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Part 1

# PENSION SECURITY ACT OF 2003

MARCH 18, 2003.—Ordered to be printed

Mr. BOEHNER, from the Committee on Education and the Workforce, submitted the following

# R E P O R T

together with

## MINORITY VIEWS

[To accompany H.R. 1000]

[Including cost estimate of the Congressional Budget Office]

The Committee on Education and the Workforce, to whom was referred the bill (H.R. 1000) to amend title I of the Employee Retirement Income Security Act of 1974 and the Internal Revenue Code of 1986 to provide additional protections to participants and beneficiaries in individual account plans from excessive investment in employer securities and to promote the provision of retirement investment advice to workers managing their retirement income assets, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment is as follows:

Strike all after the enacting clause and insert the following:

**SECTION 1. SHORT TITLE AND TABLE OF CONTENTS.**

(a) SHORT TITLE.—This Act may be cited as the "Pension Security Act of 2003".

(b) TABLE OF CONTENTS.—The table of contents is as follows:



19–006

# TITLE I—IMPROVEMENTS IN PENSION SECURITY

**SEC. 101. PERIODIC PENSION BENEFITS STATEMENTS.**

(a) AMENDMENTS TO THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974.—

(1) REQUIREMENTS.—

(A) IN GENERAL.—Section 105(a) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1025(a)) is amended to read as follows:

"(a)(1)(A) The administrator of an individual account plan shall furnish a pension benefit statement—

"(i) to each plan participant at least annually,

"(ii) to each plan beneficiary upon written request, and

"(iii) in the case of an applicable individual account plan, to each individual who is a plan participant or beneficiary and who has a right to direct investments, at least quarterly.

"(B) The administrator of a defined benefit plan shall furnish a pension benefit statement—

"(i) at least once every 3 years to each participant with a nonforfeitable accrued benefit who is employed by the employer maintaining the plan at the time the statement is furnished to participants, and

"(ii) to a plan participant or plan beneficiary of the plan upon written request.

Information furnished under clause (i) to a participant may be based on reasonable estimates determined under regulations prescribed by the Secretary, in consultation with the Pension Benefit Guaranty Corporation.

"(2) A pension benefit statement under paragraph (1)—

"(A) shall indicate, on the basis of the latest available information—

"(i) the total benefits accrued, and

"(ii) the nonforfeitable pension benefits, if any, which have accrued, or the earliest date on which benefits will become nonforfeitable,

"(B) shall be written in a manner calculated to be understood by the average plan participant, and

"(C) may be provided in written form or in electronic or other appropriate form to the extent that such form is reasonably accessible to the recipient.

"(3)(A) In the case of a defined benefit plan, the requirements of paragraph (1)(B)(i) shall be treated as met with respect to a participant if the administrator, at least once each year, provides the participant with notice, at the participant's last known address, of the availability of the pension benefit statement and the ways in which the participant may obtain such statement. Such notice shall be provided in written, electronic, or other appropriate form, and may be included with other communications to the participant if done in a manner reasonably designed to attract the attention of the participant.

"(B) The Secretary may provide that years in which no employee or former employee benefits (within the meaning of section 410(b) of the Internal Revenue Code of 1986) under the plan need not be taken into account in determining the 3-year period under paragraph (1)(B)(i).".

(B) CONFORMING AMENDMENTS.—

(i) Section 105 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1025) is amended by striking subsection (d).

(ii) Section 105(b) of such Act (29 U.S.C. 1025(b)) is amended to read as follows:

"(b) In no case shall a participant or beneficiary of a plan be entitled to more than one statement described in clause (i) or (ii) of subsection (a)(1)(A) or clause (i) or (ii) of subsection (a)(1)(B), whichever is applicable, in any 12-month period. If such report is required under subsection (a) to be furnished at least quarterly, the requirements of the preceding sentence shall be applied with respect to each quarter in lieu of the 12-month period.".

(2) INFORMATION REQUIRED FROM APPLICABLE INDIVIDUAL ACCOUNT PLANS.—Section 105 of such Act (as amended by paragraph (1)) is amended further by adding at the end the following new subsection:

"(d)(1) The statements required to be provided at least quarterly under subsection (a)(1)(A)(iii) in the case of applicable individual account plans shall include (together with the information required in subsection (a)) the following:

"(A) the value of each investment to which assets in the individual account have been allocated, determined as of the most recent valuation date under the plan, including the value of any assets held in the form of employer securities, without regard to whether such securities were contributed by the plan sponsor or acquired at the direction of the plan or of the participant or beneficiary,

"(B) an explanation, written in a manner calculated to be understood by the average plan participant, of any limitations or restrictions on the right of the participant or beneficiary to direct an investment, and

"(C) an explanation, written in a manner calculated to be understood by the average plan participant, of the importance, for the long-term retirement security of participants and beneficiaries, of a well-balanced and diversified investment portfolio, including a discussion of the risk of holding more than 25 percent of a portfolio in the security of any one entity, such as employer securities.

"(2) The Secretary shall issue guidance and model notices which meet the requirements of this subsection.".

(3) DEFINITION OF APPLICABLE INDIVIDUAL ACCOUNT PLAN.—Section 3 of such Act (29 U.S.C. 1002) is amended by adding at the end the following new paragraph:

"(42)(A) The term 'applicable individual account plan' means any individual account plan, except that such term does not include an employee stock ownership plan (within the meaning of section 4975(e)(7) of the Internal Revenue Code of 1986) unless there are any contributions to such plan (or earnings thereunder) held within such plan that are subject to subsection (k)(3) or (m)(2) of section 401 of the Internal Revenue Code of 1986. Such term shall not include a one-participant retirement plan.

"(B) The term 'one-participant retirement plan' means a pension plan with respect to which the following requirements are met:

"(i) on the first day of the plan year—

"(I) the plan covered only one individual (or the individual and the individual's spouse) and the individual owned 100 percent of the plan sponsor (whether or not incorporated), or

"(II) the plan covered only one or more partners (or partners and their spouses) in the plan sponsor;

"(ii) the plan meets the minimum coverage requirements of section 410(b) of the Internal Revenue Code of 1986 (as in effect on the date of the enactment of this paragraph) without being combined with any other plan of the business that covers the employees of the business;

"(iii) the plan does not provide benefits to anyone except the individual (and the individual's spouse) or the partners (and their spouses);

"(iv) the plan does not cover a business that is a member of an affiliated service group, a controlled group of corporations, or a group of businesses under common control; and

"(v) the plan does not cover a business that leases employees.".

(4) CIVIL PENALTIES FOR FAILURE TO PROVIDE QUARTERLY BENEFIT STATEMENTS.—Section 502 of such Act (29 U.S.C. 1132) is amended—

(A) in subsection (a)(6), by striking "(6), or (7)" and inserting "(6), (7), or (8)";

(B) by redesignating paragraph (8) of subsection (c) as paragraph (9); and

(C) by inserting after paragraph (7) of subsection (c) the following new paragraph:

"(8) The Secretary may assess a civil penalty against any plan administrator of up to $1,000 a day for each day on which the plan administrator has failed to comply with the requirements of clause (iii) of section 105(a)(1)(A) and has not corrected such failure by providing the required pension benefit statements to the affected participants and beneficiaries.".

(5) MODEL STATEMENTS.—The Secretary of Labor shall, not later than 180 days after the date of the enactment of this Act, issue initial guidance and a

model benefit statement, written in a manner calculated to be understood by the average plan participant, that may be used by plan administrators in complying with the requirements of section 105 of the Employee Retirement Income Security Act of 1974. Not later than 75 days after the date of the enactment of this Act, the Secretary shall promulgate interim final rules necessary to carry out the amendments made by this subsection.

(b) AMENDMENTS TO THE INTERNAL REVENUE CODE OF 1986.—

(1) PROVISION OF INVESTMENT EDUCATION NOTICES TO PARTICIPANTS IN CERTAIN PLANS.—Section 414 of the Internal Revenue Code of 1986 (relating to definitions and special rules) is amended by adding at the end the following:

"(w) PROVISION OF INVESTMENT EDUCATION NOTICES TO PARTICIPANTS IN CERTAIN PLANS.—

"(1) IN GENERAL.—The plan administrator of an applicable pension plan shall provide to each applicable individual an investment education notice described in paragraph (2) at the time of the enrollment of the applicable individual in the plan and not less often than annually thereafter.

"(2) INVESTMENT EDUCATION NOTICE.—An investment education notice is described in this paragraph if such notice contains—

"(A) an explanation, for the long-term retirement security of participants and beneficiaries, of generally accepted investment principles, including principles of risk management and diversification, and

"(B) a discussion of the risk of holding substantial portions of a portfolio in the security of any one entity, such as employer securities.

"(3) UNDERSTANDABILITY.—Each notice required by paragraph (1) shall be written in a manner calculated to be understood by the average plan participant and shall provide sufficient information (as determined in accordance with guidance provided by the Secretary) to allow recipients to understand such notice.

"(4) FORM AND MANNER OF NOTICES.—The notices required by this subsection shall be in writing, except that such notices may be in electronic or other form (or electronically posted on the plan's website) to the extent that such form is reasonably accessible to the applicable individual.

"(5) DEFINITIONS.—For purposes of this subsection—

"(A) APPLICABLE INDIVIDUAL.—The term 'applicable individual' means—

"(i) any participant in the applicable pension plan,

"(ii) any beneficiary who is an alternate payee (within the meaning of section 414(p)(8)) under a qualified domestic relations order (within the meaning of section 414(p)(1)(A)), and

"(iii) any beneficiary of a deceased participant or alternate payee.

"(B) APPLICABLE PENSION PLAN.—The term 'applicable pension plan' means—

"(i) a plan described in clause (i), (ii), or (iv) of section 219(g)(5)(A), and

"(ii) an eligible deferred compensation plan (as defined in section 457(b)) of an eligible employer described in section 457(e)(1)(A),

which permits any participant to direct the investment of some or all of his account in the plan or under which the accrued benefit of any participant depends in whole or in part on hypothetical investments directed by the participant. Such term shall not include a one-participant retirement plan or a plan to which section 105 of the Employee Retirement Income Security Act of 1974 applies.

"(C) ONE-PARTICIPANT RETIREMENT PLAN DEFINED.—The term 'one-participant retirement plan' means a retirement plan with respect to which the following requirements are met:

"(i) on the first day of the plan year—

"(I) the plan covered only one individual (or the individual and the individual's spouse) and the individual owned 100 percent of the plan sponsor (whether or not incorporated), or

"(II) the plan covered only one or more partners (or partners and their spouses) in the plan sponsor;

"(ii) the plan meets the minimum coverage requirements of 410(b) without being combined with any other plan of the business that covers the employees of the business;

"(iii) the plan does not provide benefits to anyone except the individual (and the individual's spouse) or the partners (and their spouses);

"(iv) the plan does not cover a business that is a member of an affiliated service group, a controlled group of corporations, or a group of businesses under common control; and

"(v) the plan does not cover a business that leases employees.

"(6) CROSS REFERENCE.—

**"For provisions relating to penalty for failure to provide the notice required by this section, see section 6652(m).".**

(2) PENALTY FOR FAILURE TO PROVIDE NOTICE.—Section 6652 of such Code (relating to failure to file certain information returns, registration statements, etc.) is amended by redesignating subsection (m) as subsection (n) and by inserting after subsection (l) the following new subsection:

"(m) FAILURE TO PROVIDE INVESTMENT EDUCATION NOTICES TO PARTICIPANTS IN CERTAIN PLANS.—In the case of each failure to provide a written explanation as required by section 414(w) with respect to an applicable individual (as defined in such section), at the time prescribed therefor, unless it is shown that such failure is due to reasonable cause and not to willful neglect, there shall be paid, on notice and demand of the Secretary and in the same manner as tax, by the person failing to provide such notice, an amount equal to $100 for each such failure, but the total amount imposed on such person for all such failures during any calendar year shall not exceed $50,000.".

**SEC. 102. INAPPLICABILITY OF RELIEF FROM FIDUCIARY LIABILITY DURING BLACKOUT PERIODS.**

(a) IN GENERAL.—Section 404(c) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1104(c)) is amended by adding at the end the following new paragraph:

"(4)(A) Paragraph (1)(B) shall not apply in connection with the direction or diversification of assets credited to the account of any participant or beneficiary during a blackout period if, by reason of the imposition of such blackout period, the ability of such participant or beneficiary to direct or diversify such assets is suspended, limited, or restricted.

"(B) If the fiduciary authorizing a blackout period meets the requirements of this title in connection with authorizing such blackout period, no person who is a fiduciary shall be liable under this title for any loss occurring during the blackout period as a result of any exercise by the participant or beneficiary of control over assets in his or her account prior to the blackout period. Matters to be considered in determining whether a fiduciary has met the requirements of this title include whether such fiduciary—

"(i) has considered the reasonableness of the expected length of the blackout period,

"(ii) has provided the notice required under section 101(i)(2), and

"(iii) has acted in accordance with the requirements of subsection (a) in determining whether to enter into the blackout period.

"(C) If a blackout period arises in connection with a change in the investment options offered under the plan, a participant or beneficiary shall be deemed to have exercised control over the assets in his or her account prior to the blackout period, if, after reasonable notice of the change in investment options is given to such participant or beneficiary before such blackout period, assets in the account of the participant or beneficiary are transferred—

"(i) to plan investment options in accordance with the affirmative election of the participant or beneficiary, or

"(ii) in any case in which there is no such election, in the manner set forth in such notice.

"(D) Any imposition of any limitation or restriction that may govern the frequency of transfers between investment vehicles shall not be treated as the imposition of a blackout period to the extent such limitation or restriction is disclosed to participants or beneficiaries through the summary plan description or materials describing specific investment alternatives under the plan.

"(E) For purposes of this paragraph, the term 'blackout period' has the meaning given such term by section 101(i)(7).".

(b) GUIDANCE.—The Secretary of Labor shall, on or before December 31, 2004, issue interim final regulations providing guidance on how plan sponsors or any other affected fiduciaries can satisfy their fiduciary responsibilities during any blackout period during which the ability of a participant or beneficiary to direct the investment of assets in his or her individual account is suspended.

**SEC. 103. INFORMATIONAL AND EDUCATIONAL SUPPORT FOR PENSION PLAN FIDUCIARIES.**

Section 404 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1104) is amended by adding at the end the following new subsection:

"(e) The Secretary shall establish a program under which information and educational resources shall be made available on an ongoing basis to persons serving as fiduciaries under employee pension benefit plans so as to assist such persons in diligently and effectively carrying out their fiduciary duties in accordance with this part. Such program shall provide information concerning the practices that define prudent investment procedures for plan fiduciaries. Information provided under the program shall address the relevant investment considerations for defined benefit and defined contribution plans, including investment in employer securities by such plans. In developing such program, the Secretary shall solicit information from the public, including investment education professionals.''.

**SEC. 104. DIVERSIFICATION REQUIREMENTS FOR DEFINED CONTRIBUTION PLANS THAT HOLD EMPLOYER SECURITIES.**

(a) AMENDMENT TO THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974.—Section 204 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1054) is amended—

(1) by redesignating subsection (j) as subsection (k); and

(2) by inserting after subsection (i) the following new subsection:

''(j) DIVERSIFICATION REQUIREMENTS FOR INDIVIDUAL ACCOUNT PLANS THAT HOLD EMPLOYER SECURITIES.—

''(1) IN GENERAL.—An applicable individual account plan shall meet the requirements of paragraphs (2) and (3).

''(2) EMPLOYEE CONTRIBUTIONS AND ELECTIVE DEFERRALS INVESTED IN EMPLOYER SECURITIES.—In the case of the portion of the account attributable to employee contributions and elective deferrals which is invested in employer securities, a plan meets the requirements of this paragraph if each applicable individual may elect to direct the plan to divest any such securities in the individual's account and to reinvest an equivalent amount in other investment options which meet the requirements of paragraph (4).

''(3) EMPLOYER CONTRIBUTIONS INVESTED IN EMPLOYER SECURITIES.—

''(A) IN GENERAL.—In the case of the portion of the account attributable to employer contributions (other than elective deferrals to which paragraph (2) applies) which is invested in employer securities, a plan meets the requirements of this paragraph if, under the plan—

''(i) each applicable individual with a benefit based on 3 years of service may elect to direct the plan to divest any such securities in the individual's account and to reinvest an equivalent amount in other investment options which meet the requirements of paragraph (4), or

''(ii) with respect to any employer security allocated to an applicable individual's account during any plan year, such applicable individual may elect to direct the plan to divest such employer security after a date which is not later than 3 years after the end of such plan year and to reinvest an equivalent amount in other investment options which meet the requirements of paragraph (4).

''(B) APPLICABLE INDIVIDUAL WITH BENEFIT BASED ON 3 YEARS OF SERVICE.—For purposes of subparagraph (A), an applicable individual has a benefit based on 3 years of service if such individual would be an applicable individual if only participants in the plan who have completed at least 3 years of service (as determined under section 203(b)) were referred to in paragraph (5)(B)(i).

''(4) INVESTMENT OPTIONS.—The requirements of this paragraph are met if—

''(A) the plan offers not less than 3 investment options, other than employer securities, to which an applicable individual may direct the proceeds from the divestment of employer securities pursuant to this subsection, each of which is diversified and has materially different risk and return characteristics, and

''(B) the plan permits the applicable individual to choose from any of the investment options made available under the plan to which such proceeds may be so directed, subject to such restrictions as may be provided by the plan limiting such choice to periodic, reasonable opportunities occurring no less frequently than on a quarterly basis.

''(5) DEFINITIONS AND RULES.—For purposes of this subsection—

''(A) APPLICABLE INDIVIDUAL ACCOUNT PLAN.—The term 'applicable individual account plan' means any individual account plan, except that such term does not include an employee stock ownership plan (within the meaning of section 4975(e)(7) of the Internal Revenue Code of 1986) unless there are any contributions to such plan (or earnings thereon) held within such plan that are subject to subsection (k)(3) or (m)(2) of section 401 of the Internal Revenue Code of 1986.

''(B) APPLICABLE INDIVIDUAL.—The term 'applicable individual' means—

''(i) any participant in the plan, and

''(ii) any beneficiary of a participant referred to in clause (i) who has an account under the plan with respect to which the beneficiary is entitled to exercise the rights of the participant.

"(C) ELECTIVE DEFERRAL.—The term 'elective deferral' means an employer contribution described in section 402(g)(3)(A) of the Internal Revenue Code of 1986 (as in effect on the date of the enactment of this subsection).

"(D) EMPLOYER SECURITY.—The term 'employer security' shall have the meaning given such term by section 407(d)(1) of this Act (as in effect on the date of the enactment of this subsection).

"(E) EMPLOYEE STOCK OWNERSHIP PLAN.—The term 'employee stock ownership plan' shall have the same meaning given to such term by section 4975(e)(7) of the Internal Revenue Code of 1986 (as in effect on the date of the enactment of this subsection).

"(F) ELECTIONS.—Elections under this subsection may be made not less frequently than quarterly.

"(6) EXCEPTION WHERE THERE IS NO READILY TRADABLE STOCK.—This subsection shall not apply if there is no class of stock issued by the employer (or by a corporation which is an affiliate of the employer (as defined in section 407(d)(7))) that is readily tradable on an established securities market (or in such other circumstances as may be determined jointly by the Secretary of Labor and the Secretary of the Treasury in regulations).

"(7) TRANSITION RULE.—

"(A) IN GENERAL.—In the case of any individual account plan which, on the first day of the first plan year to which this subsection applies, holds employer securities of any class that were acquired before such date and on which there is a restriction on diversification otherwise precluded by this subsection, this subsection shall apply to such securities of such class held in any plan year only with respect to the number of such securities equal to the applicable percentage of the total number of such securities of such class held on such date.

"(B) APPLICABLE PERCENTAGE.—For purposes of subparagraph (A), the applicable percentage shall be as follows:

| "Plan years for which provisions are effective: | Applicable percentage: |
|---|---|
| 1st plan year | 20 percent. |
| 2nd plan year | 40 percent. |
| 3rd plan year | 60 percent. |
| 4th plan year | 80 percent. |
| 5th plan year or thereafter | 100 percent. |

"(C) ELECTIVE DEFERRALS TREATED AS SEPARATE PLAN NOT INDIVIDUAL ACCOUNT PLAN.—For purposes of subparagraph (A), the applicable percentage shall be 100 percent with respect to—

"(i) employee contributions to a plan under which any portion attributable to elective deferrals is treated as a separate plan under section 407(b)(2) as of the date of the enactment of this paragraph, and

"(ii) such elective deferrals.

"(D) COORDINATION WITH PRIOR ELECTIONS.—In any case in which a divestiture of investment in employer securities of any class held by an employee stock ownership plan prior to the effective date of this subsection was undertaken pursuant to other applicable Federal law prior to such date, the applicable percentage (as determined without regard to this subparagraph) in connection with such securities shall be reduced to the extent necessary to account for the amount to which such election applied.

"(8) REGULATIONS.—The Secretary of the Treasury shall prescribe regulations under this subsection in consultation with the Secretary of Labor.".

(b) AMENDMENTS TO THE INTERNAL REVENUE CODE OF 1986.—

(1) IN GENERAL.—Section 401(a) of the Internal Revenue Code of 1986 (relating to requirements for qualification) is amended by inserting after paragraph (34) the following new paragraph:

"(35) DIVERSIFICATION REQUIREMENTS FOR DEFINED CONTRIBUTION PLANS THAT HOLD EMPLOYER SECURITIES.—

"(A) IN GENERAL.—An applicable defined contribution plan shall meet the requirements of subparagraphs (B) and (C).

"(B) EMPLOYEE CONTRIBUTIONS AND ELECTIVE DEFERRALS INVESTED IN EMPLOYER SECURITIES.—In the case of the portion of the account attributable to employee contributions and elective deferrals which is invested in employer securities, a plan meets the requirements of this subparagraph if each applicable individual in such plan may elect to direct the plan to divest any such securities in the individual's account and to reinvest an equivalent amount in other investment options which meet the requirements of subparagraph (D).

"(C) EMPLOYER CONTRIBUTIONS INVESTED IN EMPLOYER SECURITIES.—

"(i) IN GENERAL.—In the case of the portion of the account attributable to employer contributions (other than elective deferrals to which subparagraph (B) applies) which is invested in employer securities, a plan meets the requirements of this subparagraph if, under the plan—

"(I) each applicable individual with a benefit based on 3 years of service may elect to direct the plan to divest any such securities in the individual's account and to reinvest an equivalent amount in other investment options which meet the requirements of subparagraph (D), or

"(II) with respect to any employer security allocated to an applicable individual's account during any plan year, such applicable individual may elect to direct the plan to divest such employer security after a date which is not later than 3 years after the end of such plan year and to reinvest an equivalent amount in other investment options which meet the requirements of subparagraph (D).

"(ii) APPLICABLE INDIVIDUAL WITH BENEFIT BASED ON 3 YEARS OF SERVICE.—For purposes of clause (i), an applicable individual has a benefit based on 3 years of service if such individual would be an applicable individual if only participants in the plan who have completed at least 3 years of service (as determined under section 411(a)) were referred to in subparagraph (E)(ii)(I).

"(D) INVESTMENT OPTIONS.—The requirements of this subparagraph are met if—

"(i) the plan offers not less than 3 investment options, other than employer securities, to which an applicable individual may direct the proceeds from the divestment of employer securities pursuant to this paragraph, each of which is diversified and has materially different risk and return characteristics, and

"(ii) the plan permits the applicable individual to choose from any of the investment options made available under the plan to which such proceeds may be so directed, subject to such restrictions as may be provided by the plan limiting such choice to periodic, reasonable opportunities occurring no less frequently than on a quarterly basis.

"(E) DEFINITIONS AND RULES.—For purposes of this paragraph—

"(i) APPLICABLE DEFINED CONTRIBUTION PLAN.—The term 'applicable defined contribution plan' means any defined contribution plan, except that such term does not include an employee stock ownership plan (within the meaning of section 4975(e)(7)) unless there are any contributions to such plan (or earnings thereon) held within such plan that are subject to subsection (k)(3) or (m)(2).

"(ii) APPLICABLE INDIVIDUAL.—The term 'applicable individual' means—

"(I) any participant in the plan, and

"(II) any beneficiary of a participant referred to in clause (i) who has an account under the plan with respect to which the beneficiary is entitled to exercise the rights of the participant.

"(iii) ELECTIVE DEFERRAL.—The term 'elective deferral' means an employer contribution described in section 402(g)(3)(A) (as in effect on the date of the enactment of this paragraph).

"(iv) EMPLOYER SECURITY.—The term 'employer security' shall have the meaning given such term by section 407(d)(1) of the Employee Retirement Income Security Act of 1974 (as in effect on the date of the enactment of this paragraph).

"(v) EMPLOYEE STOCK OWNERSHIP PLAN.—The term 'employee stock ownership plan' shall have the same meaning given to such term by section 4975(e)(7) of the Internal Revenue Code of 1986 (as in effect on the date of the enactment of this paragraph).

"(vi) ELECTIONS.—Elections under this paragraph may be made not less frequently than quarterly.

"(F) EXCEPTION WHERE THERE IS NO READILY TRADABLE STOCK.—This paragraph shall not apply if there is no class of stock issued by the employer that is readily tradable on an established securities market (or in such other circumstances as may be determined jointly by the Secretary of the Treasury and the Secretary of Labor in regulations).

"(G) TRANSITION RULE.—

"(i) IN GENERAL.—In the case of any defined contribution plan which, on the effective date of this subsection, holds employer securities of any class that were acquired before such date and on which there is a restriction on diversification otherwise precluded by this paragraph, this paragraph shall apply to such securities of such class held in any plan year only with respect to the number of such securities equal to the applicable percentage of the total number of such securities of such class held on such date.

"(ii) APPLICABLE PERCENTAGE.—For purposes of clause (i), the applicable percentage shall be as follows:

| "Plan years for which provisions are effective: | Applicable percentage: |
|---|---|
| 1st plan year | 20 percent. |
| 2nd plan year | 40 percent. |
| 3rd plan year | 60 percent. |
| 4th plan year | 80 percent. |
| 5th plan year or thereafter | 100 percent. |

"(iii) ELECTIVE DEFERRALS TREATED AS SEPARATE PLAN NOT INDIVIDUAL ACCOUNT PLAN.—For purposes of clause (i), the applicable percentage shall be 100 percent with respect to—

"(I) employee contributions to a plan under which any portion attributable to elective deferrals is treated as a separate plan under section 407(b)(2) of the Employee Retirement Income Security Act of 1974 as of the date of the enactment of this paragraph, and

"(II) such elective deferrals.

"(iv) CONTRIBUTIONS HELD WITHIN AN ESOP.—In the case of contributions (other than elective deferrals and employee contributions) held within an employee stock ownership plan, in the case of the 1st and 2nd plan years referred to in the table in clause (ii), the applicable percentage shall be the greater of the amount determined under clause (ii) or the percentage determined under paragraph (28) (determined as if paragraph (28) applied to a plan described in this paragraph).

"(v) COORDINATION WITH PRIOR ELECTIONS UNDER PARAGRAPH (28).—In any case in which a divestiture of investment in employer securities of any class held by an employee stock ownership plan prior to the effective date of this paragraph was undertaken pursuant to an election under paragraph (28) prior to such date, the applicable percentage (as determined without regard to this clause) in connection with such securities shall be reduced to the extent necessary to account for the amount to which such election applied.

"(H) REGULATIONS.—The Secretary shall prescribe regulations under this paragraph in consultation with the Secretary of Labor.".

(2) CONFORMING AMENDMENTS.—

(A) Section 401(a)(28) of such Code is amended by adding at the end the following new subparagraph:

"(D) APPLICATION.—This paragraph shall not apply to a plan to which paragraph (35) applies.".

(B) Section 409(h)(7) of such Code is amended by inserting before the period at the end "or subparagraph (B) or (C) of section 401(a)(35)".

(C) Section 4980(c)(3)(A) of such Code is amended by striking "if—" and all that follows and inserting "if the requirements of subparagraphs (B), (C), and (D) are met.".

(c) EFFECTIVE DATE.—

(1) IN GENERAL.—Except as provided in paragraph (2) and section 108, the amendments made by this section shall apply to plan years beginning after December 31, 2003, and with respect to employer securities allocated to accounts before, on, or after the date of the enactment of this Act.

(2) EXCEPTION.—The amendments made by this section shall not apply to employer securities held by an employee stock ownership plan which are acquired before January 1, 1987.

**SEC. 105. PROHIBITED TRANSACTION EXEMPTION FOR THE PROVISION OF INVESTMENT ADVICE.**

(a) AMENDMENTS TO THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974.—

(1) EXEMPTION FROM PROHIBITED TRANSACTIONS.—Section 408(b) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1108(b)) is amended by adding at the end the following new paragraph:

"(14)(A) Any transaction described in subparagraph (B) in connection with the provision of investment advice described in section 3(21)(A)(ii), in any case in which—

"(i) the investment of assets of the plan is subject to the direction of plan participants or beneficiaries,

"(ii) the advice is provided to the plan or a participant or beneficiary of the plan by a fiduciary adviser in connection with any sale, acquisition, or holding of a security or other property for purposes of investment of plan assets, and

"(iii) the requirements of subsection (g) are met in connection with the provision of the advice.

"(B) The transactions described in this subparagraph are the following:

"(i) the provision of the advice to the plan, participant, or beneficiary;

"(ii) the sale, acquisition, or holding of a security or other property (including any lending of money or other extension of credit associated with the sale, acquisition, or holding of a security or other property) pursuant to the 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 the advice or in connection with a sale, acquisition, or holding of a security or other property pursuant to the advice.".

(2) REQUIREMENTS.—Section 408 of such Act is amended further by adding at the end the following new subsection:

"(g) REQUIREMENTS RELATING TO PROVISION OF INVESTMENT ADVICE BY FIDUCIARY ADVISERS.—

"(1) IN GENERAL.—The requirements of this subsection are met in connection with the provision of investment advice referred to in section 3(21)(A)(ii), provided to an employee benefit plan or a participant or beneficiary of an employee benefit plan by a fiduciary adviser with respect to the plan in connection with any sale, acquisition, or holding of a security or other property for purposes of investment of amounts held by the plan, if—

"(A) in the case of the initial provision of the advice with regard to the security or other property by the fiduciary adviser to the plan, participant, or beneficiary, the fiduciary adviser provides to the recipient of the advice, at a time reasonably contemporaneous with the initial provision of the advice, a written notification (which may consist of notification by means of electronic communication)—

"(i) of all fees or other compensation relating to the 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 the advice or in connection with the sale, acquisition, or holding of the security or other property,

"(ii) of any material affiliation or contractual relationship of the fiduciary adviser or affiliates thereof in the security or other property,

"(iii) of any limitation placed on the scope of the investment advice to be provided by the fiduciary adviser with respect to any such sale, acquisition, or holding of a security or other property,

"(iv) of the types of services provided by the fiduciary adviser in connection with the provision of investment advice by the fiduciary adviser,

"(v) that the adviser is acting as a fiduciary of the plan in connection with the provision of the advice, and

"(vi) that a recipient of the advice may separately arrange for the provision of advice by another adviser, that could have no material affiliation with and receive no fees or other compensation in connection with the security or other property,

"(B) the fiduciary adviser provides appropriate disclosure, in connection with the sale, acquisition, or holding of the security or other property, in accordance with all applicable securities laws,

"(C) the sale, acquisition, or holding occurs solely at the direction of the recipient of the advice,

"(D) the compensation received by the fiduciary adviser and affiliates thereof in connection with the sale, acquisition, or holding of the security or other property is reasonable, and

"(E) the terms of the sale, acquisition, or holding of the security or other property are at least as favorable to the plan as an arm's length transaction would be.

"(2) STANDARDS FOR PRESENTATION OF INFORMATION.—

"(A) IN GENERAL.—The notification required to be provided to participants and beneficiaries under paragraph (1)(A) shall be written in a clear and conspicuous manner and in a manner calculated to be understood by the average plan participant and shall be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of the information required to be provided in the notification.

"(B) MODEL FORM FOR DISCLOSURE OF FEES AND OTHER COMPENSATION.—The Secretary shall issue a model form for the disclosure of fees and other compensation required in paragraph (1)(A)(i) which meets the requirements of subparagraph (A).

"(3) EXEMPTION CONDITIONED ON MAKING REQUIRED INFORMATION AVAILABLE ANNUALLY, ON REQUEST, AND IN THE EVENT OF MATERIAL CHANGE.—The requirements of paragraph (1)(A) shall be deemed not to have been met in connection with the initial or any subsequent provision of advice described in paragraph (1) to the plan, participant, or beneficiary if, at any time during the provision of advisory services to the plan, participant, or beneficiary, the fiduciary adviser fails to maintain the information described in clauses (i) through (iv) of subparagraph (A) in currently accurate form and in the manner described in paragraph (2) or fails—

"(A) to provide, without charge, such currently accurate information to the recipient of the advice no less than annually,

"(B) to make such currently accurate information available, upon request and without charge, to the recipient of the advice, or

"(C) in the event of a material change to the information described in clauses (i) through (iv) of paragraph (1)(A), to provide, without charge, such currently accurate information to the recipient of the advice at a time reasonably contemporaneous to the material change in information.

"(4) MAINTENANCE FOR 6 YEARS OF EVIDENCE OF COMPLIANCE.—A fiduciary adviser referred to in paragraph (1) who has provided advice referred to in such paragraph shall, for a period of not less than 6 years after the provision of the advice, maintain any records necessary for determining whether the requirements of the preceding provisions of this subsection and of subsection (b)(14) have been met. A transaction prohibited under section 406 shall not be considered to have occurred solely because the records are lost or destroyed prior to the end of the 6-year period due to circumstances beyond the control of the fiduciary adviser.

"(5) EXEMPTION FOR PLAN SPONSOR AND CERTAIN OTHER FIDUCIARIES.—

"(A) IN GENERAL.—Subject to subparagraph (B), a plan sponsor or other person who is a fiduciary (other than a fiduciary adviser) shall not be treated as failing to meet the requirements of this part solely by reason of the provision of investment advice referred to in section 3(21)(A)(ii) (or solely by reason of contracting for or otherwise arranging for the provision of the 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 for the provision by the fiduciary adviser of investment advice referred to in such section,

"(ii) the terms of the arrangement require compliance by the fiduciary adviser with the requirements of this subsection, and

"(iii) the terms of the arrangement include a written acknowledgment by the fiduciary adviser that the fiduciary adviser is a fiduciary of the plan with respect to the provision of the advice.

"(B) CONTINUED DUTY OF PRUDENT SELECTION OF ADVISER AND PERIODIC REVIEW.—Nothing in subparagraph (A) shall be construed to exempt a plan sponsor or other person who is a fiduciary from any requirement of this part for the prudent selection and periodic review of a fiduciary adviser with whom the plan sponsor or other person enters into an arrangement for the provision of advice referred to in section 3(21)(A)(ii). The plan sponsor or other person who is a fiduciary has no duty under this part to monitor the specific investment advice given by the fiduciary adviser to any particular recipient of the advice.

"(C) AVAILABILITY OF PLAN ASSETS FOR PAYMENT FOR ADVICE.—Nothing in this part shall be construed to preclude the use of plan assets to pay for reasonable expenses in providing investment advice referred to in section 3(21)(A)(ii).

"(6) DEFINITIONS.—For purposes of this subsection and subsection (b)(14)—

"(A) FIDUCIARY ADVISER.—The term 'fiduciary adviser' means, with respect to a plan, a person who is a fiduciary of the plan by reason of the provision of investment advice by the person to the plan or to a participant or beneficiary and who is—

"(i) registered as an investment adviser under the Investment Advisers Act of 1940 (15 U.S.C. 80b–1 et seq.) or under the laws of the State in which the fiduciary maintains its principal office and place of business, "(ii) a bank or similar financial institution referred to in section 408(b)(4) or a savings association (as defined in section 3(b)(1) of the Federal Deposit Insurance Act (12 U.S.C. 1813(b)(1))), but only if the advice is provided through a trust department of the bank or similar financial institution or savings association which is subject to periodic examination and review by Federal or State banking authorities,

"(iii) an insurance company qualified to do business under the laws of a State,

"(iv) a person registered as a broker or dealer under the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.),

"(v) an affiliate of a person described in any of clauses (i) through (iv), or

"(vi) an employee, agent, or registered representative of a person described in any of clauses (i) through (v) who satisfies the requirements of applicable insurance, banking, and securities laws relating to the provision of the advice.

"(B) AFFILIATE.—The term 'affiliate' of another entity means an affiliated person of the entity (as defined in section 2(a)(3) of the Investment Company Act of 1940 (15 U.S.C. 80a–2(a)(3))).

"(C) REGISTERED REPRESENTATIVE.—The term 'registered representative' of another entity means a person described in section 3(a)(18) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(18)) (substituting the entity for the broker or dealer referred to in such section) or a person described in section 202(a)(17) of the Investment Advisers Act of 1940 (15 U.S.C. 80b–2(a)(17)) (substituting the entity for the investment adviser referred to in such section).".

(b) AMENDMENTS TO THE INTERNAL REVENUE CODE OF 1986.—

(1) EXEMPTION FROM PROHIBITED TRANSACTIONS.—Subsection (d) of section 4975 of the Internal Revenue Code of 1986 (relating to exemptions from tax on prohibited transactions) is amended—

(A) in paragraph (14), by striking "or" at the end;

(B) in paragraph (15), by striking the period at the end and inserting "; or"; and

(C) by adding at the end the following new paragraph:

"(16) any transaction described in subsection (f)(7)(A) in connection with the provision of investment advice described in subsection (e)(3)(B)(i), in any case in which—

"(A) the investment of assets of the plan is subject to the direction of plan participants or beneficiaries,

"(B) the advice is provided to the plan or a participant or beneficiary of the plan by a fiduciary adviser in connection with any sale, acquisition, or holding of a security or other property for purposes of investment of plan assets, and

"(C) the requirements of subsection (f)(7)(B) are met in connection with the provision of the advice.".

(2) ALLOWED TRANSACTIONS AND REQUIREMENTS.—Subsection (f) of such section 4975 (relating to other definitions and special rules) is amended by adding at the end the following new paragraph:

"(7) PROVISIONS RELATING TO INVESTMENT ADVICE PROVIDED BY FIDUCIARY ADVISERS.—

"(A) TRANSACTIONS ALLOWABLE IN CONNECTION WITH INVESTMENT ADVICE PROVIDED BY FIDUCIARY ADVISERS.—The transactions referred to in subsection (d)(16), in connection with the provision of investment advice by a fiduciary adviser, are the following:

"(i) the provision of the advice to the plan, participant, or beneficiary;

"(ii) the sale, acquisition, or holding of a security or other property (including any lending of money or other extension of credit associated with the sale, acquisition, or holding of a security or other property) pursuant to the 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 the advice or in connection with a sale, acquisition, or holding of a security or other property pursuant to the advice.

"(B) REQUIREMENTS RELATING TO PROVISION OF INVESTMENT ADVICE BY FIDUCIARY ADVISERS.—The requirements of this subparagraph (referred to in subsection (d)(16)(C)) are met in connection with the provision of investment advice referred to in subsection (e)(3)(B), provided to a plan or a participant or beneficiary of a plan by a fiduciary adviser with respect to the plan in connection with any sale, acquisition, or holding of a security or other property for purposes of investment of amounts held by the plan, if—

"(i) in the case of the initial provision of the advice with regard to the security or other property by the fiduciary adviser to the plan, participant, or beneficiary, the fiduciary adviser provides to the recipient of the advice, at a time reasonably contemporaneous with the initial provision of the advice, a written notification (which may consist of notification by means of electronic communication)—

"(I) of all fees or other compensation relating to the 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 the advice or in connection with the sale, acquisition, or holding of the security or other property,

"(II) of any material affiliation or contractual relationship of the fiduciary adviser or affiliates thereof in the security or other property,

"(III) of any limitation placed on the scope of the investment advice to be provided by the fiduciary adviser with respect to any such sale, acquisition, or holding of a security or other property,

"(IV) of the types of services provided by the fiduciary adviser in connection with the provision of investment advice by the fiduciary adviser,

"(V) that the adviser is acting as a fiduciary of the plan in connection with the provision of the advice, and

"(VI) that a recipient of the advice may separately arrange for the provision of advice by another adviser, that could have no material affiliation with and receive no fees or other compensation in connection with the security or other property,

"(ii) the fiduciary adviser provides appropriate disclosure, in connection with the sale, acquisition, or holding of the security or other property, in accordance with all applicable securities laws,

"(iii) the sale, acquisition, or holding occurs solely at the direction of the recipient of the advice,

"(iv) the compensation received by the fiduciary adviser and affiliates thereof in connection with the sale, acquisition, or holding of the security or other property is reasonable, and

"(v) the terms of the sale, acquisition, or holding of the security or other property are at least as favorable to the plan as an arm's length transaction would be.

"(C) STANDARDS FOR PRESENTATION OF INFORMATION.—The notification required to be provided to participants and beneficiaries under subparagraph (B)(i) shall be written in a clear and conspicuous manner and in a manner calculated to be understood by the average plan participant and shall be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of the information required to be provided in the notification.

"(D) EXEMPTION CONDITIONED ON MAKING REQUIRED INFORMATION AVAILABLE ANNUALLY, ON REQUEST, AND IN THE EVENT OF MATERIAL CHANGE.—The requirements of subparagraph (B)(i) shall be deemed not to have been met in connection with the initial or any subsequent provision of advice described in subparagraph (B) to the plan, participant, or beneficiary if, at any time during the provision of advisory services to the plan, participant, or beneficiary, the fiduciary adviser fails to maintain the information described in subclauses (I) through (IV) of subparagraph (B)(i) in currently accurate form and in the manner required by subparagraph (C), or fails—

"(i) to provide, without charge, such currently accurate information to the recipient of the advice no less than annually,

"(ii) to make such currently accurate information available, upon request and without charge, to the recipient of the advice, or

"(iii) in the event of a material change to the information described in subclauses (I) through (IV) of subparagraph (B)(i), to provide, without charge, such currently accurate information to the recipient of the advice at a time reasonably contemporaneous to the material change in information.

"(E) MAINTENANCE FOR 6 YEARS OF EVIDENCE OF COMPLIANCE.—A fiduciary adviser referred to in subparagraph (B) who has provided advice referred to in such subparagraph shall, for a period of not less than 6 years after the provision of the advice, maintain any records necessary for determining whether the requirements of the preceding provisions of this paragraph and of subsection (d)(16) have been met. A transaction prohibited under subsection (c)(1) shall not be considered to have occurred solely because the records are lost or destroyed prior to the end of the 6-year period due to circumstances beyond the control of the fiduciary adviser.

"(F) EXEMPTION FOR PLAN SPONSOR AND CERTAIN OTHER FIDUCIARIES.—A plan sponsor or other person who is a fiduciary (other than a fiduciary adviser) shall not be treated as failing to meet the requirements of this section solely by reason of the provision of investment advice referred to in subsection (e)(3)(B) (or solely by reason of contracting for or otherwise arranging for the provision of the 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 for the provision by the fiduciary adviser of investment advice referred to in such section,

"(ii) the terms of the arrangement require compliance by the fiduciary adviser with the requirements of this paragraph,

"(iii) the terms of the arrangement include a written acknowledgment by the fiduciary adviser that the fiduciary adviser is a fiduciary of the plan with respect to the provision of the advice, and

"(iv) the requirements of part 4 of subtitle B of title I of the Employee Retirement Income Security Act of 1974 are met in connection with the provision of such advice.

"(G) DEFINITIONS.—For purposes of this paragraph and subsection (d)(16)—

"(i) FIDUCIARY ADVISER.—The term 'fiduciary adviser' means, with respect to a plan, a person who is a fiduciary of the plan by reason of the provision of investment advice by the person to the plan or to a participant or beneficiary and who is—

"(I) registered as an investment adviser under the Investment Advisers Act of 1940 (15 U.S.C. 80b–1 et seq.) or under the laws of the State in which the fiduciary maintains its principal office and place of business,

"(II) a bank or similar financial institution referred to in subsection (d)(4) or a savings association (as defined in section 3(b)(1) of the Federal Deposit Insurance Act (12 U.S.C. 1813(b)(1))), but only if the advice is provided through a trust department of the bank or similar financial institution or savings association which is subject to periodic examination and review by Federal or State banking authorities,

"(III) an insurance company qualified to do business under the laws of a State,

"(IV) a person registered as a broker or dealer under the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.),

"(V) an affiliate of a person described in any of subclauses (I) through (IV), or

"(VI) an employee, agent, or registered representative of a person described in any of subclauses (I) through (V) who satisfies the requirements of applicable insurance, banking, and securities laws relating to the provision of the advice.

"(ii) AFFILIATE.—The term 'affiliate' of another entity means an affiliated person of the entity (as defined in section 2(a)(3) of the Investment Company Act of 1940 (15 U.S.C. 80a–2(a)(3))).

"(iii) REGISTERED REPRESENTATIVE.—The term 'registered representative' of another entity means a person described in section 3(a)(18) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(18)) (substituting the entity for the broker or dealer referred to in such section) or a person described in section 202(a)(17) of the Investment Advisers Act of 1940 (15 U.S.C. 80b–2(a)(17)) (substituting the entity for the investment adviser referred to in such section).".

