

1989—Subsecs. (b)(3), (5), (c)(2)(A)(ii), (C). Pub. L. 101-239, §7891(a)(1), substituted “Internal Revenue Code of 1986” for “Internal Revenue Code of 1954”, which for purposes of codification was translated as “title 26” thus requiring no change in text.

Subsec. (b)(3). Pub. L. 101-239, §7894(e)(3), redesignated cls. (i) and (ii) as subpars. (A) and (B), respectively, struck out “, to the extent that such plan’s assets are held in one or more custodial accounts which qualify under section 401(f) or 408(h) of title 26, whichever is applicable” before the semicolon in subpar. (B), and inserted concluding provision “to the extent that such plan’s assets are held in one or more custodial accounts which qualify under section 401(f) or 408(h) of title 26, whichever is applicable.”

Subsec. (c)(2)(A). Pub. L. 101-239, §7894(e)(1)(A), in introductory provisions, made technical amendment to reference to part 1 of subtitle E of subchapter III of this chapter to correct reference to corresponding part of original Act, requiring no change in text, and in cls. (i) and (ii), inserted “if such contribution or payment is” before “made by an employer”.

Subsec. (c)(3), (4). Pub. L. 101-239, §7881(k), redesignated par. (4) as (3) and struck out former par. (3) which read as follows: “In the case of a contribution which would otherwise be an excess contribution (as defined in section 4979(c) of title 26) paragraph (1) shall not prohibit a correcting distribution with respect to such contribution from the plan to the employer to the extent permitted in such section to avoid payment of an excise tax on excess contributions under such section.”

1987—Subsec. (c)(2)(B). Pub. L. 100-203, §9343(c)(1), amended subpar. (B) generally. Prior to amendment, subpar. (B) read as follows: “If a contribution is conditioned on qualification of the plan under section 401, 403(a), or 405(a) of title 26, and if the plan does not qualify, then paragraph (1) shall not prohibit the return of such contributions to the employer within one year after the date of denial of qualification of the plan.”

Subsec. (c)(3). Pub. L. 100-203, §9343(c)(2), substituted “section 4979(c) of title 26” for “section 4972(b) of title 26”.

1980—Subsec. (a)(1). Pub. L. 96-364, §402(b)(2), substituted “chapter” for “subchapter”.

Subsec. (b)(6). Pub. L. 96-364, §411(c), added par. (6).

Subsec. (c)(1). Pub. L. 96-364, §310(1), inserted reference to par. (4).

Subsec. (c)(2)(A). Pub. L. 96-364, §410(a), substituted provisions relating to contributions or payments of withdrawal liability under part 1 of subtitle E of subchapter III of this chapter made by an employer to a plan by a mistake of fact, and by an employer to a multiemployer plan by a mistake of fact or law, for provisions relating to contributions made by an employer by a mistake of fact.

Subsec. (c)(4). Pub. L. 96-364, §310(2), added par. (4).

#### Statutory Notes and Related Subsidiaries

##### EFFECTIVE DATE OF 2022 AMENDMENT

Amendment by Pub. L. 117-328 applicable to transfers made after Dec. 29, 2022, see section 606(c) of Pub. L. 117-328, set out as a note under section 420 of Title 26, Internal Revenue Code.

##### EFFECTIVE DATE OF 2006 AMENDMENT

Amendment by Pub. L. 109-280 applicable to plan years beginning after 2007, see section 108(e) of Pub. L. 109-280, set out as a note under section 1021 of this title.

##### EFFECTIVE DATE OF 1999 AMENDMENT

Amendment by Pub. L. 106-170 applicable to qualified transfers occurring after Dec. 17, 1999, see section 535(c)(1) of Pub. L. 106-170, set out as a note under section 420 of Title 26, Internal Revenue Code.

##### EFFECTIVE DATE OF 1990 AMENDMENT

Amendment by Pub. L. 101-508 applicable to qualified transfers under section 420 of title 26 made after Nov.

5, 1990, see section 12012(e) of Pub. L. 101-508, set out as a note under section 1021 of this title.

##### EFFECTIVE DATE OF 1989 AMENDMENT

Amendment by section 7881(k) of Pub. L. 101-239 effective, except as otherwise provided, as if included in the provision of the Pension Protection Act, Pub. L. 100-203, §§9302-9346, to which such amendment relates, see section 7882 of Pub. L. 101-239, set out as a note under section 401 of Title 26, Internal Revenue Code.

