speaker, I have no further requests for time, and I yield back the balance of my time.

The SPEAKER pro tempore (Mr. LAHOOD). Pursuant to House Resolution 288, the previous question is ordered on the bill, as amended, and on the amendment offered by the gentleman from New Jersey (Mr. ANDREWS).

Pursuant to the previous order of the House, further consideration of the bill is postponed.

MESSAGE FROM THE SENATE

A message from the Senate by Mr. Monahan, one of its clerks, announced that the Senate has passed with amendments a bill of the House of the following title:

H.R. 2540. An act to amend title 38, United States Code, to make various improvements to veterans benefits programs under laws administered by the Secretary of Veterans Affairs, and for other purposes.

MESSAGE FROM THE PRESIDENT

A message in writing from the President of the United States was communicated to the House by Ms. Wanda Evans, one of his secretaries.

REMOVAL OF NAME OF MEMBER AS COSPONSOR OF H.R. 162

Mr. BONILLA (during debate on H.R. 2269). Mr. Speaker, I ask unanimous consent to have my name removed as a cosponsor of H.R. 162.

The SPEAKER pro tempore. Is there objection to the request of the gentleman from Texas?

There was no objection.

RECESS

The SPEAKER pro tempore. Pursuant to clause 12 of rule I, the Chair declares the House in recess subject to the call of the Chair.

Accordingly (at 1 o'clock and 30 minutes p.m.), the House stood in recess subject to the call of the Chair.

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AFTER RECESS

The recess having expired, the House was called to order by the Speaker pro tempore (Mr. LAHOOD) at 2 o'clock and 39 minutes p.m.

RETIREMENT SECURITY ADVICE ACT OF 2001

The SPEAKER pro tempore. Pursuant to the previous order of the House, proceedings will now resume on the bill, H.R. 2269.

The Clerk read the title of the bill.

The SPEAKER pro tempore. The question is on the amendment in the nature of a substitute offered by the gentleman from New Jersey (Mr. ANDREWS).

The question was taken; and the Speaker pro tempore announced that the noes appeared to have it.

Mr. ANDREWS. Mr. Speaker, I object to the vote on the ground that a quorum is not present and make the point of order that a quorum is not present.

The SPEAKER pro tempore. Evidently a quorum is not present.