**SEC. 106. STUDY REGARDING IMPACT ON RETIREMENT SAVINGS OF PARTICIPANTS AND BENEFICIARIES BY REQUIRING CONSULTANTS TO ADVISE PLAN FIDUCIARIES OF INDIVIDUAL ACCOUNT PLANS.**

(a) STUDY.—As soon as practicable after the date of the enactment of this Act, the Secretary of Labor shall undertake a study of the costs and benefits to participants and beneficiaries of requiring independent consultants to advise plan fiduciaries in connection with individual account plans. In conducting such study, the Secretary shall consider—

(1) the benefits to plan participants and beneficiaries of engaging independent advisers to provide investment and other advice regarding the assets of the plan

to persons who have fiduciary duties with respect to the management or disposition of such assets,

(2) the extent to which independent advisers are currently retained by plan fiduciaries,

(3) the availability of assistance to fiduciaries from appropriate Federal agencies,

(4) the availability of qualified independent consultants to serve the needs of individual account plan fiduciaries in the United States,

(5) the impact of the additional fiduciary duty of an independent advisor on the strict fiduciary obligations of plan fiduciaries,

(6) the impact of new requirements (consulting fees, reporting requirements, and new plan duties to prudently identify and contract with qualified independent consultants) on the availability of individual account plans, and

(7) the impact of a new requirement on the plan administration costs per participant for small and mid-size employers and the pension plans they sponsor.

(b) REPORT.—Not later than 1 year after the date of the enactment of this Act, the Secretary of Labor shall report the results of the study undertaken pursuant to this section, together with any recommendations for legislative changes, to the Committee on Education and the Workforce of the House of Representatives and the Committee on Health, Education, Labor, and Pensions of the Senate.

**SEC. 107. TREATMENT OF QUALIFIED RETIREMENT PLANNING SERVICES.**

(a) IN GENERAL.—Subsection (m) of section 132 of the Internal Revenue Code of 1986 (defining qualified retirement services) is amended by adding at the end the following new paragraph:

"(4) NO CONSTRUCTIVE RECEIPT.—No amount shall be included in the gross income of any employee solely because the employee may choose between any qualified retirement planning services provided by a qualified investment advisor and compensation which would otherwise be includible in the gross income of such employee. The preceding sentence shall apply to highly compensated employees only if the choice described in such sentence is available on substantially the same terms to each member of the group of employees normally provided education and information regarding the employer's qualified employer plan.".

(b) CONFORMING AMENDMENTS.—

(1) Section 403(b)(3)(B) of such Code is amended by inserting "132(m)(4)," after "132(f)(4),".

(2) Section 414(s)(2) of such Code is amended by inserting "132(m)(4)," after "132(f)(4),".

(3) Section 415(c)(3)(D)(ii) of such Code is amended by inserting "132(m)(4)," after "132(f)(4),".

(c) EFFECTIVE DATE.—The amendment made by this section shall apply to taxable years beginning after December 31, 2003.

**SEC. 108. EFFECTIVE DATES AND RELATED RULES.**

(a) IN GENERAL.—Except as otherwise provided in the preceding provisions of this title or in subsections (c) and (d), the amendments made by this Act shall apply with respect to plan years beginning on or after the general effective date.

(b) GENERAL EFFECTIVE D'"ATE.—For purposes of this section, the term "general effective date" means the date which is 1 year after the date of the enactment of this Act.

(c) SPECIAL RULE FOR COLLECTIVELY BARGAINED PLANS.—In the case of a plan maintained pursuant to 1 or more collective bargaining agreements between employee representatives and 1 or more employers ratified on or before the date of the enactment of this Act, subsection (a) shall be applied to benefits pursuant to, and individuals covered by, any such agreement by substituting for "the general effective date" the date of the commencement of the first plan year beginning on or after the earlier of—

(1) the later of—

(A) the date which is 1 year after the general effective date, or

(B) the date on which the last of such collective bargaining agreements terminates (determined without regard to any extension thereof after the date of the enactment of this Act), or

(2) the date which is 2 years after the general effective date.

(d) AMENDMENTS RELATING TO INVESTMENT ADVICE.—The amendments made by section 105 shall apply with respect to advice referred to in section 3(21)(A)(ii) of the Employee Retirement Income Security Act of 1974 or section 4975(c)(3)(B) of the Internal Revenue Code of 1986 provided on or after January 1, 2005.

# TITLE II—OTHER PROVISIONS RELATING TO PENSIONS

**SEC. 201. AMENDMENTS TO RETIREMENT PROTECTION ACT OF 1994.**

(a) TRANSITION RULE MADE PERMANENT.—Section 769(c) of the Retirement Protection Act of 1994 (26 U.S.C. 412 note) is amended—

(1) in the heading, by striking "TRANSITION"; and

(2) in paragraph (1), by striking "transition" and by striking "for any plan year beginning after 1996 and before 2010".

(b) SPECIAL RULES.—Paragraph (2) of section 769(c) of the Retirement Protection Act of 1994 is amended to read as follows:

"(2) SPECIAL RULES.—The rules described in this paragraph are as follows:

"(A) For purposes of section 412(l)(9)(A) of the Internal Revenue Code of 1986 and section 302(d)(9)(A) of the Employee Retirement Income Security Act of 1974, the funded current liability percentage for any plan year shall be treated as not less than 90 percent.

"(B) For purposes of section 412(m) of the Internal Revenue Code of 1986 and section 302(e) of the Employee Retirement Income Security Act of 1974, the funded current liability percentage for any plan year shall be treated as not less than 100 percent.

"(C) For purposes of determining unfunded vested benefits under section 4006(a)(3)(E)(iii) of the Employee Retirement Income Security Act of 1974, the mortality table shall be the mortality table used by the plan.".

(c) EFFECTIVE DATE.—The amendments made by this section shall apply to plan years beginning after December 31, 2002.

**SEC. 202. REPORTING SIMPLIFICATION.**

(a) SIMPLIFIED ANNUAL FILING REQUIREMENT FOR OWNERS AND THEIR SPOUSES.—

(1) IN GENERAL.—The Secretary of the Treasury and the Secretary of Labor shall modify the requirements for filing annual returns with respect to one-participant retirement plans to ensure that such plans with assets of $250,000 or less as of the close of the plan year need not file a return for that year.

(2) ONE-PARTICIPANT RETIREMENT PLAN DEFINED.—For purposes of this subsection, the term "one-participant retirement plan" means a retirement plan with respect to which the following requirements are met:

(A) on the first day of the plan year—

(i) the plan covered only one individual (or the individual and the individual's spouse) and the individual owned 100 percent of the plan sponsor (whether or not incorporated), or

(ii) the plan covered only one or more partners (or partners and their spouses) in the plan sponsor;

(B) the plan meets the minimum coverage requirements of section 410(b) of the Internal Revenue Code of 1986 without being combined with any other plan of the business that covers the employees of the business;

(C) the plan does not provide benefits to anyone except the individual (and the individual's spouse) or the partners (and their spouses);

(D) the plan does not cover a business that is a member of an affiliated service group, a controlled group of corporations, or a group of businesses under common control; and

(E) the plan does not cover a business that leases employees.

(3) OTHER DEFINITIONS.—Terms used in paragraph (2) which are also used in section 414 of the Internal Revenue Code of 1986 shall have the respective meanings given such terms by such section.

(4) EFFECTIVE DATE.—The provisions of this subsection shall apply to plan years beginning on or after January 1, 2003.

(b) SIMPLIFIED ANNUAL FILING REQUIREMENT FOR PLANS WITH FEWER THAN 25 EMPLOYEES.—In the case of plan years beginning after December 31, 2004, the Secretary of the Treasury and the Secretary of Labor shall provide for the filing of a simplified annual return for any retirement plan which covers less than 25 employees on the first day of a plan year and which meets the requirements described in subparagraphs (B), (D), and (E) of subsection (a)(2).

**SEC. 203. IMPROVEMENT OF EMPLOYEE PLANS COMPLIANCE RESOLUTION SYSTEM.**

The Secretary of the Treasury shall continue to update and improve the Employee Plans Compliance Resolution System (or any successor program) giving special attention to—

(1) increasing the awareness and knowledge of small employers concerning the availability and use of the program;

(2) taking into account special concerns and circumstances that small employers face with respect to compliance and correction of compliance failures;

(3) extending the duration of the self-correction period under the Self-Correction Program for significant compliance failures;

(4) expanding the availability to correct insignificant compliance failures under the Self-Correction Program during audit; and

(5) assuring that any tax, penalty, or sanction that is imposed by reason of a compliance failure is not excessive and bears a reasonable relationship to the nature, extent, and severity of the failure.

The Secretary of the Treasury shall have full authority to effectuate the foregoing with respect to the Employee Plans Compliance Resolution System (or any successor program) and any other employee plans correction policies, including the authority to waive income, excise, or other taxes to ensure that any tax, penalty, or sanction is not excessive and bears a reasonable relationship to the nature, extent, and severity of the failure.

**SEC. 204. FLEXIBILITY IN NONDISCRIMINATION, COVERAGE, AND LINE OF BUSINESS RULES.**

(a) NONDISCRIMINATION.—

(1) IN GENERAL.—The Secretary of the Treasury shall, by regulation, provide that a plan shall be deemed to satisfy the requirements of section 401(a)(4) of the Internal Revenue Code of 1986 if such plan satisfies the facts and circumstances test under section 401(a)(4) of such Code, as in effect before January 1, 1994, but only if—

(A) the plan satisfies conditions prescribed by the Secretary to appropriately limit the availability of such test; and

(B) the plan is submitted to the Secretary for a determination of whether it satisfies such test.

Subparagraph (B) shall only apply to the extent provided by the Secretary.

(2) EFFECTIVE DATES.—

(A) REGULATIONS.—The regulation required by paragraph (1) shall apply to years beginning after December 31, 2004.

(B) CONDITIONS OF AVAILABILITY.—Any condition of availability prescribed by the Secretary under paragraph (1)(A) shall not apply before the first year beginning not less than 120 days after the date on which such condition is prescribed.

(b) COVERAGE TEST.—

(1) IN GENERAL.—Section 410(b)(1) of the Internal Revenue Code of 1986 (relating to minimum coverage requirements) is amended by adding at the end the following:

"(D) In the case that the plan fails to meet the requirements of subparagraphs (A), (B) and (C), the plan—

"(i) satisfies subparagraph (B), as in effect immediately before the enactment of the Tax Reform Act of 1986,

"(ii) is submitted to the Secretary for a determination of whether it satisfies the requirement described in clause (i), and

"(iii) satisfies conditions prescribed by the Secretary by regulation that appropriately limit the availability of this subparagraph.

Clause (ii) shall apply only to the extent provided by the Secretary.".

(2) EFFECTIVE DATES.—

(A) IN GENERAL.—The amendment made by paragraph (1) shall apply to years beginning after December 31, 2004.

(B) CONDITIONS OF AVAILABILITY.—Any condition of availability prescribed by the Secretary under regulations prescribed by the Secretary under section 410(b)(1)(D) of the Internal Revenue Code of 1986 shall not apply before the first year beginning not less than 120 days after the date on which such condition is prescribed.

(c) LINE OF BUSINESS RULES.—The Secretary of the Treasury shall, on or before December 31, 2004, modify the existing regulations issued under section 414(r) of the Internal Revenue Code of 1986 in order to expand (to the extent that the Secretary determines appropriate) the ability of a pension plan to demonstrate compliance with the line of business requirements based upon the facts and circumstances surrounding the design and operation of the plan, even though the plan is unable to satisfy the mechanical tests currently used to determine compliance.

**SEC. 205. EXTENSION TO ALL GOVERNMENTAL PLANS OF MORATORIUM ON APPLICATION OF CERTAIN NONDISCRIMINATION RULES APPLICABLE TO STATE AND LOCAL PLANS.**

(a) IN GENERAL.—

(1) Subparagraph (G) of section 401(a)(5) of the Internal Revenue Code of 1986 and subparagraph (H) of section 401(a)(26) of such Code are each amended by striking "section 414(d))" and all that follows and inserting "section 414(d)).".

(2) Subparagraph (G) of section 401(k)(3) of the Internal Revenue Code of 1986 and paragraph (2) of section 1505(d) of the Taxpayer Relief Act of 1997 (26 U.S.C. 401 note) are each amended by striking "maintained by a State or local government or political subdivision thereof (or agency or instrumentality thereof)".

(b) CONFORMING AMENDMENTS.—

(1) The heading for subparagraph (G) of section 401(a)(5) of such Code is amended to read as follows: "GOVERNMENTAL PLANS.—".

(2) The heading for subparagraph (H) of section 401(a)(26) of such Code is amended to read as follows: "EXCEPTION FOR GOVERNMENTAL PLANS.—".

(3) Subparagraph (G) of section 401(k)(3) of such Code is amended by inserting "GOVERNMENTAL PLANS.—" after "(G)".

(c) EFFECTIVE DATE.—The amendments made by this section shall apply to years beginning after December 31, 2003.

**SEC. 206. NOTICE AND CONSENT PERIOD REGARDING DISTRIBUTIONS.**

(a) EXPANSION OF PERIOD.—

(1) AMENDMENT OF INTERNAL REVENUE CODE.—

(A) IN GENERAL.—Subparagraph (A) of section 417(a)(6) of the Internal Revenue Code of 1986 is amended by striking "90-day" and inserting "180-day".

(B) MODIFICATION OF REGULATIONS.—The Secretary of the Treasury shall modify the regulations under sections 402(f), 411(a)(11), and 417 of the Internal Revenue Code of 1986 to substitute "180 days" for "90 days" each place it appears in Treasury Regulations sections 1.402(f)–1, 1.411(a)–11(c), and 1.417(e)–1(b).

(2) AMENDMENT OF ERISA.—

(A) IN GENERAL.—Section 205(c)(7)(A) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1055(c)(7)(A)) is amended by striking "90-day" and inserting "180-day".

(B) MODIFICATION OF REGULATIONS.—The Secretary of the Treasury shall modify the regulations under part 2 of subtitle B of title I of the Employee Retirement Income Security Act of 1974 to the extent that they relate to sections 203(e) and 205 of such Act to substitute "180 days" for "90 days" each place it appears.

(3) EFFECTIVE DATE.—The amendments made by paragraphs (1)(A) and (2)(A) and the modifications required by paragraphs (1)(B) and (2)(B) shall apply to years beginning after December 31, 2003.

(b) CONSENT REGULATION INAPPLICABLE TO CERTAIN DISTRIBUTIONS.—

(1) IN GENERAL.—The Secretary of the Treasury shall modify the regulations under section 411(a)(11) of the Internal Revenue Code of 1986 and under section 205 of the Employee Retirement Income Security Act of 1974 to provide that the description of a participant's right, if any, to defer receipt of a distribution shall also describe the consequences of failing to defer such receipt.

(2) EFFECTIVE DATE.—

(A) IN GENERAL.—The modifications required by paragraph (1) shall apply to years beginning after December 31, 2003.

(B) REASONABLE NOTICE.—In the case of any description of such consequences made before the date that is 90 days after the date on which the Secretary of the Treasury issues a safe harbor description under paragraph (1), a plan shall not be treated as failing to satisfy the requirements of section 411(a)(11) of such Code or section 205 of such Act by reason of the failure to provide the information required by the modifications made under paragraph (1) if the Administrator of such plan makes a reasonable attempt to comply with such requirements.

**SEC. 207. ANNUAL REPORT DISSEMINATION.**

(a) REPORT AVAILABLE THROUGH ELECTRONIC MEANS.—Section 104(b)(3) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1024(b)(3)) is amended by adding at the end the following new sentence: "The requirement to furnish information under the previous sentence with respect to an employee pension benefit plan shall be satisfied if the administrator makes such information reasonably available through electronic means or other new technology.".

(b) EFFECTIVE DATE.—The amendment made by this section shall apply to reports for years beginning after December 31, 2003.

**SEC. 208. TECHNICAL CORRECTIONS TO SAVER ACT.**

Section 517 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1147) is amended—

(1) in subsection (a), by striking "2001 and 2005 on or after September 1 of each year involved" and inserting "2006 and 2010";

(2) in subsection (e)(2)—

(A) by striking "Committee on Labor and Human Resources" in subparagraph (D) and inserting "Committee on Health, Education, Labor, and Pensions";

(B) by striking subparagraph (F) and inserting the following:

"(F) the Chairman and Ranking Member of the Subcommittee on Labor, Health and Human Services, and Education of the Committee on Appropriations of the House of Representatives and the Chairman and Ranking Member of the Subcommittee on Labor, Health and Human Services, and Education of the Committee on Appropriations of the Senate;";

(C) by redesignating subparagraph (G) as subparagraph (J); and

(D) by inserting after subparagraph (F) the following new subparagraphs:

"(G) the Chairman and Ranking Member of the Committee on Finance of the Senate;

"(H) the Chairman and Ranking Member of the Committee on Ways and Means of the House of Representatives;

"(I) the Chairman and Ranking Member of the Subcommittee on Employer-Employee Relations of the Committee on Education and the Workforce of the House of Representatives; and";

(3) in subsection (e)(3)(B), by striking "January 31, 1998" and inserting "2 months before the convening of each summit";

(4) in subsection (f)(1)(C), by inserting ", no later than 60 days prior to the date of the commencement of the National Summit," after "comment";

(5) in subsection (i)—

(A) by striking "for fiscal years beginning on or after October 1, 1997,"; and

(B) by adding at the end the following new paragraph:

"(3) RECEPTION AND REPRESENTATION AUTHORITY.—The Secretary is hereby granted reception and representation authority limited specifically to the events at the National Summit. The Secretary shall use any private contributions accepted in connection with the National Summit prior to using funds appropriated for purposes of the National Summit pursuant to this paragraph."; and

(6) in subsection (k)—

(A) by striking "shall enter into a contract on a sole-source basis" and inserting "may enter into a contract on a sole-source basis"; and

(B) by striking "in fiscal year 1998".

**SEC. 209. MISSING PARTICIPANTS AND BENEFICIARIES.**

(a) IN GENERAL.—Section 4050 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1350) is amended by redesignating subsection (c) as subsection (e) and by inserting after subsection (b) the following new subsections:

"(c) MULTIEMPLOYER PLANS.—The corporation shall prescribe rules similar to the rules in subsection (a) for multiemployer plans covered by this title that terminate under section 4041A.

"(d) PLANS NOT OTHERWISE SUBJECT TO TITLE.—

"(1) TRANSFER TO CORPORATION.—The plan administrator of a plan described in paragraph (4) may elect to transfer the benefits of a missing participant or beneficiary to the corporation upon termination of the plan.

"(2) INFORMATION TO THE CORPORATION.—To the extent provided in regulations, the plan administrator of a plan described in paragraph (4) shall, upon termination of the plan, provide the corporation information with respect to benefits of a missing participant or beneficiary if the plan transfers such benefits—

"(A) to the corporation, or

"(B) to an entity other than the corporation or a plan described in paragraph (4)(B)(ii).

"(3) PAYMENT BY THE CORPORATION.—If benefits of a missing participant or beneficiary were transferred to the corporation under paragraph (1), the corporation shall, upon location of the participant or beneficiary, pay to the participant or beneficiary the amount transferred (or the appropriate survivor benefit) either—

"(A) in a single sum (plus interest), or

"(B) in such other form as is specified in regulations of the corporation.

"(4) PLANS DESCRIBED.—A plan is described in this paragraph if—

"(A) the plan is a pension plan (within the meaning of section 3(2))—

"(i) to which the provisions of this section do not apply (without regard to this subsection), and "(ii) which is not a plan described in paragraphs (2) through (11) of section 4021(b), and

"(B) at the time the assets are to be distributed upon termination, the plan—

"(i) has one or more missing participants or beneficiaries, and

"(ii) has not provided for the transfer of assets to pay the benefits of all missing participants and beneficiaries to another pension plan (within the meaning of section 3(2)).

"(5) CERTAIN PROVISIONS NOT TO APPLY.—Subsections (a)(1) and (a)(3) shall not apply to a plan described in paragraph (4).".

(b) CONFORMING AMENDMENTS.—Section 206(f) of such Act (29 U.S.C. 1056(f)) is amended—

(1) by striking "title IV" and inserting "section 4050"; and

(2) by striking "the plan shall provide that,".

(c) EFFECTIVE DATE.—The amendments made by this section shall apply to distributions made after final regulations implementing subsections (c) and (d) of section 4050 of the Employee Retirement Income Security Act of 1974 (as added by subsection (a)), respectively, are prescribed.

**SEC. 210. REDUCED PBGC PREMIUM FOR NEW PLANS OF SMALL EMPLOYERS.**

(a) IN GENERAL.—Subparagraph (A) of section 4006(a)(3) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1306(a)(3)(A)) is amended—

(1) in clause (i), by inserting "other than a new single-employer plan (as defined in subparagraph (F)) maintained by a small employer (as so defined)," after "single-employer plan,",

(2) in clause (iii), by striking the period at the end and inserting ", and", and

(3) by adding at the end the following new clause:

"(iv) in the case of a new single-employer plan (as defined in subparagraph (F)) maintained by a small employer (as so defined) for the plan year, $5 for each individual who is a participant in such plan during the plan year.".

(b) DEFINITION OF NEW SINGLE-EMPLOYER PLAN.—Section 4006(a)(3) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1306(a)(3)) is amended by adding at the end the following new subparagraph:

"(F)(i) For purposes of this paragraph, a single-employer plan maintained by a contributing sponsor shall be treated as a new single-employer plan for each of its first 5 plan years if, during the 36-month period ending on the date of the adoption of such plan, the sponsor or any member of such sponsor's controlled group (or any predecessor of either) did not establish or maintain a plan to which this title applies with respect to which benefits were accrued for substantially the same employees as are in the new single-employer plan.

"(ii)(I) For purposes of this paragraph, the term 'small employer' means an employer which on the first day of any plan year has, in aggregation with all members of the controlled group of such employer, 100 or fewer employees.

"(II) In the case of a plan maintained by two or more contributing sponsors that are not part of the same controlled group, the employees of all contributing sponsors and controlled groups of such sponsors shall be aggregated for purposes of determining whether any contributing sponsor is a small employer.".

(c) EFFECTIVE DATE.—The amendments made by this section shall apply to plans first effective after December 31, 2003.

**SEC. 211. REDUCTION OF ADDITIONAL PBGC PREMIUM FOR NEW AND SMALL PLANS.**

(a) NEW PLANS.—Subparagraph (E) of section 4006(a)(3) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1306(a)(3)(E)) is amended by adding at the end the following new clause:

"(v) In the case of a new defined benefit plan, the amount determined under clause (ii) for any plan year shall be an amount equal to the product of the amount determined under clause (ii) and the applicable percentage. For purposes of this clause, the term 'applicable percentage' means—

"(I) 0 percent, for the first plan year.

"(II) 20 percent, for the second plan year.

"(III) 40 percent, for the third plan year.

"(IV) 60 percent, for the fourth plan year.

"(V) 80 percent, for the fifth plan year.

For purposes of this clause, a defined benefit plan (as defined in section 3(35)) maintained by a contributing sponsor shall be treated as a new defined benefit plan for each of its first 5 plan years if, during the 36-month period ending on the date of the adoption of the plan, the sponsor and each member of any controlled group including the sponsor (or any predecessor of either) did not establish or maintain a plan to which this title applies with respect to which benefits were accrued for substantially the same employees as are in the new plan.".

(b) SMALL PLANS.—Paragraph (3) of section 4006(a) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1306(a)), as amended by section 210(b), is amended—

(1) by striking "The" in subparagraph (E)(i) and inserting "Except as provided in subparagraph (G), the", and

(2) by inserting after subparagraph (F) the following new subparagraph:

"(G)(i) In the case of an employer who has 25 or fewer employees on the first day of the plan year, the additional premium determined under subparagraph (E) for each participant shall not exceed $5 multiplied by the number of participants in the plan as of the close of the preceding plan year.

"(ii) For purposes of clause (i), whether an employer has 25 or fewer employees on the first day of the plan year is determined by taking into consideration all of the employees of all members of the contributing sponsor's controlled group. In the case of a plan maintained by two or more contributing sponsors, the employees of all contributing sponsors and their controlled groups shall be aggregated for purposes of determining whether the 25-or-fewer-employees limitation has been satisfied.".

(c) EFFECTIVE DATES.—

(1) SUBSECTION (a).—The amendments made by subsection (a) shall apply to plans first effective after December 31, 2003.

(2) SUBSECTION (b).—The amendments made by subsection (b) shall apply to plan years beginning after December 31, 2003.

**SEC. 212. AUTHORIZATION FOR PBGC TO PAY INTEREST ON PREMIUM OVERPAYMENT REFUNDS.**

(a) IN GENERAL.—Section 4007(b) of the Employment Retirement Income Security Act of 1974 (29 U.S.C. 1307(b)) is amended—

(1) by striking "(b)" and inserting "(b)(1)", and

(2) by inserting at the end the following new paragraph:

"(2) The corporation is authorized to pay, subject to regulations prescribed by the corporation, interest on the amount of any overpayment of premium refunded to a designated payor. Interest under this paragraph shall be calculated at the same rate and in the same manner as interest is calculated for underpayments under paragraph (1).".

(b) EFFECTIVE DATE.—The amendment made by subsection (a) shall apply to interest accruing for periods beginning not earlier than the date of the enactment of this Act.

**SEC. 213. SUBSTANTIAL OWNER BENEFITS IN TERMINATED PLANS.**

(a) MODIFICATION OF PHASE-IN OF GUARANTEE.—Section 4022(b)(5) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1322(b)(5)) is amended to read as follows:

"(5)(A) For purposes of this paragraph, the term 'majority owner' means an individual who, at any time during the 60-month period ending on the date the determination is being made—

"(i) owns the entire interest in an unincorporated trade or business,

"(ii) in the case of a partnership, is a partner who owns, directly or indirectly, 50 percent or more of either the capital interest or the profits interest in such partnership, or

"(iii) in the case of a corporation, owns, directly or indirectly, 50 percent or more in value of either the voting stock of that corporation or all the stock of that corporation.

For purposes of clause (iii), the constructive ownership rules of section 1563(e) of the Internal Revenue Code of 1986 shall apply (determined without regard to section 1563(e)(3)(C)).

"(B) In the case of a participant who is a majority owner, the amount of benefits guaranteed under this section shall equal the product of—

"(i) a fraction (not to exceed 1) the numerator of which is the number of years from the later of the effective date or the adoption date of the plan to the termination date, and the denominator of which is 10, and

"(ii) the amount of benefits that would be guaranteed under this section if the participant were not a majority owner.".

(b) MODIFICATION OF ALLOCATION OF ASSETS.—

(1) Section 4044(a)(4)(B) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1344(a)(4)(B)) is amended by striking "section 4022(b)(5)" and inserting "section 4022(b)(5)(B)".

(2) Section 4044(b) of such Act (29 U.S.C. 1344(b)) is amended—

(A) by striking "(5)" in paragraph (2) and inserting "(4), (5),", and

(B) by redesignating paragraphs (3) through (6) as paragraphs (4) through (7), respectively, and by inserting after paragraph (2) the following new paragraph:

"(3) If assets available for allocation under paragraph (4) of subsection (a) are insufficient to satisfy in full the benefits of all individuals who are described in that paragraph, the assets shall be allocated first to benefits described in subparagraph (A) of that paragraph. Any remaining assets shall then be allocated to benefits described in subparagraph (B) of that paragraph. If assets allocated to such subparagraph (B) are insufficient to satisfy in full the benefits described in that subparagraph, the assets shall be allocated pro rata among individuals on the basis of the present value (as of the termination date) of their respective benefits described in that subparagraph.".

(c) CONFORMING AMENDMENTS.—

(1) Section 4021 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1321) is amended—

(A) in subsection (b)(9), by striking "as defined in section 4022(b)(6)", and

(B) by adding at the end the following new subsection:

"(d) For purposes of subsection (b)(9), the term 'substantial owner' means an individual who, at any time during the 60-month period ending on the date the determination is being made—

"(1) owns the entire interest in an unincorporated trade or business,

"(2) in the case of a partnership, is a partner who owns, directly or indirectly, more than 10 percent of either the capital interest or the profits interest in such partnership, or

"(3) in the case of a corporation, owns, directly or indirectly, more than 10 percent in value of either the voting stock of that corporation or all the stock of that corporation.

For purposes of paragraph (3), the constructive ownership rules of section 1563(e) of the Internal Revenue Code of 1986 shall apply (determined without regard to section 1563(e)(3)(C)).".

(2) Section 4043(c)(7) of such Act (29 U.S.C. 1343(c)(7)) is amended by striking "section 4022(b)(6)" and inserting "section 4021(d)".

(d) EFFECTIVE DATES.—

(1) IN GENERAL.—Except as provided in paragraph (2), the amendments made by this section shall apply to plan terminations—

(A) under section 4041(c) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1341(c)) with respect to which notices of intent to terminate are provided under section 4041(a)(2) of such Act (29 U.S.C. 1341(a)(2)) after December 31, 2003, and

(B) under section 4042 of such Act (29 U.S.C. 1342) with respect to which proceedings are instituted by the corporation after such date.

(2) CONFORMING AMENDMENTS.—The amendments made by subsection (c) shall take effect on January 1, 2004.

**SEC. 214. BENEFIT SUSPENSION NOTICE.**

(a) MODIFICATION OF REGULATION.—The Secretary of Labor shall modify the regulation under subparagraph (B) of section 203(a)(3) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1053(a)(3)(B)) to provide that the notification required by such regulation in connection with any suspension of benefits described in such subparagraph—

(1) in the case of an employee who returns to service described in section 203(a)(3)(B)(i) or (ii) of such Act after commencement of payment of benefits under the plan, shall be made during the first calendar month or the first 4 or 5-week payroll period ending in a calendar month in which the plan withholds payments, and

(2) in the case of any employee who is not described in paragraph (1)—

(A) may be included in the summary plan description for the plan furnished in accordance with section 104(b) of such Act (29 U.S.C. 1024(b)), rather than in a separate notice, and

(B) need not include a copy of the relevant plan provisions.

(b) EFFECTIVE DATE.—The modification made under this section shall apply to plan years beginning after December 31, 2003.

**SEC. 215. STUDIES.**

(a) MODEL SMALL EMPLOYER GROUP PLANS STUDY.—As soon as practicable after the date of the enactment of this Act, the Secretary of Labor, in consultation with the Secretary of the Treasury, shall conduct a study to determine—

(1) the most appropriate form or forms of—

(A) employee pension benefit plans which would—

(i) be simple in form and easily maintained by multiple small employers, and

(ii) provide for ready portability of benefits for all participants and beneficiaries,

(B) alternative arrangements providing comparable benefits which may be established by employee or employer associations, and

(C) alternative arrangements providing comparable benefits to which employees may contribute in a manner independent of employer sponsorship, and

(2) appropriate methods and strategies for making pension plan coverage described in paragraph (1) more widely available to American workers.

(b) MATTERS TO BE CONSIDERED.—In conducting the study under subsection (a), the Secretary of Labor shall consider the adequacy and availability of existing employee pension benefit plans and the extent to which existing models may be modified to be more accessible to both employees and employers.

(c) REPORT.—Not later than 18 months after the date of the enactment of this Act, the Secretary of Labor shall report the results of the study under subsection (a), together with the Secretary's recommendations, to the Committee on Education and the Workforce and the Committee on Ways and Means of the House of Representatives and the Committee on Health, Education, Labor, and Pensions and the Committee on Finance of the Senate. Such recommendations shall include one or more model plans described in subsection (a)(1)(A) and model alternative arrangements described in subsections (a)(1)(B) and (a)(1)(C) which may serve as the basis for appropriate administrative or legislative action.

(d) STUDY ON EFFECT OF LEGISLATION.—Not later than 5 years after the date of the enactment of this Act, the Secretary of Labor shall submit to the Committee on Education and the Workforce of the House of Representatives and the Committee on Health, Education, Labor, and Pensions of the Senate a report on the effect of the provisions of this Act and title VI of the Economic Growth and Tax Relief Reconciliation Act of 2001 on pension plan coverage, including any change in—

(1) the extent of pension plan coverage for low and middle-income workers,

(2) the levels of pension plan benefits generally,

(3) the quality of pension plan coverage generally,

(4) workers' access to and participation in pension plans, and

(5) retirement security.

**SEC. 216. INTEREST RATE RANGE FOR ADDITIONAL FUNDING REQUIREMENTS.**

(a) IN GENERAL.—Subclause (III) of section 412(l)(7)(C)(i) of the Internal Revenue Code of 1986 is amended—

(1) by striking "2002 or 2003" in the text and inserting "2001, 2002, or 2003", and

(2) by striking "2002 AND 2003" in the heading and inserting "2001, 2002, AND 2003".

(b) SPECIAL RULE.—Subclause (III) of section 302(d)(7)(C)(i) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1082(d)(7)(C)(i)) is amended—

(1) by striking "2002 or 2003" in the text and inserting "2001, 2002, or 2003", and

(2) by striking "2002 AND 2003" in the heading and inserting "2001, 2002, AND 2003".

(c) PBGC.—Subclause (IV) of section 4006(a)(3)(E)(iii) of such Act (29 U.S.C. 1306(a)(3)(E)(iii)) is amended to read as follows—

"(IV) In the case of plan years beginning after December 31, 2001, and before January 1, 2004, subclause (II) shall be applied by substituting '100 percent' for '85 percent' and by substituting '115 percent' for '100 percent'. Subclause (III) shall be applied for such years without regard to the preceding sentence. Any reference to this clause or this subparagraph by any other sections or subsections (other than sections 4005, 4010, 4011 and 4043) shall be treated as a reference to this clause or this subparagraph without regard to this subclause.".

(d) EFFECTIVE DATE.—

(1) GENERAL RULE.—Subject to paragraph (2), the amendments made by this section shall take effect as if included in the amendments made by section 405 of the Job Creation and Worker Assistance Act of 2002.

(2) ELECTION.—The plan sponsor or plan administrator of a plan may elect whether to have the amendments made by subsections (a) and (b) apply. Such election shall be made in such manner and at such time as the Secretary of the Treasury or his delegate may prescribe and, once made, may not be revoked. An election to apply such amendments shall not be treated as a prohibited change in actuarial assumptions for purposes of reports required to be filed with

the Secretary of Labor, the Secretary of Treasury, or the Pension Benefit Guaranty Corporation

# TITLE III—GENERAL PROVISIONS

**SEC. 301. PROVISIONS RELATING TO PLAN AMENDMENTS.**

(a) IN GENERAL.—If this section applies to any pension plan or contract amendment—

(1) such pension plan or contract shall be treated as being operated in accordance with the terms of the plan during the period described in subsection (b)(2)(A), and

(2) except as provided by the Secretary of the Treasury, such pension plan shall not fail to meet the requirements of section 411(d)(6) of the Internal Revenue Code of 1986 and section 204(g) of the Employee Retirement Income Security Act of 1974 by reason of such amendment.

(b) AMENDMENTS TO WHICH SECTION APPLIES.—

(1) IN GENERAL.—This section shall apply to any amendment to any pension plan or annuity contract which is made—

(A) pursuant to any amendment made by this Act or by title VI of the Economic Growth and Tax Relief Reconciliation Act of 2001, or pursuant to any regulation issued by the Secretary of the Treasury or the Secretary of Labor under this Act or such title VI, and

(B) on or before the last day of the first plan year beginning on or after January 1, 2006.

In the case of a governmental plan (as defined in section 414(d) of the Internal Revenue Code of 1986), this paragraph shall be applied by substituting "2008" for "2006".

(2) CONDITIONS.—This section shall not apply to any amendment unless—

(A) during the period—

(i) beginning on the date the legislative or regulatory amendment described in paragraph (1)(A) takes effect (or in the case of a plan or contract amendment not required by such legislative or regulatory amendment, the effective date specified by the plan), and

(ii) ending on the date described in paragraph (1)(B) (or, if earlier, the date the plan or contract amendment is adopted),

the plan or contract is operated as if such plan or contract amendment were in effect; and

(B) such plan or contract amendment applies retroactively for such period.

## PURPOSE

The purpose of H.R. 1000 is to restore worker confidence in America's pension system by establishing new 401(k) plan protections and giving workers new tools to protect and enhance their retirement savings. H.R. 1000 gives workers new freedom to diversify their investments, much greater access to quality investment advice, more information about their pensions, and other tools they can use to maximize the potential of their 401(k) plans and ensure a secure retirement future.

## COMMITTEE ACTION

Committee Chairman John Boehner, Subcommittee on Employer-Employee Relations Chairman Sam Johnson and 51 other co-sponsors introduced H.R. 1000 on February 27, 2003. The bill is the culmination of legislative activity, including hearings, bill introduction, mark-up, floor consideration started in the 106th and 107th Congresses and continuing in the 108th, on a number of bills proposed to better serve the pension needs of American workers.

## 106TH CONGRESS

In the 106th Congress, the Committee began reviewing the pension provisions of the Employee Retirement Income Security Act ("ERISA") and its relevance to the needs of participants, beneficiaries and employers in the 21st Century. The forum for these hearings was the Committee on Education and the Workforce, Subcommittee on Employer-Employee Relations, chaired during the 106th Congress by Rep. John Boehner.

On March 11, 1999, Rep. Rob Portman and Rep. Benjamin Cardin introduced H.R. 1102, the "Comprehensive Retirement Security and Pension Reform Act of 1999." That bill was jointly referred to the Employer-Employee Relations Subcommittee of the Education and Workforce Committee and to the Ways and Means Committee. The purpose of the bill was to make retirement security more available to millions of workers by (1) expanding small business retirement plans, (2) allowing workers to save more, (3) addressing the needs of an increasingly mobile workforce through greater portability and other changes, (4) making pensions more secure, and (5) cutting the red tape that has hamstrung employers who want to establish pension plans for their workers.

On June 29, 1999, the Subcommittee on Employer-Employee Relations held a hearing, entitled "Enhancing Retirement Security: A Hearing on H.R. 1102, The 'Comprehensive Retirement Security and Pension Reform Act of 1999.'" Testimony was received from the bill's authors, Representatives Portman and Cardin. On July 14, 1999, the full Education and the Workforce Committee marked up the bill and favorably reported it by voice vote to the full House of Representatives on the same date. On July 19, 2000, the House of Representatives passed the bill by a vote of 401 yeas to 25 nays.

Although the bill had a great deal of support, it failed to become law during the 106th Congress. Fifteen provisions of Title VI of the bill, containing amendments to the Employee Retirement Income Security Act (ERISA), were added to H.R. 2488, the "Taxpayer Refund and Relief Act of 1999," which passed the House and Senate on August 5, 1999, but was vetoed by President Clinton. Subsequently, twenty-two ERISA provisions from H.R. 1102 were included in the "Retirement Savings and Pension Coverage Act of 2000," part of H.R. 2614, the "Taxpayer Relief Act of 2000" which passed the House on October 26, 2000, but was not acted upon by the Senate.

The Employer-Employee Relations Subcommittee also laid the framework for other pension legislation in the second session of the 106th Congress by holding hearings on the modernization of ERISA. On February 15, 2000, the Subcommittee on Employer-Employee Relations held a hearing entitled, "The Evolving Pension and Investment World after 25 Years of ERISA." The witnesses discussed the larger challenges facing the Employee Retirement Income Security Act (ERISA) and private pension plans now and in the future. The following individuals testified: Professor John H. Langbein, Chancellor Kent Professor of Law and Legal History, Yale Law School; Mr. Michael S. Gordon, Esquire, from the law offices of Michael S. Gordon, Washington, DC; Dr. John B. Shoven, Charles R. Schwab Professor of Economics, Stanford University;

and Dr. Teresa Ghilarducci, Associate Professor of Economics at the University of Notre Dame.

The Subcommittee on Employer-Employee Relations also held two days of hearings on pension reform March 9 and 10, 2000 with a hearing entitled: "A More Secure Retirement for Workers: Proposals for ERISA Reform." Testifying at the March 9th hearing were: Mr. W. Allen Reed, President, General Motors Investment Management Company, on behalf of the Committee on Investment of Employee Benefit Assets (CIEBA) of the Financial Executives Institute; Mr. Daniel P. O'Connell, Corporate Director for Employee Benefits and HR Systems, United Technologies Corporation, on behalf of the ERISA Industry Committee (ERIC); Mr. Damon Silvers, Associate General Counsel of the AFL–CIO; Professor Joseph A. Grundfest, William A. Franke Professor of Law and Business and co-founder of Financial Engines, Incorporated; Ms. Eula Ossofsky, President of the Board of Directors, the Older Women's League; and Ms. Margaret Raymond, Assistant General Counsel, Fidelity Investments, on behalf of the Investment Company Institute.

During the second day of hearings on March 10th, the following individuals testified before the Subcommittee on Employer-Employee Relations: Mr. Kenneth S. Cohen, Senior Vice President and Deputy General Counsel of the Massachusetts Mutual Life Insurance Company, on behalf of the American Council of Life Insurers; Mr. Marc E. Lackritz, President, the Securities Industry Association; Mr. David Certner, Senior Coordinator, Department of Federal Affairs for the American Association of Retired Persons; Mr. Louis Colosimo, Managing Director, Morgan Stanley Dean Witter & Company, Incorporated, on behalf of the Bond Market Association; Mr. John Hotz, Deputy Director of the Pension Rights Center; and Ms. Deedra Walkey, Assistant General Counsel for the Frank Russell Company.

On March 16, 2000, the Subcommittee held a hearing entitled "The Wealth through the Workplace Act: Worker Ownership in Today's Economy." The hearing focused on a bill introduced by then Subcommittee Chairman John A. Boehner, H.R. 3462, which made stock options more available to ERISA participants. Testifying before the Subcommittee that day was Jane F. Greenman, Esquire, Deputy General Counsel, Human Resources, Honeywell on behalf of the American Benefits Counsel; Mr. Tim Byland, Senior Sales Executive, INTERVU, Inc., Fairfax, VA; and Mr. Patrick Von Bargen, Executive Director, National Commission on Entrepreneurship, Washington, DC.

On April 4, 2000, the Subcommittee on Employer-Employee Relations held a subsequent hearing laying the framework for future legislation entitled "Modernizing ERISA to Promote Retirement Security." The following individuals testified: the Honorable Leslie Kramerich, Acting Assistant Secretary of Labor for Pension and Welfare Benefits, U.S. Department of Labor; and the Honorable David M. Strauss, Executive Director of the Pension Benefit Guaranty Corporation.

On June 26, 2000, Representative John A. Boehner, then Chairman of the Subcommittee on Employer-Employee Relations, introduced H.R. 4747, the Retirement Security Advice Act of 2000. On July 19, 2000, the Subcommittee on Employer-Employee Relations ordered H.R. 4747 favorably reported, as amended, by voice vote.

There was no further action taken on the legislation prior to the conclusion of the 106th Congress.

Concluding the legislative activity for the 106th Congress, the Subcommittee held a hearing on September 14, 2000 entitled "How to Improve Pension Coverage for American Workers." Testifying at the hearing was: Theodore Groom, Esquire, Groom Law Group, Washington, DC; Mr. Michael Calabrese, Director, Public Assets Program, New America Foundation, Washington, DC; and Mr. Ed Tinsley, III, President and CEO, K-Bob's Steakhouse, Albuquerque, NM.

107TH CONGRESS

Building upon the activity of the previous Congress, Representative Rob Portman and Representative Ben Cardin, introduced on March 14, 2001, H.R. 10, a bill very similar to the House-passed H.R. 1102 of the previous Congress. The bill had 305 cosponsors—175 Republicans and 130 Democrats, including Committee Chairman John Boehner, Subcommittee on Employer-Employee Relations Chairman Sam Johnson, and Subcommittee Ranking Member Rob Andrews.

The Subcommittee on Employer-Employee Relations held a legislative hearing on the bill on April 5, 2001. At the hearing, entitled "Enhancing Retirement Security: A Hearing on H.R. 10, The 'Comprehensive Retirement Security and Pension Reform Act of 2001,'" testimony was received from the bill's authors, Representatives Portman and Cardin, as well as Nanci S. Palmintere, director of Tax, Licensing and Customs, Intel Corporation, appearing on behalf of the American Benefits Council; Richard Turner, Associate General Counsel, American General Financial Group, appearing on behalf of the American Council of Life Insurers; Judith Mazo, Senior Vice President, The Segal Co., on behalf of the Building and Construction Trades Department, AFL–CIO and the National Coordinating Committee for Multiemployer Plans; and Karen Ferguson, Director, the Pension Rights Center.

On April 26, 2001, the Committee on Education and the Workforce approved H.R. 10, as amended, by a voice vote, a quorum being present, and by voice vote ordered the bill favorably reported. On May 5, 2001, the House of Representatives passed H.R. 10 on a vote of 407 yeas–24 nays. On May 16, 2001, H.R. 10 was included in H.R. 1836, the Economic Growth and Tax Relief Reconciliation Act, and passed by the House of Representatives on a vote of 230 yeas–197 nays. After a conference with the Senate, the House passed the Conference Report on May 26th 2001, on a vote of 240 yea–154 nays and President George W. Bush signed the bill into law on June 7, 2001.[1] Due to the imposition of the "Byrd Rule" in the Senate,[2] some of the ERISA provisions contained in H.R. 10 were dropped from the bill and not included in final passage.