Amendment by section 7891(a)(1) of Pub. L. 101-239 effective, except as otherwise provided, as if included in the provision of the Tax Reform Act of 1986, Pub. L. 99-514, to which such amendment relates, see section 7891(f) of Pub. L. 101-239, set out as a note under section 1002 of this title.

Section 7894(e)(1)(B) of Pub. L. 101-239 provided that: “The amendments made by subparagraph (A) [amending this section] shall take effect as if included in section 410 of the Multiemployer Pension Plan Amendments Act of 1980 [Pub. L. 96-364].”

Amendment by section 7894(e)(3) of Pub. L. 101-239 effective, except as otherwise provided, as if originally included in the provision of the Employee Retirement Income Security Act of 1974, Pub. L. 93-406, to which such amendment relates, see section 7894(i) of Pub. L. 101-239, set out as a note under section 1002 of this title.

##### EFFECTIVE DATE OF 1980 AMENDMENT

Amendment by Pub. L. 96-364 effective Sept. 26, 1980, except as specifically provided, see section 1461(e) of this title.

Amendment by section 410(a) of Pub. L. 96-364 effective Jan. 1, 1975, except with respect to contributions received by a collectively bargained plan maintained by more than one employer before Sept. 26, 1980, see section 410(c) of Pub. L. 96-364, set out as a note under section 401 of Title 26, Internal Revenue Code.

##### REGULATIONS

Secretary authorized, effective Sept. 2, 1974, to promulgate regulations wherever provisions of this part call for the promulgation of regulations, see sections 1031 and 1114 of this title.

##### APPLICABILITY OF AMENDMENTS BY SUBTITLES A AND B OF TITLE I OF PUB. L. 109-280

For special rules on applicability of amendments by subtitles A (§§101-108) and B (§§111-116) of title I of Pub. L. 109-280 to certain eligible cooperative plans, PBGC settlement plans, and eligible government contractor plans, see sections 104, 105, and 106 of Pub. L. 109-280, set out as notes under section 401 of Title 26, Internal Revenue Code.

#### **§ 1104. Fiduciary duties**

##### **(a) Prudent man standard of care**

(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and  
(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III.

(2) In the case of an eligible individual account plan (as defined in section 1107(d)(3) of this title), the diversification requirement of paragraph (1)(C) and the prudence requirement (only to the extent that it requires diversification) of paragraph (1)(B) is not violated by acquisition or holding of qualifying employer real property or qualifying employer securities (as defined in section 1107(d)(4) and (5) of this title).

**(b) Indicia of ownership of assets outside jurisdiction of district courts**

Except as authorized by the Secretary by regulations, no fiduciary may maintain the indicia of ownership of any assets of a plan outside the jurisdiction of the district courts of the United States.

**(c) Control over assets by participant or beneficiary**

(1)(A) In the case of a pension plan which provides for individual accounts and permits a participant or beneficiary to exercise control over the assets in his account, if a participant or beneficiary exercises control over the assets in his account (as determined under regulations of the Secretary)—

(i) such participant or beneficiary shall not be deemed to be a fiduciary by reason of such exercise, and

(ii) no person who is otherwise a fiduciary shall be liable under this part for any loss, or by reason of any breach, which results from such participant's or beneficiary's exercise of control, except that this clause shall not apply in connection with such participant or beneficiary for any blackout period during which the ability of such participant or beneficiary to direct the investment of the assets in his or her account is suspended by a plan sponsor or fiduciary.

(B) If a person referred to in subparagraph (A)(ii) meets the requirements of this subchapter in connection with authorizing and implementing the blackout period, any person who is otherwise a fiduciary shall not be liable under this subchapter for any loss occurring during such period.

(C) For purposes of this paragraph, the term "blackout period" has the meaning given such term by section 1021(i)(7) of this title.

(2) In the case of a simple retirement account established pursuant to a qualified salary reduction arrangement under section 408(p) of title 26, a participant or beneficiary shall, for purposes of paragraph (1), be treated as exercising control over the assets in the account upon the earliest of—

(A) an affirmative election among investment options with respect to the initial investment of any contribution,

(B) a rollover to any other simple retirement account or individual retirement plan, or

(C) one year after the simple retirement account is established.

No reports, other than those required under section 1021(g) of this title, shall be required with

respect to a simple retirement account established pursuant to such a qualified salary reduction arrangement.