On June 21, 2001, Representative John A. Boehner, Chairman of the Committee on Education and the Workforce, introduced H.R. 2269, "The Retirement Security Advice Act of 2001," a bill to promote the provision of retirement investment advice to workers managing their retirement income assets. The bill was referred to

[1] See House Committee Report 84; Public Law 107–16.

[2] § 313 of the Congressional Budget Act restricts non-mandatory spending provision through budget reconciliation.

the Committee on Education and Workforce, Employee-Employer Subcommittee and the Committee on Ways and Means. On July 17, 2001, the Subcommittee on Employer-Employee Relations held a hearing on the bill. Testifying before the Subcommittee were: the Honorable Ann L. Combs, Assistant Secretary for Pension and Welfare Benefits, U.S. Department of Labor; Ms. Betty Shepard, Human Resources Administrator, Mohawk Industries, Inc.; Mr. Damon Silvers, Associate General Counsel, AFL–CIO; Mr. Richard A. Hiller, Vice President, Western Division, of TIAA–CREF; Mr. Joseph Perkins, Immediate Past President of the American Association for Retired Persons; and Mr. Jon Breyfogle, Principal, The Groom Law Group, on behalf of the American Council of Life Insurers.

On August 2, 2001, the Subcommittee on Employer-Employee Relations approved H.R. 2269, without amendment, by voice vote and ordered the bill favorably reported to the Full Committee. On October 3, 2001, the Committee on Education and the Workforce approved H.R. 2269, as amended, by voice vote and ordered the bill favorably reported by a roll call vote of 29–17. Following this action, the Committee on Ways and Means considered and marked up the bill on November 7, 2001 and reported the bill to the full House on November 13, 2001. The bill as amended passed the House of Representatives on November 15, 2001 on a roll call vote of 280 yeas–144 nays.

On February 6 and 7, 2002, the full Committee held a hearing entitled "The Enron Collapse and its Implications for Worker Retirement Security". At the first session of this hearing the sole witness was the Honorable Elaine Chao, Secretary of Labor. On the second day, the witnesses were: Mr. Thomas O. Padgett, Senior Lab Analyst, EOTT (Enron Subsidiary); Ms. Cindy K. Olson, Executive Vice President, Human Resources and Community Relations, and Building Services, Enron Corporation; Ms. Mikie Rath, Benefits Manager, Enron Corporation; Mr. Scott Peterson, Global Practice Leader for Defined Contribution Services, Hewitt Associates; and Ms. Teresa Ghilarducci, Associate Professor, Department of Economics, University of Notre Dame.

Following the two-day hearing of the full Committee, the Subcommittee on Employer-Employee Relations, held a hearing on February 13, 2002 entitled "Enron and Beyond: Enhancing Worker Retirement Security." The witnesses were: Jack L. VanDerhei, PhD, CEBS, Professor, Department of Risk, Insurance, and Healthcare Management, The Fox School of Business and Management, Temple University, appearing on behalf of the Employee Benefit Research Institute; Douglas Kruse, PhD, Professor, School of Management and Labor Relations, Rutgers University; Mr. Norman Stein, Douglas Arant Professor of Law, University of Alabama, School of Law; and Ms. Rebecca Miller, CPA, Partner, McGladrey & Pullen, LLP.

On February 14, 2002, Chairman John Boehner and Subcommittee on Employer-Employee Relations Chairman Sam Johnson introduced H.R. 3762, "The Pension Security Act." The bill embodied the pension reform principles outlined by President George W. Bush. The President envisioned new protections for workers so that they would have the freedom to diversify employer contributions after three years. To ensure parity between the top floor and the shop floor, the President's proposal would preclude senior executives from selling company stock outside of the company 401(k) while workers were unable to diversify their plan account during a blackout. In order to ensure that employer plan administrators made sound decisions about blackouts, the President's proposed plan would have held fiduciaries liable if they violated their duty to act in the interests of workers when they created the blackout period. The President's plan would also increase the information workers receive about their benefits and their notice as to the limiting of their rights during a blackout. The final prong of the President's plan was his call for the enactment of the Retirement Security Advice Act, H.R. 2269, which encouraged employers to make investment advice available to their workers.

After the introduction of this bill, the Employer-Employee Relations Subcommittee held a hearing entitled "Enron and Beyond: Legislative Solutions" on February 27, 2002. The witnesses were: Mr. Dave Evans, Vice President, Retirement and Financial Services, Independent Insurance Agents of America Ms. Angela Reynolds, Director, International Pension and Benefits, NCR Corporation; Mr. Erik Olsen, Member, Board of Directors, American Association of Retired Persons; Dr. John H. Warner, Jr., Corporate Executive Vice President, Science Applications International Corp., appearing on behalf of the Profit Sharing Council of America; Mr. Richard Ferlauto, Director of Pensions and Benefits, American Federation of State, County, and Municipal Employees, testifying on behalf of AFSCME and AFL–CIO; and John M. Vine, Esq., Partner, Covington and Burling, testifying on behalf of the ERISA Industry Committee.

On March 20, 2002, the Committee on the Education and the Workforce marked-up and approved H.R. 3762, as amended, the "Pension Security Act of 2002." The Committee considered seventeen amendments, adopted three of them, and ordered the bill favorably reported to the House of Representatives by a roll call vote of 28 yeas–19 nays. The bill as amended passed the House of Representatives on April 11, 2002 on a roll call vote of 255 yeas–163 nays.

On February 14, 2002, Rep. Mike Oxley introduced H.R. 3763, the Corporate and Auditing Accountability, Responsibility, and Transparency Act of 2002. Provisions from the bill were combined with provisions from the Public Company Accounting Reform and Investor Protection Act, introduced by Sen. Paul Sarbanes on June 18, 2002. The final bill, the "Sarbanes-Oxley" bill, passed the House by a roll call vote of 423–3 and by the Senate by a vote of 99–0 on July 25, 2002. The President signed the Sarbanes-Oxley Act into law on July 30, 2002 (P.L. 104–204). Incorporated into the Sarbanes-Oxley Act were two provisions originally included in H.R. 3762 regarding notice to plan participants regarding blackout periods and a prohibition on corporate trading during pension plan blackout periods.

On September 10, 2002, the Employer-Employee Relations Subcommittee held a hearing entitled "Retirement Security for American Workers: Examining Pension Enforcement and Accountability." The witnesses were: The Honorable Ann L. Combs, Assistant Secretary for the Pensions Welfare Benefits Administration, U.S. Department of Labor; Stephen J. Cossu, Deputy Inspector

General, Office of Labor Racketeering and Fraud Investigations, Office of Inspector General, U.S. Department of Labor; Kenneth Boehm, Chairman, National Legal and Policy Center; Karen Ferguson, Director, Pension Rights Center.

### 108TH CONGRESS

Building on the success of corporate reform and the foundation of the pension reform principles started in the 107th Congress, on February 13, 2003, the Employer-Employee Relations Subcommittee held a hearing entitled: "The Pension Security Act: New Pension Protections to Safeguard the Retirement Savings of American Workers." The witnesses were: the Honorable Ann L. Combs, Assistant Secretary, Employee Benefits Security Administration, United States Department of Labor; Ed Rosic, Vice President and Managing Assistant General Counsel, Marriott International, Inc., appearing on behalf of The American Benefits Council; Nell Minow, Editor, The Corporate Library, appearing on behalf of Robert Monks, Lens Governance Advisors; and Scott Sleyster, Senior Vice President and President of Retirement Services and Guaranteed Products, Prudential Financial.

On February 27, 2003, Chairman John Boehner and Subcommittee on Employer-Employee Relations Chairman Sam Johnson introduced H.R. 1000, "The Pension Security Act of 2003." The bill contained the same pension reform principles outlined by President George W. Bush in 2002, omitting the two provisions that were passed into law in the Sarbanes-Oxley Act. The bill contained new protections for workers so that they would have the freedom to diversify employer contributions after three years. In order to ensure that employer plan administrators made sound decisions about blackouts, the bill clarified the duty of fiduciaries to act in the best interests of workers during blackout periods. Finally, the bill incorporated the provisions of the Retirement Security Advice Act, H.R. 2269, which encouraged employers to make investment advice available to their workers. The legislation also contains a number of ERISA provisions from H.R. 10 in the 107th Congress that were dropped prior to final passage. These would make it easier for small businesses to adopt and maintain defined benefit pension plans. The legislation also makes technical changes to the National Saver Summit.

On March 5, 2003, the Committee on Education and the Workforce marked-up and approved H.R. 1000, as amended, the "Pension Security Act of 2003." The Committee considered 7 amendments, adopted the Chairman's Amendment in the Nature of a Substitute, and ordered the bill favorably reported to the House of Representatives by a roll call vote of 29 yeas—19 nays.

## COMMITTEE STATEMENT AND VIEWS

### A. BACKGROUND AND NEED FOR LEGISLATION

The Employee Retirement Income Security Act ("ERISA")[3] was enacted in 1974 to provide a safe, honest and efficient structure for protecting pension benefits for America's private sector employees. ERISA created federal standards and remedies for pensions with

[3] 29 U.S.C. § 1001, et seq.

U.S. Department of Labor oversight. As demonstrated at a number of bipartisan hearings held by the Committee on Education and the Workforce, (hereinafter the "Committee") and the Subcommittee on Employer-Employee Relations during the 108th and 107th Congresses, as well as hearings held by the Subcommittee during the 106th Congress, ERISA has been largely successful in protecting the integrity of privately managed pension plans.

In fact, there is a great deal of evidence that the private pension system is a great success story. As Secretary of Labor Elaine Chao stated in her testimony before the Committee on February 6, 2002:

> Just two generations ago, a "comfortable retirement" was available to just a privileged few; for many, old age was characterized by poverty and insecurity. Today, thanks to the private pension system that has flourished under ERISA, the majority of American workers and their families can look forward to spending their retirement years in relative comfort. Today, more than 46 million Americans are earning pension benefits on the job. More than $4 trillion is invested in the private pension system. This is, by any measure, a remarkable achievement.[4]

Secretary Chao explained the basic structure of ERISA and how that structure preserves security for plan participants and beneficiaries.

> The fiduciary provisions of Title I of ERISA, which are administered by the Labor Department, were enacted to address public concern that funding, vesting and management of plan assets were inadequate. ERISA's enactment was the culmination of a long line of legislative proposals concerned with the labor and tax aspects of employee benefit plans. Since its enactment in 1974, ERISA has been strengthened and amended to meet the changing retirement and health care needs of employees and their families. The Department's Pension and Welfare Benefits Administration is charged with interpreting and enforcing the statute. The Office of the Inspector General also has some criminal enforcement responsibilities regarding certain ERISA covered plans.
>
> Under ERISA, the Department has enforcement and interpretative authority over issues related to pension plan coverage, reporting, disclosure and fiduciary responsibilities of those who handle plan funds. Additionally, the Labor Department regularly works in coordination with other state and federal enforcement agencies including the Internal Revenue Service, Federal Bureau of Investigation, and the Securities and Exchange Commission. Another agency with responsibility for private pensions is the Pension Benefit Guaranty Corporation, which insures defined-benefit pensions.
>
> ERISA focuses on the conduct of persons (fiduciaries) who are responsible for operating pension and welfare benefit plans. Such persons must operate the plans solely in

[4] Hearing on "The Enron Collapse and Its Implications for Worker Retirement Security" before the Committee on Education and the Workforce, U.S. House of Representatives, 107th Congress, Second Session, February 6, 2002, Serial No. 107–42, p. 45.

> the interests of the participants and beneficiaries. If a fiduciary's conduct fails to meet ERISA's standard, the fiduciary is personally liable for plan losses attributable to such failure.[5]

Although ERISA has made pensions safer for participants, the evolving nature of pension plans with increased participation of participants in securities markets call for improved safeguards to protect these individually controlled pension accounts. That was illustrated in significant fashion by the collapse of Enron Corporation, a Houston Texas energy bond-trading firm. On December 2, 2001, Enron Corp. filed the then largest bankruptcy petition in U.S. history.[6] The day after declaring bankruptcy, the company announced that it would lay off 4,000 of its 7,500 employees as part of a corporate restructuring program to drastically cut costs. Significant scrutiny by the Congress, federal regulatory authorities and media and public attention followed and focused on two main areas: alleged accounting errors and/or securities violations that caused the company to vastly overstate its earnings and ultimately collapse financially and, most important to the Committee on Education and the Workforce's jurisdiction, the losses in the company's 401(k) plan[7] that diminished the retirement funds of many Enron employees.

In response to the Enron situation, the Committee held three hearings to examine the facts of the Enron situation and whether it demonstrated any broader implications for pension reforms. The facts in the Enron bankruptcy showed that 57% of Enron's 401(k) plan assets were invested in company stock, which fell in value by 98.8% during 2001.[8] Most of these plan assets were voluntarily directed by participants into Enron stock. Enron contributed an employer match of up to 3% of the employee's contribution in Enron stock. The employer match was restricted from trading until age 50—meaning that employees could not divest the company stock contributed by Enron until they reached age 50. Otherwise, the investment allocations in the Enron plan were unrestricted and could be traded daily.[9] A further complicating factor in the Enron situation was that prior to Enron announcing bankruptcy, Enron's 401(k) plan changed plan record keepers.[10] The change of plan record keepers required the plan to enter into an eleven business

[5] Hearing on "The Enron Collapse and Its Implications for Worker Retirement Security" before the Committee on Education and the Workforce, U.S. House of Representatives, 107th Congress, Second Session, February 6, 2002, Serial No. 107–42, p. 46.

[6] WorldCom, Inc. has since filed the largest bankruptcy petition in U.S. history on July 22, 2002.

[7] Sponsorship of any retirement plan is voluntary, but any company that sponsors a plan for its employees must abide by the standards established by ERISA. A 401(k) plan is a type of benefit plan that can be offered under ERISA as individual account plan. 401(k) refers to a provision in the Internal Revenue Code that provides for tax-qualified retirement plans with the requirement that cash-deferred plans be nondiscriminatory, ensuring that highly paid executives do not benefit disproportionately. I.R. Code § 401(k). These tax-qualified plans can be funded by contributions from employer, employee or both. Savings are paid out at retirement, which is when the taxes are paid.

[8] Hearing on "The Enron Collapse and Its Implications for Worker Retirement Security" before the Committee on Education and the Workforce, U.S. House of Representatives, 107th Congress, Second Session, February 7, 2002, Serial No. 107–42, p. 113.

[9] Ibid at 112.

[10] A plan record keeper's role includes processing all transactions by plan participants, including contributions, changes in investments and withdrawals, loans, and distributions. Record keepers can also provide customer service centers and can respond to participant inquiries. The record keeper, however, does not design the plan or determine investment options in the plan. Likewise, record keepers do not make any discretionary decisions about the plan.

day trading suspension period during which Enron employees could not have access to their accounts. During the suspension period, Enron announced a $600 million loss. Enron stock consequently dropped during that period, from approximately $13 to $8. In the year prior to the suspension period, Enron stock had dropped from $81.39 in January 2001 to $20.65 in October 2001.

At the Committee's first day of hearings regarding Enron, Secretary of Labor Elaine Chao testified about the steps the Department of Labor was taking to respond to Enron. In addition, she outlined changes the Bush Administration felt were necessary to protect pension plan participants from future Enron situations. The second day featured a panel of Enron executives, an Enron employee, a representative from Enron's plan record keeper, and an economist. The Enron employee, the Enron executives, and the plan record keeper testified about the events surrounding the Enron situation.

The second day of hearings gave the Committee an understanding of the facts that lead to problems at Enron, which included areas such as the lack of investment advice and confusion about the blackout period. An Enron employee, Tom Padgett, testified he lost over $600,000 over the course of a year in his 401(k) plan because it was primarily invested in Enron stock. Mr. Padgett observed that he managed his own retirement funds and did not have access to "Wall Street" information:

> Based on what we were told—repeatedly by the men at the top—I never dreamed that this disaster could have happened. We are not Wall Street analysts. I am sure that most Enron employees manage their investments themselves, like * * * I did. The fact remains, though, that good investment decisions require honest information. We all know now that the information that we were given was false.[11]

The Committee also heard from Enron Benefits Manager, Mikie Rath, who testified that Enron's 401(k) plan offered a menu of 20 investment options, including mutual funds, a Schwab self-directed brokerage account, and Enron stock. Ms. Rath confirmed that Enron offered a matching contribution in company stock starting in 1998. Finally, Ms. Rath explained that the Enron plan offered daily trading for all investments, including Enron stock. Only the matching stock contribution was restricted from trading until the participant reached age 50.

Ms. Rath also offered insight into the so-called "lockdown" or "blackout" period at Enron when trading in the 401(k) plan was suspended for eleven days while Enron changed plan service providers.

> After Enron outsourced its benefits services in 2000, it became clear that Northern Trust [Enron's former plan record keeper] had difficulty providing the level of service demanded by Enron's employees. In January 2001, Enron began searching for a new benefits administrator, and

[11] Hearing on "The Enron Collapse and Its Implications for Worker Retirement Security" before the Committee on Education and the Workforce, U.S. House of Representatives, 107th Congress, Second Session, February 7, 2002, Serial No. 107–42, p. 112.

> after a Request for Proposal process, we selected Hewitt in May of 2001.

Ms. Rath explained what happened during the lockdown period:

> Enron, Northern Trust, and Hewitt worked together to shorten [the] time period as much as possible without sacrificing the integrity of participants' accounts. Ultimately, the trading suspension encompassed eleven trading days from October 29 to November 13, 2001. Enron mailed a brochure to all participants some three weeks before the trading suspension, explaining the transition and notifying them of the temporary suspension. Enron employees with email accounts received additional reminders in the days leading up to the transition.
>
> Unfortunately, as the Committee is no doubt aware, the commencement of the transition coincided with certain bad news about the state of Enron's finances. We considered postponing the transition but found it was not feasible to notify more than 20,000 participants in a timely fashion. As the Enron news continued to break, we and the plan's Administrative Committee again considered stopping the transition. However, in addition to the problem of notifying participants, it would actually take longer to reverse the transition than to finish it. Ultimately, we worked with Hewitt to shave one week off the transition and we implemented a process for notifying participants of the early resumption of trading.[12]

Scott Peterson, Practice Leader for the Defined Contribution Services of Hewitt Associates LLC, also testified before the Committee about how lockdowns, in general, work. Hewitt Associates became the new plan record keeper for the Enron plan in May 2001.

> In the case of large plans such as the Enron 401(k) plan, a transition period, commonly referred to as a blackout period, is standard. A blackout period is designed to ensure accuracy of the date transferred by the old record keeper and to enable the new record keeper to transfer the data to its system and confirm its operational integrity. Trustees need to follow a similar process if trustees are changing. During all portions of this period, plan participants are restricted in their ability to deposit or withdraw funds or to change their investments.[13]

Mr. Peterson also detailed some of the events that occurred during Enron's lockdown period:

> [T]he blackout period for loans, withdrawals, etc. actually began after the close of trading on October 19, 2001. The blackout period for changes in investment options including the Enron Corp. stock fund, was scheduled to begin after the close of trading on October 26, 2001.

[12] Hearing on "The Enron Collapse and Its Implications for Worker Retirement Security" before the Committee on Education and the Workforce, U.S. House of Representatives, 107th Congress, Second Session, February 7, 2002, Serial No. 107–42, p.104.

[13] Ibid. at p. 198.

> On October 25, 2001, almost a week into the first phase of the blackout period, a member of the Enron Benefits Department contacted Hewitt and posed a few questions. Specifically, we were asked about the systems issues and similar practical consequences of accelerating the live date by shortening the blackout period. * * * Enron mentioned the possibility that they could postpone the whole conversion and wait until the following February or March.
>
> Enron asked that we respond to these questions that same day and we did so. With respect to accelerating the live date, we pointed out a series of risk considerations. These risks included the adverse effects on plan participants of commencing our record keeping activities with incorrect plan data due to a shortened review period and the possible compromising of the quality of the services we could provide to plan participants. In addition, we noted that similar data quality issues could arise with respect to the new trustee's reconciliation process. * * * Finally, we discussed some of the factors Enron would want to consider in deciding whether to delay the transition period in its entirety. These factors include extra cost, staffing implications, and the inability to predict whether the Enron stock would be any less volatile. We also made clear that we would work with Enron to accommodate any changes it might decide to make in the schedule.
>
> Later on October 25, 2001, a member of Enron's Benefit Resources Department called to notify us that a determination had been made that the transition would go forward on the then current schedule. We subsequently learned that Enron had been advised by its legal counsel that it should not alter the blackout schedule. As a result, restrictions on changes in investment allocations took effect at the close of business on the next day, October 26, 2001.[14]

At the prior day's hearing, Secretary Chao testified about the Department of Labor's resources in responding to companies in crisis and their specific efforts with respect to Enron:

> On November 16, 2001, over two weeks before Enron declared bankruptcy, the Department launched an investigation into the activities of Enron's pension plans. Our investigation is fact intensive with our investigators conducting document searches and interviews. The investigation is examining the full range of relevant issues to determine whether violations of ERISA occurred, including Enron's treatment of their recent blackout period.
>
> In early December, it became apparent that Enron would enter bankruptcy. Because the health and pension benefits of workers were at risk, we initiated our rapid response participant assistance program to provide as much help as possible to individual workers.

[14] Hearing on "The Enron Collapse and Its Implications for Worker Retirement Security" before the Committee on Education and the Workforce, U.S. House of Representatives, 107th Congress, Second Session, February 7, 2002, Serial No. 107–42, p. 199–200.

On December 6 and 7, 2001, the Department, working directly with the Texas Workforce Commission, met on-site in Houston with 1200 laid-off employees from Enron to provide information about unemployment insurance, job placement, retraining and employee benefits issues. PWBA's staff was there to answer questions about health care continuation coverage under COBRA, special enrollment rights under HIPAA, pension plans, how to file claims for benefits, and other questions posed by the employees. We also distributed 4500 booklets to the workers and Enron personnel describing employee benefits rights after job loss, and provided Enron employees with a direct line to our benefit advisors and to nearby One-Stop reemployment centers. These services were made available nationwide to other Enron locations.

The Rapid ERISA Action Team (REACT) enforcement program is designed to assist vulnerable workers who are potentially exposed to the greatest risk of loss, such as when their employer has filed for bankruptcy. The new REACT initiative enables PWBA to respond in an expedited manner to protect the rights and benefits of plan participants. Since introduction of the REACT program in 2000, we have initiated over 500 REACT investigations and recovered over $10 million.

Under REACT, PWBA reviews the company's benefit plans, the rules that govern them, and takes immediate action to ascertain whether the plan's assets are accounted for. We also advise all those affected by the bankruptcy filing, and provide rapid assistance in filing proofs of claim to protect the plans, the participants, and the beneficiaries. PWBA investigates the conduct of the responsible fiduciaries and evaluated whether a lawsuit should be filed to recover plan losses and secure benefits.

Our investigation of Enron was begun under REACT. Because I do not want to jeopardize our ongoing Enron investigation, I cannot discuss the details of the case. Without drawing any conclusions about Enron activities, I will attempt to briefly describe what constitutes a fiduciary duty under ERISA, how that duty impacts [a]n investment in employer securities, the duty to disclose, and the ability to impose blackout periods.

Determining whether ERISA has been violated often requires a finding of a breach of fiduciary responsibility. Fiduciaries include the named fiduciary of a plan, as well as those individuals who exercise discretionary authority in the management of employee benefits plans, individuals who give investment advice for compensation, and those who have discretionary responsibility for administration of the pension plan.

ERISA holds fiduciaries to an extremely high standard of care, under which the fiduciary must act in the sole interest of the plan, its participants and beneficiaries, using the care, skill and diligence of an expert—the "prudent expert" rule. The fiduciary also must follow plan documents to the extent consistent with the law. Fiduciaries may be

> held personally liable for damages and equitable relief, such as disgorgement of profits, for breaching their duties under ERISA.
>
> While a participant or beneficiary can sue on their behalf of the plan, the Secretary of the Labor can also sue on behalf of the plan, and pursue civil penalties. We have 683 enforcement and compliance personnel and 65 attorneys who work on ERISA matters. In calendar year 2001, the Department closed approximately 4,800 civil cases and recovered over $662 million. There were also 77 criminal indictments during the year, as well as 42 convictions and 49 guilty pleas.[15]

Secretary Chao also detailed principles for a legislative proposal announced by President George W. Bush. She explained, at the President's direction, a Task Force comprised of the Department of Labor, Treasury and Commerce, had studied the broader implications of the Enron situation in regard to retirement security, and made recommendations to the President. Secretary Chao summarized the President's plan as follows: "The President's Retirement Security Plan, announced on February 1, would strengthen workers' ability to manage their retirement funds more effectively by giving them freedom to diversify, better information, and access to professional investment advice. It would ensure that senior executives are held to the same restrictions as American workers during temporary blackout periods and that employers assume full fiduciary responsibility during such times."[16]

On February 13, 2002, the Subcommittee on Employer-Employee Relations held a hearing to discuss legislative solutions to some of the problems the Enron situation had presented. One of the focal points at the hearing was Congress' policy decision to encourage employers to offer contributions in the form of company stock to their employees' 401(k) plans.

Dr. Jack VanDerhei, testifying on behalf of the Employee Benefits Research Institute (EBRI), explained that EBRI has maintained a database on 35,367 401(k) plans from 1996 through 2000. Of the approximately 36,000 plans in the EBRI database, only 2.9% of 401(k) plans include company stock, however of that small number of plans, Dr. VanDerhei noted that the plans that hold company stock represented 42% of the participants in the database. Dr. VanDerhei also observed that "[p]revious research has shown that the availability and level of a company match is a primary impetus for at least some employees to make contributions to their 401(k) plan."[17]

Dr. Douglas Kruse, Professor of Management and Labor Relations at Rutgers University testified "employee-owners represent a substantial portion of the U.S. workforce and 25 years of research shows that employee ownership often leads to higher-performing

[15] Hearing on "The Enron Collapse and Its Implications for Worker Retirement Security" before the Committee on Education and the Workforce, U.S. House of Representatives, 107th Congress, Second Session, February 6, 2002 Serial No. 107–42, p. 49–51.

[16] Ibid. at p. 51.

[17] Ibid. at p. 64–65.

workplaces and better compensation and worklives for employees."[18]

Dr. Kruse recognized that "employee-owners" may have limited information about the state of their company, but believed that this should not be an impediment to employee ownership.

> Employees clearly need good information and investment advice to ensure that they make intelligent decisions; once they receive such information and advice, they should not be prevented from accepting company stock from employers or investing their own assets in company stock. Obviously many individuals make well-informed choices to invest much of their assets in farms or small businesses that they operate, which are often very risky assets. Limiting workers' involvement in employee ownership plans due to a concern about their financial risk would be akin to preventing individuals from owning their own farms or small businesses. Substantial new restrictions on employee ownership of stock would very likely cut back a potentially lucrative benefit for employees, without providing anything of value in return since employees generally do not sacrifice pay or other benefits when they participate in employee ownership plans. [19]

Additionally, Rebecca Miller, Managing Director for Employee Benefits Practice Policy, RSM McGladrey, Inc., testified that employee ownership was a positive tool and resulted in increases in productivity and performance for companies, and better benefits and higher retirement income and wages for employees.[20] Ms. Miller recommended that if any legislative change should be made, "[t]he first focus of change in the retirement plan rules should be on investment education and assistance. It is clear from Enron, Lucent and other recent experiences with participant directed 401(k) plans—employees are generally unsophisticated investors. They need a better understanding of risk management, diversification, etc."[21]

As a result of the hearings held by the Committee and Subcommittee, on February 14, 2002, Chairman John Boehner and Subcommittee Chairman Sam Johnson introduced H.R. 3762, the Pension Security Act, embodying the principles set forth by the President.[22] Following introduction of the bill, the Subcommittee on Employer-Employee Relations held a hearing on February 27, 2002 on the legislative solutions to Enron. [23] Interest groups expressed support for H.R. 3762, but also cautioned the Subcommittee to tread carefully in creating additional regulations for employers.

[18] Ibid. at p. 103.

[19] Hearing on "Enron and Beyond: Enhancing Worker Retirement Security" before the Subcommittee on Employer-Employee Relations, Committee on Education and the Workforce, U.S. House of Representatives, 107th Congress, Second Session, February 13, 2002, Serial No. 107–44, p. 103.

[20] Ibid. at p. 5.

[21] Ibid. at p. 54

[22] The substance of H.R. 1000 is explained more thoroughly infra n. 34–75.

[23] By the time of the Feb. 27, 2002 hearing, more than fourteen bills had been introduced in the second session of the 107th Congress related to pensions and the fallout from Enron. They include H.R. 3416, H.R. 3463, H.R. 3509, H.R. 3622, H.R. 3623, H.R. 3640, H.R. 3692, H.R. 3642, H.R. 3657, H.R. 3669, H.R. 3677, S. 1838, S. 1919, and S. 1921.

Angela Reynolds, the Director of International Pension & Benefits of NCR Corporation, appeared on behalf of the American Benefits Council and testified:

> [O]ne cannot examine the realities of the 401(k) system without concluding that overly aggressive legislative change could unintentionally harm the very people that Congress hopes to protect. Chairman Johnson and Chairman Boehner, you both understand the delicate balance of regulation and incentives upon which the success of our voluntary, employer-sponsored pension system depends, and we appreciate your sensitivity to these issues as you lead this Committee's response to the Enron bankruptcy. In order to avoid unintended harms, the Council believes that retirement policy responses to Enron should focus on ensuring that 401(k) participants have the information, education and professional advice they need to wisely exercise their investment responsibility. Chairman Johnson, this is the course that you and Chairman Boehner have charted.[24]

Dr. John Warner, the Corporate Executive Vice President and Director, Science Applications International Corporation, appearing on behalf of Profit Sharing Council of America agreed with Ms. Reynolds and underscored the need for additional education and advice for plan participants:

There is an ongoing need to educate all employees in the basics of investing. Congress should work with employers to encourage financial education for employees and identify and remove barriers that deter many employers from making professional investment advice available to workers. The advice provision in H.R. 3762 will help some plan sponsors, as will a provision in H.R. 3669, cosponsored by Reps. Portman and Cardin, that will allow workers to purchase financial advice with pre-tax dollars.[25]

In addition, some of the witnesses expressed concern for other legislative proposals regarding pension reform. Ms. Reynolds addressed her concerns about H.R. 3657, the bill introduced by Rep. George Miller, ranking member of the Committee:

> One of our * * * concerns about H.R. 3657 is that, unlike the Boehner/Johnson legislation (H.R. 3762), it does not advance targeted responses to the specific issues raised by Enron but rather seeks to make wide-ranging and fundamental changes to our nation's defined contribution plan retirement system. The bill would fundamentally alter the governance system for 401(k) and other defined contribution plans, radically change the enforcement mechanism applicable to all ERISA claims (not those just in the pension area) and substantially revise the rules on vesting of employer contributions. The results would be increased workplace conflict, hampered plan administration, more litigation, fewer employer contributions and, for many employees, no retirement plan at all. These changes would

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[24] 1Hearing on "Enron and Beyond: Legislative Solutions" before the Subcommittee on Employer-Employee Relations, Committee on Education and the Workforce, U.S. House of Representatives, 107th Congress, Second Session, February 27, 2002, Serial No. 107–49, p. 50–51.

[25] Ibid. at p. 76–77.

undermine the 401(k) system's current success and should be rejected.[26]

John M. Vine, Esq., representing the ERISA Industry Committee (ERIC), testified that the proposal to mandate joint trusteeship in H.R. 3657, Rep. Miller's proposal, on individual account plans would create problems:

> ERIC also strongly opposes proposals that have been made for the joint trusteeship of individual account plans. Joint trusteeship will be divisive, disruptive, and counterproductive. It will politicize fiduciary responsibility. It will create employee relations strife. It will allow unions to speak for nonunion workers. It will require employers to spend resources on conducting [plan] elections rather than on discharging fiduciary responsibilities. It will disrupt, rather than strengthen, plan management. And because it will discourage employers from setting up plans, it will reduce retirement savings.[27]

David G. Evans from the Independent Insurance Agents of America echoed Ms. Reynolds' testimony and added that over-regulation would lead to employers offering plans that are not subject to ERISA's same fiduciary standards. Mr. Evans noted that other plans including IRA, SEP (Simplified Employer Pension) or SIMPLE IRAs do not have fiduciary liability exposure as it relates to investments because employees can move their account to any investment vehicle. "This ability becomes a two-edged sword because they can choose to take monies out of these accounts even though they have to pay an excise tax in addition to ordinary income tax. Yet, some employees will do this, damaging their future standard of living in retirement, in order to get their hands on the money."[28]

Although the House ultimately passed H.R. 3762 on April 11, 2002 by a vote of 255–163, the Senate failed to act on the legislation prior the end of the 107th Congress. At the beginning of the 108th Congress, the Employer-Employee Relations Subcommittee again took up the issue of pension reform and held a hearing on the pension reform provisions introduced in the previous Congress. The Subcommittee heard from the Honorable Ann L. Combs, Assistant Secretary in the Employee Benefit Security Administration, U.S. Department of Labor, about the importance of completing the pension reforms that were begun in the previous Congress:

> Congress made a down payment on improving retirement security by passing a portion of the President's Retirement Security Plan last year. The Administration believes the first order of business should be to pass the remainder of the Plan, as reiterated in the President's 2004 budget sent to Congress last week. We are pleased that the Chairman has made this an immediate priority.[29]

[26] Hearing on "Enron and Beyond: Legislative Solutions" before the Subcommittee on Employer-Employee Relations, Committee on Education and the Workforce, U.S. House of Representatives, 107th Congress, Second Session, February 27, 2002, Serial No. 107–49, p. 52.
[27] Ibid. at p. 92.
[28] Ibid. at p. 46.
[29] Hearing on "The Pension Security Act: New Pension Protections to Safeguard the Retirement Savings of American Workers" before the Subcommittee on Employer-Employee Relations, Committee on Education and the Workforce, U.S. House of Representatives, 108th Congress, First Session, February 13, 2003 .

Assistant Secretary Combs also addressed the importance of the investment advice provisions in the Pension Security Act:

> It's clear that people who participate in 401(k) plans want their employers and plans to provide more investment advice. According to a survey recently released by CIGNA Retirement and Investment Services, 89 percent of 401(k) investors want "specific information on investment decision-making."
>
> Investment advice also encourages participation in employer-provided retirement plans. Studies conducted on behalf of the investment advisory firm mPower show workers who receive advice are more likely to participate in savings plans and to save more than workers who never get any guidance.
>
> On December 14, 2001, the Department of Labor took a first step toward facilitating the broader availability of investment advice by issuing an advisory opinion (to SunAmerica) providing a model for independent investment advice. The model allows a financial services firm to provide advice services, including advice with respect to investment options offered by the firm, provided it hires an independent financial expert to make investment recommendations for their clients. Over the last year, several financial services companies have launched initiatives based on the advisory opinion, making independent investment advice more widely available to workers and their families.
>
> The independent advice model of the advisory opinion, however, has limitations. For example, when a worker receives specific recommendations generated by the independent advisor and delivered by the financial service provider, the worker cannot consult with the financial services firm to question or deviate from those recommendations. A financial services firm cannot discuss its own products with a plan participant because of ERISA's prohibited transaction rules.
>
> For many workers, investment decisions are intimidating. The Department is encouraged to see growing interest in the adoption of an alternative method sanctioned by the advisory opinion where workers turn over the decision making to the financial services firm who manages their account in accordance with the independent adviser's decisions.[30]

Assistant Secretary Combs also discussed how the provisions in the Pension Security Act were inter-related and important to each other:

> The reforms set forth in the President's Retirement Security Plan complement each other. The need for investment advice will increase once workers are provided additional rights to diversify their retirement savings, as will

[30] Hearing on "The Pension Security Act: New Pension Protections to Safeguard the Retirement Savings of American Workers" before the Subcommittee on Employer-Employee Relations, Committee on Education and the Workforce, U.S. House of Representatives, 108th Congress, First Session, February 13, 2003 (to be published).

the benefits of this advice. The President's Plan will give workers new freedom to sell company stock and diversify into other investment options after three years of participation in the plan. For workers with little or no investment sophistication, this new diversification right will be much more valuable when workers have access to professional investment advice to assist them in making these important decisions.

For example, the workers who may need to diversify the most, such as those Enron and WorldCom workers who held a high percentage of company stock in their accounts, could most benefit from access to professional investment advisers who could alert them to the benefits of diversification.

Taken together, the measures proposed by the President will give workers the choice, confidence and control they need to protect their savings and plan for a secure retirement future. Workers deserve the chance to make unrestricted investment decisions, the confidence that comes from good information and professional investment advice, and control over their retirement savings.[31]

Ed Rosic, Vice President at Marriott International, Inc., spoke about his experience working for a plan sponsor and how the provisions in the Pension Security Act could help plan participants. Mr. Rosic specifically applauded the bill's three-year diversification rule:

In addressing the question of company stock and retirement plans, we have been concerned that aggressive diversification rules could risk reduced matching contributions in some circumstances since employers would no longer be able to guarantee that every worker has a long-term ownership stake. The Pension Security Act's diversification rule under which employees can exchange shares of company stock after three years, is directly responsive to our concern. It allows employers to use either 3 years of service rule, or a rolling 3 years from date of grant rule, and also adopts a transition rule under the proposed diversification regime. We sincerely appreciated the bill's approach on this issue.[32]

Scott Sleyster, Senior Vice President and President of Retirement Services and Guaranteed Products, Prudential Financial, testified about the importance of investment advice and addressed the so-called "conflict" issue in the bill.

[F]irst and foremost, you need to remember that the choices, the options that are being offered in DC [defined contribution] plans have already been reviewed by the plan sponsor. The industry has demanded open architecture for some time. So you typically have 11 to 15 choices,

[31] Hearing on "The Pension Security Act: New Pension Protections to Safeguard the Retirement Savings of American Workers" before the Subcommittee on Employer-Employee Relations, Committee on Education and the Workforce, U.S. House of Representatives, 108th Congress, First Session, February 13, 2003 (to be published).

[32] Hearing on "The Pension Security Act: New Pension Protections to Safeguard the Retirement Savings of American Workers" before the Subcommittee on Employer-Employee Relations, Committee on Education and the Workforce, U.S. House of Representatives, 108th Congress, First Session, February 13, 2003 (to be published).

and in most cases, our funds and any company's funds would probably only represent about a third of that.

Second, the * * * most important decision here isn't the individual fund or even fund manager. The most important issue in managing a portfolio is asset allocation. And models are built to design asset allocation, and that is really what designs the choices you have. So, that if you have 15 funds, you don't have 15 growth funds; you have some that are growth, some that are international, some that are small capped, some that are fixed income, [and] some that are stable value. And I think that what really drives this is asset allocation.

[T]he issue here is how are we going to get advice to people in a cost effective manner. While you can probably come up with more esoteric and elegant solutions that seem pure, if you are asking the company to fund that or you are asking the participant to pay an additional fee for that, then you are going to end up with what we have ended up already, which tools out there that aren't utilized or options that plan sponsors don't want to pay for. And, you know, quite frankly, that is really the issue: How do we get investment advice to the average employee—remember, the average 401(k) balance, 45 percent of plan participant have less than $10,000. People aren't typically trying to go after those customers to sell them other products. The real question is, how do we get them advice that is as close to unbiased as possible, but also in a very cost efficient and simple manner.[33]

B. LEGISLATION

As described supra, improving the retirement security of American workers will be the subject of considerable Committee attention during the current Congress, as it has been during the past two Congresses. The corporate scandals of Enron, WorldCom, Global Crossing and Union Labor Life Insurance Company, the tragic losses to retirement savings faced by Enron employees, and the downturn in the stock market has sharpened the focus on some immediate needs to shore up the pension laws that govern 42 million American workers with individual account pension plans. More than $2.0 trillion are currently held in retirement assets by American workers.

The proposal offered by President Bush on Feb. 1, 2002 outlined new principles to protect the retirement security of American workers. Those principles would:

- Provide workers with greater freedom to diversify and manage their own retirement funds;
- Ensure that senior corporate executives are held to the same restrictions as average American workers during "blackout periods" and that employers assume full fiduciary responsibility during these times;

[33] Hearing on "The Pension Security Act: New Pension Protections to Safeguard the Retirement Savings of American Workers" before the Subcommittee on Employer-Employee Relations, Committee on Education and the Workforce, U.S. House of Representatives, 108th Congress, First Session, February 13, 2003 (to be published).

- Give workers quarterly information about their investments and rights to diversify them; and
- Expand workers' access to investment advice.[34]

As outlined, President Bush envisioned new protections for workers so that they would have the freedom to diversify employer contributions to their individual accounts after three years. To ensure parity between the top floor and the shop floor, the President's proposal would preclude senior executives from selling company stock outside of the company 401(k) while workers were unable to diversify their plan assets during a blackout. In order to ensure that employer plan administrators made sound decisions about blackouts, the President's plan would clarify that they were liable if they violated their duty to act in the interests of workers when they created the blackout period. The President's plan proposed to increase the information workers receive about their pension benefits and their notice as to the limiting of their rights during a blackout. The final prong of the President's plan was his call for enactment of the Retirement Security Advice Act, H.R. 2269, which encouraged employers to make investment advice available to their workers.[35]

Two of the provisions in the President's proposal were enacted into law by the Sarbanes-Oxley Act (P.L. 104–204): the preclusion of insiders selling company stock during blackouts and notice of those blackout periods to participants and beneficiaries. The Committee also notes that the Department of Labor recently finalized regulations clarifying the requirements for the blackout notices.[36]

This year, Committee Chairman John Boehner and Subcommittee Chairman Sam Johnson re-introduced the Pension Security Act on Feb. 27, 2002 with bipartisan support to complete the work Congress began on the President's proposal.

The legislation builds on the rights and protections contained in Title I of the Employee Retirement Income Security Act of 1974 (ERISA). Section 2(b)[37] of ERISA sets forth this Congressional Finding and Declaration of Policy:

> It is hereby declared to be the policy of this Act to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions and ready access to the Federal courts.[38]

Title I of ERISA contains these fundamental protections for participants and beneficiaries of employee benefit plans. Part 1 of Title I[39] sets forth the duties of plan administrators to notify participants and beneficiaries of the terms of the benefit plans in which they participate, their rights under these plans, the benefits which

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[34] February 1, 2002 Press Release, Office of the Press Secretary, President of the United States.
[35] Ibid; see also discussion of H.R. 2269, Committee Action, infra n. 71–72.
[36] 29 C.F.R. § 2520, et. al.
[37] 29 U.S.C. § 1001(b).
[38] Ibid.
[39] 29 U.S.C. § 1021, 1022, 1024, 1025.

have accrued under the terms of their plans, and any changes which may be made to these benefits or rights.

Equally important, Part 4 of Title I of ERISA[40] explains the fundamental duties of fiduciaries to employee benefit plans. In short, fiduciaries are to act solely in the interest of participants and beneficiaries with care, skill, prudence and diligence. Fiduciaries are to diversify the investments of employee benefit plans so as to minimize the risk of large losses, and are to act in accordance with the terms of the plan.[41]

In 1974, the Congressional crafters of ERISA noted the lack of employee information and safeguards with regard to employee benefit plans and provided for such disclosure and safeguards as would protect employees' interests.[42] In 1974, however, pension plans were primarily in the form of traditional defined benefit plans, which typically guaranteed specific monthly pension payments for the duration of a participant's lifetime. In this context, ERISA's one per year limit on the reports that outlined the total and nonforfeitable pension benefits that had accrued to the participant was more than adequate.[43]

Likewise, in 1974 the fiduciary duty to diversify the investments of the plan was an adequate safeguard to minimize the risk of large losses to defined benefit plans where risk is borne by the sponsor.[44]

Today's workforce is very different than the workforce in 1974. Employees are much less likely to work for long periods of time for a single employer and are less likely to participate in traditional defined benefit plans. In response to these labor trends, Congress has adapted pension and tax law to allow for individual retirement account plans, such as the 401(k) plan, which are well suited for today's mobile workforce. Today's retirement plan system is largely one of pension plans that, while employer sponsored, are individual in nature where employers and employees jointly contribute to an account and the employee has the ability to direct its own account, choosing investments that best meet its retirement needs.

Individual account plans necessitate different safeguards and standards for information disclosure in order to provide the same level of retirement security for participants and beneficiaries that were envisioned in 1974. As such, the provisions of H.R. 1000 represent a logical upgrade to the provisions of Title I of ERISA to ensure adequate retirement protection for today's workforce.

## TITLE I

### *H.R. 1000's Investment Education and Benefit Statement*

H.R. 1000 amends ERISA to require plan administrators of "applicable individual account plan" to provide a quarterly notice to plan participants and beneficiaries of the value of investments allocated to their individual account. Building upon ERISA's current requirement to provide an annual notice of benefits at the request

[40] 29 U.S.C. § 1104.

[41] ERISA has included a general exception to the diversification requirement with respect to employer securities in individual account plans in order to accommodate employee stock option plans (ESOPs).

[42] 29 U.S.C. § 1001(a).

[43] 29 U.S.C. § 1025(b).

[44] 29 U.S.C. § 1104(a)(1)(C).

of participants and beneficiaries,[45] the new provision will increase the benefit information available to participants who may be making real time investment decisions about the assets held in their "applicable individual account plans." Provisions from H.R. 10, the Comprehensive Retirement Security and Pension Reform Act of 2001, were also incorporated into H.R. 1000 to require plan administrators of all individual account plans, as defined by Section 3 (34) of ERISA to provide a pension benefit statement at least annually.

For the purpose of the benefit statements, H.R. 1000 defines "applicable individual account plan" by limiting the existing definition of individual account plan in ERISA[46] to exclude employee stock ownership plans (ESOP)[47] unless there are any contributions to such plan or earnings held within such plan that are subject to subsection (k)(3) or (m)(2) of section 401 of the Internal Revenue Code of 1986. In H.R. 1000, the Committee clarified that the quarterly benefits statement does not require that the value of non-publicly traded stock held in an individual account plan be determined quarterly. Rather, the bill provides that the quarterly statement will give the value of any securities that are not readily tradable on an established securities market based upon the most recent valuation of such securities.

Additional provisions from H.R. 10 which were added to H.R. 1000 require administrators of traditional defined benefit plans to furnish a benefit statement to each participant of a defined benefit plan at least once every three years and to a plan participant or beneficiary upon written request. In the case of a defined benefit plan, if administrators annually provide participants with a notice of the availability of a pension benefit statement, the new requirements are treated as having been met.

Because many participants and beneficiaries have on-line access to their accounts, H.R. 1000 continues to allow that the new notices may be provided in electronic or other appropriate form provided that such form is reasonably accessible to the recipient. H.R. 1000 is intended to work in tandem with Department of Labor regulations regarding electronic delivery of notices to participants.[48] The Committee intends that plan sponsors who make the quarterly benefits information available through the company's website or other electronic means as prescribed in the Department of Labor's regulations will have "furnished" the disclosures required in section 105.

H.R. 1000 gives participants new rights to diversify the assets that are contributed to their account in the form of employer securities. Because of this new right, the new quarterly benefit statement for applicable individual accounts will include an explanation of any limitations or restrictions on the right of the participant or beneficiary to direct an investment, including their right to diversify any assets held in employer securities. Because Section 105 of ERISA was created not only to report on the benefits of participants and beneficiaries, but also to report on the rights of partici-

[45] 29 U.S.C. § 1025(a).
[46] 29 U.S.C. § 1102 (34).
[47] 26 U.S.C. § 4975 (e)(7).
[48] 29 C.F.R. § 2520.104b–1(c).

pants and beneficiaries under their benefit plans, this new diversification right is correctly placed in Section 105 of ERISA.

As shown by the concentration of Enron securities held by Enron pension plan participants, American workers need assistance in recognizing the importance of diversification to a well-balanced and secure retirement account. Because of this, the benefit statement will also include an explanation of the importance of a diversified investment portfolio, including the risk of holding substantial portions of a portfolio in any one security, such as employer securities. As in the case of the Enron employees, participants of individual account pension plans all too frequently depart from the principles of diversification by holding more than one fourth of their retirement portfolio in employer securities, particularly in pension plans that have more than 5,000 participants.[49] Because of this, the required educational information about the importance of diversification is appropriately placed in the same statement that specifies the participant's right to diversify assets held in employer securities.

In order to help plan sponsors and administrators comply with the bill's requirements relating to investment education and benefit statements, the Secretary of Labor shall issue guidance and model notices that include the value of investments, the rights of employees to diversify any employer securities and an explanation of the importance of a diversified investment portfolio. This initial guidance will be promulgated no later than 180 days after the enactment. So that plan sponsors and administrators are able to comply in a timely fashion, the Secretary may also issue interim model guidance.

Consistent with current law civil penalties of $1000 for a plan administrator's failure to file an annual report,[50] H.R. 1000 amends Section 502 of ERISA[51] to allow the Secretary to assess a civil penalty against a plan administrator of up to $1,000 a day from the date of such plan administrator's failure to provide participants and beneficiaries with a benefit statement on a quarterly basis.

*H.R. 1000's Clarification of Fiduciary Duty*

In order to protect against large losses, ERISA places a duty on plan fiduciaries to diversify assets.[52] In the case of individual account pension plans that permit participants and beneficiaries to exercise control over the assets in their account, Section 404(c) of ERISA specifies that fiduciaries are not liable for any loss that results from such participant's or beneficiary's exercise of control.[53] As such, the responsibility to diversify to protect against large losses passes from the fiduciary to the participant or beneficiary. This presents a unique challenge when plan administrators interrupt the otherwise available ability of participants and beneficiaries to direct or diversify assets, as in the case of a "blackout"

[49] Testimony of Jack L. VanDerhei, Ph.D., CEBS, EBRI Fellow, Hearing on "Enron and Beyond: Enhancing Worker Retirement Security" before the Subcommittee on Employer-Employee Relations, Committee on Education and the Workforce, U.S. House of Representatives, 107th Congress, Second Session, February 13, 2002 (to be published).
[50] 29 U.S.C. § 1132 (c)(2).
[51] 29 U.S.C. § 1132.
[52] 29 U.S.C. § 1104(a)(1)(C).
[53] 29 U.S.C. § 1104(c)(1)(B).

where participants are unable to access their accounts while the administration of the plan is switched from one service provider to another or plan investment options are changed. In order to protect the retirement security of pension plan participants in these cases, the Committee believes that additional clarification for plan administrators is needed.

During a blackout, as defined in the Sarbanes-Oxley Act,[54] H.R. 1000 requires that the administrator must consider the reasonableness of the expected period of the blackout. The Committee intends this duty to determine the reasonableness of the period of suspension to be read in the context of part 4 of ERISA[55] which requires that plan fiduciaries discharge their duties prudently and solely in the interest of participants and beneficiaries—the highest duty of loyalty known to the law.[56] Like fiduciary conduct in general, whether a fiduciary meets these requirement is determined by evaluating the conduct of the fiduciary ex ante, rather than ex post, with the benefit of 20–20 hindsight. Plan administrators should evaluate the amount of time that the participants' ability to direct or diversify will be suspended and the potential impact of this suspension on the participants' accounts in light of the need for the suspension and its potential benefits for participants and the plan. The Committee understands that there are many good reasons that may justify a suspension period, including hiring a more efficient recordkeeper, reducing plan administrative expenses, and enhancing plan investment options by making available more choices or better performing, lower expense investments.

In addition to considering the reasonableness of the blackout period, H.R. 1000 requires plan administrators to provide notice to participants and beneficiaries as required in section 101(i)(2) of ERISA.

As was clearly the case in the Enron situation, employees did not take appropriate action to diversify their accounts in advance of the "blackout."[57] Because the stock market and the Enron securities specifically were in an extremely volatile state, a warning to participants and beneficiaries about their own responsibilities may have protected the Enron employees from some of their losses. In the view of the Committee, it is only when participants and beneficiaries have been provided with this notice that they are adequately prepared to be responsible for their own individual accounts in the event of a blackout.

The Committee believes that the consideration of reasonableness with respect to a "blackout" and the provision of additional information to participants and beneficiaries about their own duty to evaluate the appropriateness of their current investment decisions are fundamental to the fiduciary protection from liability contained in 404(c) of ERISA.[58] Generally, participants and beneficiaries of applicable individual account plans bear the risk of their own accounts. The Committee believes that during a suspension, the plan

[54] 29 U.S.C. § 1021(i)(7).
[55] 29 U.S.C. § 1104(a)(1).
[56] See, e.g., *Donovan* v. *Bierwith,* 680 F.2d 263, 272 n.8 (2d Cir.1982).
[57] Testimony of Mr. Thomas O. Padgett, Senior Lab Analyst at EOTT (an Enron subsidiary), Hearing on "The Enron Collapse and its Implications for Worker Retirement Security" before the Committee on Education and the Workforce, U.S. House of Representatives, 107th Congress, Second Session, February 7, 2002, Serial No. 107–42, p. 182.
[58] 29 U.S.C. § 1104(c)(1)(B).

fiduciary and the plan participants and beneficiaries each have responsibilities that amount to a shared risk. H.R. 1000 balances this shared responsibility by requiring plan administrators to consider the reasonableness of the blackout and to provide information to participants and beneficiaries about the blackout. As H.R. 1000 clarifies, after this, fiduciaries are relieved of their own liability and granted the 404(c)[59] liability protection.

H.R. 1000 amends section 404(c) of ERISA to clarify that the protection afforded plan fiduciaries under this section will be lost in the event of a suspension period unless the fiduciary acts in a manner consistent with the requirements of title 1 of ERISA in entering into the suspension period. The intention of the provision is to ensure that plan fiduciaries address suspension periods in a manner that ensures the interests of plan participants are protected. In the Committee's view, even prior to this amendment, plan fiduciaries generally had a fiduciary duty to act solely in the interest of participants and beneficiaries when taking the actions that typically lead to a suspension period, such as hiring a new record keeper or selecting new plan investment options.[60] The amendment makes clear that among the factors the Department or a court should consider in evaluating whether a fiduciary met its fiduciary obligations include whether the fiduciary considered in advance the reasonableness of the expected suspension period, provided the suspension notice required by H.R. 1000 and acted solely in the interest of participants and beneficiaries in determining whether or not to enter into the suspension. The Committee notes that the duty to act solely in the interest of participants is one of the several duties set forth in section 404(a)(1) of ERISA that have applied to all fiduciary decisions since ERISA's enactment. Of course, in entering into a suspension period a plan fiduciary must meet the other applicable requirements of part 4 of ERISA, including the duty to act prudently and follow the terms of the plan (where consistent with the requirements of title I).

Provided the plan fiduciary entering into the suspension period satisfies his duties under title I of ERISA, the amendments to section 404(c) make clear that the fiduciary will not be liable for investment losses that are attributable to a plan participant's prior exercise of control over plan investments (i.e., the investment elections made by the participant prior to the suspension). In the event of a suspension that occurs when a plan is changing investment options, H.R. 1000 clarifies that a participant will have exercised prior investment control over investment in the plan's new investments options if (1) the participant gave affirmative investment instructions with respect to the new investment options, or (2) the participant approved the investment through a negative consent process. Under the latter option, participant consent would occur where the participant is informed in advance of the change in investment options, is told how the account will be invested if the

[59] Ibid.

[60] The Committee notes that both the courts and the Department of Labor have indicated that selecting service providers (like a plan record keeper) and selecting plan investment options are fiduciary duties subject to the requirements of Title I of ERISA. See, e.g., *Brock* v. *Hendershott,* 840 F.2d 339, 342 (6th Cir. 1988) (selection of service provider is a fiduciary decision); 57 Fed. Reg. 46906, 46924 n.27 (Oct. 13, 1992) (Preamble to Department of Labor Regulation interpreting ERISA section 404(c)) (limiting or designating investment options under a section 404(c) plan is itself a fiduciary function).

participant fails to provide an affirmative election (i.e., was informed of the default selections) and elects not to make an affirmative direction selecting new investment options. It is the Committee's expectation that information regarding new plan investment options, including default investments for participants, may be included in connection with the notice of an upcoming blackout. It is the Committee's further view that by providing for both affirmative and negative election, participants will generally exercise investment control over the selection of new investment options when a plan fiduciary or service provider employs common processes such as "fund mapping" (i.e., matching the plan's new investment options to the plan's prior investment options) provided proper advance notice is provided. The Committee notes that both the Department of Labor and the courts have on numerous occasions endorsed the concept of negative consent, concluding that both plan fiduciaries and plan participants may exercise control over plan investments through negative consent.[61]

H.R. 1000 provides that the Secretary of Labor shall issue guidance and model notices that include the above factors and such other provisions the Secretary may specify. The initial guidance will be promulgated no later than December 31, 2004. In order to assist plan administrators in complying with the new requirements in a timely fashion, the Secretary may issue interim model guidance.

*H.R. 1000's Provision for Fiduciary Education*

H.R. 1000 also directs the Department of Labor to establish a program to make information and educational resources available to pension plan fiduciaries on an ongoing basis in order to assist them in diligently and efficiently carrying out their fiduciary duties with respect to the plan. H.R. 1000 clarifies that in developing this program, the Secretary shall solicit information from the public, including investment education professionals.

The fiduciary duty of loyalty—the highest duty of loyalty known to the law,[62] is a protection to participants and beneficiaries only if the fiduciary understands the responsibilities and implications of this duty. As such, the Committee unanimously agreed that the provision of educational information to pension plan fiduciaries is of the utmost importance.

*H.R. 1000's Right To Diversify*

H.R. 1000 amends ERISA to reduce the period of time in which companies can require workers to hold company stock to three years. Currently, ERISA limits to 10 percent the amount of company stock that can be held in a pension plan.[63] The Internal Revenue Code provides that for employer stock contributions made in an ESOP, the time these securities can be required to be held is

[61] DOL Adv. Op. 2001–02A (Feb. 15, 2001) (default allocation of demutualization proceeds where fiduciary of 401(k) plan fails to respond to insurer notices seeking affirmative direction); DOL Adv. Op. 97–16A (May 22, 1997) (substitution of new mutual fund in defined contribution plans where plan fiduciary fails to respond to advance notices by insurer seeking approval of new fund); *Herman* v. *NationsBank Trust Co.,* 126 F. 3d 1354, 1370–71 (11th Cir. 1997) (participants with voting rights over shares allocated to their individual ESOP accounts failed to vote proxies with respect to allocated shares are deemed to have exercised control over shares).

[62] See, e.g., *Donovan* v. *Bierwith,* 680 F.2d 263, 272 n.8 (2d Cir. 1982).

[63] See 29 U.S.C. § 1107, 1114.

until the participant is age 55 and has at least 10 years of participation in the plan.[64]

H.R. 1000 gives employees a new right to diversify employer securities in their individual account after three years of service with the employer or three years after receiving employer stock in their individual account plan. In a survey conducted by EBRI of the International Society of Certified Employee Benefit Specialist members, of the plans where employer contributions were required to be in company stock, 60% of them reported that the stock was restricted until a specified age and/or service requirement is met.[65] Current law has encouraged employers to offer employer securities as part of ERISA plans and the Committee has received a great deal of testimony regarding the benefits of increasing employee ownership through employer securities.[66] In light of the recent events of Enron, which demonstrated the problems with over-concentration in one particular investment, the Committee recognizes that requiring employees to hold employer securities for long periods of time may run counter to an employee's objective of a diversified retirement portfolio. The Committee believes that the three-year diversification rule will provide employees the flexibility to choose how to invest their savings while continuing to encourage employers to make matching contributions.

The President specifically outlined this proposal in his plan and stated that: "Employers should be encouraged to make generous contributions to workers 401(k) plans, including the option to use company stock to make matching contributions. However, workers must be free to choose how to invest their retirement savings. The President's proposal will ensure that workers can sell company stock and diversify into other investment options after they have participated in the 401(k) plan for three years. While many companies already allow rapid diversification, others impose holding periods which can last for decades." [67]

The Committee believes that employees should have greater options in determining if and when to diversify from employer securities. The Committee also wants to continue to encourage employers to offer matching contributions and employee stock ownership programs. To that end, the Committee requires employers that have publicly traded employer securities to permit employees to diversify from employer securities into other investments either three years after the employee begins employment or three years after the em-

[64] 26 U.S.C. § 401(a)(28).

[65] Testimony of Dr. Jack VanDerhei, Hearing on "Enron and Beyond: Enhancing Worker Retirement Security" before the Subcommittee on Employer Employee Relations, U.S. House of Representatives, 107th Congress, Second Session, February 13, 2002, Serial No. 107–44, p. 68.

[66] "Although the topic of company stock investment in 401(k) plans has recently been the focus of considerable interest, the concept of preferred status for employee ownership has been part of the U.S. tax code for more than 80 years. When the Employee Retirement Income Security Act (ERISA) was passed in 1974, it required fiduciaries to diversify plan investments for defined benefit plans and some types of defined contribution plans. However, ERISA includes an exception for 'eligible individual account plans' that invest in 'qualifying employer securities.' An Employee Stock Ownership Plan (ESOP) normally qualifies for this exception, as do profit-sharing plans." Testimony of Dr. Jack VanDerhei, Hearing on "Enron and Beyond: Enhancing Worker Retirement Security" before the Subcommittee on Employer-Employee Relations, U.S. House of Representatives, 107th Congress, Second Session, February 13, 2002, Serial No. 107–44, 64; see also generally ibid. at 45–54, 64–87 and Hearing on Enron and Beyond: Legislative Solutions" before the Subcommittee on Employer Employee Relations, Committee on Education and the Workforce, U.S. House of Representatives, 107th Congress, Second Session, February 27, 2002, Serial No. 107–49, 49–54, 75–78.

[67] February 1, 2002 Press Release, Office of the Press Secretary, President of the United States.

ployer contribution is credited to the participant's account. The three-year time period tracks the new three-year vesting rules implemented by the Economic Growth and Tax Relief Act, H.R. 1836, passed by Congress in 2001. Allowing plan sponsors to require the employee to hold the security for three years preserves the benefits of employee ownership while still providing employees much more flexibility than currently allowed. The Committee also continues to encourage employee stock ownership plans ("ESOPs") by exempting "stand alone" ESOPs from the bill's diversification provisions.[68] The Committee believes this strikes a balance between preserving the incentives for employers to offer employer stock to their employees while allowing employees the freedom to make greater investment decisions.

Finally, the Committee exempts privately held companies from the diversification requirement. The Committee believes that the three-year rule for privately held companies would be too onerous and would discourage them from offering contributions because the companies would be required to hold cash in reserve to purchase back any stock contributions. This could result in serious financial strain on these companies. The Committee believes, however, that employers who have publicly traded stock do not feel the same financial burden. H.R. 1000 additionally clarifies that there may be circumstances in which a privately held company has limited publicly traded securities where it is not appropriate to apply the diversification requirement. H.R. 1000 allows the Secretaries of Labor and Treasury to fashion regulations to determine when such companies may be exempt from the diversification rules. The Committee intends that the regulations shall provide an exclusion from the diversification requirement in the case of a controlled group of corporations treated as a single employer with respect to the plan where all employer securities held by the plan consist of stock of the common parent that is not publicly traded; the common parent has no publicly traded stock; and the gross receipts and the employees of all publicly-traded subsidiaries together constitute a relatively small amount of the total gross receipts and a small amount of the total employees of the employer's controlled group as a whole. The Secretaries of Labor and Treasury will have regulatory authority to determine the appropriate thresholds for this standard.

At the time diversification is required to be permitted by the employer, the Committee has specified that employers must offer a "broad range of investment alternatives" to the employees. The Committee does not want to be overly prescriptive by specifying the types of investment vehicles into which employers may offer re-investment. However, the Committee intends that employers should offer a range of investment options that would be acceptable to meet section 404(c) standards.[69] If necessary, the Department of Labor may issue clarifications on how the investment alternatives of 404(c) relate to this provision.

Opponents of the bill have argued that three years is too long to require employees to hold employer stock in their accounts and that the diversification should be one year after the employee be-

[68] A "stand-alone" ESOP does not contain employer matching or employee pre-tax or after-tax contributions.
[69] 29 C.F.R. § 2550.404(c)–1(b)(2)(ii)(C).

gins service. The Committee notes several difficulties with that proposal. First, many plans do not even allow employees to participate in the pension plan until they have served for a year. Reducing diversification to one year would, in essence, require immediate diversification once the employee is enrolled in the plan. Second, such a short diversification time greatly reduces the incentive to employers to provide any company match because it can be so quickly transferred out of employer securities. Third, the diversification does not coordinate with the three and five year vesting rules. The Committee believes that the three-year diversification rule strikes the appropriate balance between allowing diversification, coordinating with current vesting structure, and continuing to encourage employers to contribute a company match to participants' accounts.

H.R. 1000 provides an option for plans to administer the three-year diversification requirement through a cliff or a rolling vehicle. In the cliff situation, once the participant completed three years of service with the employer, all employer security contributions made by the employer will be immediately diversifiable. For the rolling option, the plan may require the participant to hold the employer security for three years once the security has been credited to the participant's account. Although the three-year rolling option would be more difficult to administer, the employer community has expressed a strong desire to provide them with the option.[70] The rolling option will apply only to those contributions made after the effective date of the amendment, i.e., plan years beginning one year after the date of enactment. The Committee believes the rolling option provides employers a continued incentive to make matches while still providing diversification rights to employees within a short period of time.

H.R. 1000 provides a five-year transition rule with respect to the diversification of amounts held in an applicable individual account plan as of the effective date of the provision. Under this transition rule, applicable individual account plans must allow assets invested in employer securities on which there are restrictions on divestment to be reinvested in other investments over a five-year period based on an applicable percentage of such amounts. The transition rule applies only to contributions that exist in plan participant accounts on the day of enactment. The transition rule does not apply to contributions that are received after the day of enactment. The Committee also intends that the three-year holding requirement not apply to employer contributions that are subject to the five-year transition rule.

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[70] A plan sponsor testifying before the Employer-Employee Relations Subcommittee underscored the business community's desire for a transition period on the diversifications requirements: "The [American Benefits] Council also appreciates the inclusion of a transition rule under the new diversification regime. This will prevent market instability and ensure that the price at which employees sell shares is not decreased by a glut of stock all reaching the market at the same time." Testimony of Ed L. Rosic, Vice President, Marriott International, Inc., Hearing on "The Pension Security Act: New Pension Protections to Safeguard the Retirement Savings of American Workers" before the Subcommittee on Employer-Employee Relations, Committee on Education and the Workforce, U.S. House of Representatives, 108th Congress, First Session, February 13, 2003 (to be published). Additionally, the Subcommittee heard testimony in the 107th Congress that a rolling option would permit employees to have a meaningful stake in the company. See Hearing on "Enron and Beyond: Legislative Solutions" before the Subcommittee on Employer-Employee Relations, Committee on Education and the Workforce, U.S. House of Representatives, 107th Congress, Second Session, February 27, 2002, Serial No. 107–49 at 19.

*H.R. 1000's Department of Labor Study on Requiring Fiduciary Consultants to Plans*

H.R. 1000 also contains a provision that requires the Secretary of Labor to undertake a study of the costs and benefits to participants and beneficiaries of requiring independent consultants to advise plan fiduciaries in connection with the administration of individual account plans.

The Committee believes that independent consultants to the fiduciaries of individual account pension plans could have merit, however the Committee is concerned that a requirement to obtain such counsel could add to plan costs that may be borne by participants and beneficiaries, and even more seriously, impact the availability of individual account plans altogether. Because of this, the Committee has determined that a study to determine the relative costs and benefits of such a new requirement is the appropriate action to take in order to allow the Committee to make an informed decision about a new requirement.

*H.R. 1000's Investment Advice Provision*

The Pension Security Act also provides for employees to have greater access to investment advice in making investment decisions. H.R. 1000 incorporates the Retirement Security Advice Act, H.R. 2269, which passed the House in the fall of 2001 with a large bipartisan vote. Although ERISA has been largely successful in protecting the integrity of privately managed pension plans, its drafters did not contemplate the explosive growth of defined contribution plans. In particular, provisions of ERISA have resulted in a huge shift of responsibility to plan participants for investing individual assets effectively without a corresponding shift in investment advice.

That concern is even clearer now, with the decline of many high-technology stocks and greater volatility in the financial markets. Despite the obvious benefits of equity investment, for the first time since the inception of the 401(k) program, total 401(k) assets declined in 2000. This decline was due in large part to volatile equity markets, but the lack of available investment advice exacerbated the problem. The average 401(k) participant balance dropped to $41,919 in 2000 from $46,740 in 1999. The hearings on Enron's pension funds made the concern even more palpable. Some executives with independent access to investment advice were counseled to diversify well before Enron's stock collapsed. Many employees who lacked such access lost enormous retirement savings assets, even though their Enron shares were largely tradable.

The bill amends ERISA and the Internal Revenue Code to permit the provision of investment advice to plan participants and beneficiaries, the purchase or sale of assets pursuant to the investment advice and the direct or indirect receipt of fees in connection with providing the advice. The bill is intended to enable regulated financial institutions that provide investment options and administrative and other services to employee benefit plans also to provide investment advisory services directly to plans, participants and beneficiaries desiring these services.

In order to nurture a dynamic, competitive, and consumer-responsive market for employer-provided investment advice, the bill seeks to give providers, sponsors, and participants flexibility within which to be innovative while protecting participants through strong and clear expressions of the adviser's overarching fiduciary duty—the highest duty of loyalty known to the law[71]—and through rigorous but practical disclosures of any potential conflicts of interest.

The bill establishes a new statutory exemption from ERISA's prohibited transaction rules for certain comprehensively regulated entities to provide advice services to plan fiduciaries or plan participants ("fiduciary advisers"). The Committee intends the exemption to specifically provide relief from both the party in interest restrictions (section 406(a)) and conflict of interest rules (section 406(b)) and is therefore broader than the Department of Labor has construed other statutory exemptions.[72]

The Committee intends that the investment advice provision in this bill incorporate the substantive provisions and report language of H.R. 2269, as reported by this Committee on October 31, 2001, with three distinctions. In the floor debate on November 15, 2001, Chairman Boehner engaged in a colloquy with Representative Earl Pomeroy wherein Chairman Boehner agreed to add three provisions to the bill. The investment advice provision in H.R. 1000 contains those additional provisions and further discussion about them is provided below.

*Adviser Qualifications.*—The first concern raised in the colloquy was that advisers who provide advice should have an individual license or test administered by a state or federal agency in order to insure that plan participants receive qualified advice. The Committee added language that clarifies that in the situation that agents of banks or credit unions offer advice, the agent or employee must be in the institution's trust department, which is regularly examined by a state or federal agency. While this provision does not require those employees or agents of a bank or similar institution to have a license, it does ensure that the bank employees giving advice are well regulated and supervised, thus ensuring quality advice by banking institutions.

*Two Improvements to the Disclosure Form.*—In response to Chairman Boehner's and Representative Pomeroy's colloquy regarding H.R. 2269, the Committee has made two other improvements to the disclosure form in H.R. 1000 required to be provided to participants prior to the advice. First, the Committee has required the Secretary of Labor to issue a model disclosure. The Committee intends that this model disclosure will promote uniformity among the disclosures, which should assure that the disclosures are readily understandable to the average plan participant. Second, the Committee has added a disclosure that requires the fiduciary adviser to remind plan participants that they are free to seek advice elsewhere and that the other advisor may be unaffiliated with the plan and its investment options. The purpose of this disclosure is to remind participants that independent advice can be sought outside of the plan context.

With the addition of these three provisions, the investment advice provision contained in H.R. 1000 bill will empower workers with the information they need to make the most of the retirement savings and investment opportunities afforded them by today's

[71] See, e.g., *Donovan* v. *Bierwith,* 680 F.2d 263, 272 n.8 (2d Cir. 1982).

[72] Compare with 29 C.F.R. 2550.408b–2(a) (limiting relief of section 408(b)(2) to transactions described in section 406(a)).

401(k)-type plans. This legislation will foster a competitive, dynamic investment advice marketplace that serves worker needs but also establish a strong, protective framework that safeguards their interests.

*Other Proposals Offered on Title I of the Pension Security Act*

The Committee also considered other substantive changes to the administration of pension plans. During consideration of H.R. 1000 the Committee considered and rejected an amendment that would have required that any plan which permits employee control of investment decisions must have a joint board of trustees to act as fiduciaries of the plan. This board would be comprised of both employer and employee representative.

The Committee notes that employee representation on a board of trustees is currently allowable under ERISA and is practiced by many companies. However, requiring all pension plans to include employee representatives is a fundamental change to pension law—a change that Congress rejected in 1989 by a vote of 250–173. Advocates of joint trusteeship argue that employees are the only party that truly has the employee's best interest at heart. The Committee strongly disagrees with this viewpoint. ERISA standards strictly govern the duty of every fiduciary—whether an employee or an employer. Each fiduciary must act in the sole interest of participants and beneficiaries. If fiduciaries don't act in the sole interest of participants and beneficiaries they are liable under ERISA.

In addition to these fundamental concerns, the Committee also fears that the amendment would have greatly increased the administrative burdens of pension plans by requiring new processes to select employees as trustees, allow for votes of all pension plan participants and resolve disputes related to pension issues. These administrative costs would be borne by the pension plan itself—a detriment to account balances for participants.

## TITLE II

*H.R. 1000's Modification of Funding Rules for Plans Sponsored by Interurban or Interstate Bus Service Companies*

Under present law, defined benefit pension plans are required to meet certain minimum funding rules. In some cases, additional contributions are required if a defined benefit pension plan is underfunded. Additional contributions generally are not required in the case of a plan with a funded current liability percentage of at least 90 percent. A plan's funded current liability percentage is the value of plan assets as a percentage of current liability. In general, a plan's current liability means all liabilities to employees and their beneficiaries under the plan. Quarterly minimum funding contributions are required in the case of underfunded plans.

The Pension Benefit Guaranty Corporation ("PBGC") insures benefits under most defined benefit pension plans in the event the plan is terminated with insufficient assets to pay for plan benefits. The PBGC is funded in part by a flat-rate premium per plan participant, and a variable rate premium based on plan underfunding.

Under present law, a special rule modifies the minimum funding requirements in the case of certain plans. The special rule applies in the case of plans that (1) were not required to pay a variable rate PBGC premium for the plan year beginning in 1996, (2) do not, in plan years beginning after 1995 and before 2009, merge with another plan (other than a plan sponsored by an employer that was a member of the controlled group of the employer in 1996), and (3) are sponsored by a company that is engaged primarily in interurban or interstate passenger bus service.

The special rule treats a plan to which it applies as having a funded current liability percentage of at least 90 percent for plan years beginning after 1996 and before 2005 if for such plan year the funded current liability percentage is at least 85 percent. If the funded current liability of the plan is less than 85 percent for any plan year beginning after 1996 and before 2005, the relief from the minimum funding requirements applies only if certain specified contributions are made.

For plan years beginning after 2004 and before 2010, the funded current liability percentage will be deemed to be at least 90 percent if the actual funded current liability percentage is at least at certain specified levels.

The relief from the minimum funding requirements applies for the plan year beginning in 2005, 2006, 2007, and 2008 only if contributions to the plan equal at least the expected increase in current liability due to benefits accruing during the plan year.

H.R. 1000 modifies the special funding rule for plans sponsored by a company engaged primarily in interurban or interstate passenger bus service. Currently, plans must use the fixed mortality assumption under the General Agreement on Tariffs and Trade (GATT) legislation. Recognizing this situation, Congress temporarily exempted this industry from these rules in the Taxpayer Relief Act of 1997,[73] and required them to comply with the normal funding rules of ERISA apply to them. In addition, the modification of the current rule provides that (1) the funded current liability percentage of a plan to which the rule applies is treated as not less than 90 percent for purposes of the minimum funding rules applicable to underfunded plans, and (2) the funded current liability percentage of a plan to which the rule applies is treated as not less than 100 percent for purposes of the quarterly contribution requirement. The provision is effective with respect to plan years beginning after December 31, 2002.

The Committee believes that this provision is proper pension policy since these plans are "frozen" (not accepting new participants) and are adequately funded. Application of the GATT rules is not proper for these plans due to their different mortality experience. If the provision was not enacted, these bus companies would have to divert capital from other corporate needs to be in technical compliance with pension rules that do not practically apply or benefit their employees.

*H.R. 1000's Reporting Simplification*

Under present law, each employer that maintains a qualified retirement plan must file an annual report with both the Internal Revenue Service and the Department of Labor. This report contains, among other things, information relative to the assets of the plan, number of participants, identification of service providers,

[73] P.L. 105–34.

and the identity of the fiduciaries. Presently, a one participant plan and those plans with less than 100 participants are allowed to file a more abbreviated form than larger plans.

H.R. 1000 allows a one participant plan with $250,000 or less in assets at the close of the plan year not to have to file an annual report. Additionally, for those plans that cover less than 25 employees, the Secretaries of Labor and the Treasury will provide for the filing of a simplified annual return for each plan year.

The Committee believes that small employers should be encouraged to both start and maintain defined benefit plans for their employees. Over the past three Congresses, the Committee has heard a substantial amount of testimony that the costs of establishing and maintaining a defined benefit pension plan have discouraged those employers who had put them in place from continuing them and those employers who had not started one from creating one.

*H.R. 1000's Improvement of Employee Plans Compliance Resolution System*

Presently, the Internal Revenue Service ("IRS") has established the Employee Plans Compliance Resolution System, which is a comprehensive system of programs for the sponsors of pension plans to correct their unintended failures to follow statutory and regulatory requirements for maintaining qualification under the tax code. This program permits plan sponsors to correct compliance failures in their plan operation while continuing to provide their employees with retiree benefits on a tax favored basis without interruption.

H.R. 1000 mandates that the Secretary of the Treasury continue to update and improve this successful program with emphasis on the special circumstances of small employers, in terms of awareness of the program, compliance, and the reasonableness of any tax, penalty, or sanction imposed on small businesses under this program.

*H.R. 1000's Flexibility in Nondiscrimination, Coverage, and Line of Business Rules*

A plan is not a qualified retirement plan under the Internal Revenue Code if the contributions or benefits provided under the plan discriminate in favor of highly compensated employees (sec. 401(a)(4)). The applicable Treasury regulations set forth the exclusive rules for determining whether a plan satisfies the nondiscrimination requirement. These regulations state that the form of the plan and the effect of the plan in operation determine whether the plan is nondiscriminatory and that intent is irrelevant.

Similarly, a plan is not a qualified retirement plan if the plan does not benefit a minimum number of employees (sec. 410(b)). A plan satisfies this minimum coverage requirement if and only if it satisfies one of the tests specified in the applicable Treasury regulations. If an employer is treated as operating separate lines of business, the employer may apply the minimum coverage requirements to a plan separately with respect to the employees in each separate line of business (sec. 414(r)). Under a so-called "gateway" requirement, however, the plan must benefit a classification of employees that does not discriminate in favor of highly compensated employees in order for the employer to apply the minimum coverage requirements separately for the employees in each separate line of business. A plan satisfies this gateway requirement only if it satisfies one of the tests specified in the applicable Treasury regulations.

In H.R. 1000, the Secretary of the Treasury is directed to modify, on or before December 31, 2004, the existing regulations issued under section 414(r) in order to expand (to the extent that the Secretary may determine to be appropriate) the ability of a plan to demonstrate compliance with the line of business requirements based upon the facts and circumstances surrounding the design and operation of the plan, even though the plan is unable to satisfy the mechanical tests currently used to determine compliance.

Also, H.R. 1000 directs the Secretary of the Treasury to provide by regulation applicable to years beginning after December 31, 2004, that a plan is deemed to satisfy the nondiscrimination requirements of section 401(a)(4) if the plan satisfied the pre–1994 facts and circumstances test, satisfied the conditions prescribed by the Secretary to appropriately limit the availability of such test, and is submitted to the Secretary for a determination of whether it satisfies such test (to the extent provided by the Secretary).

Similarly, a plan will comply with the minimum coverage requirement of section 410(b) if the plan satisfied the pre-1989 coverage rules, is submitted to the Secretary for a determination of whether it satisfied the pre-1989 coverage rules (to the extent provided by the Secretary), and satisfies conditions prescribed by the Secretary by regulation that appropriately limit the availability of the pre-1989 coverage rules.

*H.R. 1000's Extension to All Governmental Plans of Moratorium on Application of Certain Nondiscrimination Rules Applicable to State and Local Plans*

A qualified retirement plan maintained by a State or local government is exempt from the rules concerning nondiscrimination (sec. 401(a)(4)) and minimum participation (sec. 401(a)(26)). All other governmental plans are not exempt from the nondiscrimination and minimum participation rules.

Under H.R. 1000, all governmental plans (as defined in sec. 414(d)) are exempted from the nondiscrimination and minimum participation rules.

*H.R. 1000's Notice and Consent Period Regarding Distributions*

Notice and consent requirements in Section 205 of ERISA apply to certain distributions from qualified retirement plans. These requirements relate to the content and timing of information that a plan must provide to a participant prior to a distribution, and to whether the plan must obtain the participant's consent to the distribution. The nature and extent of the notice and consent requirements applicable to a distribution depend upon the value of the participant's vested accrued benefit and whether the joint and survivor annuity requirements apply to the participant.

If the present value of the participant's vested accrued benefit exceeds $5,000, the plan may not distribute the participant's benefit without the written consent of the participant. The participant's consent to a distribution is not valid unless the participant has received from the plan a notice that contains a written explanation of: (1) the material features and the relative values of the optional forms of benefit available under the plan, (2) the participant's right, if any, to have the distribution directly transferred to another retirement plan or IRA, and (3) the rules concerning the taxation of a distribution. If the joint and survivor annuity requirements apply to the participant, this notice also must contain a written explanation of (1) the terms and conditions of the qualified joint and survivor annuity ("QJSA"), (2) the participant's right to make, and the effect of, an election to waive the QJSA, (3) the rights of the participant's spouse with respect to a participant's waiver of the QJSA, and (4) the right to make, and the effect of, a revocation of a waiver of the QJSA. The plan generally must provide this notice to the participant no less than 30 days and no more than 90 days before the date distribution commences.

If the participant's vested accrued benefit does not exceed $5,000, the terms of the plan may provide for distribution without the participant's consent. The plan generally is required, however, to provide to the participant a notice that contains a written explanation of: (1) the participant's right, if any, to have the distribution directly transferred to another retirement plan or IRA, and (2) the rules concerning the taxation of a distribution. The plan generally must provide this notice to the participant no less than 30 days and no more than 90 days before the date distribution commences.

H.R. 1000 requires qualified retirement plans to provide the applicable distribution notice no less than 30 days and no more than 180 days before the date distribution commences. The Secretary of the Treasury is directed to modify the applicable regulations to reflect the extension of the notice period to 180 days and to provide that the description of a participant's right, if any, to defer receipt of a distribution shall also describe the consequences of failing to defer such receipt. The provision is effective for years beginning after December 31, 2003.

The Committee understands that an employee is not always able to evaluate distribution alternatives, select the most appropriate alternative, and notify the plan of the selection within a 90–day period. The Committee believes that requiring a plan to furnish multiple distribution notices to an employee who does not make a distribution election within 90 days is administratively burdensome. In addition, the Committee believes that participants who are entitled to defer distributions should be informed of the impact of a decision not to defer distribution on the taxation and accumulation of their retirement benefits.

*H.R. 1000's Annual Report Dissemination*

Section 104(b)(3) of ERISA requires that within nine months after the close of each plan year, the plan administrator must "furnish" a summary annual report to each plan participant and to each beneficiary receiving benefit. The summary annual report is a summary of the annual report filed with the DOL regarding the financial position and management of the plan.

The bill requires that plan administrators furnish a summary annual report would be satisfied if the report were made reasonably available through electronic means or other new technology. This provision would be interpreted consistent with the regulations of the Departments of Labor and Treasury. The change applies to reports for years beginning after December 31, 2003.

The Committee believes that this simplification of the summary annual report requirement will reduce the burden and cost of plan administration and disclosure, thereby encouraging more employers to establish and maintain retirement plans.

*H.R. 1000's Technical Corrections to the SAVER Act*

The Savings Are Vital to Everyone's Retirement (SAVER) Act of 1997 (P.L. 105–92), in addition to establishing an ongoing program by the Department of Labor on retirement savings education and outreach[74] convenes a National Summit on Retirement Savings at the White House, cohosted by the President and the bipartisan Congressional leadership.[75] Summits were held in 1998 and 2002. The National Summit brings together experts in the fields of employee benefits and retirement savings, key leaders of government, and interested parties from the private sector and general public. The Congressional leadership and the President select the delegates. The National Summit is a public-private partnership, receiving substantial funding from private sector contributions. The goals of the National Summits are to: (1) advance the public's knowledge and understanding of retirement savings and facilitate the development of a broad-based, public education program; (2) identify the barriers which hinder workers from setting aside adequate savings for retirement and impede employers, especially small employers, from assisting their workers in accumulating retirement savings; and (3) develop specific recommendations for legislative, executive, and private sector actions to promote retirement income savings among American workers.

This section of H.R. 1000 makes technical amendments to the SAVER Act regarding the administration of future statutorily created National Summits on Retirement Savings. It clarifies that a National Summit shall be held in 2006, and adds an additional National Summit in 2010. To facilitate the administration of future National Summits, the DOL is given authority to enter into cooperative agreements (pursuant to the Federal Grant and Cooperative Agreement Act of 1977) with any appropriate, qualified entity.

Six new statutory delegates are added to future summits: the Chairman and Ranking Member of the House Ways and Means Committee, the Senate Finance Committee, and the Subcommittee on Employer-Employee Relations of the House Education and the Workforce Committee, respectively.

H.R. 1000 also sets deadlines for DOL to publish the Summit agenda, make delegate appointment, and gives DOL limited reception and representation authority. The section is effective upon date of enactment.

H.R. 1000 clarifies the administration of future National Summits and is designed to assist in their planning and execution.

*H.R. 1000's Expansion of the Missing Participants Program*

The plan administrator of a defined benefit pension plan that is subject to Title IV of ERISA, is maintained by a single employer,

[74] P.L. 105–92, sec. 516.
[75] Ibid. sec. 517.

and terminates under a standard termination is required to distribute the assets of the plan. With respect to a participant whom the plan administrator cannot locate after a diligent search, the plan administrator satisfies the distribution requirement only by purchasing irrevocable commitments from an insurer to provide all benefit liabilities under the plan or transferring the participant's designated benefit to the PBGC, which holds the benefit of the missing participant as trustee until the PBGC locates the missing participant and distributes the benefit. The PBGC missing participant program is not available to multiemployer plans or defined contribution plans and other plans not covered by Title IV of ERISA.

H.R. 1000 directs the PBGC to prescribe rules for terminating multiemployer plans similar to the present-law missing participant rules applicable to terminating single employer plans that are subject to Title IV of ERISA. The missing participants program is also extended to defined contribution plans, defined benefit plans that do not have more than 25 active participants and are maintained by professional service employers, and the portions of defined benefit plans that provide benefits based upon the separate accounts of participants and therefore are treated as defined contribution plans under ERISA.

The provision is effective for distributions from terminating plans that occur after the PBGC adopts final regulations implementing the provision. The Committee expects the regulations to be completed within one year.

By allowing plan sponsors the option of transferring pension funds to PBGC, the chances will be increased that a missing participant will be able to recover benefits. Sponsors of terminated multiemployer plans and plans that are not covered by Title IV face uncertainty with respect to missing participants due to a lack of statutory or regulatory guidance. The Committee believes that it is appropriate to extend the established PBGC missing participant program to these plans in order to reduce uncertainty for plan sponsors and increase the likelihood that missing participants will receive their retirement benefits.

*H.R. 1000's Reduction of PBGC Premium for New Plans of Small Employers*

Under present law ERISA sec. 4006, the Pension Benefit Guaranty Corporation ("PBGC") provides insurance protection for participants and beneficiaries under certain defined benefit pension plans by guaranteeing certain basic benefits under the plan in the event the plan is terminated with insufficient assets to pay benefits promised under the plan. The guaranteed benefits are funded in part by premium payments from employers who sponsor defined benefit plans. The amount of the required annual PBGC premium for a single-employer plan is generally a flat rate premium of $19 per participant and an additional variable rate premium based on a charge of $9 per $1,000 of unfunded vested benefits. Unfunded vested benefits under a plan generally means (1) the unfunded current liability for vested benefits under the plan, over (2) the value of the plan's assets, reduced by any credit balance in the funding standard account. No variable rate premium is imposed for a year if contributions to the plan were at least equal to the full funding limit.

The PBGC guarantee is phased in ratably in the case of plans that have been in effect for less than 5 years, and with respect to benefit increases from a plan amendment that was in effect for less than 5 years before termination of the plan.

Under the provision in H.R. 1000, for the first five plan years of a new single-employer plan of a small employer, the flat-rate PBGC premium is $5 per plan participant.

A small employer is a contributing sponsor that, on the first day of the plan year, has 100 or fewer employees. For this purpose, all employees of the members of the controlled group of the contributing sponsor are taken into account. In the case of a plan to which more than one unrelated contributing sponsor contributes, employees of all contributing sponsors (and their controlled group members) are taken into account in determining whether the plan is a plan of a small employer.

A new plan means a defined benefit plan maintained by a contributing sponsor if, during the 36-month period ending on the date of adoption of the plan, such contributing sponsor (or controlled group member or a predecessor of either) has not established or maintained a plan subject to PBGC coverage with respect to which benefits were accrued for substantially the same employees as are in the new plan. The provisions relating to new plans apply for plans effective after December 31, 2003.

The Committee believes that reducing the PBGC premiums for new and small plans will help encourage the establishment of defined benefit pension plans. The number of single-employer defined benefit plans covered by PBGC has declined dramatically in recent years—from 112,000 in 1985 to 43,000 in 1997. Most of the decline is because of the termination of small plans. An employer incurs a number of one-time costs to establish a plan. The legislation is intended to remove the PBGC premium as a disincentive to the establishment of a defined benefit plan by a small employer.