(3) In the case of a pension plan which makes a transfer to an individual retirement account or annuity of a designated trustee or issuer under section 401(a)(31)(B) of title 26, the participant or beneficiary shall, for purposes of paragraph (1), be treated as exercising control over the assets in the account or annuity upon—

(A) the earlier of—

(i) a rollover of all or a portion of the amount to another individual retirement account or annuity; or

(ii) one year after the transfer is made; or

(B) a transfer that is made in a manner consistent with guidance provided by the Secretary.

(4)(A) In any case in which a qualified change in investment options occurs in connection with an individual account plan, a participant or beneficiary shall not be treated for purposes of paragraph (1) as not exercising control over the assets in his account in connection with such change if the requirements of subparagraph (C) are met in connection with such change.

(B) For purposes of subparagraph (A), the term "qualified change in investment options" means, in connection with an individual account plan, a change in the investment options offered to the participant or beneficiary under the terms of the plan, under which—

(i) the account of the participant or beneficiary is reallocated among one or more remaining or new investment options which are offered in lieu of one or more investment options offered immediately prior to the effective date of the change, and

(ii) the stated characteristics of the remaining or new investment options provided under clause (i), including characteristics relating to risk and rate of return, are, as of immediately after the change, reasonably similar to those of the existing investment options as of immediately before the change.

(C) The requirements of this subparagraph are met in connection with a qualified change in investment options if—

(i) at least 30 days and no more than 60 days prior to the effective date of the change, the plan administrator furnishes written notice of the change to the participants and beneficiaries, including information comparing the existing and new investment options and an explanation that, in the absence of affirmative investment instructions from the participant or beneficiary to the contrary, the account of the participant or beneficiary will be invested in the manner described in subparagraph (B),

(ii) the participant or beneficiary has not provided to the plan administrator, in advance of the effective date of the change, affirmative investment instructions contrary to the change, and

(iii) the investments under the plan of the participant or beneficiary as in effect immediately prior to the effective date of the change were the product of the exercise by such participant or beneficiary of control over the assets of the account within the meaning of paragraph (1).

## (5) DEFAULT INVESTMENT ARRANGEMENTS.—

(A) IN GENERAL.—For purposes of paragraph (1), a participant or beneficiary in an individual account plan meeting the notice requirements of subparagraph (B) shall be treated as exercising control over the assets in the account with respect to the amount of contributions and earnings which, in the absence of an investment election by the participant or beneficiary, are invested by the plan in accordance with regulations prescribed by the Secretary. The regulations under this subparagraph shall provide guidance on the appropriateness of designating default investments that include a mix of asset classes consistent with capital preservation or long-term capital appreciation, or a blend of both.

## (B) NOTICE REQUIREMENTS.—

(i) IN GENERAL.—The requirements of this subparagraph are met if each participant or beneficiary—

(I) receives, within a reasonable period of time before each plan year, a notice explaining the employee's right under the plan to designate how contributions and earnings will be invested and explaining how, in the absence of any investment election by the participant or beneficiary, such contributions and earnings will be invested, and

(II) has a reasonable period of time after receipt of such notice and before the beginning of the plan year to make such designation.

(ii) FORM OF NOTICE.—The requirements of clauses (i) and (ii) of section 401(k)(12)(D) of title 26 shall apply with respect to the notices described in this subparagraph.

(6) DEFAULT INVESTMENT ARRANGEMENTS FOR A PENSION-LINKED EMERGENCY SAVINGS ACCOUNT.—For purposes of paragraph (1), a participant in a pension-linked emergency savings account shall be treated as exercising control over the assets in the account with respect to the amount of contributions and earnings which are invested in accordance with section 1193(c)(1)(A)(iii) of this title.

## (d) Plan terminations

(1) If, in connection with the termination of a pension plan which is a single-employer plan, there is an election to establish or maintain a qualified replacement plan, or to increase benefits, as provided under section 4980(d) of title 26, a fiduciary shall discharge the fiduciary's duties under this subchapter and subchapter III in accordance with the following requirements:

(A) In the case of a fiduciary of the terminated plan, any requirement—

(i) under section 4980(d)(2)(B) of title 26 with respect to the transfer of assets from the terminated plan to a qualified replacement plan, and

(ii) under section 4980(d)(2)(B)(ii) or 4980(d)(3) of title 26 with respect to any increase in benefits under the terminated plan.