*H.R. 1000's Reduction of Additional PBGC Premium for New and Small Plans*

Under present law, the PBGC provides insurance protection for participants and beneficiaries under certain defined benefit pension plans by guaranteeing certain basic benefits under the plan in the event the plan is terminated with insufficient assets to pay benefits promised under the plan. The guaranteed benefits are funded in part by premium payments from employers who sponsor defined benefit plans. The amount of the required annual PBGC premium for a single-employer plan is generally a flat rate premium of $19 per participant and an additional variable rate premium based on a charge of $9 per $1,000 of unfunded vested benefits. Unfunded vested benefits under a plan generally means (1) the unfunded current liability for vested benefits under the plan, over (2) the value of the plan's assets, reduced by any credit balance in the funding standard account. No variable rate premium is imposed for a year if contributions to the plan were at least equal to the full funding limit.

The PBGC guarantee is phased in ratably in the case of plans that have been in effect for less than 5 years, and with respect to benefit increases from a plan amendment that was in effect for less than 5 years before termination of the plan.

H.R. 1000 amends ERISA sec. 4006(a)(3) to provide that the variable premium is phased in for new defined benefit plans over a six-year period starting with the plan's first plan year. The amount of the variable premium is a percentage of the variable premium otherwise due, as follows: 0 percent of the otherwise applicable variable premium in the first plan year; 20 percent in the second plan year; 40 percent in the third plan year; 60 percent in the fourth plan year; 80 percent in the fifth plan year; and 100 percent in the sixth plan year (and thereafter).

A new plan would mean a defined benefit plan maintained by a contributing sponsor if, during the 36 month period ending on the date of adoption of such plan, such contributing sponsor (or controlled group member or a predecessor of either) had not established or maintained a plan subject to PBGC coverage with respect to which benefits were accrued to substantially the same employees as in the new plan.

The provision also provides that, in the case of any plan (not just a new plan) of an employer with 25 or fewer employees, the variable-rate premium is no more than $5 multiplied by the number of plan participants in the plan at the close of the preceding year.

The provision relating to premiums for new plans is effective for plans established after December 31, 2003. The provision reducing the PBGC variable premium for small plans is effective for years beginning after December 31, 2003.

The Committee believes this provision will help encourage the establishment of defined benefit pension plans. The number of single-employer defined benefit plans covered by PBGC has declined dramatically in recent years—from 112,000 in 1985 to 43,000 in 1997. Moreover, employers that establish plans are not choosing defined benefit plans. The PBGC variable rate premium can be a disincentive to some employers.

*H.R. 1000's Authorization for PBGC To Pay Interest on Premium Overpayment Refunds*

Under Sec. 4007(b) of ERISA, the PBGC charges interest on underpayments of premiums, but is not authorized to pay interest on overpayments. The provision in H.R. 1000 allows the PBGC to pay interest on overpayments made by premium payers. Interest paid on overpayments is to be calculated at the same rate and in the same manner as interest is charged on premium underpayments. The provision is effective with respect to interest accruing for periods beginning not earlier than the date of enactment.

The Committee believes that premium payers should receive interest on monies that are owed to them and that this provision will decrease the burden on employers sponsoring these types of plans.

*H.R. 1000's Substantial Owner Benefits in Terminated Plans*

The PBGC provides participants and beneficiaries in a defined benefit pension plan with certain minimal guarantees as to the receipt of benefits under the plan in case of plan termination. The employer sponsoring the defined benefit pension plan is required to pay premiums to the PBGC to provide insurance for the guaranteed benefits. In general, the PBGC will guarantee all basic benefits which are payable in periodic installments for the life (or lives) of the participant and his or her beneficiaries and are non-forfeitable at the time of plan termination. The amount of the guaranteed benefit is subject to certain limitations. One limitation is that the plan (or an amendment to the plan which increases benefits) must be in effect for 60 months before termination for the PBGC to guarantee the full amount of basic benefits for a plan participant, other than a substantial owner. In the case of a substantial owner, the guaranteed basic benefit is phased in over 30 years beginning with participation in the plan. A substantial owner is one who owns, directly or indirectly, more than 10 percent of the voting stock of a corporation or all the stock of a corporation. Special rules restricting the amount of benefit guaranteed and the allocation of assets also apply to substantial owners.

H.R. 1000 provides that the 60-month phase-in of guaranteed benefits applies to a substantial owner with less than 50 percent ownership interest. For a substantial owner with a 50 percent or more ownership interest ("majority owner"), the phase-in depends on the number of years the plan has been in effect. The majority owner's guaranteed benefit is limited so that it may not be more than the amount phased in over 60 months for other participants. The rules regarding allocation of assets apply to substantial owners, other than majority owners, in the same manner as other participants.

The provision is effective for plan terminations with respect to which notices of intent to terminate are provided, or for which proceedings for termination are instituted by the PBGC, after December 31, 2003.

The Committee believes that the present-law rules concerning limitations on guaranteed benefits for substantial owners are overly complicated and restrictive and thus may discourage some small business owners from establishing defined benefit pension plans. Moreover, the current special substantial owner rules are inordinately complex and require plan documents going back as far as 30 years, which are often difficult or impossible to obtain.

*H.R. 1000's Benefit Suspension Notice*

Section 203(a)(3)(B) of ERISA provides that a plan will not fail to satisfy the vesting requirements with respect to a participant by reason of suspending payment of the participant's benefits while such participant is employed. Under the applicable Department of Labor regulations, such a suspension is only permissible if the plan notifies the participant during the first calendar month or payroll period in which the plan withholds benefit payments. Such notice must provide certain information and must also include a copy of the plan's provisions relating to the suspension of payments.

In the case of a plan that suspends benefits for participants working past normal retirement age (i.e., does not commence benefit payments to those participants and also does not provide an actuarially increased benefit upon retirement), the employer must monitor plan participants to determine when any participant who is still employed attains normal retirement age. In order to "suspend" payment of such a participant's benefits, generally a plan must, as noted above, promptly provide the participant with a suspension notice.

H.R. 1000 directs the Secretary of Labor to revise the regulations relating to the benefit suspension notice to generally permit the information currently required to be set forth in a suspension notice to be included in the summary plan description. The provision also directs the Secretary of Labor to eliminate the requirement that the notice include a copy of relevant plan provisions. However, individuals reentering the workforce to resume work with a former employer—or with an employer that belongs to the same multiemployer pension plan—after they have begun to receive benefits will still receive the notification of the suspension of benefits (and a copy of the plan's provisions relating to suspension of payments). In addition, if a reduced rate of future benefit accrual will apply to a returning employee (as of his or her first date of participation in the plan after returning to work) who has begun to receive benefits, the notice must include a statement that the rate of future benefit accrual will be reduced. The individual benefit-suspension statement only need include such notice of reduction of future benefit accrual where the reduction is the result of a plan amendment covered under section 204(h). Such notice should include a description of the change and the date it took effect. The modification made under this section shall apply to plan years beginning after December 31, 2003.

The Committee believes that the present-law rules regarding suspension notices create unjustified burdens on defined benefit plans that do not pay benefits to active participants upon attainment of normal retirement age when they continue to draw pay. This dispenses with individual notices going to employees at the time they attain the normal retirement age—a practice that often unduly alarms workers who believe they are being encouraged to retire by their employer. The provision does provide notice of suspension to those who are reentering the workforce, along with notice of any reduction in rate of future benefit accrual.

*H.R. 1000's Studies*

*Study on small employer group plans:* H.R. 1000 directs the Department of Labor, in consultation with the Treasury Department, to conduct a study to determine (1) the most appropriate form(s) of pension plans that would be simple to create and easy to maintain by multiple small employers, while providing ready portability of benefits for all participants and beneficiaries, (2) how such arrangements could be established by employer or employee associations, (3) how such arrangements could provide for employees to contribute independent of employer sponsorship, and (4) appropriate methods and strategies for making such pension plan coverage more widely available to American workers.

The Department is to consider the adequacy and availability of existing pension plans and the extent to which existing models may be modified to be more accessible to both employees and employers. The Secretary of Labor is to issue a report within 18 months, including recommendations for one or more model plans or arrangements as described above which may serve as the basis for appropriate administrative or legislative action.

*Study on pension coverage:* H.R. 1000 also directs the Secretary of Labor to report to the Committee on Education and the Workforce of the House of Representatives and the Committee on

Health, Education, Labor and Pensions of the Senate regarding the effect of the bill on pension coverage, including: the extent of pension plan coverage for low and middle-income workers, the levels of pension plan benefits generally, the quality of pension plan coverage generally, worker's access to and participation in pension plans, and retirement security. This report is required to be submitted no later than five years after the date of enactment. This section is effective upon enactment.

The Committee believes that the possibility of small employer pooling for pension coverage is worthy of study and consideration. During Committee hearings, witnesses have focused on the problem of low pension plan sponsorship rates by small employers. Some have proposed a possible solution of allowing individual small employers to join together to sponsor pension plans or to join into an existing group pension plan vehicle (similar to the "association health plan" concept reported out by the Employer-Employee Relations Subcommittee in the 106th Congress in H.R. 2047).

The Committee also believes that it is appropriate to study the effects of this Act on pension coverage.

*H.R. 1000's Interest Rate Range for Additional Funding Requirements*

ERISA and the Code impose both minimum and maximum funding requirements with respect to defined benefit pension plans. The minimum funding requirements are designed to provide at least a certain level of benefit security by requiring the employer to make certain minimum contributions to the plan. The amount of contributions required for a plan year is generally the amount needed to fund benefits earned during that year plus that year's portion of other liabilities that are amortized over a period of years, such as benefits resulting from a grant of past service credit.

Additional contributions are required under a special funding rule if a single-employer defined benefit pension plan is underfunded. Under the special rule, a plan is considered underfunded for a plan year if the value of the plan assets is less than 90 percent of the plan's current liability. The value of plan assets, as a percentage of current liability is the plan's "funded current liability percentage."

In general, a plan's current liability means all liabilities to employees and their beneficiaries under the plan. The interest rate used to determine a plan's current liability must be within a permissible range of the weighted average of the interest rates on 30-year Treasury securities for the four-year period ending on the last day before the plan year begins. The permissible range is from 90 percent to 105 percent. As a result of debt reduction, the Department of the Treasury does not currently issue 30-year Treasury securities.

In general, plan contributions required to satisfy the funding rules must be made within 8½ months after the end of the plan year. If the contribution is made by such due date, the contribution is treated as if it were made on the last day of the plan year. In the case of a plan with a funded current liability percentage of less than 100 percent for the preceding plan year, estimated contributions for the current plan year must be made in quarterly installments during the current plan year. The amount of each required installment is 25 percent of the lesser of (1) 90 percent of the amount required to be contributed for the current plan year or (2) 100 percent of the amount required to be contributed for the preceding plan year.

Because benefits under a defined benefit pension plan may be funded over a period of years, plan assets may not be sufficient to provide the benefits owed under the plan to employees and their beneficiaries if the plan terminates before all benefits are paid. In order to protect employees and their beneficiaries, the Pension Benefit Guaranty Corporation ("PBGC") generally insures the benefits owed under defined benefit pension plans. Employers pay premiums to the PBGC for this insurance coverage.

In the case of an underfunded plan, additional PBGC premiums are required based on the amount of unfunded vested benefits. These premiums are referred to as "variable rate premiums." In determining the amount of unfunded vested benefits, the interest rate used is 85 percent of the interest rate on 30-year Treasury securities for the month preceding the month in which the plan year begins.

Section 405 of the Job Creation and Worker Assistance Act of 2002, Public Law 107–147, enacted March 9, 2002, provides a special interest rate rule applicable in determining the amount of additional contributions for plan years beginning after December 31, 2001, and before January 1, 2004 (the "applicable plan years").

The special rule expands the permissible range of the statutory interest rate used in calculating a plan's current liability for purposes of applying the additional contribution requirements for the applicable plan years. The permissible range is from 90 percent to 120 percent for these years. Use of a higher interest rate under the expanded range will affect the plan's current liability, which may in turn affect the need to make additional contributions and the amount of any additional contributions.

Because the quarterly contributions requirements are based on current liability for the preceding plan year, a special rule is provided for applying these requirements for plan years beginning in 2002 (when the expanded range first applies) and 2004 (when the expanded range no longer applies). In each of those years ("present year"), current liability for the preceding year is redetermined, using the permissible range applicable to the present year. This redetermined current liability will be used for purposes of the plan's funded current liability percentage for the preceding year, which may affect the need to make quarterly contributions and for purposes of determining the amount of any quarterly contributions in the present year, which is based in part on the preceding year.

Under the provisions of H.R. 1000, the special interest rate rule for 2002 and 2003 would apply also in determining the amount of additional contributions for the 2001 plan year that must be contributed to the plan within 8½ months after the end of the plan year (e.g., by September 15, 2002). The proposal would not affect quarterly contributions required to be made for the 2001 plan year.

In addition, due to this change in the interest rate, the bill conforms those provisions of ERISA which are directly related to the consequences of a plan being under funded such as the establishment of a separate fund in the PBGC for additional premiums, the special participant notice requirements, reporting requirements to the PBGC and information that the PBGC may request in underfunding situations.

The provisions of the bill would be effective as if included in section 405 of the Job Creation and Worker Assistance Act of 2002.

The Committee notes that the Treasury Department has discontinued issuing the 30-Year Treasury bond. Pension plans are required to use this rate as a benchmark for a variety of pension calculation purposes, including the valuation of current funding liabilities and Pension Benefit Guaranty Corporation (PBGC) variable premium calculations. The decision by Treasury compels the Committee to adjust the interest rate for these purposes.

The 30-Year Treasury Bond interest rate is at historic lows, causing it to be an inaccurate proxy for long-term rates of return likely to be earned by pension funds. By increasing the acceptable range of the percentage part of the funding formula, which uses the 30-Year Treasury bond as its base, plan sponsors will have a more realistic interest rate assumption when calculating necessary contributions to defined benefit plans.

The Committee believes that this change will prevent plan sponsors from both making unneeded contributions to pension plans and paying unwarranted extra premiums to the PBGC for under-funding situations that do not exist. Since these under-funding situations do not exist, the special participant notice and PBGC reporting requirements will not apply. (The valuation of lump sum distributions from pension plans is not affected by this change.)

*H.R. 1000's Provisions Relating to Plan Amendments*

Currently, plans making amendments because of changes in the law must make them by the time they are required to file income taxes for the year in which the change in law occurs.

H.R. 1000 eases this burden on plans by permitting certain plan amendments made pursuant to the changes made by the bill (or regulations issued under the provisions of the bill) to be retroactively effective. If the plan amendment meets the requirements of the bill, then the plan is treated as being operated in accordance with its terms and the amendment does not violate the prohibition of reductions of accrued benefits. In order for this treatment to apply, the plan amendment must be made on or before the last day of the first plan year beginning on or after January 1, 2006.

The provision applies to plan amendments required to maintain qualified status, as well as other amendments pursuant to the provisions of the bill (or applicable regulations). A plan amendment is not considered to be pursuant to the bill (or applicable regulations) if it has an effective date before the effective date of the provision of the bill (or regulations) to which it relates. Similarly, the provision does not provide relief from section 204(g) or Internal Revenue Code section 411(d)(6) for periods prior to the effective date of the relevant provision of the bill (or regulations) or the plan amendment. The Secretary of the Treasury is given authority to provide exceptions to the relief from the prohibition on reductions in accrued benefits. The provision is effective on the date of enactment.

The Committee believes that plan sponsors should have adequate time to amend their plans to reflect amendments to the law.

## SUMMARY

Title I of ERISA contains fundamental protections for participants and beneficiaries of employee benefit plans. Part I of Title I sets forth the duties of plan administrators to notify participants and beneficiaries of the terms of the benefit plans in which they participate, their rights under these plans, and the benefits which have accrued under the terms of their plans. Part 4 of Title I explains the fundamental duty of fiduciaries to act in the sole interest of participants and beneficiaries of employee benefit plans.

When ERISA was enacted in 1974, Congress provided for such disclosure and safeguards as would protect employees' retirement security. In 1974, pension plans were primarily in the form of defined benefit plans, which made specific guarantees for retirement payments to ensure the retirement security of participants and beneficiaries.

Today's workforce is very different than the workforce in 1974. Today's retirement plan context is largely one of pension plans that are individual in nature where participants have the ability to direct their own accounts, choosing investments that best meet their retirement needs.

Individual account plans necessitate different safeguards and standards for information disclosure in order to provide the same level of retirement security for participants and beneficiaries that was envisioned in 1974. As such, the provisions of H.R. 1000 represent a logical upgrade to the provisions of Title I of ERISA to ensure adequate retirement protection for today's workforce.

The bill requires the plan administrator to provide a quarterly notice to plan participants and beneficiaries of self-directed plans of the value of investments allocated to their individual account, including their rights to diversify any assets held in qualified employer securities. The notice will also include an explanation of the importance of a diversified investment portfolio including the risk of holding substantial portions of a portfolio in any one security, such as qualified employer securities. The bill also provides civil penalties for failure to properly adhere to such notice requirements.

The bill clarifies that fiduciaries are not liable for losses during a period of suspension provided that fiduciaries satisfy their fiduciary obligation with regard to the interruption of participant and beneficiary's ability to direct or diversify assets. H.R. 1000 outlines relevant considerations in determining the satisfaction of fiduciary duty, such as the provision of the blackout notice, the fiduciary's consideration of the reasonableness of the period of suspension, and the fiduciary's actions solely in the interest of participants and beneficiaries. If fiduciaries meet these requirements, the bill protects them from any losses sustained by participants and beneficiaries during a period of suspension.

In order to promote the education of fiduciaries as to their fiduciary obligations, the bill requires the Department of Labor to establish a program to make information and educational resources available to pension plan fiduciaries on an ongoing basis in order to assist them in diligently and efficiently carrying out their fiduciary duties with respect to the plan.

H.R. 1000 mandates that participants must be able to diversify contributions to their account that are in the form of employer securities after three years. The bill provides for the option of a rolling three-year diversification of employer securities. In this case employer securities may be diversified three years after the calendar quarter in which they were contributed. The bill also sets forth a five-year transition rule for the allowable diversification of employer securities held in individual account plans as of the date of enactment. The bill exempts individual account plans that do not hold employer securities that are readily tradable on an established securities market from the diversification requirements.

H.R. 1000 requires the Secretary of Labor to undertake a study of the costs and benefits to participants and beneficiaries of requiring independent consultants to advise plan fiduciaries in connection with the administration of individual account plans.

The bill includes the text of H.R. 2269, the Retirement Security Advice Act, which, as modified, provides increased availability of investment advisors to assist plan participants in making good decisions about their retirement assets.

The bill also includes provisions contained in H.R. 10 from the first session of the 107th Congress which were excluded because of a Senate procedural rule affecting the Conference Report of H.R. 1836, the "Economic Growth and Tax Relief Reconciliation Act." H.R. 1000 provides incentives to small businesses to offer pension plans to their workers by lowering Pension Benefit Guaranty Corporation (PBGC) premiums for new small business defined benefit plans. The bill allows the PBGC to pay employers interest if they over pay their premiums to it. Furthermore, the bill also expands the missing participant program administered by the PBGC to include defined contribution plans so that individuals may locate 401(k) money they may have left with a previous employer. The bill also modifies the rules of the PBGC for small business owners when plans terminate.

H.R. 1000 extends the notice and consent period for distributions to allow individuals to plan for and request a pension distribution further in advance, while also modifying the rules dealing with the distribution of the Benefit Suspension Notice to those employees who although they have reached retirement age, continue to work for their employer.

Part 5 of Title I of ERISA provides for the holding of National Summits on Retirement Savings to advance the public's knowledge and awareness of the importance of saving for their future retirement. The bill provides for Summits in 2006 and 2010 and modifies the appointment procedure for delegate selection.

The bill also provides for a study on small employer group plans and the effect of the legislation on pension plans.

Finally, the bill also includes provisions dealing with problems that have arisen due to the change in status of the 30-year Treasury bond and certain mortality tables as a benchmark for certain pension calculations.

On this last point, ERISA requires defined benefit plans to make annual contributions based upon calculations that take into account the liability of the plan to pay benefits to participants. A statutory factor in these calculations is the 30-year Treasury bond. With the government buy back of some of these bonds in the past few years in response to the budget surplus and the announcement by the Department of the Treasury in the fall of 2001 that they were no longer going to issue these instruments, its validity as a statutory benchmark has been brought into question.

The mortality tables used by defined benefit pension plans to determine funding requirements can sometimes be inappropriate for certain pension plans. In 1997, Congress granted interim relief to certain frozen (no new participants) plans of inter-city bus companies because these tables did not accurately reflect the mortality experience of the plan. The bill specifies that this relief is permanent.

## SECTION-BY-SECTION ANALYSIS

### *Section 1. Short Title and Table of Contents*

"Pension Security Act of 2003."

### *Section 101. Periodic Pension Benefits Statements*

H.R. 1000 amends ERISA to require plan administrators to provide a quarterly notice to plan participants and beneficiaries who have a right to direct their investments regarding the value of investments allocated to their applicable individual account. Provisions from H.R. 10 were also incorporated into H.R. 1000 to require plan administrators of all individual account plans to provide a pension benefit statement at least annually. For purposes of the quarterly benefit statement, the value of such securities that are not readily tradable on an established securities market may be determined by using the most recent valuation.

The bill also requires administrators of defined benefit plans to furnish a benefit statement to each participant of a defined benefit plan at least once every three years and to a plan participant or beneficiary upon written request. In the case of a defined benefit plan, if administrators annually provide participants with a notice of the availability of a pension benefit statement, the new requirements are treated as having been met.

The new quarterly benefit statement for applicable individual accounts will include a statement of each participant's right to diversify any assets held in employer securities. The benefit statement will also include an explanation of the importance of a diversified investment portfolio including the risk of holding substantial portions of a portfolio in any one security, such as employer securities.

Applicable individual account plans are defined by limiting the definition of individual account plan in ERISA to exclude employee stock ownership plans unless there are any contributions to such plan or earnings held within such plan that are subject to subsection (k)(3) or (m)(2) of section 401 of the IRS Code of 1986.

The Secretary shall issue guidance and model notices that include the value of investments, the rights of employees to diversify any employer securities and an explanation of the importance of a diversified investment portfolio. The Secretary may also issue interim model guidance.

The bill amends Section 502 of ERISA to allow the Secretary to assess a civil penalty against a plan administrator of up to $1,000 a day from the date of such plan administrator's failure to provide participants and beneficiaries with a benefit statement on a quarterly basis.

*Section 102. Inapplicability of Relief From Fiduciary Liability During Blackout Periods*

H.R. 1000 amends Section 404(c)(1) of ERISA to state that the exemption from liability shall not apply in connection with any period where a participant or beneficiary's ability to direct the investment of the assets in his or her account is suspended by a plan sponsor or fiduciary. The bill also adds another paragraph that specifies that if fiduciaries meet certain requirements, they shall not be liable in a suspension period. The bill adds relevant matters to be considered in determining whether or not a fiduciary has met their obligations. These include the consideration of the reasonableness of the suspension period and the provision of notice to participants and beneficiaries. The bill also restates the implicit fiduciary duty to act in the sole interest of participants and beneficiaries in determining to enter into the suspension as another matter to be considered. As H.R. 1000 indicates, it is only then that fiduciaries are relieved of their own liability and granted the 404(c) liability protection.

H.R. 1000 provides that limitations or restrictions in trading that are disclosed to plan participants in the summary plan description are not considered a blackout.

In connection with changes in investment options offered under the plan, the participant or beneficiary will be deemed to have exercised control if the participant or beneficiary received notice of the change in investment option and either transferred their assets in an affirmative election. In the case where the participant or beneficiary fails to make an election, if the assets are transferred to the investments as set out in the notice of the option change, then the participant will be deemed to have exercised control.

H.R. 1000 provides that the Secretary shall issue guidance and model notices that include the above factors and such other provisions the Secretary may specify. The initial guidance will be promulgated no later than December 31, 2004. The Secretary may also issue interim model guidance.

*Section 103. Information and Educational Support for Pension Plan Fiduciaries*

H.R. 1000 amends Section 404 of ERISA to direct the Department of Labor to establish a program to make information and educational resources available to pension plan fiduciaries on an ongoing basis in order to assist them in diligently and efficiently carrying out their fiduciary duties with respect to the plan.

*Section 104. Limitations on Restrictions of Investments in Employer Securities*

The bill creates a diversification right for individual account plans that hold employer securities readily tradable on an established securities market. After a participant has completed three years of service, the plan may not restrict divestment of any employer security held by the participant or it may not restrict divestment of any employer security later than 3 years during a calendar quarter after the employer security is allocated to the individual account.

A plan must offer a broad range of investment alternatives as determined by the Secretary in which the plan participant must be allowed to re-allocate and the plan participant must be given the right to re-allocate on a periodic, reasonable basis, but no less frequently than on a quarterly basis.

Plans holding employer securities as of the date of enactment, must provide for the removal of all trading restrictions on those securities on an increasing percentage basis annually and requiring complete diversification by the plan year beginning 2008.

*Section 105. Prohibited Transaction Exemption for the Provision of Investment Advice*

The bill provides a statutory exemption from the prohibited transaction rules of the Employee Retirement Income Security Act (ERISA) and the Internal Revenue Code (a new § 408(b)(14) of ERISA and a new § 4975(d)(14) of the IRC) for: (1) the provision of investment advice regarding plan assets subject to the direction of plan participants and beneficiaries plan to a plan, its participants and beneficiaries, (2) the sale, acquisition, or holding of securities or other property pursuant to such investment advice, and (3) the direct or indirect receipt of fees or other compensation in connection with providing the advice.

In order to qualify for the exemption, an entity must be a "fiduciary adviser" and must meet a series of detailed requirements. The bill defines the following regulated entities to qualify as fiduciary advisers: registered investment advisers, the trust department of banks or similar institutions, insurance companies, registered broker-dealers, and the affiliates, employees, agents, or registered representatives of those entities who satisfy the requirements of the applicable insurance, banking and securities laws with respect to the provision of such advice.

The fiduciary adviser, at a time reasonably contemporaneous with the initial delivery of investment advice on a security or other property, must provide a clear and conspicuous written (including electronic) disclosure of: (1) the fees or other compensation that the fiduciary adviser and its affiliates receive relating to the provision of investment advice or a resulting sale or acquisition of securities or other property (including from third parties), (2) any interest of the fiduciary adviser (and its affiliates) in any security or other property recommended, purchased or sold, (3) any limitation placed on the fiduciary's ability to provide advice, (4) the advisory services offered, and (5) that the adviser is acting as a fiduciary of the plan in connection with the provision of such advice; (6) any information required to be disclosed under applicable securities laws and (7) that the plan participant may seek advice from an unaffiliated adviser. This disclosure must be written in a way that the average plan participant could understand the information. This material must be maintained in currently accurate form. The Secretary of Labor will issue a model disclosure form.

Any investment advice provided to participants or beneficiaries may be implemented (through a purchase or sale of securities or other property) only at their direction.

The terms of the transaction must be at least as favorable to the plan as an arm's length transaction would be, and the compensation received by the fiduciary adviser (and its affiliates) in connection with any transaction must be reasonable. The fiduciary adviser must also provide a written acknowledgement that it is acting as a fiduciary of the plan to the plan sponsor.

Fiduciary advisers must comply with a six-year record-keeping requirement (for records necessary to determine whether the conditions of the exemption have been met).

A plan sponsor or other fiduciary that arranges for a fiduciary adviser to provide investment advice to participants and beneficiaries has no duty to monitor the specific investment advice given by the fiduciary adviser to any particular recipient of advice. The plan sponsor or other fiduciary retains the duty of prudent selection and periodic review of the fiduciary adviser. The fiduciary adviser must acknowledge in writing to the plan sponsor that it is acting as a fiduciary of the plan with respect to the advice provided. Plan assets may be used to pay for the expenses of providing investment advice to participants and beneficiaries.

*Section 106. Study Regarding Impact on Retirement Savings of Participants and Beneficiaries by Requiring Fiduciary Consultants for Individual Account Plans*

As modified by an amendment adopted in Committee, H.R. 1000 requires the Secretary of Labor to undertake a study of the costs and benefits to participants and beneficiaries of requiring independent consultants to advise plan fiduciaries in connection with the administration of individual account plans.

The study shall address the merit of a requirement, as well as relationship to such a requirement to the expenses borne by participants and beneficiaries, and the availability of individual account plans.

*Section 107. Treatment of Qualified Retirement Planning Services*

The provision permits employers to offer employees a choice between cash compensation and eligible qualified retirement planning services. The provision only applies to qualified retirement planning services provided by a qualified investment advisor. It is intended that qualified investment advisors will be certified and regulated under applicable laws and regulations. In addition, qualified investment advisors also include investment advisors within a financial institution's trust or custody department chartered under the National Bank Act.

*Section 108. Effective Dates and Related Rules*

The effective date of these titles is one year after the date of enactment.

*Section 201. Amendments to Retirement Protection Act of 1994*

Retirement plans sponsored by interstate bus companies are facing inappropriate funding obligations that do not accurately reflect the economic realities underlying these plans or the interstate bus transportation industry. This situation has arisen, in part, due to the decline and elimination of the 30 year Treasury bond and the fixed mortality assumption that these plans must use under the General Agreement on Tariffs and Trade (GATT) legislation. Recognizing this situation, Congress temporarily exempted this industry from these rules in the Taxpayer Relief Act of 1997, thus having the normal funding rules of ERISA apply to them. This section makes that exemption from the GATT funding rules permanent.

*Section 202. Reporting Simplification*

The Secretary of the Treasury and the Secretary of Labor are directed to modify the annual return filing requirements with respect to plans that satisfy the eligibility requirements for Form 5500–EZ (referred to as a "one-participant plan") to provide that if the total value of the plan assets of such a plan as of the end of the plan year does not exceed $250,000, the plan administrator is not required to file a return. In addition, the provision directs the Secretary of the Treasury and the Secretary of Labor to provide simplified reporting requirements for plan years beginning after December 31, 2003, for certain plans with fewer than 25 employees.

*Section 203. Improvement of Employee Plans Compliance Resolution System*

The Secretary of the Treasury is directed to continue to update and improve EPCRS, giving special attention to (1) increasing the awareness and knowledge of small employers concerning the availability and use of EPCRS, (2) taking into account special concerns and circumstances that small employers face with respect to compliance and correction of compliance failures, (3) extending the duration of the self-correction period under SCP for significant compliance failures, (4) expanding the availability to correct insignificant compliance failures under SCP during audit, and (5) assuring that any tax, penalty, or sanction that is imposed by reason of a compliance failure is not excessive and bears a reasonable relationship to the nature, extent, and severity of the failure.

The provision clarifies that the Secretary has the full authority to effectuate the foregoing with respect to EPCRS (or similar program or policies), including the authority to waive income, excise or other taxes to ensure that any tax, penalty or sanction is not excessive and bears a reasonable relationship to the nature, extent and severity of the failure.

*Section 204. Flexibility in Nondiscrimination, Coverage, and Line of Business Rules*

The Secretary of the Treasury is directed to modify, on or before December 31, 2003, the existing regulations issued under section 414(r) in order to expand (to the extent that the Secretary may determine to be appropriate) the ability of a plan to demonstrate compliance with the line of business requirements based upon the facts and circumstances surrounding the design and operation of the plan, even though the plan is unable to satisfy the mechanical tests currently used to determine compliance.

The Secretary of the Treasury is directed to provide by regulation applicable to years beginning after December 31, 2003, that a plan is deemed to satisfy the nondiscrimination requirements of section 401(a)(4) if the plan satisfied the pre-1994 facts and circumstances test, satisfied the conditions prescribed by the Secretary to appropriately limit the availability of such test, and is submitted to the Secretary for a determination of whether it satisfies such test (to the extent provided by the Secretary).

Similarly, a plan will comply with the minimum coverage requirement of section 410(b) if the plan satisfied the pre–1989 coverage rules, is submitted to the Secretary for a determination of whether it satisfied the pre-1989 coverage rules (to the extent provided by the Secretary), and satisfies conditions prescribed by the Secretary by regulation that appropriately limit the availability of the pre-1989 coverage rules.

*Section 205. Extension to All Governmental Plans of Moratorium on Application of Certain Nondiscrimination Rules Applicable to State and Local Plans*

The provision exempts all governmental plans (as defined in sec. 414(d)) from the nondiscrimination and minimum participation rules.

*Section 206. Notice and Consent Period Regarding Distributions*

Generally, benefits cannot be distributed before the later of age 62 or normal retirement age unless the participant consents no more than 90 days before benefit commencement. Also, information on the tax implications of rollovers must be given to the employee within 90 days of distribution. Under this provision, the notice and consent period regarding distributions would be expanded from 90 days to 180 days.

*Section 207. Annual Report Dissemination*

Within 210 days after the close of a plan's fiscal year, the plan administrator must provide certain information to participants in a summary annual report (SAR). Under this section, Summary Annual Reports could now be distributed through electronic means (including Internet) or via other new technologies.

*Section 208. Technical Corrections to the SAVER Act*

The Savings Are Vital to Everyone's Retirement (SAVER) Act of 1997 convenes a National Summit on Retirement Savings at the White House, which will be co-hosted by the executive and legislative branches in 2006 and 2010. The National Summit brings together experts in the fields of employee benefits and retirement savings, key leaders of government, and interested parties from the private sector and general public. The Congressional leadership and the President select the delegates. The National Summit is a public-private partnership, receiving substantial funding from private sector contributions. This section provides for technical amendments to the SAVER Act, regarding the administration of and delegate selection to future statutorily created National Summits on Retirement Savings.

*Section 209. Missing Participants*

The PBGC acts as a clearinghouse for benefits due to participants who cannot be located. When a defined benefit plan terminates, the plan may transfer the benefits of the missing participant to the PBGC, which then attempts to locate the participant. Under this section, the PBGC's missing participant program would be expanded to cover defined contribution plans. This expansion would be voluntary at the election of the plan sponsor.

*Section 210. Reduced PBGC Premiums for New Plans*

Defined benefit plans are subject to a flat-rate premium of $19 per participant. Underfunded defined benefit plans are subject to an additional variable rate premium. There is no variable rate premium for the first year of a new defined benefit plan. Under this provision, new defined benefit plans established by employers with 100 employees or less would only have to pay a $5 per participant PBGC premium for the first 5 years of the plan. No variable rate premium would be assessed during this period.

*Section 211. Reduction of Additional PBGC Premiums*

Defined benefit plans are subject to a flat-rate premium of $19 per participant. Underfunded defined benefit plans are subject to an additional variable rate premium. There is no variable rate premium for the first year of a new defined benefit plan. Under this section, any variable rate premium that might be assessed against a new defined benefit plan established by a larger employer would be phased-in as follows: 0% for the first plan year; 20% for the second; 40% for the third; 60% for the fourth; 80% for the fifth, and 100% for the sixth and succeeding plan years. For employers who have 25 or fewer employees on the first day of the plan year, the additional premium for each participant would not exceed $5 multiplied by the number of participants in the plan as of the close of the preceding plan year.

*Section 212. Authorization for PBGC To Pay Interest on Premium Overpayment Refunds*

This would allow the PBGC to pay interest on overpayments made by premium payers. Interest paid on overpayments would be calculated at the same rate and in the same manner as interest is charged on premium underpayments.

*Section 213. Substantial Owner Benefits in Terminated Plans*

"Substantial owners" are individuals who own more than 10% of a business. ERISA contains complicated rules governing the benefit earned by substantial owners when a plan is terminating. Under this section, the same five-year phase-in that currently applies to a participant who is not a substantial owner would apply to a substantial owner with less than a 50% ownership interest. For a majority owner, the phase-in would depend on the number of years the plan has been in effect, rather than on the number of years the owner has been a participant and the initial plan benefit.

*Section 214. Benefit Suspension Notice*

When an employee continues to work beyond normal retirement age, or is reemployed after commencing benefits, a defined benefit plan may provide for a suspension of pension payments during the post normal retirement age employment period. DOL regulations require that affected participants be notified in writing of such suspension and that such notice include a copy of the relevant plan provisions. Under this section, DOL would be required to modify its regulations regarding suspension of benefits rules to eliminate the requirement of a written individual notice and instead require that the suspension of benefits rules be outlined in the summary plan description, except for individuals reentering the workforce. Those rejoining a former employer would still receive the existing notice of suspension, along with a notice of any reduction in the rate of future benefit accrual.

*Section 215. Studies*

*(1) Model Small Employer Group Plans:* Under this section, the DOL is directed to conduct a study to determine (1) the most appropriate form(s) of pension plans that would be simple to create and easy to maintain by multiple small employers, while providing ready portability of benefits for all participants and beneficiaries, (2) how such arrangements could be established by employer or employee associations, (3) how such arrangements could provide for employees to contribute independent of employer sponsorship, and (4) appropriate methods and strategies for making such pension plan coverage more widely available to American workers.

*(2) Pension Coverage:* This section also directs the DOL to conduct a study regarding the effect of the bill on pension coverage, including: the extent of pension plan coverage for low and middle-income workers, the levels of pension plan benefits generally, the quality of pension plan coverage generally, worker's access to and participation in pension plans, and retirement security.

*Section 216. Interest Rate Range for Additional Funding Requirements*

The decline in yield and elimination of the 30 year Treasury bond has forced defined benefit pension plan sponsors to artificially increase their contributions due to inaccurately low rate of the 30 year Treasuries that are used as the basis of the statutory formula that determines acceptable funding levels. Furthermore, this flawed formula might cause some companies to also have to pay to the PBGC a penalty for under funding under the formula but in reality there is no under funding. This section gives plans an expanded formula which takes into consideration the low rate of the 30 year Treasury bonds for plan years 2001, 2002 and 2003.

## TITLE III

*Section 301. Provisions Relating to Plan Amendments*

The provision permits certain plan amendments made pursuant to the changes made by title I or II of the bill or by title VI of the Economic Growth and Tax Relief Reconciliation Act of 2001 (or regulations issued thereunder) to be retroactively effective. If the plan amendment meets the requirements of the bill, then the plan will be treated as being operated in accordance with its terms and the amendment will not violate the prohibition of reductions of accrued benefits for purposes of the Internal Revenue Code. In order for this treatment to apply, the plan amendment is required to be made on or before the last day of the first plan year beginning on or after January 1, 2006 (January 1, 2008, in the case of a governmental plan). If the amendment is required to be made to retain qualified status as a result of the changes in the law (or regulations), the amendment is required to be made retroactively effective as of the date on which the change became effective with respect to the plan and the plan is required to be operated in compliance until the amendment is made. Amendments that are not required to retain qualified status but that are made pursuant to the changes made by the bill or the 2001 Act (or applicable regulations) could be made retroactive as of the first day the plan is operated in accordance with the amendment.

A plan amendment will not be considered to be pursuant to the bill or the 2001 Act (or applicable regulations) if it has an effective date before the effective date of the provision of the bill or Act (or regulations) to which it related. Similarly, the provision does not provide relief from section 411(d)(6) for periods prior to the effective date of the relevant provision (or regulations) or the plan amendment.

The Secretary of Treasury is authorized to provide exceptions to the relief from the prohibition on reductions in accrued benefits. It is intended that the Secretary will not permit inappropriate reductions in contributions or benefits that are not directly related to the provisions of the bill or the 2001 Act. For example, it is intended that a plan that incorporates the Internal Revenue Code section 415 limits by reference can be retroactively amended to impose the section 415 limits in effect before the 2001 Act.

## EXPLANATION OF AMENDMENTS

The provisions of the substitute are explained in this report.

## APPLICATION OF LAW TO THE LEGISLATIVE BRANCH

Section 102(b)(3) of Public Law 104–1 requires a description of the application of this bill to the legislative branch. This bill gives workers new freedom to diversify their investments, much greater access to quality investment advice, more information about their pensions, and other tools they can use to maximize the potential of their 401(k) plans and ensure a secure retirement future though amendments to the Employee Retirement Income Security Act (ERISA) and complementary amendments to the Internal Revenue Code. Since ERISA excludes governmental plans, the bill does not apply to legislative branch employees. As public employees, legislative branch employees are eligible to participate in the Federal Employee Retirement System.

## UNFUNDED MANDATE STATEMENT

Section 423 of the Congressional Budget and Impoundment Control Act (as amended by Section 101(a)(2) of the Unfunded Mandates Reform Act, P.L. 104–4) requires a statement of whether the provisions of the reported bill include unfunded mandates. This bill gives workers new freedom to diversify their investments, much greater access to quality investment advice, more information about their pensions, and other tools they can use to maximize the potential of their 401(k) plans and ensure a secure retirement future through amendments to the Employee Retirement Income Security Act (ERISA). In compliance with this requirement, the Committee has received a letter from the Congressional Budget Office included herein.

# ROLLCALL VOTES

ROLLCALL VOTES

COMMITTEE ON EDUCATION AND THE WORKFORCE

ROLL CALL 1 BILL H.R. 1000 DATE March 5, 2003

AMENDMENT NUMBER 2 DEFEATED 20 -21

SPONSOR/AMENDMENT Mr. Miller / amendment in the nature of a substitute

| MEMBER | AYE | NO | PRESENT | NOT VOTING |
|---|---|---|---|---|
| Mr. BOEHNER, Chairman | | X | | |
| Mr. PETRI, Vice Chairman | | X | | |
| Mr. BALLENGER | | X | | |
| Mr. HOEKSTRA | | X | | |
| Mr. McKEON | | X | | |
| Mr. CASTLE | | | | X |
| Mr. JOHNSON | | X | | |
| Mr. GREENWOOD | | X | | |
| Mr. NORWOOD | | X | | |
| Mr. UPTON | | | | X |
| Mr. EHLERS | | | | X |
| Mr. DeMINT | | X | | |
| Mr. ISAKSON | | X | | |
| Mrs. BIGGERT | | X | | |
| Mr. PLATTS | | | | X |
| Mr. TIBERI | | X | | |
| Mr. KELLER | | X | | |
| Mr. OSBORNE | | | | X |
| Mr. WILSON | | | | X |
| Mr. COLE | | X | | |
| Mr. PORTER | | X | | |
| Mr. KLINE | | X | | |
| Mr. CARTER | | X | | |
| Mrs. MUSGRAVE | | X | | |
| Mrs. BLACKBURN | | X | | |
| Mr. GINGREY | | X | | |
| Mr. BURNS | | X | | |
| Mr. MILLER | X | | | |
| Mr. KILDEE | X | | | |
| Mr. OWENS | X | | | |
| Mr. PAYNE | X | | | |
| Mr. ANDREWS | X | | | |
| Ms. WOOLSEY | X | | | |
| Mr. HINOJOSA | | | | X |
| Mrs. McCARTHY | | | | X |
| Mr. TIERNEY | X | | | |
| Mr. KIND | X | | | |
| Mr. KUCINICH | X | | | |
| Mr. WU | X | | | |
| Mr. HOLT | X | | | |
| Mrs. DAVIS | X | | | |
| Ms. McCOLLUM | X | | | |
| Mr. DAVIS | X | | | |
| Mr. CASE | X | | | |
| Mr. GRIJALVA | X | | | |
| Ms. MAJETTE | X | | | |
| Mr. VAN HOLLEN | X | | | |
| Mr. RYAN | X | | | |
| Mr. BISHOP | X | | | |
| TOTALS | 20 | 21 | | 8 |

COMMITTEE ON EDUCATION AND THE WORKFORCE

ROLL CALL 2 BILL H.R. 1000 DATE March 6, 2003

AMENDMENT NUMBER 3 DEFEATED 20 - 23

SPONSOR/AMENDMENT Mr. Miller / amendment to limit cash balance plan conversions

| MEMBER | AYE | NO | PRESENT | NOT VOTING |
|---|---|---|---|---|
| Mr. BOEHNER, Chairman | | X | | |
| Mr. PETRI, Vice Chairman | X | | | |
| Mr. BALLENGER | | X | | |
| Mr. HOEKSTRA | | X | | |
| Mr. McKEON | | X | | |
| Mr. CASTLE | | X | | |
| Mr. JOHNSON | | X | | |
| Mr. GREENWOOD | | X | | |
| Mr. NORWOOD | | X | | |
| Mr. UPTON | | | | X |
| Mr. EHLERS | | X | | |
| Mr. DeMINT | | | | X |
| Mr. ISAKSON | | X | | |
| Mrs. BIGGERT | | X | | |
| Mr. PLATTS | | | | X |
| Mr. TIBERI | | X | | |
| Mr. KELLER | | X | | |
| Mr. OSBORNE | | X | | |
| Mr. WILSON | | X | | |
| Mr. COLE | | X | | |
| Mr. PORTER | | X | | |
| Mr. KLINE | | X | | |
| Mr. CARTER | | X | | |
| Mrs. MUSGRAVE | | X | | |
| Mrs. BLACKBURN | | X | | |
| Mr. GINGREY | | X | | |
| Mr. BURNS | | X | | |
| Mr. MILLER | X | | | |
| Mr. KILDEE | X | | | |
| Mr. OWENS | | | | X |
| Mr. PAYNE | X | | | |
| Mr. ANDREWS | X | | | |
| Ms. WOOLSEY | X | | | |
| Mr. HINOJOSA | X | | | |
| Mrs. McCARTHY | | | | X |
| Mr. TIERNEY | | | | X |
| Mr. KIND | X | | | |
| Mr. KUCINICH | X | | | |
| Mr. WU | X | | | |
| Mr. HOLT | X | | | |
| Mrs. DAVIS | X | | | |
| Ms. McCOLLUM | X | | | |
| Mr. DAVIS | X | | | |
| Mr. CASE | X | | | |
| Mr. GRIJALVA | X | | | |
| Ms. MAJETTE | X | | | |
| Mr. VAN HOLLEN | X | | | |
| Mr. RYAN | X | | | |
| Mr. BISHOP | X | | | |
| TOTALS | 20 | 23 | | 6 |

COMMITTEE ON EDUCATION AND THE WORKFORCE

ROLL CALL 3 BILL H.R. 1000 DATE March 6, 2003

AMENDMENT NUMBER 4 DEFEATED 19 - 25

SPONSOR/AMENDMENT Mr. Bishop / amendment regarding participation in trusteeship of individual account plans

| MEMBER | AYE | NO | PRESENT | NOT VOTING |
|---|---|---|---|---|
| Mr. BOEHNER, Chairman | | X | | |
| Mr. PETRI, Vice Chairman | | X | | |
| Mr. BALLENGER | | X | | |
| Mr. HOEKSTRA | | X | | |
| Mr. McKEON | | X | | |
| Mr. CASTLE | | X | | |
| Mr. JOHNSON | | X | | |
| Mr. GREENWOOD | | X | | |
| Mr. NORWOOD | | X | | |
| Mr. UPTON | | X | | |
| Mr. EHLERS | | X | | |
| Mr. DeMINT | | | | X |
| Mr. ISAKSON | | X | | |
| Mrs. BIGGERT | | X | | |
| Mr. PLATTS | | | | X |
| Mr. TIBERI | | X | | |
| Mr. KELLER | | X | | |
| Mr. OSBORNE | | X | | |
| Mr. WILSON | | X | | |
| Mr. COLE | | X | | |
| Mr. PORTER | | X | | |
| Mr. KLINE | | X | | |
| Mr. CARTER | | X | | |
| Mrs. MUSGRAVE | | X | | |
| Mrs. BLACKBURN | | X | | |
| Mr. GINGREY | | X | | |
| Mr. BURNS | | X | | |
| Mr. MILLER | X | | | |
| Mr. KILDEE | X | | | |
| Mr. OWENS | | | | X |
| Mr. PAYNE | X | | | |
| Mr. ANDREWS | X | | | |
| Ms. WOOLSEY | X | | | |
| Mr. HINOJOSA | X | | | |
| Mrs. McCARTHY | | | | X |
| Mr. TIERNEY | | | | X |
| Mr. KIND | X | | | |
| Mr. KUCINICH | X | | | |
| Mr. WU | X | | | |
| Mr. HOLT | X | | | |
| Mrs. DAVIS | X | | | |
| Ms. McCOLLUM | X | | | |
| Mr. DAVIS | X | | | |
| Mr. CASE | X | | | |
| Mr. GRIJALVA | X | | | |
| Ms. MAJETTE | X | | | |
| Mr. VAN HOLLEN | X | | | |
| Mr. RYAN | X | | | |
| Mr. BISHOP | X | | | |
| TOTALS | 19 | 25 | | 5 |

COMMITTEE ON EDUCATION AND THE WORKFORCE

ROLL CALL 4 BILL H.R. 1000 DATE March 6, 2003

AMENDMENT NUMBER 5 DEFEATED 20 - 26

SPONSOR/AMENDMENT Ms. Woolsey / amendment regarding funded deferred compensation plans for corporate insiders

| MEMBER | AYE | NO | PRESENT | NOT VOTING |
|---|---|---|---|---|
| Mr. BOEHNER, Chairman | | X | | |
| Mr. PETRI, Vice Chairman | | X | | |
| Mr. BALLENGER | | X | | |
| Mr. HOEKSTRA | | X | | |
| Mr. McKEON | | X | | |
| Mr. CASTLE | | X | | |
| Mr. JOHNSON | | X | | |
| Mr. GREENWOOD | | X | | |
| Mr. NORWOOD | | X | | |
| Mr. UPTON | | X | | |
| Mr. EHLERS | | X | | |
| Mr. DeMINT | | X | | |
| Mr. ISAKSON | | X | | |
| Mrs. BIGGERT | | X | | |
| Mr. PLATTS | | | | X |
| Mr. TIBERI | | X | | |
| Mr. KELLER | | X | | |
| Mr. OSBORNE | | X | | |
| Mr. WILSON | | X | | |
| Mr. COLE | | X | | |
| Mr. PORTER | | X | | |
| Mr. KLINE | | X | | |
| Mr. CARTER | | X | | |
| Mrs. MUSGRAVE | | X | | |
| Mrs. BLACKBURN | | X | | |
| Mr. GINGREY | | X | | |
| Mr. BURNS | | X | | |
| Mr. MILLER | X | | | |
| Mr. KILDEE | X | | | |
| Mr. OWENS | X | | | |
| Mr. PAYNE | X | | | |
| Mr. ANDREWS | X | | | |
| Ms. WOOLSEY | X | | | |
| Mr. HINOJOSA | X | | | |
| Mrs. McCARTHY | | | | X |
| Mr. TIERNEY | X | | | |
| Mr. KIND | | | | X |
| Mr. KUCINICH | X | | | |
| Mr. WU | X | | | |
| Mr. HOLT | X | | | |
| Mrs. DAVIS | X | | | |
| Ms. McCOLLUM | X | | | |
| Mr. DAVIS | X | | | |
| Mr. CASE | X | | | |
| Mr. GRIJALVA | X | | | |
| Ms. MAJETTE | X | | | |
| Mr. VAN HOLLEN | X | | | |
| Mr. RYAN | X | | | |
| Mr. BISHOP | X | | | |
| TOTALS | 20 | 26 | | 3 |

COMMITTEE ON EDUCATION AND THE WORKFORCE

ROLL CALL 5 BILL H.R. 1000 DATE March 6, 2003

AMENDMENT NUMBER 6 DEFEATED 19 - 27

SPONSOR/AMENDMENT Mr. Holt / amendment regarding diversification and vesting upon one year of service

| MEMBER | AYE | NO | PRESENT | NOT VOTING |
|---|---|---|---|---|
| Mr. BOEHNER, Chairman | | X | | |
| Mr. PETRI, Vice Chairman | | X | | |
| Mr. BALLENGER | | X | | |
| Mr. HOEKSTRA | | X | | |
| Mr. McKEON | | X | | |
| Mr. CASTLE | | X | | |
| Mr. JOHNSON | | X | | |
| Mr. GREENWOOD | | X | | |
| Mr. NORWOOD | | X | | |
| Mr. UPTON | | X | | |
| Mr. EHLERS | | X | | |
| Mr. DeMINT | | X | | |
| Mr. ISAKSON | | X | | |
| Mrs. BIGGERT | | X | | |
| Mr. PLATTS | | | | X |
| Mr. TIBERI | | X | | |
| Mr. KELLER | | X | | |
| Mr. OSBORNE | | X | | |
| Mr. WILSON | | X | | |
| Mr. COLE | | X | | |
| Mr. PORTER | | X | | |
| Mr. KLINE | | X | | |
| Mr. CARTER | | X | | |
| Mrs. MUSGRAVE | | X | | |
| Mrs. BLACKBURN | | X | | |
| Mr. GINGREY | | X | | |
| Mr. BURNS | | X | | |
| Mr. MILLER | X | | | |
| Mr. KILDEE | X | | | |
| Mr. OWENS | X | | | |
| Mr. PAYNE | X | | | |
| Mr. ANDREWS | X | | | |
| Ms. WOOLSEY | | | X | |
| Mr. HINOJOSA | X | | | |
| Mrs. McCARTHY | | | X | |
| Mr. TIERNEY | X | | | |
| Mr. KIND | X | | | |
| Mr. KUCINICH | X | | | |
| Mr. WU | X | | | |
| Mr. HOLT | X | | | |
| Mrs. DAVIS | X | | | |
| Ms. McCOLLUM | | X | | |
| Mr. DAVIS | X | | | |
| Mr. CASE | X | | | |
| Mr. GRIJALVA | X | | | |
| Ms. MAJETTE | X | | | |
| Mr. VAN HOLLEN | X | | | |
| Mr. RYAN | X | | | |
| Mr. BISHOP | X | | | |
| TOTALS | 19 | 27 | | 3 |

COMMITTEE ON EDUCATION AND THE WORKFORCE

ROLL CALL 6 BILL H.R. 1000 DATE March 6, 2003

AMENDMENT NUMBER 7 DEFEATED 22-25

SPONSOR/AMENDMENT Mr. Andrews / amendment regarding investment advice

| MEMBER | AYE | NO | PRESENT | NOT VOTING |
|---|---|---|---|---|
| Mr. BOEHNER, Chairman | | X | | |
| Mr. PETRI, Vice Chairman | X | | | |
| Mr. BALLENGER | | X | | |
| Mr. HOEKSTRA | | X | | |
| Mr. McKEON | | X | | |
| Mr. CASTLE | | X | | |
| Mr. JOHNSON | | X | | |
| Mr. GREENWOOD | | X | | |
| Mr. NORWOOD | | X | | |
| Mr. UPTON | | X | | |
| Mr. EHLERS | | X | | |
| Mr. DeMINT | | X | | |
| Mr. ISAKSON | | X | | |
| Mrs. BIGGERT | | X | | |
| Mr. PLATTS | | | | X |
| Mr. TIBERI | | X | | |
| Mr. KELLER | | X | | |
| Mr. OSBORNE | | X | | |
| Mr. WILSON | | X | | |
| Mr. COLE | | X | | |
| Mr. PORTER | | X | | |
| Mr. KLINE | | X | | |
| Mr. CARTER | | X | | |
| Mrs. MUSGRAVE | | X | | |
| Mrs. BLACKBURN | | X | | |
| Mr. GINGREY | | X | | |
| Mr. BURNS | | X | | |
| Mr. MILLER | X | | | |
| Mr. KILDEE | X | | | |
| Mr. OWENS | X | | | |
| Mr. PAYNE | X | | | |
| Mr. ANDREWS | X | | | |
| Ms. WOOLSEY | X | | | |
| Mr. HINOJOSA | X | | | |
| Mrs. McCARTHY | | | | X |
| Mr. TIERNEY | X | | | |
| Mr. KIND | X | | | |
| Mr. KUCINICH | X | | | |
| Mr. WU | X | | | |
| Mr. HOLT | X | | | |
| Mrs. DAVIS | X | | | |
| Ms. McCOLLUM | X | | | |
| Mr. DAVIS | X | | | |
| Mr. CASE | X | | | |
| Mr. GRIJALVA | X | | | |
| Ms. MAJETTE | X | | | |
| Mr. VAN HOLLEN | X | | | |
| Mr. RYAN | X | | | |
| Mr. BISHOP | X | | | |
| TOTALS | 22 | 25 | | 2 |

COMMITTEE ON EDUCATION AND THE WORKFORCE

ROLL CALL 7 BILL H.R. 1000 DATE March 6, 2003

**H.R. 1000 was ordered favorably reported, as amended, by a vote of 29 – 19**

SPONSOR/AMENDMENT Mr. Petri /motion to report the bill to the House with an amendment and with the recommendation that the bill as amended do pass

| MEMBER | AYE | NO | PRESENT | NOT VOTING |
|---|---|---|---|---|
| Mr. BOEHNER, Chairman | X | | | |
| Mr. PETRI, Vice Chairman | X | | | |
| Mr. BALLENGER | X | | | |
| Mr. HOEKSTRA | X | | | |
| Mr. McKEON | X | | | |
| Mr. CASTLE | X | | | |
| Mr. JOHNSON | X | | | |
| Mr. GREENWOOD | X | | | |
| Mr. NORWOOD | X | | | |
| Mr. UPTON | X | | | |
| Mr. EHLERS | X | | | |
| Mr. DeMINT | X | | | |
| Mr. ISAKSON | X | | | |
| Mrs. BIGGERT | X | | | |
| Mr. PLATTS | X | | | |
| Mr. TIBERI | X | | | |
| Mr. KELLER | X | | | |
| Mr. OSBORNE | X | | | |
| Mr. WILSON | X | | | |
| Mr. COLE | X | | | |
| Mr. PORTER | X | | | |
| Mr. KLINE | X | | | |
| Mr. CARTER | X | | | |
| Mrs. MUSGRAVE | X | | | |
| Mrs. BLACKBURN | X | | | |
| Mr. GINGREY | X | | | |
| Mr. BURNS | X | | | |
| Mr. MILLER | | X | | |
| Mr. KILDEE | | X | | |
| Mr. OWENS | | X | | |
| Mr. PAYNE | | X | | |
| Mr. ANDREWS | | X | | |
| Ms. WOOLSEY | | X | | |
| Mr. HINOJOSA | | X | | |
| Mrs. McCARTHY | | | | X |
| Mr. TIERNEY | | X | | |
| Mr. KIND | X | | | |
| Mr. KUCINICH | | X | | |
| Mr. WU | X | | | |
| Mr. HOLT | | X | | |
| Mrs. DAVIS | | X | | |
| Ms. McCOLLUM | | X | | |
| Mr. DAVIS | | X | | |
| Mr. CASE | | X | | |
| Mr. GRIJALVA | | X | | |
| Ms. MAJETTE | | X | | |
| Mr. VAN HOLLEN | | X | | |
| Mr. RYAN | | X | | |
| Mr. BISHOP | | X | | |
| **TOTALS** | 29 | 19 | | 1 |

CORRESPONDENCE

HOUSE OF REPRESENTATIVES,
*Washington, DC, March 12, 2003.*

Hon. JOHN BOEHNER,
*Chairman, Committee on Education and the Workforce,*
*Rayburn House Office Building, Washington, DC.*

DEAR MR. CHAIRMAN: Due to other legislative duties, I was unavoidably detained during Committee consideration of H.R. 1000, "Pension Security Act of 2003," Consequently, I missed roll call number one on the second amendment in the nature of a substitute offered by Representative George Miller. Had I been present, I would have voted against the amendment.

I would appreciate your including this letter in the Committee Report to accompany H.R. 1000. Thank you for your attention to this matter.

Sincerely,

MICHAEL N. CASTLE,
*Member of Congress.*

STATEMENT OF OVERSIGHT FINDINGS AND RECOMMENDATIONS OF THE COMMITTEE

In compliance with clause 3(c)(1) of rule XIII and clause (2)(b)(1) of rule X of the Rules of the House of Representatives, the Committee's oversight findings and recommendations are reflected in the body of this report.

BUDGET AUTHORITY AND CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

With respect to the requirements of clause 3(c)(2) of rule XIII of the House of Representatives and section 308(a) of the Congressional Budget Act of 1974 and with respect to requirements of 3(c)(3) of rule XIII of the House of Representatives and section 402 of the Congressional Budget Act of 1974, the Committee has received the following cost estimate for H.R. 1000 from the Director of the Congressional Budget Office:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
*Washington, DC, March 13, 2003.*

Hon. JOHN A. BOEHNER,
*Chairman, Committee on Education and the Workforce,*
*House of Representatives, Washington, DC.*

DEAR MR. CHAIRMAN: As you requested, the Congressional Budget Office has prepared the enclosed cost estimate for H.R. 1000, the Pension Security Act of 2003.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Geoffrey Gerhardt.

Sincerely,

DOUGLAS HOLTZ-EAKIN,
*Director.*

Enclosure.

*H.R. 1000—Pension Security Act of 2003*

Summary: H.R. 1000 would make numerous changes to the Employee Retirement Income Security Act of 1974 (ERISA) that would affect the operations of private pension plans. These include new reporting requirements, limitations on certain investments, modifications in premiums paid to the Pension Benefit Guaranty Corporations (PBGC), and other changes.

CBO and the Joint Committee on Taxation (JCT) estimate that enacting the bill would increase federal revenue by $196 million in 2003 and by $19 million over the 2003–2008 period, but would reduce revenue by $482 million over the 2003–2013 period. CBO estimates that the bill would decrease direct spending by $39 million in 2003, by $101 million over the 2003–2008 period. and by $87 million over the 2003–2013 period. Discretionary spending under the bill would total $24 million over the 2004–2008 period, assuming appropriation of the necessary amounts.

State, local, and tribal governments are exempt from the requirement of ERISA that H.R. 1000 would amend. and other provisions of the bill would impose no requirements on those governments. Consequently, CBO has determines that the non-tax provisions of the bill contain no intergovernmental mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would impose no costs on state, local, or tribal governments.

JCT has determined that the tax provisions of H.R. 1000 contain no intergovernmental or private-sector mandates as defined in UMRA. The bill does contain private-sector mandates on sponsors, administrators, and fiduciaries of private pension plans. CBO estimates that the direct cost of those new requirements would not exceed the annual threshold specified in UMRA ($117 million in 2003, adjusted annually for inflation) in any of the first five years the mandates would be effective.

Estimated cost to the Federal Government: The estimated budgetary impact of H.R. 1000 is shown in the following table. The costs of this legislation would fall within budget function 600 (income security).

| | By fiscal year, in millions of dollars— | | | | | |
|---|---|---|---|---|---|---|
| | 2003 | 2004 | 2005 | 2006 | 2007 | 2008 |
| CHANGES IN REVENUES | | | | | | |
| Interest rate range for calculating plans' funding requirements | 196 | 401 | 50 | −266 | −179 | −90 |
| Treatment of qualified retirement planning servicess | 0 | −10 | −15 | −20 | −23 | −25 |
| Total changes in revenuestirement planning servicess | 196 | 391 | 35 | −286 | −202 | −115 |
| CHANGES IN DIRECT SPENDING | | | | | | |
| Reduced PBGC flat-rate premiums | 0 | * | * | 1 | 1 | 1 |
| Changes in PBGC variable premiums | −39 | −37 | −26 | −10 | −4 | −3 |
| Payment in interest on overpayments of PBGC premiums | 0 | 3 | 3 | 3 | 3 | 3 |
| Benefits paid to substantial owners | 0 | * | * | * | * | * |
| Total additional outlays | −39 | −34 | −23 | −6 | * | 1 |
| CHANGES IN SPENDING SUBJECT TO APPROPRIATION | | | | | | |
| Studies by the Department of Labor: | | | | | | |
| Estimated authorization level | 0 | 2 | 0 | 0 | 0 | 0 |
| Estimated outlays | 0 | * | 1 | * | * | * |
| Informational and educational support for pension plan fiduciaries: | | | | | | |
| Estimated authorization level | 0 | 5 | 5 | 5 | 5 | 6 |

| | By fiscal year, in millions of dollars— | | | | | |
|---|---|---|---|---|---|---|
| | 2003 | 2004 | 2005 | 2006 | 2007 | 2008 |
| Estimated outlays | 0 | 3 | 5 | 5 | 5 | 5 |
| Total changes: | | | | | | |
| Estimated authorization level | 0 | 7 | 5 | 5 | 5 | 6 |
| Estimated outlays | 0 | 3 | 6 | 5 | 5 | 5 |

Note: *=less than $500,000.

Sources: CBO and Joint Committee on Taxation.

*Basis of estimate*

*Revenues*

CBO and JCT estimate that, if enacted, H.R. 1000 would increase receipts to the federal government during the 2003–2005 period, but decrease federal receipts after that. For the purposes of this estimate, CBO and JCT assume the bill will be enacted by July 1, 2003.

H.R. 1000 would reduce revenues by modifying the treatment of qualified retirement planning services for purposes of computing gross income in years after 2003 and by altering the interest rate range for pension funding requirements. The former would reduce taxable income for employees, and would decrease revenues by $93 million over the next five years and by $261 million over the 2004–2013 period. Changing the interest rate range (the change would increase the interest rates used to calculate how much sponsors must contribute to pension plans) would reduce tax deductible contributions by pension plan sponsors in 2003 and 2004, but would increase such contributions thereafter. This has the opposite effect on taxable income, and therefore on revenues. JCT estimates that the interest rate provision would increase revenues by $112 million over the 2003–2008 period, but would decrease revenues by $221 million over the 2003–2013 period.

In addition, section 101 of H.R. 1000 would require plan sponsors to provide quarterly benefit statements to plan participants, and would subject sponsors to civil penalties for failure to meet these requirements. Based on information from the Department of Labor, CBO expects that additional civil penalties resulting from section 101 would increase revenues by less than $500,000 annually.

*Direct spending*

Reduced Flat-Rate Premiums Paid to the PBGC. Under current law, defined benefit pension plans operated by a single employer pay two types of annual permiums to the Pension Benefit Guaranty Corporation. All covered plans are subject to a flat-rate premium of $19 per participant. In addition, underfunded plans must also pay a variable-rate premium that depends on the amount by which the plan's liabilities exceed its assets.

The bill would reduce the flat-rate premium from $19 to $5 per participant for plans established by employers with 100 or fewer employees during the first five years of the plan's operation. According to information obtained from the PBGC, approximately 8,300 plans would eventually qualify for this reduction. Those plans cover an average of about 10 participants. CBO estimates that the change would reduce the PBGC's premium income by less than $500,000 in 2004, by $3 million over the 2004–2008 period, and $8 million from 2004 thorugh 2013. Because PBGC premiums are offsetting collections to a mandatory spending account, reductions in premium receipts are reflected as increases in direct spending.

Changes in Variable Premiums Paid to the PBGC. H.R. 1000 would make several changes affecting the variable-rate premium paid by underfunded plans. CBO estimates, in total, those provisions would decrease premium receipts by $39 million in 2003, $119 million over the 2003–2008 period, and $125 million during the 2003–2013 period.

First, for all new plans that are underfunded, the bill would phase in the variable-rate premium. In the first year, plans would pay nothing. In the succeeding four years, they would pay 20 percent, 40 percent, 60 percent, and 80 percent, respectively, of the full amount. In the sixth and later years, they would pay the full variable-rate premium determined by their funding status. Based on information from the PBGC, CBO estimates that this change would affect the premiums of approximately 250 plans each year. It would reduce the PBGC's total premium receipts by about $14 million over the 2004–2008 period and $41 million over the 2004–2013 period.

Second, the bill would reduce the variable-rate premium paid by all underfunded plans (not just new plans) established by employers with 25 or fewer employees. Under the bill, the variable-rate premium per participant paid by those plans would not exceed $5 multiplied by the number of participants in the plan. CBO estimates that approximately 2,500 plans would have their premium payments to the PBGC reduced by this provision beginning in 2004. As a result, premium receipts would decline by $4 million during the 2004–2008 period, and by $9 million over the 2004–2013 period.

Third, the bill would alter the pension funding requirements in ERISA, which would allow plans to become more underfunded in plan year 2001 without subjecting them to tax and other penalties. JCT estimates that this provision would initially cause employers to reduce pension plan contributions, but later increase contributions until funding returns to baseline levels. As a result, some plans would have to pay higher permiums because their level of underfunding would increase. Based on preliminary information from the PBGC, CBO estimates plan underfunding would initially increase by roughly $5.8 billion and that the net effect would be an increase of $39 million in premium receipts in 2003. Over the 2003–2008 period, CBO estimates this provision would cause receipts to increase by a net of $137 million. The effects through 2013 would total $176 billion.

Finally, H.R. 1000 would set the interest rate used to determine variable-rate premiums at 115 percent of the 30-year Treasury bond rate once new mortality tables are issued by the Department of the Treasury, but only through the remainder of plan-years 2002 and 2003, at which time the interest rate would return to 100 percent. CBO anticipates that the new mortality tables will be issued immediately before the start of plan-year 2004. Therefore, CBO assumes the bill would have no effect on premium collections.

Authorization for the PBGC to Pay Interest on Premium Overpayment Refunds. The legislation would authorize the PBGC to pay interest to plan sponsors on premium overpayments. Interest paid on overpayments would be calculated at the same rate as interest charged on premium underpayments. On average, the PBGC receives $19 million per year in premium overpayments, charges an interest rate of 8 percent for underpayments, and experiences a two-year lag between the receipt of payments and the issuance of refunds. Based on this information, CBO estimates that direct spending would increase by $3 million annually.

Substantial Owner Benefits in Terminated Plans. H.R. 1000 would simplify the rules by which the PBGC pays benefits to substantial owners (those with an ownership interest of at least 10 percent) of terminated pension plans. Only about one-third of the plans taken over by the PBGC involve substantial owners, and the change in benefits paid to owner-employees under this provision would be less than $500,000 annually.

National Summit on Retirement Income Security. H.R. 1000 would extend the authorization for the National Summit on Retirement Income Security so that meetings would be held in 2006 and 2010. The most recent summit was held in January 2002. Based on donations received for that summit, CBO estimates that the Department of Labor would receive about $500,000 in private donations for each future summit, which would be spent to defray part of the costs of the conferences. Therefore, this provision would increase revenues and direct spending by the same amounts and would have no net impact on the budget surplus.

*Discretionary spending*

H.R. 1000 includes several provisions that would, assuming the appropriation of the necessary amounts, cost $24 million over the 2004–2008 period.

Studies by the Department of Labor. H.R. 1000 would direct the Department of Labor to undertake three studies: one on the impact of requiring fiduciary consultants for individual account plans, one on making employee pension plans more widely available to workers, and one on the impact of the legislation on pension security and availability. Based on the costs of studies with comparable requirements, CBO estimates these studies would cost about $2 million over the 2004–2008 period.

Informational and Educational Support for Pension Plan Fiduciaries. The bill also would require DOL to provide information and educational resources to persons serving as fiduciaries for employee pension benefit plans. Based on a review of other federal programs that provide consumer-related and technical information to the public, CBO estimates that providing this support would cost about $5 million per year.

National Summit on Retirement Income Security. H.R. 1000 would amend the authorization for the National Summit on Retirement Security to require the President to convene a conference on national savings in 2006 rather than in 2005, and to hold an additional summit in 2010. The bill would authorize the appropriation of such sums as may be necessary for that purpose. The Secretary of Labor is authorized to accept private donations to defray the costs of the conference, and must spend the donated funds prior to spending the appropriated funds. Based upon the experience of the 1998 and 2002 National Summits, CBO estimates that future summits would cost less than $1 million and that more than one-half of the expenses would be offset by private donations.

Effects on Direct Spending and Revenues: The net changes in governmental receipts (i.e., revenues) and outlays from direct spending over the 2003–2013 period are shown in the following table.

| | By fiscal year, in millions of dollars— | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|
| | 2003 | 2004 | 2005 | 2006 | 2007 | 2008 | 2009 | 2010 | 2011 | 2012 | 2013 |
| Changes in receipts | −39 | −34 | −23 | −6 | 0 | 1 | 1 | 1 | 4 | 5 | 3 |
| Changes in outlays | 196 | 391 | 35 | −286 | −202 | −115 | −56 | −76 | −142 | −148 | −79 |

Estimated impact on State, local, and tribal governments: CBO has reviewed all provisions of H.R. 1000 that are not amendments to the Internal Revenue Code and determined that those provisions contain no intergovernmental mandates as defined in UMRA and would impose no costs on state, local, or tribal governments. State, local, and tribal governments are exempt from the requirements of ERISA that H.R. 1000 would amend; the other non-tax provisions of the bill would impose no requirements on those governments.

Estimated impact on the private sector: JCT has determined that the tax provisions of H.R. 1000 contains no intergovernmental or private-sector mandates as defined in UMRA. However, CBO has determined that the non-tax provisions of the bill do contain private-sector mandates as defined in UMRA.

With only limited exceptions, private employers who provide pension plans for their workers must follow rules specified in ERISA. Therefore, CBO considers changes to ERISA that expand those rules to be private-sector mandates under UMRA. H.R. 1000 would make changes to ERISA that would affect sponsors, administrators, and fiduciaries of pension plans. CBO estimates that the direct cost to affected entities of the new requirements in the bill would not exceed the annual threshold specified in UMRA ($117 million in 2003, adjusted annually for inflation) in any of the first five years the mandates would be effective.

Benefit Statements. Section 101 of the bill would require administrators of private, individual-account (defined contributions) pension plans to provide quarterly statements to participants and beneficiaries who are able to direct investments. Those statements would have to contain several items, including the amount of accrued benefits, the amount of nonforfeitable benefits, the value of any assets held in the form of securities of the employing firm, an explanation of any limitations or restrictions on the right of the participant or beneficiary to direct an investment, and an explanation of the importance of a well-balanced and diversified portfolio. Currently, plans must provide more limited statements to participants upon request.

CBO estimates that the direct cost of this new requirement on private plans would be about $70 million annually. According to industry sources, the majority of plans sponsored by large employers already provide pension statements on a quarterly basis, and it is becoming increasingly common for plans sponsored by smaller employers to do so as well. CBO estimates that fewer than half of the approximately 70 million participants in privates individual account plans in 2004 would newly receive statements four times per year under the bill. The average cost of providing each statement would be relatively small because plans are now required to provide benefit statements on request and because the bill would allow statements to be provided electronically to participants with access to the Internet.

Section 101 would also require administrators of private, defined-benefit pension plans to provide vested participants currently employed by the sponsor with a benefit statement at least once every three years, or to provide notice to participants of the availability of benefit statements on an annual basis. CBO estimates that the added cost of this provision would be less that $5 million per year.

Fiduciaries' Liability. Currently, plan fiduciaries generally are not liable for investment decisions made by participants, nor are they liable for the inability of participants to alter their investments during blackout periods. Section 102 of the bill would potentially expand the personal liability of plan fiduciaries during blackouts by removing the current limitation on liability and adding specific new requirements under which they could avoid liability. Fiduciaries would be required to consider the reasonablenesss of the length of the blackout period, provide 30 days notice to participants, and act solely in the interest of participants in entering the blackout. CBO estimates that abiding by the new requirements to avoid liability in the bill would add little to their costs.

Investment in Employers' Securities. Section 104 would require individual-account plans to allow participants to sell securities issued by their employer and acquired through employee contributions and elective deferrals. Participants would also be allowed to sell securities issued by their employer and allocated to their accounts through employer contributions either three years after the securities are allocated to their accounts or after three years of service. (The bill would phase in the requirements in 20 percent annual increments for certain assets acquired before the effective date of the bill.) Section 104 would also require plans that offer participants securities issued by employers to offer a range of investment opportunities.

Both the expansion of participants' allowable investments of future contributions and the phase-in for past contributions would increase the administrative and record-keeping costs of affected pension plans. Based on information from the Employee Benefit Research Institute about company stock in individual account plans, CBO estimates that the added administrative costs attributable to these provisions would be about $20 million annually. Requiring plans to offer a range of investment options would probably add little to plan costs because many plans now abide by a safe harbor provision in ERISA that has similar requirements.

Estimate prepared by: Federal revenues: Annabelle Bartsch; outlays of the Pension Benefit Guaranty Corporation: Geoffrey Gerhardt; other spending by the Department of Labor: Christina Hawley Sadoti; impact on state, local and tribal governments: Leo Lex; impact on the private sector: Daniel Wilmoth.

Estimate approved by: Peter H. Fontaine, Deputy Assistant Director for Budget Analysis; G. Thomas Woodward, Assistant Director for Tax Analysis.

### Statement of General Performance Goals and Objectives

In accordance with Clause (3)(c) of House rule XIII, the goals of H.R. 1000 to give workers new freedom to diversify their investments, much greater access to quality investment advice, more information about their pensions, and other tools they can use to maximize the potential of their 401(k) plans and ensure a secure retirement future though amendments to the Employee Retirement Income Security Act (ERISA) and complementary amendments to the Internal Revenue Code. The Committee expects the Department of Labor and Department of Treasury to implement the changes to the law in accordance with these stated goals.

### Constitutional Authority Statement

Under clause 3(d)(1) of rule XIII of the Rules of the House of Representatives, the Committee must include a statement citing the specific powers granted to Congress in the Constitution to enact the law proposed by H.R. 1000. The Employee Retirement Income Security Act (ERISA) has been determined by the federal courts to be within Congress' Constitutional authority. In *Commercial Mortgage Insurance, Inc.* v. *Citizens National Bank of Dallas*, 526 F.Supp. 510 (N.D. Tex. 1981), the court held that Congress legitimately concluded that employee benefit plans so affected interstate commerce as to be within the scope of Congressional powers under Article 1, Section 8, Clause 3 of the Constitution of the United States. In *Murphy* v. *Wal-Mart Associates' Group Health Plan*, 928 F.Supp. 700 (E.D. Tex 1996), the court upheld the preemption provisions of ERISA. Because H.R. 1000 modifies but does not extend the federal regulation of pensions, the Committee believes that the Act falls within the same scope of Congressional authority as ERISA.

### Committee Estimate

Clause 3(d)(2) of rule XIII of the Rules of the House of Representatives requires an estimate and a comparison by the Committee of the costs that would be incurred in carrying out H.R. 1000. However, clause 3(d)(3)(B) of that rule provides that this requirement does not apply when the Committee has included in its report a timely submitted cost estimate of the bill prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act.

### Changes in Existing Law Made by the Bill, as Reported

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

## EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974

* * * * * * *

# TITLE I—PROTECTION OF EMPLOYEE BENEFIT RIGHTS

## SUBTITLE A—GENERAL PROVISIONS

* * * * * * *

### DEFINITIONS

SEC. 3. For purposes of this title:

(1) * * *

* * * * * * *

*(42)(A) The term "applicable individual account plan" means any individual account plan, except that such term does not include an employee stock ownership plan (within the meaning of section 4975(e)(7) of the Internal Revenue Code of 1986) unless there are any contributions to such plan (or earnings thereunder) held within such plan that are subject to subsection (k)(3) or (m)(2) of section 401 of the Internal Revenue Code of 1986. Such term shall not include a one-participant retirement plan.*

*(B) The term "one-participant retirement plan" means a pension plan with respect to which the following requirements are met:*

*(i) on the first day of the plan year—*

*(I) the plan covered only one individual (or the individual and the individual's spouse) and the individual owned 100 percent of the plan sponsor (whether or not incorporated), or*

*(II) the plan covered only one or more partners (or partners and their spouses) in the plan sponsor;*

*(ii) the plan meets the minimum coverage requirements of section 410(b) of the Internal Revenue Code of 1986 (as in effect on the date of the enactment of this paragraph) without being combined with any other plan of the business that covers the employees of the business;*

*(iii) the plan does not provide benefits to anyone except the individual (and the individual's spouse) or the partners (and their spouses);*

*(iv) the plan does not cover a business that is a member of an affiliated service group, a controlled group of corporations, or a group of businesses under common control; and*

*(v) the plan does not cover a business that leases employees.*

* * * * * * *

## SUBTITLE B—REGULATORY PROVISIONS

### PART 1—REPORTING AND DISCLOSURE

* * * * * * *

#### FILING WITH SECRETARY AND FURNISHING INFORMATION TO PARTICIPANTS

SEC. 104. (a) * * *

(b) Publication of the summary plan descriptions and annual reports shall be made to participants and beneficiaries of the particular plan as follows:

(1) * * *

* * * * * * *

(3) Within 210 days after the close of the fiscal year of the plan, the administrators shall furnish to each participant, and to each beneficiary receiving benefits under the plan, a copy of the statements and schedules, for such fiscal year, described in subparagraphs (A) and (B) of section 103(b)(3) and such other material (including the percentage determined under section 103(d)(11)) as is necessary to fairly summarize the latest annual report. *The requirement to furnish information under the previous sentence with respect to an employee pension benefit plan shall be satisfied if the administrator makes such information reasonably available through electronic means or other new technology.*

* * * * * * *

REPORTING OF PARTICIPANT'S BENEFIT RIGHTS

SEC. 105. ⟦(a) Each administrator of an employee pension benefit plan shall furnish to any plan participant or beneficiary who so requests in writing, a statement indicating, on the basis of the latest available information—

⟦(1) the total benefits accrued, and

⟦(2) the nonforfeitable pension benefits, if any, which have accrued, or the earliest date on which benefits will become nonforfeitable.

⟦(b) In no case shall a participant or beneficiary be entitled under this section to receive more than one report described in subsection (a) during any one 12-month period.⟧

*(a)(1)(A) The administrator of an individual account plan shall furnish a pension benefit statement—*

*(i) to each plan participant at least annually,*

*(ii) to each plan beneficiary upon written request, and*

*(iii) in the case of an applicable individual account plan, to each individual who is a plan participant or beneficiary and who has a right to direct investments, at least quarterly.*

*(B) The administrator of a defined benefit plan shall furnish a pension benefit statement—*

*(i) at least once every 3 years to each participant with a nonforfeitable accrued benefit who is employed by the employer maintaining the plan at the time the statement is furnished to participants, and*

*(ii) to a plan participant or plan beneficiary of the plan upon written request.*

*Information furnished under clause (i) to a participant may be based on reasonable estimates determined under regulations prescribed by the Secretary, in consultation with the Pension Benefit Guaranty Corporation.*

*(2) A pension benefit statement under paragraph (1)—*

*(A) shall indicate, on the basis of the latest available information—*

*(i) the total benefits accrued, and*

*(ii) the nonforfeitable pension benefits, if any, which have accrued, or the earliest date on which benefits will become nonforfeitable,*

*(B) shall be written in a manner calculated to be understood by the average plan participant, and*

*(C) may be provided in written form or in electronic or other appropriate form to the extent that such form is reasonably accessible to the recipient.*

*(3)(A) In the case of a defined benefit plan, the requirements of paragraph (1)(B)(i) shall be treated as met with respect to a participant if the administrator, at least once each year, provides the participant with notice, at the participant's last known address, of the availability of the pension benefit statement and the ways in which the participant may obtain such statement. Such notice shall be provided in written, electronic, or other appropriate form, and may be included with other communications to the participant if done in a manner reasonably designed to attract the attention of the participant.*

*(B) The Secretary may provide that years in which no employee or former employee benefits (within the meaning of section 410(b) of the Internal Revenue Code of 1986) under the plan need not be taken into account in determining the 3-year period under paragraph (1)(B)(i).*

*(b) In no case shall a participant or beneficiary of a plan be entitled to more than one statement described in clause (i) or (ii) of subsection (a)(1)(A) or clause (i) or (ii) of subsection (a)(1)(B), whichever is applicable, in any 12-month period. If such report is required under subsection (a) to be furnished at least quarterly, the requirements of the preceding sentence shall be applied with respect to each quarter in lieu of the 12-month period.*

[(d) Subsection (a) of this section shall apply to a plan to which more than one unaffiliated employer is required to contribute only to the extent provided in regulations prescribed by the Secretary in coordination with the Secretary of the Treasury.]

* * * * * * *

*(d)(1) The statements required to be provided at least quarterly under subsection (a)(1)(A)(iii) in the case of applicable individual account plans shall include (together with the information required in subsection (a)) the following:*

*(A) the value of each investment to which assets in the individual account have been allocated, determined as of the most recent valuation date under the plan, including the value of any assets held in the form of employer securities, without regard to whether such securities were contributed by the plan sponsor or acquired at the direction of the plan or of the participant or beneficiary,*

*(B) an explanation, written in a manner calculated to be understood by the average plan participant, of any limitations or restrictions on the right of the participant or beneficiary to direct an investment, and*

*(C) an explanation, written in a manner calculated to be understood by the average plan participant, of the importance, for the long-term retirement security of participants and beneficiaries, of a well-balanced and diversified investment portfolio, including a discussion of the risk of holding more than 25 percent of a portfolio in the security of any one entity, such as employer securities.*

*(2) The Secretary shall issue guidance and model notices which meet the requirements of this subsection.*

* * * * * * *

PART 2—PARTICIPATION AND VESTING

* * * * * * *

BENEFIT ACCRUAL REQUIREMENTS

SEC. 204. (a) * * *

* * * * * * *

*(j) DIVERSIFICATION REQUIREMENTS FOR INDIVIDUAL ACCOUNT PLANS THAT HOLD EMPLOYER SECURITIES.—*

*(1) IN GENERAL.—An applicable individual account plan shall meet the requirements of paragraphs (2) and (3).*

*(2) EMPLOYEE CONTRIBUTIONS AND ELECTIVE DEFERRALS INVESTED IN EMPLOYER SECURITIES.—In the case of the portion of the account attributable to employee contributions and elective deferrals which is invested in employer securities, a plan meets the requirements of this paragraph if each applicable individual may elect to direct the plan to divest any such securities in the individual's account and to reinvest an equivalent amount in other investment options which meet the requirements of paragraph (4).*

*(3) EMPLOYER CONTRIBUTIONS INVESTED IN EMPLOYER SECURITIES.—*

*(A) IN GENERAL.—In the case of the portion of the account attributable to employer contributions (other than elective deferrals to which paragraph (2) applies) which is invested in employer securities, a plan meets the requirements of this paragraph if, under the plan—*

*(i) each applicable individual with a benefit based on 3 years of service may elect to direct the plan to divest any such securities in the individual's account and to reinvest an equivalent amount in other investment options which meet the requirements of paragraph (4), or*

*(ii) with respect to any employer security allocated to an applicable individual's account during any plan year, such applicable individual may elect to direct the plan to divest such employer security after a date which is not later than 3 years after the end of such plan year and to reinvest an equivalent amount in other investment options which meet the requirements of paragraph (4).*

*(B) APPLICABLE INDIVIDUAL WITH BENEFIT BASED ON 3 YEARS OF SERVICE.—For purposes of subparagraph (A), an applicable individual has a benefit based on 3 years of service if such individual would be an applicable individual if only participants in the plan who have completed at least 3 years of service (as determined under section 203(b)) were referred to in paragraph (5)(B)(i).*

*(4) INVESTMENT OPTIONS.—The requirements of this paragraph are met if—*

*(A) the plan offers not less than 3 investment options, other than employer securities, to which an applicable individual may direct the proceeds from the divestment of employer securities pursuant to this subsection, each of which is diversified and has materially different risk and return characteristics, and*

*(B) the plan permits the applicable individual to choose from any of the investment options made available under the plan to which such proceeds may be so directed, subject to such restrictions as may be provided by the plan limiting such choice to periodic, reasonable opportunities occurring no less frequently than on a quarterly basis.*

*(5) DEFINITIONS AND RULES.—For purposes of this subsection—*

*(A) APPLICABLE INDIVIDUAL ACCOUNT PLAN.—The term "applicable individual account plan" means any individual account plan, except that such term does not include an employee stock ownership plan (within the meaning of section 4975(e)(7) of the Internal Revenue Code of 1986) unless there are any contributions to such plan (or earnings thereon) held within such plan that are subject to subsection (k)(3) or (m)(2) of section 401 of the Internal Revenue Code of 1986.*

*(B) APPLICABLE INDIVIDUAL.—The term "applicable individual" means—*

*(i) any participant in the plan, and*

*(ii) any beneficiary of a participant referred to in clause (i) who has an account under the plan with respect to which the beneficiary is entitled to exercise the rights of the participant.*

*(C) ELECTIVE DEFERRAL.—The term "elective deferral" means an employer contribution described in section 402(g)(3)(A) of the Internal Revenue Code of 1986 (as in effect on the date of the enactment of this subsection).*

*(D) EMPLOYER SECURITY.—The term "employer security" shall have the meaning given such term by section 407(d)(1) of this Act (as in effect on the date of the enactment of this subsection).*

*(E) EMPLOYEE STOCK OWNERSHIP PLAN.—The term "employee stock ownership plan" shall have the same meaning given to such term by section 4975(e)(7) of the Internal Revenue Code of 1986 (as in effect on the date of the enactment of this subsection).*

*(F) ELECTIONS.—Elections under this subsection may be made not less frequently than quarterly.*

*(6) EXCEPTION WHERE THERE IS NO READILY TRADABLE STOCK.—This subsection shall not apply if there is no class of stock issued by the employer (or by a corporation which is an affiliate of the employer (as defined in section 407(d)(7))) that is readily tradable on an established securities market (or in such other circumstances as may be determined jointly by the Secretary of Labor and the Secretary of the Treasury in regulations).*

*(7) TRANSITION RULE.—*

*(A) IN GENERAL.—In the case of any individual account plan which, on the first day of the first plan year to which this subsection applies, holds employer securities of any class that were acquired before such date and on which there is a restriction on diversification otherwise precluded by this subsection, this subsection shall apply to such securities of such class held in any plan year only with respect to the number of such securities equal to the applicable percentage of the total number of such securities of such class held on such date.*

*(B) APPLICABLE PERCENTAGE.—For purposes of subparagraph (A), the applicable percentage shall be as follows:*

| ***Plan years for which provisions are effective:*** | ***Applicable percentage:*** |
| --- | --- |
| *1st plan year* | *20 percent.* |
| *2nd plan year* | *40 percent.* |
| *3rd plan year* | *60 percent.* |
| *4th plan year* | *80 percent.* |
| *5th plan year or thereafter* | *100 percent.* |

*(C) ELECTIVE DEFERRALS TREATED AS SEPARATE PLAN NOT INDIVIDUAL ACCOUNT PLAN.—For purposes of subparagraph (A), the applicable percentage shall be 100 percent with respect to—*

*(i) employee contributions to a plan under which any portion attributable to elective deferrals is treated as a separate plan under section 407(b)(2) as of the date of the enactment of this paragraph, and*

*(ii) such elective deferrals.*

*(D) COORDINATION WITH PRIOR ELECTIONS.—In any case in which a divestiture of investment in employer securities of any class held by an employee stock ownership plan prior to the effective date of this subsection was undertaken pursuant to other applicable Federal law prior to such date, the applicable percentage (as determined without regard to this subparagraph) in connection with such securities shall be reduced to the extent necessary to account for the amount to which such election applied.*

*(8) REGULATIONS.—The Secretary of the Treasury shall prescribe regulations under this subsection in consultation with the Secretary of Labor.*

[(j)] *(k)* CROSS REFERENCE.—

**For special rules relating to plan provisions adopted to preclude discrimination, see section 203(c)(2).**

REQUIREMENT OF JOINT AND SURVIVOR ANNUITY AND PRERETIREMENT SURVIVOR ANNUITY

SEC. 205. (a) * * *

* * * * * * *

(c)(1) * * *

* * * * * * *

(7) For purposes of this subsection, the term "applicable election period" means—

(A) in the case of an election to waive the qualified joint and survivor annuity form of benefit, the [90-day] *180-day* period ending on the annuity starting date, or

* * * * * * *

OTHER PROVISIONS RELATING TO FORM AND PAYMENT OF BENEFITS

SEC. 206. (a) * * *

* * * * * * *

(f) MISSING PARTICIPANTS IN TERMINATED PLANS.—In the case of a plan covered by [title IV] *section 4050*, [the plan shall provide that,] upon termination of the plan, benefits of missing participants shall be treated in accordance with section 4050.