(B) In the case of a fiduciary of a qualified replacement plan, any requirement—

(i) under section 4980(d)(2)(A) of title 26 with respect to participation in the qualified

replacement plan of active participants in the terminated plan,

(ii) under section 4980(d)(2)(B) of title 26 with respect to the receipt of assets from the terminated plan, and

(iii) under section 4980(d)(2)(C) of title 26 with respect to the allocation of assets to participants of the qualified replacement plan.

## (2) For purposes of this subsection—

(A) any term used in this subsection which is also used in section 4980(d) of title 26 shall have the same meaning as when used in such section, and

(B) any reference in this subsection to title 26 shall be a reference to title 26 as in effect immediately after the enactment of the Omnibus Budget Reconciliation Act of 1990.

## (e) Safe harbor for annuity selection

## (1) In general

With respect to the selection of an insurer for a guaranteed retirement income contract, the requirements of subsection (a)(1)(B) will be deemed to be satisfied if a fiduciary—

(A) engages in an objective, thorough, and analytical search for the purpose of identifying insurers from which to purchase such contracts;

(B) with respect to each insurer identified under subparagraph (A)—

(i) considers the financial capability of such insurer to satisfy its obligations under the guaranteed retirement income contract; and

(ii) considers the cost (including fees and commissions) of the guaranteed retirement income contract offered by the insurer in relation to the benefits and product features of the contract and administrative services to be provided under such contract; and

(C) on the basis of such consideration, concludes that—

(i) at the time of the selection, the insurer is financially capable of satisfying its obligations under the guaranteed retirement income contract; and

(ii) the relative cost of the selected guaranteed retirement income contract as described in subparagraph (B)(ii) is reasonable.

## (2) Financial capability of the insurer

A fiduciary will be deemed to satisfy the requirements of paragraphs (1)(B)(i) and (1)(C)(i) if—

(A) the fiduciary obtains written representations from the insurer that—

(i) the insurer is licensed to offer guaranteed retirement income contracts;

(ii) the insurer, at the time of selection and for each of the immediately preceding 7 plan years—

(I) operates under a certificate of authority from the insurance commissioner of its domiciliary State which has not been revoked or suspended;

(II) has filed audited financial statements in accordance with the laws of its

- domiciliary State under applicable statutory accounting principles;
- (III) maintains (and has maintained) reserves which satisfies all the statutory requirements of all States where the insurer does business; and
- (IV) is not operating under an order of supervision, rehabilitation, or liquidation;
- (iii) the insurer undergoes, at least every 5 years, a financial examination (within the meaning of the law of its domiciliary State) by the insurance commissioner of the domiciliary State (or representative, designee, or other party approved by such commissioner); and
- (iv) the insurer will notify the fiduciary of any change in circumstances occurring after the provision of the representations in clauses (i), (ii), and (iii) which would preclude the insurer from making such representations at the time of issuance of the guaranteed retirement income contract; and
- (B) after receiving such representations and as of the time of selection, the fiduciary has not received any notice described in subparagraph (A)(iv) and is in possession of no other information which would cause the fiduciary to question the representations provided.
- (3) No requirement to select lowest cost**
- Nothing in this subsection shall be construed to require a fiduciary to select the lowest cost contract. A fiduciary may consider the value of a contract, including features and benefits of the contract and attributes of the insurer (including, without limitation, the insurer's financial strength) in conjunction with the cost of the contract.
- (4) Time of selection**
- (A) In general**
- For purposes of this subsection, the time of selection is—
- (i) the time that the insurer and the contract are selected for distribution of benefits to a specific participant or beneficiary; or
- (ii) if the fiduciary periodically reviews the continuing appropriateness of the conclusion described in paragraph (1)(C) with respect to a selected insurer, taking into account the considerations described in such paragraph, the time that the insurer and the contract are selected to provide benefits at future dates to participants or beneficiaries under the plan.
- Nothing in the preceding sentence shall be construed to require the fiduciary to review the appropriateness of a selection after the purchase of a contract for a participant or beneficiary.
- (B) Periodic review**
- A fiduciary will be deemed to have conducted the periodic review described in subparagraph (A)(ii) if the fiduciary obtains the written representations described in clauses (i), (ii), and (iii) of paragraph (2)(A) from the insurer on an annual basis, unless the fiduciary receives any notice described in paragraph (2)(A)(iv) or otherwise becomes aware of facts that would cause the fiduciary to question such representations.
- (5) Limited liability**
- A fiduciary which satisfies the requirements of this subsection shall not be liable following the distribution of any benefit, or the investment by or on behalf of a participant or beneficiary pursuant to the selected guaranteed retirement income contract, for any losses that may result to the participant or beneficiary due to an insurer's inability to satisfy its financial obligations under the terms of such contract.
- (6) Definitions**
- For purposes of this subsection—
- (A) Insurer**
- The term “insurer” means an insurance company, insurance service, or insurance organization, including affiliates of such companies.
- (B) Guaranteed retirement income contract**
- The term “guaranteed retirement income contract” means an annuity contract for a fixed term or a contract (or provision or feature thereof) which provides guaranteed benefits annually (or more frequently) for at least the remainder of the life of the participant or the joint lives of the participant and the participant's designated beneficiary as part of an individual account plan.
- (Pub. L. 93-406, title I, § 404, Sept. 2, 1974, 88 Stat. 877; Pub. L. 96-364, title III, § 309, Sept. 26, 1980, 94 Stat. 1296; Pub. L. 101-508, title XII, § 12002(b)(1), (2)(A), Nov. 5, 1990, 104 Stat. 1388-565, 1388-566; Pub. L. 104-188, title I, § 1421(d)(2), Aug. 20, 1996, 110 Stat. 1799; Pub. L. 107-16, title VI, § 657(c)(1), June 7, 2001, 115 Stat. 136; Pub. L. 107-147, title IV, § 411(t), Mar. 9, 2002, 116 Stat. 51; Pub. L. 109-280, title VI, §§ 621(a), 624(a), Aug. 17, 2006, 120 Stat. 978, 980; Pub. L. 110-458, title I, § 106(d), Dec. 23, 2008, 122 Stat. 5107; Pub. L. 116-94, div. O, title II, § 204, Dec. 20, 2019, 133 Stat. 3165; Pub. L. 117-328, div. T, title I, § 127(d), Dec. 29, 2022, 136 Stat. 5324.)