* * * * * * *

PART 3—FUNDING

* * * * * * *

MINIMUM FUNDING STANDARDS

SEC. 302. (a) * * *

* * * * * * *

(d) ADDITIONAL FUNDING REQUIREMENTS FOR PLANS WHICH ARE NOT MULTIEMPLOYER PLANS.—

(1) * * *

* * * * * * *

(7) CURRENT LIABILITY.—For purposes of this subsection—

(A) * * *

* * * * * * *

(C) INTEREST RATE AND MORTALITY ASSUMPTIONS USED.—Effective for plan years beginning after December 31, 1994—

(i) INTEREST RATE.—

(I) * * *

* * * * * * *

(III) SPECIAL RULE FOR [2002 AND 2003] *2001, 2002, AND 2003*.—For a plan year beginning in [2002 or 2003] *2001, 2002, or 2003*, notwithstanding subclause (I), in the case that the rate of interest used under subsection (b)(5) exceeds the highest rate permitted under subclause (I), the rate of interest used to determine current liability under this subsection may exceed the rate of interest otherwise permitted under subclause (I); except that such rate of interest shall not exceed 120 percent of the weighted average referred to in subsection (b)(5)(B)(ii).

* * * * * * *

PART 4—FIDUCIARY RESPONSIBILITY

* * * * * * *

FIDUCIARY DUTIES

SEC. 404. (a) * * *

* * * * * * *

(c)(1) * * *

* * * * * * *

*(4)(A) Paragraph (1)(B) shall not apply in connection with the direction or diversification of assets credited to the account of any participant or beneficiary during a blackout period if, by reason of the imposition of such blackout period, the ability of such participant or beneficiary to direct or diversify such assets is suspended, limited, or restricted.*

*(B) If the fiduciary authorizing a blackout period meets the requirements of this title in connection with authorizing such blackout period, no person who is a fiduciary shall be liable under this title for any loss occurring during the blackout period as a result of any exercise by the participant or beneficiary of control over assets in his or her account prior to the blackout period. Matters to be considered in determining whether a fiduciary has met the requirements of this title include whether such fiduciary—*

*(i) has considered the reasonableness of the expected length of the blackout period,*

*(ii) has provided the notice required under section 101(i)(2), and*

*(iii) has acted in accordance with the requirements of subsection (a) in determining whether to enter into the blackout period.*

*(C) If a blackout period arises in connection with a change in the investment options offered under the plan, a participant or beneficiary shall be deemed to have exercised control over the assets in his or her account prior to the blackout period, if, after reasonable notice of the change in investment options is given to such participant or beneficiary before such blackout period, assets in the account of the participant or beneficiary are transferred—*

*(i) to plan investment options in accordance with the affirmative election of the participant or beneficiary, or*

*(ii) in any case in which there is no such election, in the manner set forth in such notice.*

*(D) Any imposition of any limitation or restriction that may govern the frequency of transfers between investment vehicles shall not be treated as the imposition of a blackout period to the extent such limitation or restriction is disclosed to participants or beneficiaries through the summary plan description or materials describing specific investment alternatives under the plan.*

*(E) For purposes of this paragraph, the term "blackout period" has the meaning given such term by section 101(i)(7).*

* * * * * * *

*(e) The Secretary shall establish a program under which information and educational resources shall be made available on an ongoing basis to persons serving as fiduciaries under employee pension benefit plans so as to assist such persons in diligently and effectively carrying out their fiduciary duties in accordance with this part. Such program shall provide information concerning the practices that define prudent investment procedures for plan fiduciaries.*

*Information provided under the program shall address the relevant investment considerations for defined benefit and defined contribution plans, including investment in employer securities by such plans. In developing such program, the Secretary shall solicit information from the public, including investment education professionals.*

* * * * * * *

EXEMPTIONS FROM PROHIBITED TRANSACTIONS

SEC. 408. (a) * * *

(b) The prohibitions provided in section 406 shall not apply to any of the following transactions:

(1) * * *

* * * * * * *

*(14)(A) Any transaction described in subparagraph (B) in connection with the provision of investment advice described in section 3(21)(A)(ii), in any case in which—*

*(i) the investment of assets of the plan is subject to the direction of plan participants or beneficiaries,*

*(ii) the advice is provided to the plan or a participant or beneficiary of the plan by a fiduciary adviser in connection with any sale, acquisition, or holding of a security or other property for purposes of investment of plan assets, and*

*(iii) the requirements of subsection (g) are met in connection with the provision of the advice.*

*(B) The transactions described in this subparagraph are the following:*

*(i) the provision of the advice to the plan, participant, or beneficiary;*

*(ii) the sale, acquisition, or holding of a security or other property (including any lending of money or other extension of credit associated with the sale, acquisition, or holding of a security or other property) pursuant to the 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 the advice or in connection with a sale, acquisition, or holding of a security or other property pursuant to the advice.*

* * * * * * *

*(g) REQUIREMENTS RELATING TO PROVISION OF INVESTMENT ADVICE BY FIDUCIARY ADVISERS.—*

*(1) IN GENERAL.—The requirements of this subsection are met in connection with the provision of investment advice referred to in section 3(21)(A)(ii), provided to an employee benefit plan or a participant or beneficiary of an employee benefit plan by a fiduciary adviser with respect to the plan in connection with any sale, acquisition, or holding of a security or other property for purposes of investment of amounts held by the plan, if—*

*(A) in the case of the initial provision of the advice with regard to the security or other property by the fiduciary adviser to the plan, participant, or beneficiary, the fiduciary*

*adviser provides to the recipient of the advice, at a time reasonably contemporaneous with the initial provision of the advice, a written notification (which may consist of notification by means of electronic communication)—*

*(i) of all fees or other compensation relating to the 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 the advice or in connection with the sale, acquisition, or holding of the security or other property,*

*(ii) of any material affiliation or contractual relationship of the fiduciary adviser or affiliates thereof in the security or other property,*

*(iii) of any limitation placed on the scope of the investment advice to be provided by the fiduciary adviser with respect to any such sale, acquisition, or holding of a security or other property,*

*(iv) of the types of services provided by the fiduciary adviser in connection with the provision of investment advice by the fiduciary adviser,*

*(v) that the adviser is acting as a fiduciary of the plan in connection with the provision of the advice, and*

*(vi) that a recipient of the advice may separately arrange for the provision of advice by another adviser, that could have no material affiliation with and receive no fees or other compensation in connection with the security or other property,*

*(B) the fiduciary adviser provides appropriate disclosure, in connection with the sale, acquisition, or holding of the security or other property, in accordance with all applicable securities laws,*

*(C) the sale, acquisition, or holding occurs solely at the direction of the recipient of the advice,*

*(D) the compensation received by the fiduciary adviser and affiliates thereof in connection with the sale, acquisition, or holding of the security or other property is reasonable, and*

*(E) the terms of the sale, acquisition, or holding of the security or other property are at least as favorable to the plan as an arm's length transaction would be.*

*(2) STANDARDS FOR PRESENTATION OF INFORMATION.—*

*(A) IN GENERAL.—The notification required to be provided to participants and beneficiaries under paragraph (1)(A) shall be written in a clear and conspicuous manner and in a manner calculated to be understood by the average plan participant and shall be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of the information required to be provided in the notification.*

*(B) MODEL FORM FOR DISCLOSURE OF FEES AND OTHER COMPENSATION.—The Secretary shall issue a model form for the disclosure of fees and other compensation required in paragraph (1)(A)(i) which meets the requirements of subparagraph (A).*

*(3) EXEMPTION CONDITIONED ON MAKING REQUIRED INFORMATION AVAILABLE ANNUALLY, ON REQUEST, AND IN THE EVENT OF MATERIAL CHANGE.—The requirements of paragraph (1)(A) shall be deemed not to have been met in connection with the initial or any subsequent provision of advice described in paragraph (1) to the plan, participant, or beneficiary if, at any time during the provision of advisory services to the plan, participant, or beneficiary, the fiduciary adviser fails to maintain the information described in clauses (i) through (iv) of subparagraph (A) in currently accurate form and in the manner described in paragraph (2) or fails—*

*(A) to provide, without charge, such currently accurate information to the recipient of the advice no less than annually,*

*(B) to make such currently accurate information available, upon request and without charge, to the recipient of the advice, or*

*(C) in the event of a material change to the information described in clauses (i) through (iv) of paragraph (1)(A), to provide, without charge, such currently accurate information to the recipient of the advice at a time reasonably contemporaneous to the material change in information.*

*(4) MAINTENANCE FOR 6 YEARS OF EVIDENCE OF COMPLIANCE.—A fiduciary adviser referred to in paragraph (1) who has provided advice referred to in such paragraph shall, for a period of not less than 6 years after the provision of the advice, maintain any records necessary for determining whether the requirements of the preceding provisions of this subsection and of subsection (b)(14) have been met. A transaction prohibited under section 406 shall not be considered to have occurred solely because the records are lost or destroyed prior to the end of the 6-year period due to circumstances beyond the control of the fiduciary adviser.*

*(5) EXEMPTION FOR PLAN SPONSOR AND CERTAIN OTHER FIDUCIARIES.—*

*(A) IN GENERAL.—Subject to subparagraph (B), a plan sponsor or other person who is a fiduciary (other than a fiduciary adviser) shall not be treated as failing to meet the requirements of this part solely by reason of the provision of investment advice referred to in section 3(21)(A)(ii) (or solely by reason of contracting for or otherwise arranging for the provision of the 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 for the provision by the fiduciary adviser of investment advice referred to in such section,*

*(ii) the terms of the arrangement require compliance by the fiduciary adviser with the requirements of this subsection, and*

*(iii) the terms of the arrangement include a written acknowledgment by the fiduciary adviser that the fiduciary adviser is a fiduciary of the plan with respect to the provision of the advice.*

*(B) CONTINUED DUTY OF PRUDENT SELECTION OF ADVISER AND PERIODIC REVIEW.—Nothing in subparagraph (A) shall be construed to exempt a plan sponsor or other person who is a fiduciary from any requirement of this part for the prudent selection and periodic review of a fiduciary adviser with whom the plan sponsor or other person enters into an arrangement for the provision of advice referred to in section 3(21)(A)(ii). The plan sponsor or other person who is a fiduciary has no duty under this part to monitor the specific investment advice given by the fiduciary adviser to any particular recipient of the advice.*

*(C) AVAILABILITY OF PLAN ASSETS FOR PAYMENT FOR ADVICE.—Nothing in this part shall be construed to preclude the use of plan assets to pay for reasonable expenses in providing investment advice referred to in section 3(21)(A)(ii).*

*(6) DEFINITIONS.—For purposes of this subsection and subsection (b)(14)—*

*(A) FIDUCIARY ADVISER.—The term "fiduciary adviser" means, with respect to a plan, a person who is a fiduciary of the plan by reason of the provision of investment advice by the person to the plan or to a participant or beneficiary and who is—*

*(i) registered as an investment adviser under the Investment Advisers Act of 1940 (15 U.S.C. 80b–1 et seq.) or under the laws of the State in which the fiduciary maintains its principal office and place of business,*

*(ii) a bank or similar financial institution referred to in section 408(b)(4) or a savings association (as defined in section 3(b)(1) of the Federal Deposit Insurance Act (12 U.S.C. 1813(b)(1))), but only if the advice is provided through a trust department of the bank or similar financial institution or savings association which is subject to periodic examination and review by Federal or State banking authorities,*

*(iii) an insurance company qualified to do business under the laws of a State,*

*(iv) a person registered as a broker or dealer under the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.),*

*(v) an affiliate of a person described in any of clauses (i) through (iv), or*

*(vi) an employee, agent, or registered representative of a person described in any of clauses (i) through (v) who satisfies the requirements of applicable insurance, banking, and securities laws relating to the provision of the advice.*

*(B) AFFILIATE.—The term "affiliate" of another entity means an affiliated person of the entity (as defined in section 2(a)(3) of the Investment Company Act of 1940 (15 U.S.C. 80a–2(a)(3))).*

*(C) REGISTERED REPRESENTATIVE.—The term "registered representative" of another entity means a person described in section 3(a)(18) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(18)) (substituting the entity for the broker or dealer referred to in such section) or a person described*

*in section 202(a)(17) of the Investment Advisers Act of 1940 (15 U.S.C. 80b–2(a)(17)) (substituting the entity for the investment adviser referred to in such section).*

* * * * * * *

PART 5—ADMINISTRATION AND ENFORCEMENT

* * * * * * *

CIVIL ENFORCEMENT

SEC. 502. (a) A civil action may be brought—

(1) * * *

* * * * * * *

(6) by the Secretary to collect any civil penalty under paragraph (2), (4), (5), ⟦(6), or (7)⟧ *(6), (7), or (8)* of subsection (c) or under subsection (i) or (l);

* * * * * * *

(c)(1) * * *

* * * * * * *

*(8) The Secretary may assess a civil penalty against any plan administrator of up to $1,000 a day for each day on which the plan administrator has failed to comply with the requirements of clause (iii) of section 105(a)(1)(A) and has not corrected such failure by providing the required pension benefit statements to the affected participants and beneficiaries.*

⟦(8)⟧ *(9)* The Secretary and the Secretary of Health and Human Services shall maintain such ongoing consultation as may be necessary and appropriate to coordinate enforcement under this subsection with enforcement under section 1144(c)(8) of the Social Security Act.

* * * * * * *

NATIONAL SUMMIT ON RETIREMENT SAVINGS

SEC. 517. (a) AUTHORITY TO CALL SUMMIT.—Not later than July 15, 1998, the President shall convene a National Summit on Retirement Income Savings at the White House, to be co-hosted by the President and the Speaker and the Minority Leader of the House of Representatives and the Majority Leader and Minority Leader of the Senate. Such a National Summit shall be convened thereafter in ⟦2001 and 2005 on or after September 1 of each year involved⟧ *2006 and 2010*. Such a National Summit shall—

(1) * * *

* * * * * * *

(e) NATIONAL SUMMIT PARTICIPANTS.—

(1) * * *

(2) STATUTORILY REQUIRED PARTICIPATION.—The participants in the National Summit shall include the following individuals or their designees:

(A) * * *

* * * * * * *

(D) the Chairman and ranking Member of the ⟦Committee on Labor and Human Resources⟧ *Committee on Health, Education, Labor, and Pensions* of the Senate;

* * * * * * *

⟦(F) the Chairman and ranking Member of the Subcommittees on Labor, Health and Human Services, and Education of the Senate and House of Representatives; and⟧

*(F) the Chairman and Ranking Member of the Subcommittee on Labor, Health and Human Services, and Education of the Committee on Appropriations of the House of Representatives and the Chairman and Ranking Member of the Subcommittee on Labor, Health and Human Services, and Education of the Committee on Appropriations of the Senate;*

*(G) the Chairman and Ranking Member of the Committee on Finance of the Senate;*

*(H) the Chairman and Ranking Member of the Committee on Ways and Means of the House of Representatives;*

*(I) the Chairman and Ranking Member of the Subcommittee on Employer-Employee Relations of the Committee on Education and the Workforce of the House of Representatives; and*

⟦(G)⟧ *(J)* the parties referred to in subsection (b).

(3) ADDITIONAL PARTICIPANTS.—

(A) * * *

(B) APPOINTMENT REQUIREMENTS.—The additional participants described in subparagraph (A) shall be—

(i) appointed not later than ⟦January 31, 1998⟧ *2 months before the convening of each summit*;

* * * * * * *

(f) NATIONAL SUMMIT ADMINISTRATION.—

(1) ADMINISTRATION.—In administering this section, the Secretary shall—

(A) * * *

* * * * * * *

(C) make available for public comment*, no later than 60 days prior to the date of the commencement of the National Summit,* a proposed agenda for the National Summit that reflects to the greatest extent possible the purposes for the National Summit set out in this section;

* * * * * * *

(i) AUTHORIZATION OF APPROPRIATIONS.—

(1) IN GENERAL.—There is authorized to be appropriated ⟦for fiscal years beginning on or after October 1, 1997,⟧ such sums as are necessary to carry out this section.

* * * * * * *

*(3) RECEPTION AND REPRESENTATION AUTHORITY.—The Secretary is hereby granted reception and representation authority limited specifically to the events at the National Summit. The Secretary shall use any private contributions accepted in connection with the National Summit prior to using funds appro-*

*priated for purposes of the National Summit pursuant to this paragraph.*

* * * * * * *

(k) CONTRACTS.—The Secretary may enter into contracts to carry out the Secretary's responsibilities under this section. The Secretary [shall enter into a contract on a sole-source basis] *may enter into a contract on a sole-source basis* to ensure the timely completion of the National Summit [in fiscal year 1998].

* * * * * * *

## TITLE IV—PLAN TERMINATION INSURANCE

### SUBTITLE A—PENSION BENEFIT GUARANTY CORPORATION

* * * * * * *

#### PREMIUM RATES

SEC. 4006. (a)(1) * * *

* * * * * * *

(3)(A) Except as provided in subparagraph (C), the annual premium rate payable to the corporation by all plans for basic benefits guaranteed under this title is—

(i) in the case of a single-employer plan, *other than a new single-employer plan (as defined in subparagraph (F)) maintained by a small employer (as so defined),* for plan years beginning after December 31, 1990, an amount equal to the sum of $19 plus the additional premium (if any) determined under subparagraph (E) for each individual who is a participant in such plan during the plan year;

* * * * * * *

(iii) in the case of a multiemployer plan, for plan years beginning after the date of enactment of the Multiemployer Pension Plan Amendments Act of 1980 [September 26, 1980], an amount equal to—

(I) * * *

* * * * * * *

(IV) $2.60 for each participant, for the ninth plan year, and for each succeeding plan year[.]*, and*

*(iv) in the case of a new single-employer plan (as defined in subparagraph (F)) maintained by a small employer (as so defined) for the plan year, $5 for each individual who is a participant in such plan during the plan year.*

* * * * * * *

(E)(i) [The] *Except as provided in subparagraph (G), the* additional premium determined under this subparagraph with respect to any plan for any plan year shall be an amount equal to the amount determined under clause (ii) divided by the number of participants in such plan as of the close of the preceding plan year.

* * * * * * *

(iii) For purposes of clause (ii)—

(I) * * *

* * * * * * *

⟦(IV) In the case of plan years beginning after December 31, 2001, and before January 1, 2004, subclause (II) shall be applied by substituting "100 percent" for "85 percent". Subclause (III) shall be applied for such years without regard to the preceding sentence. Any reference to this clause by any other sections or subsections shall be treated as a reference to this clause without regard to this subclause.⟧

*(IV) In the case of plan years beginning after December 31, 2001, and before January 1, 2004, subclause (II) shall be applied by substituting "100 percent" for "85 percent" and by substituting "115 percent" for "100 percent". Subclause (III) shall be applied for such years without regard to the preceding sentence. Any reference to this clause or this subparagraph by any other sections or subsections (other than sections 4005, 4010, 4011 and 4043) shall be treated as a reference to this clause or this subparagraph without regard to this subclause.*

* * * * * * *

*(v) In the case of a new defined benefit plan, the amount determined under clause (ii) for any plan year shall be an amount equal to the product of the amount determined under clause (ii) and the applicable percentage. For purposes of this clause, the term "applicable percentage" means—*

*(I) 0 percent, for the first plan year.*

*(II) 20 percent, for the second plan year.*

*(III) 40 percent, for the third plan year.*

*(IV) 60 percent, for the fourth plan year.*

*(V) 80 percent, for the fifth plan year.*

*For purposes of this clause, a defined benefit plan (as defined in section 3(35)) maintained by a contributing sponsor shall be treated as a new defined benefit plan for each of its first 5 plan years if, during the 36-month period ending on the date of the adoption of the plan, the sponsor and each member of any controlled group including the sponsor (or any predecessor of either) did not establish or maintain a plan to which this title applies with respect to which benefits were accrued for substantially the same employees as are in the new plan.*

*(F)(i) For purposes of this paragraph, a single-employer plan maintained by a contributing sponsor shall be treated as a new single-employer plan for each of its first 5 plan years if, during the 36-month period ending on the date of the adoption of such plan, the sponsor or any member of such sponsor's controlled group (or any predecessor of either) did not establish or maintain a plan to which this title applies with respect to which benefits were accrued for substantially the same employees as are in the new single-employer plan.*

*(ii)(I) For purposes of this paragraph, the term "small employer" means an employer which on the first day of any plan year has, in aggregation with all members of the controlled group of such employer, 100 or fewer employees.*

*(II) In the case of a plan maintained by two or more contributing sponsors that are not part of the same controlled group, the employees of all contributing sponsors and controlled groups of such spon-*

*sors shall be aggregated for purposes of determining whether any contributing sponsor is a small employer.*

*(G)(i) In the case of an employer who has 25 or fewer employees on the first day of the plan year, the additional premium determined under subparagraph (E) for each participant shall not exceed $5 multiplied by the number of participants in the plan as of the close of the preceding plan year.*

*(ii) For purposes of clause (i), whether an employer has 25 or fewer employees on the first day of the plan year is determined by taking into consideration all of the employees of all members of the contributing sponsor's controlled group. In the case of a plan maintained by two or more contributing sponsors, the employees of all contributing sponsors and their controlled groups shall be aggregated for purposes of determining whether the 25-or-fewer-employees limitation has been satisfied.*

* * * * * * *

PAYMENT OF PREMIUMS

SEC. 4007. (a) * * *

【(b)】 *(b)(1)* If any basic benefit premium is not paid when it is due the corporation is authorized to assess a late payment charge of not more than 100 percent of the premium payment which was not timely paid. The preceding sentence shall not apply to any payment of premium made within 60 days after the date on which payment is due, if before such date, the designated payor obtains a waiver from the corporation based upon a showing of substantial hardship arising from the timely payment of the premium. The corporation is authorized to grant a waiver under this subsection upon application made by the designated payor, but the corporation may not grant a waiver if it appears that the designated payor will be unable to pay the premium within 60 days after the date on which it is due. If any premium is not paid by the last date prescribed for a payment, interest on the amount of such premium at the rate imposed under section 6601(a) of the Internal Revenue Code of 1986 (relating to interest on underpayment, nonpayment, or extensions of time for payment of tax) shall be paid for the period from such last date to the date paid.

*(2) The corporation is authorized to pay, subject to regulations prescribed by the corporation, interest on the amount of any overpayment of premium refunded to a designated payor. Interest under this paragraph shall be calculated at the same rate and in the same manner as interest is calculated for underpayments under paragraph (1).*

* * * * * * *

## Subtitle B—Coverage

PLANS COVERED

SEC. 4021. (a) * * *

(b) This section does not apply to any plan—

(1) * * *

* * * * * * *

(9) which is established and maintained exclusively for substantial owners [as defined in section 4022(b)(6)];

*    *    *    *    *    *    *

*(d) For purposes of subsection (b)(9), the term "substantial owner" means an individual who, at any time during the 60-month period ending on the date the determination is being made—*

*(1) owns the entire interest in an unincorporated trade or business,*

*(2) in the case of a partnership, is a partner who owns, directly or indirectly, more than 10 percent of either the capital interest or the profits interest in such partnership, or*

*(3) in the case of a corporation, owns, directly or indirectly, more than 10 percent in value of either the voting stock of that corporation or all the stock of that corporation.*

*For purposes of paragraph (3), the constructive ownership rules of section 1563(e) of the Internal Revenue Code of 1986 shall apply (determined without regard to section 1563(e)(3)(C)).*

SINGLE-EMPLOYER PLAN BENEFITS GUARANTEED

SEC. 4022. (a) * * *

(b)(1) * * *

*    *    *    *    *    *    *

[(5)(A) For purposes of this title, the term "substantial owner" means an individual who—

[(i) owns the entire interest in an unincorporated trade or business,

[(ii) in the case of a partnership, is a partner who owns, directly or indirectly, more than 10 percent of either the capital interest or the profits interest in such partnership, or

[(iii) in the case of a corporation, owns, directly or indirectly, more than 10 percent in value of either the voting stock of that corporation or all the stock of that corporation.

For purposes of clause (iii) the constructive ownership rules of section 1563(e) of the Internal Revenue Code of 1986 shall apply (determined without regard to section 1563(e)(3)(C)). For purposes of this title an individual is also treated as a substantial owner with respect to a plan if, at any time within the 60 months preceding the date on which the determination is made, he was a substantial owner under the plan.

[(B) In the case of a participant in a plan under which benefits have not been increased by reason of any plan amendments and who is covered by the plan as a substantial owner, the amount of benefits guaranteed under this section shall not exceed the product of—

[(i) a fraction (not to exceed 1) the numerator of which is the number of years the substantial owner was an active participant in the plan, and the denominator of which is 30, and

[(ii) the amount of the substantial owner's monthly benefits guaranteed under subsection (a) (as limited under paragraph (3) of this subsection).

[(C) In the case of a participant in a plan, other than a plan described in subparagraph (B), who is covered by the plan as a substantial owner, the amount of the benefit guaranteed under this section shall, under regulations prescribed by the corporation, treat each benefit increase attributable to a plan amendment as if it were provided under a new plan. The benefits guaranteed under this section with respect to all such amendments shall not exceed the amount which would be determined under subparagraph (B) if subparagraph (B) applied.]

*(5)(A) For purposes of this paragraph, the term "majority owner" means an individual who, at any time during the 60-month period ending on the date the determination is being made—*

*(i) owns the entire interest in an unincorporated trade or business,*

*(ii) in the case of a partnership, is a partner who owns, directly or indirectly, 50 percent or more of either the capital interest or the profits interest in such partnership, or*

*(iii) in the case of a corporation, owns, directly or indirectly, 50 percent or more in value of either the voting stock of that corporation or all the stock of that corporation.*

*For purposes of clause (iii), the constructive ownership rules of section 1563(e) of the Internal Revenue Code of 1986 shall apply (determined without regard to section 1563(e)(3)(C)).*

*(B) In the case of a participant who is a majority owner, the amount of benefits guaranteed under this section shall equal the product of—*

*(i) a fraction (not to exceed 1) the numerator of which is the number of years from the later of the effective date or the adoption date of the plan to the termination date, and the denominator of which is 10, and*

*(ii) the amount of benefits that would be guaranteed under this section if the participant were not a majority owner.*

* * * * * * *

# Subtitle C—Terminations

* * * * * * *

REPORTABLE EVENTS

SEC. 4043. (a) * * *

* * * * * * *

(c) For purposes of this section a reportable event occurs—

(1) * * *

* * * * * * *

(7) when there is a distribution under the plan to a participant who is a substantial owner as defined in [section 4022(b)(6)] *section 4021(d)* if—

(A) * * *

* * * * * * *

ALLOCATION OF ASSETS

SEC. 4044. (a) In the case of the termination of a single-employer plan, the plan administrator shall allocate the assets of the plan (available to provide benefits) among the participants and beneficiaries of the plan in the following order:

(1) * * *

* * * * * * *

(4) Fourth—

(A) * * *

(B) to the additional benefits (if any) which would be determined under subparagraph (A) if [section 4022(b)(5)] *section 4022(b)(5)(B)* did not apply.

* * * * * * *

(b) For purposes of subsection (a)—

(1) * * *

(2) If the assets available for allocation under any paragraph of subsection (a) (other than paragraphs [(5)] *(4), (5),* and (6)) are insufficient to satisfy in full the benefits of all individuals which are described in that paragraph, the assets shall be allocated pro rata among such individuals on the basis of the present value (as of the termination date) of their respective benefits described in that paragraph.

*(3) If assets available for allocation under paragraph (4) of subsection (a) are insufficient to satisfy in full the benefits of all individuals who are described in that paragraph, the assets shall be allocated first to benefits described in subparagraph (A) of that paragraph. Any remaining assets shall then be allocated to benefits described in subparagraph (B) of that paragraph. If assets allocated to such subparagraph (B) are insufficient to satisfy in full the benefits described in that subparagraph, the assets shall be allocated pro rata among individuals on the basis of the present value (as of the termination date) of their respective benefits described in that subparagraph.*

[(3)] *(4)* This paragraph applies if the assets available for allocation under paragraph (5) of subsection (a) are not sufficient to satisfy in full the benefits of individuals described in that paragraph.

(A) * * *

* * * * * * *

[(4)] *(5)* If the Secretary of the Treasury determines that the allocation made pursuant to this section (without regard to this paragraph) results in discrimination prohibited by section 401(a)(4) of the Internal Revenue Code of 1986 then, if required to prevent the disqualification of the plan (or any trust under the plan) under section 401(a) or 403(a) of such Code, the assets allocated under subsections (a)(4)(B), (a)(5), and (a)(6) shall be reallocated to the extent necessary to avoid such discrimination.

[(5)] *(6)* The term "mandatory contributions" means amounts contributed to the plan by a participant which are required as a condition of employment, as a condition of participation in such plan, or as a condition of obtaining benefits under the plan attributable to employer contributions. For this purpose, the total amount of mandatory contributions of a participant is the amount of such contributions reduced (but not below zero) by the sum of the amounts paid or distributed to him under the plan before its termination.

[(6)] *(7)* A plan may establish subclasses and categories within the classes described in paragraphs (1) through (6) of subsection (a) in accordance with regulations prescribed by the corporation.

* * * * * * *

**SEC. 4050. MISSING PARTICIPANTS.**

(a) * * *

* * * * * * *

*(c) MULTIEMPLOYER PLANS.—The corporation shall prescribe rules similar to the rules in subsection (a) for multiemployer plans covered by this title that terminate under section 4041A.*

*(d) PLANS NOT OTHERWISE SUBJECT TO TITLE.—*

*(1) TRANSFER TO CORPORATION.—The plan administrator of a plan described in paragraph (4) may elect to transfer the benefits of a missing participant or beneficiary to the corporation upon termination of the plan.*

*(2) INFORMATION TO THE CORPORATION.—To the extent provided in regulations, the plan administrator of a plan described in paragraph (4) shall, upon termination of the plan, provide the corporation information with respect to benefits of a missing participant or beneficiary if the plan transfers such benefits—*

*(A) to the corporation, or*

*(B) to an entity other than the corporation or a plan described in paragraph (4)(B)(ii).*

*(3) PAYMENT BY THE CORPORATION.—If benefits of a missing participant or beneficiary were transferred to the corporation under paragraph (1), the corporation shall, upon location of the participant or beneficiary, pay to the participant or beneficiary the amount transferred (or the appropriate survivor benefit) either—*

*(A) in a single sum (plus interest), or*

*(B) in such other form as is specified in regulations of the corporation.*

*(4) PLANS DESCRIBED.—A plan is described in this paragraph if—*

*(A) the plan is a pension plan (within the meaning of section 3(2))—*

*(i) to which the provisions of this section do not apply (without regard to this subsection), and*

*(ii) which is not a plan described in paragraphs (2) through (11) of section 4021(b), and*

*(B) at the time the assets are to be distributed upon termination, the plan—*

*(i) has one or more missing participants or beneficiaries, and*

*(ii) has not provided for the transfer of assets to pay the benefits of all missing participants and beneficiaries to another pension plan (within the meaning of section 3(2)).*

*(5) CERTAIN PROVISIONS NOT TO APPLY.—Subsections (a)(1) and (a)(3) shall not apply to a plan described in paragraph (4).*

* * * * * * *

【(c)】 *(e)* REGULATORY AUTHORITY.—The corporation shall prescribe such regulations as are necessary to carry out the purposes of this section, including rules relating to what will be considered a diligent search, the amount payable to the corporation, and the amount to be paid by the corporation.

* * * * * * *

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**INTERNAL REVENUE CODE OF 1986**

# Subtitle A—Income Taxes

* * * * * * *

# CHAPTER 1—NORMAL TAXES AND SURTAXES

* * * * * * *

## Subchapter B—Computation of Taxable Income

* * * * * * *

### PART III—ITEMS SPECIFICALLY EXCLUDED FROM GROSS INCOME

* * * * * * *

**SEC. 132. CERTAIN FRINGE BENEFITS.**

(a) * * *

* * * * * * *

(m) QUALIFIED RETIREMENT PLANNING SERVICES.—

(1) * * *

* * * * * * *

*(4) NO CONSTRUCTIVE RECEIPT.—No amount shall be included in the gross income of any employee solely because the employee may choose between any qualified retirement planning services provided by a qualified investment advisor and compensation which would otherwise be includible in the gross income of such employee. The preceding sentence shall apply to highly compensated employees only if the choice described in such sentence is available on substantially the same terms to each member of the group of employees normally provided education and information regarding the employer's qualified employer plan.*

* * * * * * *

## Subchapter D—Deferred Compensation, Etc.

* * * * * * *

### PART I—PENSION, PROFIT-SHARING, STOCK BONUS PLANS, ETC.

* * * * * * *

### Subpart A—General Rule

* * * * * * *

**SEC. 401. QUALIFIED PENSION, PROFIT-SHARING, AND STOCK BONUS PLANS.**

(a) REQUIREMENTS FOR QUALIFICATION.—A trust created or organized in the United States and forming part of a stock bonus, pension, or profit-sharing plan of an employer for the exclusive benefit of his employees or their beneficiaries shall constitute a qualified trust under this section—

(1) * * *

* * * * * * *

(5) SPECIAL RULES RELATING TO NONDISCRIMINATION REQUIREMENTS.—

(A) * * *

* * * * * * *

(G) ⟦STATE AND LOCAL GOVERNMENTAL PLANS.—⟧ *GOVERNMENTAL PLANS*.—Paragraphs (3) and (4) shall not apply to a governmental plan (within the meaning of ⟦section 414(d)) maintained by a State or local government or political subdivision thereof (or agency or instrumentality thereof).⟧ *section 414(d)).*

* * * * * * *

(26) ADDITIONAL PARTICIPATION REQUIREMENTS.—

(A) * * *

* * * * * * *

(H) ⟦EXCEPTION FOR STATE AND LOCAL GOVERNMENTAL PLANS.—⟧ *EXCEPTION FOR GOVERNMENTAL PLANS*.—This paragraph shall not apply to a governmental plan (within the meaning of ⟦section 414(d)) maintained by a State or local government or political subdivision thereof (or agency or instrumentality thereof).⟧ *section 414(d)).*

* * * * * * *

(28) ADDITIONAL REQUIREMENTS RELATING TO EMPLOYEE STOCK OWNERSHIP PLANS.—

(A) * * *

* * * * * * *

*(D) APPLICATION.—This paragraph shall not apply to a plan to which paragraph (35) applies.*

* * * * * * *

*(35) DIVERSIFICATION REQUIREMENTS FOR DEFINED CONTRIBUTION PLANS THAT HOLD EMPLOYER SECURITIES.—*

*(A) IN GENERAL.—An applicable defined contribution plan shall meet the requirements of subparagraphs (B) and (C).*

*(B) EMPLOYEE CONTRIBUTIONS AND ELECTIVE DEFERRALS INVESTED IN EMPLOYER SECURITIES.—In the case of the portion of the account attributable to employee contributions and elective deferrals which is invested in employer securities, a plan meets the requirements of this subparagraph if*

*each applicable individual in such plan may elect to direct the plan to divest any such securities in the individual's account and to reinvest an equivalent amount in other investment options which meet the requirements of subparagraph (D).*

*(C) EMPLOYER CONTRIBUTIONS INVESTED IN EMPLOYER SECURITIES.—*

*(i) IN GENERAL.—In the case of the portion of the account attributable to employer contributions (other than elective deferrals to which subparagraph (B) applies) which is invested in employer securities, a plan meets the requirements of this subparagraph if, under the plan—*

*(I) each applicable individual with a benefit based on 3 years of service may elect to direct the plan to divest any such securities in the individual's account and to reinvest an equivalent amount in other investment options which meet the requirements of subparagraph (D), or*

*(II) with respect to any employer security allocated to an applicable individual's account during any plan year, such applicable individual may elect to direct the plan to divest such employer security after a date which is not later than 3 years after the end of such plan year and to reinvest an equivalent amount in other investment options which meet the requirements of subparagraph (D).*

*(ii) APPLICABLE INDIVIDUAL WITH BENEFIT BASED ON 3 YEARS OF SERVICE.—For purposes of clause (i), an applicable individual has a benefit based on 3 years of service if such individual would be an applicable individual if only participants in the plan who have completed at least 3 years of service (as determined under section 411(a)) were referred to in subparagraph (E)(ii)(I).*

*(D) INVESTMENT OPTIONS.—The requirements of this subparagraph are met if—*

*(i) the plan offers not less than 3 investment options, other than employer securities, to which an applicable individual may direct the proceeds from the divestment of employer securities pursuant to this paragraph, each of which is diversified and has materially different risk and return characteristics, and*

*(ii) the plan permits the applicable individual to choose from any of the investment options made available under the plan to which such proceeds may be so directed, subject to such restrictions as may be provided by the plan limiting such choice to periodic, reasonable opportunities occurring no less frequently than on a quarterly basis.*

*(E) DEFINITIONS AND RULES.—For purposes of this paragraph—*

*(i) APPLICABLE DEFINED CONTRIBUTION PLAN.—The term "applicable defined contribution plan" means any defined contribution plan, except that such term does*

*not include an employee stock ownership plan (within the meaning of section 4975(e)(7)) unless there are any contributions to such plan (or earnings thereon) held within such plan that are subject to subsection (k)(3) or (m)(2).*

*(ii) APPLICABLE INDIVIDUAL.—The term "applicable individual" means—*

*(I) any participant in the plan, and*

*(II) any beneficiary of a participant referred to in clause (i) who has an account under the plan with respect to which the beneficiary is entitled to exercise the rights of the participant.*

*(iii) ELECTIVE DEFERRAL.—The term "elective deferral" means an employer contribution described in section 402(g)(3)(A) (as in effect on the date of the enactment of this paragraph).*

*(iv) EMPLOYER SECURITY.—The term "employer security" shall have the meaning given such term by section 407(d)(1) of the Employee Retirement Income Security Act of 1974 (as in effect on the date of the enactment of this paragraph).*

*(v) EMPLOYEE STOCK OWNERSHIP PLAN.—The term "employee stock ownership plan" shall have the same meaning given to such term by section 4975(e)(7) of the Internal Revenue Code of 1986 (as in effect on the date of the enactment of this paragraph).*

*(vi) ELECTIONS.—Elections under this paragraph may be made not less frequently than quarterly.*

*(F) EXCEPTION WHERE THERE IS NO READILY TRADABLE STOCK.—This paragraph shall not apply if there is no class of stock issued by the employer that is readily tradable on an established securities market (or in such other circumstances as may be determined jointly by the Secretary of the Treasury and the Secretary of Labor in regulations).*

*(G) TRANSITION RULE.—*

*(i) IN GENERAL.—In the case of any defined contribution plan which, on the effective date of this subsection, holds employer securities of any class that were acquired before such date and on which there is a restriction on diversification otherwise precluded by this paragraph, this paragraph shall apply to such securities of such class held in any plan year only with respect to the number of such securities equal to the applicable percentage of the total number of such securities of such class held on such date.*

*(ii) APPLICABLE PERCENTAGE.—For purposes of clause (i), the applicable percentage shall be as follows:*

| ***Plan years for which provisions are effective:*** | ***Applicable percentage:*** |
|---|---|
| *1st plan year* | *20 percent.* |
| *2nd plan year* | *40 percent.* |
| *3rd plan year* | *60 percent.* |
| *4th plan year* | *80 percent.* |
| *5th plan year or thereafter* | *100 percent.* |

*(iii) ELECTIVE DEFERRALS TREATED AS SEPARATE PLAN NOT INDIVIDUAL ACCOUNT PLAN.—For purposes of*

*clause (i), the applicable percentage shall be 100 percent with respect to—*

*(I) employee contributions to a plan under which any portion attributable to elective deferrals is treated as a separate plan under section 407(b)(2) of the Employee Retirement Income Security Act of 1974 as of the date of the enactment of this paragraph, and*

*(II) such elective deferrals.*

*(iv) CONTRIBUTIONS HELD WITHIN AN ESOP.—In the case of contributions (other than elective deferrals and employee contributions) held within an employee stock ownership plan, in the case of the 1st and 2nd plan years referred to in the table in clause (ii), the applicable percentage shall be the greater of the amount determined under clause (ii) or the percentage determined under paragraph (28) (determined as if paragraph (28) applied to a plan described in this paragraph).*

*(v) COORDINATION WITH PRIOR ELECTIONS UNDER PARAGRAPH (28).—In any case in which a divestiture of investment in employer securities of any class held by an employee stock ownership plan prior to the effective date of this paragraph was undertaken pursuant to an election under paragraph (28) prior to such date, the applicable percentage (as determined without regard to this clause) in connection with such securities shall be reduced to the extent necessary to account for the amount to which such election applied.*

*(H) REGULATIONS.—The Secretary shall prescribe regulations under this paragraph in consultation with the Secretary of Labor.*

(k) CASH OR DEFERRED ARRANGEMENTS.—

(1) * * *

* * * * * * *

(3) APPLICATION OF PARTICIPATION AND DISCRIMINATION STANDARDS.—

(A) * * *

* * * * * * *

(G) *GOVERNMENTAL PLANS*.—A governmental plan (within the meaning of section 414(d) [maintained by a State or local government or political subdivision thereof (or agency or instrumentality thereof)] shall be treated as meeting the requirements of this paragraph.

* * * * * * *

**SEC. 403. TAXATION OF EMPLOYEE ANNUITIES.**

(a) * * *

(b) TAXABILITY OF BENEFICIARY UNDER ANNUITY PURCHASED BY SECTION 501(c)(3) ORGANIZATION OR PUBLIC SCHOOL.—

(1) * * *

* * * * * * *

(3) INCLUDIBLE COMPENSATION.—For purposes of this subsection, the term "includible compensation" means, in the case of any employee, the amount of compensation which is received

from the employer described in paragraph (1)(A), and which is includible in gross income (computed without regard to section 911) for the most recent period (ending not later than the close of the taxable year) which under paragraph (4) may be counted as one year of service, and which precedes the taxable year by no more than five years. Such term does not include any amount contributed by the employer for any annuity contract to which this subsection applies. Such term includes—

(A) * * *

(B) any amount which is contributed or deferred by the employer at the election of the employee and which is not includible in the gross income of the employee by reason of section 125, 132(f)(4), *132(m)(4),* or 457.

* * * * * * *

**SEC. 409. QUALIFICATIONS FOR TAX CREDIT EMPLOYEE STOCK OWNERSHIP PLANS.**

(a) * * *

* * * * * * *

(h) RIGHT TO DEMAND EMPLOYER SECURITIES; PUT OPTION.—

(1) * * *

* * * * * * *

(7) EXCEPTION WHERE EMPLOYEE ELECTED DIVERSIFICATION.—Paragraph (1)(A) shall not apply with respect to the portion of the participant's account which the employee elected to have reinvested under section 401(a)(28)(B) *or subparagraph (B) or (C) of section 401(a)(35)*.

* * * * * * *

## Subpart B—Special Rules

* * * * * * *

**SEC. 410. MINIMUM PARTICIPATION STANDARDS.**

(a) * * *

(b) MINIMUM COVERAGE REQUIREMENTS.—

(1) IN GENERAL.—A trust shall not constitute a qualified trust under section 401(a) unless such trust is designated by the employer as part of a plan which meets 1 of the following requirements:

(A) * * *

* * * * * * *

*(D) In the case that the plan fails to meet the requirements of subparagraphs (A), (B) and (C), the plan—*

*(i) satisfies subparagraph (B), as in effect immediately before the enactment of the Tax Reform Act of 1986,*

*(ii) is submitted to the Secretary for a determination of whether it satisfies the requirement described in clause (i), and*

*(iii) satisfies conditions prescribed by the Secretary by regulation that appropriately limit the availability of this subparagraph.*

*Clause (ii) shall apply only to the extent provided by the Secretary.*

* * * * * * *

**SEC. 412. MINIMUM FUNDING STANDARDS.**

(a) * * *

* * * * * * *

(l) ADDITIONAL FUNDING REQUIREMENTS FOR PLANS WHICH ARE NOT MULTIEMPLOYER PLANS.—

(1) * * *

* * * * * * *

(7) CURRENT LIABILITY.—For purposes of this subsection—

(A) * * *

* * * * * * *

(C) INTEREST RATE AND MORTALITY ASSUMPTIONS USED.—Effective for plan years beginning after December 31, 1994—

(i) INTEREST RATE.—

(I) * * *

* * * * * * *

(III) SPECIAL RULE FOR [2002 AND 2003] *2001, 2002, AND 2003*.—For a plan year beginning in [2002 or 2003] *2001, 2002, or 2003*, notwithstanding subclause (I), in the case that the rate of interest used under subsection (b)(5) exceeds the highest rate permitted under subclause (I), the rate of interest used to determine current liability under this subsection may exceed the rate of interest otherwise permitted under subclause (I); except that such rate of interest shall not exceed 120 percent of the weighted average referred to in subsection (b)(5)(B)(ii).

* * * * * * *

**SEC. 414. DEFINITIONS AND SPECIAL RULES.**

(a) * * *

* * * * * * *

(s) COMPENSATION.—For purposes of any applicable provision—

(1) * * *

(2) EMPLOYER MAY ELECT NOT TO TREAT CERTAIN DEFERRALS AS COMPENSATION.—An employer may elect not to include as compensation any amount which is contributed by the employer pursuant to a salary reduction agreement and which is not includible in the gross income of an employee under section 125, 132(f)(4), *132(m)(4),* 402(e)(3), 402(h), or 403(b).

* * * * * * *

*(w) PROVISION OF INVESTMENT EDUCATION NOTICES TO PARTICIPANTS IN CERTAIN PLANS.—*

*(1) IN GENERAL.—The plan administrator of an applicable pension plan shall provide to each applicable individual an investment education notice described in paragraph (2) at the*

*time of the enrollment of the applicable individual in the plan and not less often than annually thereafter.*

*(2) INVESTMENT EDUCATION NOTICE.—An investment education notice is described in this paragraph if such notice contains—*

*(A) an explanation, for the long-term retirement security of participants and beneficiaries, of generally accepted investment principles, including principles of risk management and diversification, and*

*(B) a discussion of the risk of holding substantial portions of a portfolio in the security of any one entity, such as employer securities.*

*(3) UNDERSTANDABILITY.—Each notice required by paragraph (1) shall be written in a manner calculated to be understood by the average plan participant and shall provide sufficient information (as determined in accordance with guidance provided by the Secretary) to allow recipients to understand such notice.*

*(4) FORM AND MANNER OF NOTICES.—The notices required by this subsection shall be in writing, except that such notices may be in electronic or other form (or electronically posted on the plan's website) to the extent that such form is reasonably accessible to the applicable individual.*

*(5) DEFINITIONS.—For purposes of this subsection—*

*(A) APPLICABLE INDIVIDUAL.—The term "applicable individual" means—*

*(i) any participant in the applicable pension plan,*

*(ii) any beneficiary who is an alternate payee (within the meaning of section 414(p)(8)) under a qualified domestic relations order (within the meaning of section 414(p)(1)(A)), and*

*(iii) any beneficiary of a deceased participant or alternate payee.*

*(B) APPLICABLE PENSION PLAN.—The term "applicable pension plan" means—*

*(i) a plan described in clause (i), (ii), or (iv) of section 219(g)(5)(A), and*

*(ii) an eligible deferred compensation plan (as defined in section 457(b)) of an eligible employer described in section 457(e)(1)(A),*

*which permits any participant to direct the investment of some or all of his account in the plan or under which the accrued benefit of any participant depends in whole or in part on hypothetical investments directed by the participant. Such term shall not include a one-participant retirement plan or a plan to which section 105 of the Employee Retirement Income Security Act of 1974 applies.*

*(C) ONE-PARTICIPANT RETIREMENT PLAN DEFINED.—The term "one-participant retirement plan" means a retirement plan with respect to which the following requirements are met:*

*(i) on the first day of the plan year—*

*(I) the plan covered only one individual (or the individual and the individual's spouse) and the individual owned 100 percent of the plan sponsor (whether or not incorporated), or*

*(II) the plan covered only one or more partners (or partners and their spouses) in the plan sponsor;*

*(ii) the plan meets the minimum coverage requirements of 410(b) without being combined with any other plan of the business that covers the employees of the business;*

*(iii) the plan does not provide benefits to anyone except the individual (and the individual's spouse) or the partners (and their spouses);*

*(iv) the plan does not cover a business that is a member of an affiliated service group, a controlled group of corporations, or a group of businesses under common control; and*

*(v) the plan does not cover a business that leases employees.*

*(6) CROSS REFERENCE.—*

***For provisions relating to penalty for failure to provide the notice required by this section, see section 6652(m).***

* * * * * * *

**SEC. 415. LIMITATIONS ON BENEFITS AND CONTRIBUTIONS UNDER QUALIFIED PLANS.**

(a) * * *

* * * * * * *

(c) LIMITATION FOR DEFINED CONTRIBUTION PLANS.—

(1) * * *

* * * * * * *

(3) PARTICIPANT'S COMPENSATION.—For purposes of paragraph (1)—

(A) * * *

* * * * * * *

(D) CERTAIN DEFERRALS INCLUDED.—The term "participant's compensation" shall include—

(i) * * *

(ii) any amount which is contributed or deferred by the employer at the election of the employee and which is not includible in the gross income of the employee by reason of section 125, 132(f)(4), *132(m)(4),* or 457.

* * * * * * *

**SEC. 417. DEFINITIONS AND SPECIAL RULES FOR PURPOSES OF MINIMUM SURVIVOR ANNUITY REQUIREMENTS.**

(a) ELECTION TO WAIVE QUALIFIED JOINT AND SURVIVOR ANNUITY OR QUALIFIED PRERETIREMENT SURVIVOR ANNUITY.—

(1) * * *

* * * * * * *

(6) APPLICABLE ELECTION PERIOD DEFINED.—For purposes of this subsection, the term "applicable election period" means—

(A) in the case of an election to waive the qualified joint and survivor annuity form of benefit, the [90-day] *180-day* period ending on the annuity starting date, or

* * * * * * *

# Subtitle D—Miscellaneous Excise Taxes

* * * * * * *

## CHAPTER 43—QUALIFIED PENSION, ETC., PLANS

* * * * * * *

**SEC. 4975. TAX ON PROHIBITED TRANSACTIONS.**

(a) * * *

* * * * * * *

(d) EXEMPTIONS.—Except as provided in subsection (f)(6), the prohibitions provided in subsection (c) shall not apply to—

(1) * * *

* * * * * * *

(14) any transaction required or permitted under part 1 of subtitle E of title IV or section 4223 of the Employee Retirement Income Security Act of 1974, but this paragraph shall not apply with respect to the application of subsection (c)(1) (E) or (F); [or]

(15) a merger of multiemployer plans, or the transfer of assets or liabilities between multiemployer plans, determined by the Pension Benefit Guaranty Corporation to meet the requirements of section 4231 of such Act, but this paragraph shall not apply with respect to the application of subsection (c)(1) (E) or (F)[.]*; or*

*(16) any transaction described in subsection (f)(7)(A) in connection with the provision of investment advice described in subsection (e)(3)(B)(i), in any case in which—*

*(A) the investment of assets of the plan is subject to the direction of plan participants or beneficiaries,*

*(B) the advice is provided to the plan or a participant or beneficiary of the plan by a fiduciary adviser in connection with any sale, acquisition, or holding of a security or other property for purposes of investment of plan assets, and*

*(C) the requirements of subsection (f)(7)(B) are met in connection with the provision of the advice.*

* * * * * * *

(f) OTHER DEFINITIONS AND SPECIAL RULES.—For purposes of this section—

(1) * * *

* * * * * * *

*(7) PROVISIONS RELATING TO INVESTMENT ADVICE PROVIDED BY FIDUCIARY ADVISERS.—*

*(A) TRANSACTIONS ALLOWABLE IN CONNECTION WITH INVESTMENT ADVICE PROVIDED BY FIDUCIARY ADVISERS.—The*

*transactions referred to in subsection (d)(16), in connection with the provision of investment advice by a fiduciary adviser, are the following:*

*(i) the provision of the advice to the plan, participant, or beneficiary;*

*(ii) the sale, acquisition, or holding of a security or other property (including any lending of money or other extension of credit associated with the sale, acquisition, or holding of a security or other property) pursuant to the 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 the advice or in connection with a sale, acquisition, or holding of a security or other property pursuant to the advice.*

*(B) REQUIREMENTS RELATING TO PROVISION OF INVESTMENT ADVICE BY FIDUCIARY ADVISERS.—The requirements of this subparagraph (referred to in subsection (d)(16)(C)) are met in connection with the provision of investment advice referred to in subsection (e)(3)(B), provided to a plan or a participant or beneficiary of a plan by a fiduciary adviser with respect to the plan in connection with any sale, acquisition, or holding of a security or other property for purposes of investment of amounts held by the plan, if—*

*(i) in the case of the initial provision of the advice with regard to the security or other property by the fiduciary adviser to the plan, participant, or beneficiary, the fiduciary adviser provides to the recipient of the advice, at a time reasonably contemporaneous with the initial provision of the advice, a written notification (which may consist of notification by means of electronic communication)—*

*(I) of all fees or other compensation relating to the 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 the advice or in connection with the sale, acquisition, or holding of the security or other property,*

*(II) of any material affiliation or contractual relationship of the fiduciary adviser or affiliates thereof in the security or other property,*

*(III) of any limitation placed on the scope of the investment advice to be provided by the fiduciary adviser with respect to any such sale, acquisition, or holding of a security or other property,*

*(IV) of the types of services provided by the fiduciary adviser in connection with the provision of investment advice by the fiduciary adviser,*

*(V) that the adviser is acting as a fiduciary of the plan in connection with the provision of the advice, and*

*(VI) that a recipient of the advice may separately arrange for the provision of advice by another adviser, that could have no material affiliation with and receive no fees or other compensation in connection with the security or other property,*

*(ii) the fiduciary adviser provides appropriate disclosure, in connection with the sale, acquisition, or holding of the security or other property, in accordance with all applicable securities laws,*

*(iii) the sale, acquisition, or holding occurs solely at the direction of the recipient of the advice,*

*(iv) the compensation received by the fiduciary adviser and affiliates thereof in connection with the sale, acquisition, or holding of the security or other property is reasonable, and*

*(v) the terms of the sale, acquisition, or holding of the security or other property are at least as favorable to the plan as an arm's length transaction would be.*

*(C) STANDARDS FOR PRESENTATION OF INFORMATION.—The notification required to be provided to participants and beneficiaries under subparagraph (B)(i) shall be written in a clear and conspicuous manner and in a manner calculated to be understood by the average plan participant and shall be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of the information required to be provided in the notification.*

*(D) EXEMPTION CONDITIONED ON MAKING REQUIRED INFORMATION AVAILABLE ANNUALLY, ON REQUEST, AND IN THE EVENT OF MATERIAL CHANGE.—The requirements of subparagraph (B)(i) shall be deemed not to have been met in connection with the initial or any subsequent provision of advice described in subparagraph (B) to the plan, participant, or beneficiary if, at any time during the provision of advisory services to the plan, participant, or beneficiary, the fiduciary adviser fails to maintain the information described in subclauses (I) through (IV) of subparagraph (B)(i) in currently accurate form and in the manner required by subparagraph (C), or fails—*

*(i) to provide, without charge, such currently accurate information to the recipient of the advice no less than annually,*

*(ii) to make such currently accurate information available, upon request and without charge, to the recipient of the advice, or*

*(iii) in the event of a material change to the information described in subclauses (I) through (IV) of subparagraph (B)(i), to provide, without charge, such currently accurate information to the recipient of the advice at a time reasonably contemporaneous to the material change in information.*

*(E) MAINTENANCE FOR 6 YEARS OF EVIDENCE OF COMPLIANCE.—A fiduciary adviser referred to in subparagraph (B) who has provided advice referred to in such subparagraph shall, for a period of not less than 6 years after the provision of the advice, maintain any records necessary for de-*

*termining whether the requirements of the preceding provisions of this paragraph and of subsection (d)(16) have been met. A transaction prohibited under subsection (c)(1) shall not be considered to have occurred solely because the records are lost or destroyed prior to the end of the 6-year period due to circumstances beyond the control of the fiduciary adviser.*

*(F) EXEMPTION FOR PLAN SPONSOR AND CERTAIN OTHER FIDUCIARIES.—A plan sponsor or other person who is a fiduciary (other than a fiduciary adviser) shall not be treated as failing to meet the requirements of this section solely by reason of the provision of investment advice referred to in subsection (e)(3)(B) (or solely by reason of contracting for or otherwise arranging for the provision of the 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 for the provision by the fiduciary adviser of investment advice referred to in such section,*

*(ii) the terms of the arrangement require compliance by the fiduciary adviser with the requirements of this paragraph,*

*(iii) the terms of the arrangement include a written acknowledgment by the fiduciary adviser that the fiduciary adviser is a fiduciary of the plan with respect to the provision of the advice, and*

*(iv) the requirements of part 4 of subtitle B of title I of the Employee Retirement Income Security Act of 1974 are met in connection with the provision of such advice.*

*(G) DEFINITIONS.—For purposes of this paragraph and subsection (d)(16)—*

*(i) FIDUCIARY ADVISER.—The term "fiduciary adviser" means, with respect to a plan, a person who is a fiduciary of the plan by reason of the provision of investment advice by the person to the plan or to a participant or beneficiary and who is—*

*(I) registered as an investment adviser under the Investment Advisers Act of 1940 (15 U.S.C. 80b–1 et seq.) or under the laws of the State in which the fiduciary maintains its principal office and place of business,*

*(II) a bank or similar financial institution referred to in subsection (d)(4) or a savings association (as defined in section 3(b)(1) of the Federal Deposit Insurance Act (12 U.S.C. 1813(b)(1))), but only if the advice is provided through a trust department of the bank or similar financial institution or savings association which is subject to periodic examination and review by Federal or State banking authorities,*

*(III) an insurance company qualified to do business under the laws of a State,*

*(IV) a person registered as a broker or dealer under the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.),*

*(V) an affiliate of a person described in any of subclauses (I) through (IV), or*

*(VI) an employee, agent, or registered representative of a person described in any of subclauses (I) through (V) who satisfies the requirements of applicable insurance, banking, and securities laws relating to the provision of the advice.*

*(ii) AFFILIATE.—The term "affiliate" of another entity means an affiliated person of the entity (as defined in section 2(a)(3) of the Investment Company Act of 1940 (15 U.S.C. 80a–2(a)(3))).*

*(iii) REGISTERED REPRESENTATIVE.—The term "registered representative" of another entity means a person described in section 3(a)(18) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(18)) (substituting the entity for the broker or dealer referred to in such section) or a person described in section 202(a)(17) of the Investment Advisers Act of 1940 (15 U.S.C. 80b–2(a)(17)) (substituting the entity for the investment adviser referred to in such section).*

* * * * * * *

**SEC. 4980. TAX ON REVERSION OF QUALIFIED PLAN ASSETS TO EMPLOYER.**

(a) * * *

* * * * * * *

(c) DEFINITIONS AND SPECIAL RULES.—For purposes of this section—

(1) * * *

* * * * * * *

(3) EXCEPTION FOR EMPLOYEE STOCK OWNERSHIP PLANS.—

(A) IN GENERAL.—If, upon an employer reversion from a qualified plan, any applicable amount is transferred from such plan to an employee stock ownership plan described in section 4975(e)(7) or a tax credit employee stock ownership plan (as described in section 409), such amount shall not be treated as an employer reversion for purposes of this section (or includible in the gross income of the employer) ⟦if—

⟦(i) the requirements of subparagraphs (B), (C), and (D) are met, and

⟦(ii) under the plan, employer securities to which subparagraph (B) applies must, except to the extent necessary to meet the requirements of section 401(a)(28), remain in the plan until distribution to participants in accordance with the provisions of such plan.⟧ *if the requirements of subparagraphs (B), (C), and (D) are met.*

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# Subtitle F—Procedure and Administration

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## CHAPTER 68—ADDITIONS TO THE TAX, ADDITIONAL AMOUNTS, AND ASSESSABLE PENALTIES

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## Subchapter A—Additions to the Tax and Additional Amounts

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### PART I—GENERAL PROVISIONS

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**SEC. 6652. FAILURE TO FILE CERTAIN INFORMATION RETURNS, REGISTRATION STATEMENTS, ETC.**

(a) * * *

* * * * * * *

*(m) FAILURE TO PROVIDE INVESTMENT EDUCATION NOTICES TO PARTICIPANTS IN CERTAIN PLANS.—In the case of each failure to provide a written explanation as required by section 414(w) with respect to an applicable individual (as defined in such section), at the time prescribed therefor, unless it is shown that such failure is due to reasonable cause and not to willful neglect, there shall be paid, on notice and demand of the Secretary and in the same manner as tax, by the person failing to provide such notice, an amount equal to $100 for each such failure, but the total amount imposed on such person for all such failures during any calendar year shall not exceed $50,000.*

⟦(m)⟧ *(n)* ALCOHOL AND TOBACCO TAXES.—For penalties for failure to file certain information returns with respect to alcohol and tobacco taxes, see, generally, subtitle E.

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## SECTION 769 OF THE RETIREMENT PROTECTION ACT OF 1994

**SEC. 769. SPECIAL FUNDING RULES FOR CERTAIN PLANS.**

(a) * * *

* * * * * * *

(c) ⟦TRANSITION⟧ RULES FOR CERTAIN PLANS.—

(1) IN GENERAL.—In the case of a plan that—

(A) * * *

* * * * * * *

the ⟦transition⟧ rules described in paragraph (2) shall apply ⟦for any plan year beginning after 1996 and before 2010⟧.

⟦(2) TRANSITION RULES.—The transition rules described in this paragraph are as follows:

⟦(A) For purposes of section 412(l)(9)(A) of the Internal Revenue Code of 1986 and section 302(d)(9)(A) of the Employee Retirement Income Security Act of 1974—

⟦(i) the funded current liability percentage for any plan year beginning after 1996 and before 2005 shall be treated as not less than 90 percent if for such plan year the funded current liability percentage is at least 85 percent, and

⟦(ii) the funded current liability percentage for any plan year beginning after 2004 and before 2010 shall be treated as not less than 90 percent if for such plan year the funded current liability percentage satisfies the minimum percentage determined according to the following table:

| ⟦In the case of a plan year beginning in: | The minimum percentage is: |
|---|---|
| 2005 | 86 percent |
| 2006 | 87 percent |
| 2007 | 88 percent |
| 2008 | 89 percent |
| 2009 and thereafter | 90 percent. |

⟦(B) Sections 412(c)(7)(E)(i)(I) of such Code and 302(c)(7)(E)(i)(I) of such Act shall be applied—

⟦(i) by substituting "85 percent" for "90 percent" for plan years beginning after 1996 and before 2005, and

⟦(ii) by substituting the minimum percentage specified in the table contained in subparagraph (A)(ii) for "90 percent" for plan years beginning after 2004 and before 2010.

⟦(C) In the event the funded current liability percentage of a plan is less than 85 percent for any plan year beginning after 1996 and before 2005, the transition rules under subparagraphs (A) and (B) shall continue to apply to the plan if contributions for such a plan year are made to the plan in an amount equal to the lesser of—

⟦(i) the amount necessary to result in a funded current liability percentage of 85 percent, or

⟦(ii) the greater of—

⟦(I) 2 percent of the plan's current liability as of the beginning of such plan year, or

⟦(II) the amount necessary to result in a funded current liability percentage of 80 percent as of the end of such plan year.

For the plan year beginning in 2005 and for each of the 3 succeeding plan years, the transition rules under subparagraphs (A) and (B) shall continue to apply to the plan for such plan year only if contributions to the plan for such plan year equal at least the expected increase in current liability due to benefits accruing during such plan year.⟧

*(2) SPECIAL RULES.—The rules described in this paragraph are as follows:*

*(A) For purposes of section 412(l)(9)(A) of the Internal Revenue Code of 1986 and section 302(d)(9)(A) of the Employee Retirement Income Security Act of 1974, the funded current liability percentage for any plan year shall be treated as not less than 90 percent.*

*(B) For purposes of section 412(m) of the Internal Revenue Code of 1986 and section 302(e) of the Employee Retirement Income Security Act of 1974, the funded current liability percentage for any plan year shall be treated as not less than 100 percent.*

*(C) For purposes of determining unfunded vested benefits under section 4006(a)(3)(E)(iii) of the Employee Retirement Income Security Act of 1974, the mortality table shall be the mortality table used by the plan.*

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## SECTION 1505 OF THE TAXPAYER RELIEF ACT OF 1997

**SEC. 1505. EXTENSION OF MORATORIUM ON APPLICATION OF CERTAIN NONDISCRIMINATION RULES TO STATE AND LOCAL GOVERNMENTS.**

(a) * * *

* * * * * * *

(d) EFFECTIVE DATES.—

(1) * * *

(2) TREATMENT FOR YEARS BEGINNING BEFORE DATE OF ENACTMENT.—A governmental plan (within the meaning of section 414(d) of the Internal Revenue Code of 1986) [maintained by a State or local government or political subdivision thereof (or agency or instrumentality thereof)] shall be treated as satisfying the requirements of sections 401(a)(3), 401(a)(4), 401(a)(26), 401(k), 401(m), 403 (b)(1)(D) and (b)(12)(A)(i), and 410 of such Code for all taxable years beginning before the date of enactment of this Act.

## MINORITY VIEWS

### INTRODUCTION

Over a year after the collapse of Enron, Global Crossing and other giant corporations, millions of Americans remain deeply concerned about their retirement security. But H.R. 1000 pretends that Enron never happened. It not only fails to correct abuses in the pension system, but through its conflicted investment advice provision, it makes things even worse. This bill is a huge missed opportunity to respond to the severe pension abuses that have cost millions of rank and file employees billions of retirement dollars.

The nation's pension system is in crisis. The first blow occurred when employees at Enron and Global Crossing lost their life savings due to the misconduct and excesses of company officials, and by pension trustees who knew the company was in peril, but failed to act. The Enron scandal exposed weaknesses in our pension laws that allow runaway executive pensions, locked employees out of decisions affecting their retirement nest eggs, and failed to hold pension plan officials accountable when there is wrongdoing. Enron workers and retirees are still waiting over a year later for the Department of Labor to even file suit on their behalf.

The failed economic policies and the failure to address a growing crisis in pension plan funding, by the Bush Administration has added to Americans' anxiety over their retirement security. The Pension Benefit Guaranty Corporation, the federally sponsored agency that insures workers' pensions, lost over $11 billion in only one year, and is now in the red by billions of dollars. Private pensions underfunding has skyrocketed to over $300 billion, almost ten times that reported in the last two decades. And workers have lost billions in their 401(k) plans due to falling stocks and corporate fraud and abuse.

Rather than taking decisive action on behalf of workers to address the growing crisis, the Bush Administration and Republicans are further weakening retirement security by giving companies the green light to slash older workers' pensions. What's more, the Bush Administration has failed to recover hundreds of millions of dollars owed hundreds of thousands of workers from companies such as Enron, WorldCom, Global Crossing, Dynegy, Lucent, Xerox, and other companies where employees lost their nest egg due to the fraud, abuse, or neglect of corporate executives.

### THE COMMITTEE PASSED BILL

H.R. 1000 fails to include basic reforms that are necessary to ensure that there are no more Enrons or to more broadly shore up workers' pensions, despite repeated efforts by Democratic members to strengthen employee protections. In fact, the Majority's bill would take our pension system backwards by exposing workers to marketing and sales pressure from self-interested investment advisors and creating exemptions to the coverage and non-discrimination rules to permit employers to drop millions of workers from company pension plans. Below we have highlighted H.R. 1000's many shortcomings.

*The Bill Fails To Protect the Pensions of Older Workers*

In December 2002, the Bush Administration proposed to lift a pending moratorium and issue new pension rules that will give companies the green light to convert the traditional defined benefit pension plans of long-standing employees to less generous cash balance plans. Companies will save hundreds of millions of dollars a year by converting to cash balance plans. But without adequate protections, converting is devastating for older employees and the Bush Administration's rules offer those long-time employees no protection whatsoever.

Cash balance pension plan conversions have been controversial from their inception. For a long time workers and the policymakers did not fully appreciate the dire effect on workers' pensions. However, in 2000, the non-partisan General Accounting Office reported that the pensions of older workers could be cut by conversions by a third or even a half, with no possibility to recover the lost retirement income on which they had depended.

The new rules would specifically protect companies from age discrimination lawsuits by employees affected by cash balance conversions. There are currently over 1000 age discrimination lawsuits pending before the EEOC resulting from cash balance conversions.

Recently, 218 members of Congress, from both parties and from both sides of the Capitol, called on President Bush to withdraw this ill-conceived regulatory change. The President's plan does nothing more than allow companies to steal the hard earned pension benefits of American workers. Large profitable companies, like AT&T, IBM, Verizon, and others, converted their employees' traditional pension plans to cash balance plans in the hope of saving hundreds of millions of dollars a year. But those savings do not come from increased productivity, higher prices, or greater sales—they come right out of the retirement pockets of managers and rank and file employees. The new rules will undermine pension security.

The Minority offered an amendment to require companies that convert to cash balance plans to give their vested workers a choice of which pension benefit to receive. Under the amendment, workers would be held harmless. No worker would lose the retirement benefits he or she was promised and worked a lifetime to earn.

If the cash balance plan offers a better benefit for them, then workers would have the ability to choose that benefit. The Democratic amendment does exactly what Treasury Secretary John Snow did when he was at CSX and Verizon and what he told the U.S. Senate he thought was fair—give workers a choice.

This is exactly what large responsible employers have done, sometimes after employee complaints, but often out of simple fairness. AT&T, IBM, Verizon, Fed Ex, Motorola, Kodak, Wells Fargo, 3-M, Honeywell and CSX all gave their workers a choice. If these companies can do it, then all companies can do it.

The Majority defeated the Democratic amendment. H.R. 1000 does not respond to the real threats facing workers' pensions. If the Administration's cash balance regulations are not withdrawn, the retirement security of millions of workers and our Nation will be put in jeopardy.

*Bad Investment Advice for Employees*

The bill reported out of Committee opens up a new, dangerous loophole that allows for self-interested investment advice to be provided to employees without assuring an independent alternative. For the first time since ERISA was enacted almost three decades ago, investment firms would be permitted to serve both as principal financial advisor and investment managers to employees.

Authur Levitt, the former Chairman of the Securities and Exchange Commission has also expressed concerns about conflicted investment advice:

> * * * I have reservations when [investment advice] comes from the very same mutual fund company whose products are for sale to a plan's participants. One of my bedrock principles of investing is that advice should come from neutral parties with no ax to grind. [1]

The Committee bill eliminates current ERISA rules that prohibit conflicts of interests that protect plan participants from self-interested investment advisors. The bill would permit investment advisers to recommend their firms's products and earn additional fees on recommended products, upon disclosure of their financial conflict. It does not require access to independent advice or assure any independent oversight. The proposal would actually take ERISA backward and jeopardize the retirement savings of millions of workers and their families if financial service salespersons market investment products that may be good for their bottom line, but not necessarily the retirement savings of working families.

During our hearings, no Enron employees or representatives in any way suggested that if only they had access to any form of investment advice would their retirement security have been protected. Rather, the testimony of Enron employees and others demonstrated how employees were provided misleading advice by company officials to continue to hold and buy additional employer stock; advice which they ultimately relied upon to their detriment. The lesson of Enron is not to open the door to self-interested players, but rather to tighten the rules to ensure that employees are not misinformed or misled by individuals with financial conflicts of interest and offer them independent advice. The Enron debacle painfully demonstrates how accountants were unable to offer unvarnished advice to one of their largest clients for their other financial services and how Enron management officials were unable to protect the interests of pension plan participants because it conflicted with their corporate interests. Further, during the past years, dozens of large Wall Street investment firms, their analysts and advisors have been charged or fined for investment advice related to abuses, such as Citigroup Inc.'s Salomon Smith Barney,

[1] Take on the Street: What Wall Street and Corporate America Don't Want You to Know, page 251–252.

Merrill Lynch, Credit Suisse First Boston, and the Strategic Income Fund.

The issue of investment advice is subject to a variety of misnomers. First, there is a subtle difference between what is investment education and investment advice. Employers are free to provide investment education with few restrictions and over 90% do so. Investment advice, which more strongly involves specific investment recommendations, is also readily provided by a growing number of employers.

The financial services industry has, by and large, been providing either investment education and/or advice to pension plans and participants. There is a fairly well developed market of independent advisors and most of the large financial investment firms have contracted with independent firms to provide advice. The only group that remains restricted are those companies wishing to provide specific investment advice on their own products in which they receive varying financial benefit depending on the investment selected.

According to a 2001 study of plan sponsors conducted by Mercer 33% of firms offers investment advice to plan participants. The study also found that 93% of employers held meetings to educate and communicate with employees on retirement issues.

Those employers that have declined to make investment education or advice available have stated two reasons for their decision: either excessive cost or fear of liability if imprudent advice is provided. An Institute of Management & Administration (IOMA) study of 401(k) plan sponsors found that 89% of employers/sponsors did not provide advice because they were concerned with fiduciary liability.

Additional concerns have been raised about the qualification of investment advisors under the Committee reported bill. Currently, ERISA limits investment advisors to federally or state regulated investment advisors or broker/dealers. The Committee reported bill would weaken investment advisor qualification requirements and permit non-licensed individuals to provide investment advice. The Inspector General (IG) to the Department of Labor, in a letter dated March 18, 2002, to Congressman George Miller, stated that, "HR 3762 does not contain provisions relative to fiduciary adviser qualifications." The IG further stated, "* * * DOL and plan participants would be in a better position to monitor and oversee the advice given, if minimum standards for qualifications and disclosure were established * * *"[2]

Since last year's debate on legislation to expand investment advice, the Department of Labor has issued an advisory opinion (known as Sun America) which would allow employers to provide full-service investment management within their 401(k) plans, as long as there is an independent safeguard to protect participants from self-dealing by financial advisors.

Under the Sun America opinion, companies can contract with financial service firms to provide two different types of investment advice services—either automatic enrollment in a professionally

[2] March 18, 2002, Letter from Office of Inspector General, U.S. Department of Labor to Representative George Miller.

managed investment account that is invested according to a participant's needs and preferences or discretionary investment advice on investment options.

Under both types of services, if the advice provider provides advice on its proprietary funds, it would then be required to contract with an independent investment firm to program its investment recommendations. Sun America provides a new avenue for firms that would otherwise be subject to conflicts of interest to provide investment advice. It has been publicly reported that a number of large financial service firms are considering using the DOL opinion to provide investment advice.

We have long been concerned about opening ERISA to conflicts without guarantees of independence, and post-Enron, there is greater reason for caution. Conflicted investment advice would not have protected Enron's employees and their retirement savings. Most investment advisors do not provide advice on employer stock and the Committee bill specifically permits them to limit the scope of their advice. Post-Enron we should do everything possible to ensure that workers' 401(k) money is subject to the highest standards of care, not the lowest.

*The Committee Bill Fails To Give Employees Control of Their Nest Egg*

The Committee bill continues to lock employees into company matched stock for 3 years after the contributions have been made, and does not permit billions of dollars in existing company stock currently owned by employees to be fully divested until 2007. At a time when markets move at lightning speed, and company fortunes—like Enron, Global Crossing, and myriad other companies—can spiral downward in months, such a limitation is unconscionable and continues to leave employees at risk of losing all of their retirement savings.

The Republican proposal creates an unworkable morass of inadequate employee protections. The Committee bill would permit companies to restrict employee diversification of existing contributions for 5 years, and limit diversification of future contributions to an annual 3-year diversification rule (new contributions made in 2002 would not eligible for diversification until 2005, contributions made in 2003 would be eligible in 2006, and so on). Companies will continue to be able to tie the hands of employees by subjecting them to different and administratively complex rules depending on when contributions are made. According to the most recent Bureau of Labor Statistics data on employee tenure, average job tenure for all employees 16 and over is 3.5 years, and for employees ages 25–34 is 2.6 years. For millions of employees, the Republican proposal will not change their ability to protect their individual savings. By comparison, the Democratic Substitute would allow all company-matched stock to be diversified after only one year of employment.

The Democratic Substitute would significantly revamp ERISA. The goal of ERISA is to protect the interests of participants and their beneficiaries in employee benefit plans. However, when ERISA was enacted, 401(k) plans did not exist, and changes to ERISA have not kept pace with trends in retirement plans. Under current law, plan sponsors can require participants to hold on to employer stock contributed by the employer until retirement age. The Democratic Substitute allows employees to have immediate control over their own contributions to their 401(k) plans and requires that employees be able to control their employer contribution after one year of service in the plan.

Enron, like many companies, matched employee contributions with company stock. Despite the rapid decline in the value of Enron stock, employees were prohibited from protecting their own retirement security by an outright prohibition on selling company contributions until reaching age 50. Enron is not the only company compelling employees to invest pension savings in their own company—or barring them from transferring shares out, or punishing them if they do. At K–Mart and other companies, if you sell company stock in your 401(k) plan before a certain age, the company withholds its employer contribution to your plan for six months. There should be no such restriction or penalty.

As previously stated, a recent Hewitt Associates survey shows that 56% of 401(k) plans that match employee contributions with employer stock require participants to reach a certain age—typically 50 or 55, or according to ESOP rules—before they can sell. Of the firms that match employee contributions with employer stock, only 15% allow their employees to sell the stock immediately, while 19% do not permit diversification at any time. Employees' retirement nest eggs should not be threatened by arbitrary restrictions on their ability to sell company stock contributed by the employer. Employees must be given the opportunity to diversify their investments—and where necessary—rescue their savings when the company's fortunes turn bad.

According to Department of Labor data reported in 1997, 29% of all employees currently have immediate full vesting. A recent survey conducted by Hewitt Associates of 25% of Fortune 500 companies regarding the vesting requirements for employer contributions in 401(k) plans, found that 33% of plans had immediate vesting. Further, only 3% of plans tied diversification rights to vesting periods. A number of notable companies state that they do not restrict employee ability to diversify, including Abbott Laboratories, Chevron, Coca Cola, McDonald's, Pfizer and Proctor and Gamble.

Professor Shlomo Benartzi of UCLA, who has done extensive research on the issue of company stock as a 401(k) investment, has stated, "Since you already have all your human capital invested in the company, my rule of thumb is, don't invest any of your plan assets in the company."

The Democratic Substitute would provide employees total control over the investment of money that they earned and contributed to their retirement plans, and that their employer contributed to their plans as part of their compensation, after one year of service. This change is critical to help avoid the problem we just witnessed with Enron. It will provide employees the ability to rescue their nest eggs, as well as diversify and manage their investments consistent with the advice of financial professionals and the goals of their families. These investments are the employee's money. They should be the ones who decide where and how to invest them.

*The Committee Bill Fails To Require Companies to Provide Notice to Employees Who Are Dumping Company Stock*

The Committee's hearings confirmed that Enron company executives—with inside information about the real financial condition of the company—were dumping millions of dollars in company stock while employees were left in the dark and locked out of their savings. Similarly, it appears that executives at Global Crossing were also acting on insider knowledge for their exclusive benefit—and to the detriment of rank-and-file employees—when they sold company stock valued at $1.3 billion and cashed out executive pension plans. Such information should be provided directly to employees. Ken Lay, Enron's CEO, trading almost daily, sold Enron stock 350 times and received $101.3 million. Between early 1999 and July 2001, Lay sold 1.8 million Enron shares back to the company. Employees were totally unaware their boss was dumping company stock.

The Committee bill fails to address this issue, and it defeated the Democratic substitute that requires insiders to immediately report stock sales to the pension trustees and employees. The amendment was designed to complement new SEC rules that would require immediate disclosure to investors.

*The Committee Bill Fails To Provide Employees a Voice in Their Own Retirement Savings*

At Enron there was a catastrophic failure by its pension plan trustees to protect the irreplaceable life savings of thousands of Enron employees, despite conclusive evidence that a number of the trustees were aware or should have been aware that the company was covering up serious financial problems. The actions of Cindy Olson, an Enron executive appointed to sit on the pension plan administrative committee, is a clear case of the inherent conflict of interest where the executive is charged with presiding as a pension trustee—with legal responsibility to act solely in the plan interests—while at the same time serving the company with the sole focus of promoting the company in the most favorable light and maximizing the corporate bottom line.

Ms. Olson testified before this Committee that she had personal knowledge that there was significant risk and trouble in holding Enron stock through the receipt of Sherron Watkins' memorandum in August of 2001.[3] She also knew that there was a huge concentration of investment of Enron stock, both in the voluntary contributions from the employees and obviously in the employer match, in the pension plan. Ms. Olson, acting as both a fiduciary and an executive, made a decision not to inform other plan fiduciaries so that they might consider warning the employees or otherwise educating them. Ms. Olson further testified that while she chose not to educate employees, she was divesting herself of shares that she held in her own personal account. Ms. Olson also missed four trustee meetings during the critical period in which Enron stock was in freefall.

[3] Sherron Watkins memo, distributed anonymously to employees at Enron in August of 2001, warned that Enron "will implode in a wave of accounting candals."

Another trustee, Tod Lindholm, missed at least eight trustee meetings in 2001. Mr. Lindholm signed the approval sheets for Enron's LJM1 partnership, one of a number of investment schemes to hide Enron debts.[4]

Another trustee, Paula H. Reicker, worked in investment relations where she regularly fielded concerns by investors over Enron's tangled financial statements, as well as concerns about Andrew Fastow's conflicted relationships as an Enron employee and investor in Enron partnerships.[5]

Pensions have changed dramatically in recent years. We are no longer operating in a defined benefit pension plan world where employers make all or most of the contributions to a pooled fund of monies. Now, most workers are in defined contribution plans, such as 401(k) plans, where they contribute their own salaries to their pension plans. It is simply unconscionable that we permit employers 100% control over monies that are generally 67% or more of employee salary deferrals. The Committee bill does nothing to let employees decide what to do with their monies or protect themselves if financial circumstances change. In the case of Enron, we saw that company executives were unable to separate the workers' interests from those of the company. It is common practice among state and local pensions, multi-employer union pensions, non-profit organization pensions, and international pensions for employees to be involved in their own funds. For example, 6 out of 9 members on the board of Ohio's Public Employees Retirement System, 3 out of 6 members on the board of Texas' Employee Retirement System, and 6 out of 13 members on the board of California's Public Employee Retirement System are elected by active and retired employees/participants in the respective plans. It is time to bring ERISA into the 21st Century. If 401(k)'s put the risk of retirement saving on employees, then employees should have the ability to manage and make decisions about their own investments.

The Republican bill keeps the status quo on pension boards by denying employees a voice on pension boards. By contrast, the Democratic Substitute would require employee representatives on pension boards.

Dr. Teresa Ghilarducci, an economics professor at the University of Notre Dame, testified before this Committee and urged Committee members to require that employees have representatives on boards that oversee retirement plans. Dr. Ghilarducci testified that, "the United States is the only industrialized nation that does not require employee representation on a pension board." In pension plans that permit employees to direct control of their pension investments, the Democratic Substitute would require the plan to include an equal number of employer and employee trustees to oversee the plan. Despite research showing that plans with employee trustees experience a higher rate of savings and investment by employees, have more active involvement by employees in investment decisions, and that such representation helps solve inherent conflict of interests, many plans today have no employee trustees overseeing employees' pension funds.

[4] From minutes of Enron Administrative Committee Meetings conducted in 2001.
[5] Vinson and Elkins Interviews; confidential interviews with selected Enron officials, 2001.

If equal representation of employee and employer trustees had been on the Enron board, it is likely that the board would have carried out ERISA requirements to manage the plans solely for the benefit of the employees and losses may have been mitigated. The Democratic Substitute is narrowly tailored to defined contribution plans that hold employee monies. It is patently unfair that these plans, which primarily contain deferred worker salaries, are 100% controlled by employers. It's the workers' money, they should have at least an equal say in how it is invested and managed.

*The Committee Bill Continues Special Treatment for Company Executive Pensions at the Expense of Rank-and-File Employees*

Enron and Global Crossing have brought attention to serious inequities in pension rules for executives and rank and file employees. As Enron began to implode in a wave of accounting scandals, company executives, such as CEO Ken Lay, were able not only to cash out millions in company stock, but also protected themselves through a number of executive type 401(k) plans that are not subject to attack by Enron's numerous general creditors. Enron agreed to pay Mr. Lay a total of $1.25 million in life insurance premiums on a $12 million dollar policy. These agreements—commonly referred to as "split-dollar" policies—are used to give executives tax-free pension benefits, and place such benefits beyond the reach of creditors. Mr. Lay also received a guaranteed return of 12% on a special deferred compensation plan, and a pension estimated at approximately $485,000 a year for life. By contrast, employees must stand in line behind even the company's general creditors to get any recovery of their hard earned savings—a prospect that is quite unlikely. Neither ERISA nor the Internal Revenue Code intended to permit executives to protect their financial security through questionably funded executive pension plan arrangements. As President Bush has frequently stated: "what's good for the top floor should be good for the shop floor." The Committee bill does nothing to address this great inequity.

*The Committee Bill Fails To Hold Company Officials Responsible for Misconduct and Fails To Enhance Plan Accountability*

The Majority bill fails to include a number of critical accountability provisions that are designed to prohibit future scandals and ensure that employees don't skirt responsibility for wrongdoing.

Because of weak remedy provisions in current law, Enron employees who had their life savings decimated will likely never recover their funds in court. Employees who are cheated out of their retirement funds as a result of misconduct by company officials should be able to make them pay for their misdeeds.

Over 50 million workers currently participate in 401(k) type and similar plans, representing almost $2 trillion worth of investments. However, current law does not provide adequate redress for the workers at Enron or Global Crossing, and millions of others like them who lose their retirement savings. Current pension law interpretations severely limit the ability of employees to collect damages resulting from the misconduct of company officials. Current law primarily limits liability to fiduciaries that fail to act solely in the interests of the plan participants. Fiduciaries are those persons formally named to oversee the plan, or any individual who has control over plan assets. Non-fiduciaries who participate in a violation of the law have limited liability.

Additionally, liability is currently limited by the courts to equitable relief, which means employees can only receive the pension they were wrongfully denied. Many courts will not award aggrieved employees any interest for the years they did not timely receive their benefits.

Furthermore, many courts will not award them attorney's fees and court costs. And no court will award them recovery for other monetary losses, such as the value of foreclosed homes or loans incurred to make ends meet.

The Democratic Substitute clarifies ERISA remedies so that in cases of a breach of duty by a fiduciary, or breach by a knowing participant, the plan or employees may be made whole. Additionally, the Democratic Substitute requires that employers may not require participants to sign waivers of statutory pension rights as part of a termination or severance agreement. ERISA was enacted to protect workers and retirees. When workers' retirement funds are misused, Congress must ensure that workers will get timely and adequate redress.

Additional critical accountability provisions offered by Democrats, but rejected by the Majority include:

*Assurance That Plan Fiduciaries Have Insurance or be Bonded.*—Such coverage is critical to cover financial losses due to breach of fiduciary duty as determined by the Secretary of Labor. It is a significant weakness of ERISA that it does not require pension plan fiduciaries to obtain insurance.

*Prohibition on Waivers of Legal Rights.*—Employers should not be permitted to skirt responsibility for wrongdoing by coercing employees to sign waivers giving away their federal pension rights. It is alleged that Enron required employees to waive their rights to file ERISA claims in order to receive severance benefits. Recently, there have been a spate of court cases in which companies attempted to deny workers their statutory legal rights through boilerplate contract waiver language. ERISA never intended these types of abrogation of statutory rights and they should be explicitly prohibited.

*Improved Labor Department Assistance.*—The Department of Labor shall establish an Office of the Participant Advocate to monitor potential abuses of employee pension plan rights and assist pension plan participants in preventing loss of retirement savings. It has been a longstanding concern that the Department of Labor generally does not act proactively or prophylactically to assist employees in protecting their pensions and other employee benefits or to prevent pension plan abuses. Future Enrons could be averted if the Department were more active and zealous in protecting the interests of pension plan participants and their families.

## CONCLUSION

H.R. 1000 fails to provide pension reforms necessary to stop future Enrons, fails to stop companies from raiding the pensions of older workers, creates dangerous new legal loopholes that allow for conflicted investment advice, fails to restore fairness between the pension rights afforded executives versus those of average employees, and fails to give employees control over their own nest eggs. The Majority unfortunately rejected the Democratic Substitute that would have provided these protections—thus dashing a real opportunity to provide the kind of retirement security all Americans are urgently demanding.

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