#### Editorial Notes

#### REFERENCES IN TEXT

The enactment of the Omnibus Budget Reconciliation Act of 1990, referred to in subsec. (d)(2)(B), is the enactment of Pub. L. 101-508, which was approved Nov. 5, 1990.

#### AMENDMENTS

- 2022—Subsec. (c)(6). Pub. L. 117-328 added par. (6).
- 2019—Subsec. (e). Pub. L. 116-94 added subsec. (e).
- 2008—Subsec. (c)(5). Pub. L. 110-458 substituted “participant or beneficiary” for “participant” wherever appearing.
- 2006—Subsec. (c)(1). Pub. L. 109-280, § 621(a)(1), designated existing provisions as subpar. (A), redesignated former subpars. (A) and (B) as cl. (i) and (ii), respectively, of subpar. (A), in cl. (ii), inserted “, except that this clause shall not apply in connection with such participant or beneficiary for any blackout period during which the ability of such participant or beneficiary to

direct the investment of the assets in his or her account is suspended by a plan sponsor or fiduciary" before period at end, and added subpars. (B) and (C).

Subsec. (c)(4). Pub. L. 109-280, §621(a)(2), added par. (4).

Subsec. (c)(5). Pub. L. 109-280, §624(a), added par. (5).

2002—Subsec. (c)(3)(A). Pub. L. 107-147, §411(t)(1), struck out "the earlier of" after "the earlier of" in introductory provisions.

Subsec. (c)(3)(B). Pub. L. 107-147, §411(t)(2), substituted "a transfer that" for "if the transfer".

2001—Subsec. (c)(3). Pub. L. 107-16 added par. (3).

1996—Subsec. (c). Pub. L. 104-188 designated existing provisions as par. (1), redesignated former pars. (1) and (2) as subpars. (A) and (B), respectively, and added par. (2).

1990—Subsec. (a)(1)(D). Pub. L. 101-508, §12002(b)(2)(A), substituted "and subchapter III" for "or subchapter III".

Subsec. (d). Pub. L. 101-508, §12002(b)(1), added subsec. (d).

1980—Subsec. (a)(1)(D). Pub. L. 96-364 inserted reference to subchapter III of this chapter.

#### Statutory Notes and Related Subsidiaries

##### EFFECTIVE DATE OF 2022 AMENDMENT

Amendment by Pub. L. 117-328 applicable to plan years beginning after Dec. 31, 2023, see section 127(g) of Pub. L. 117-328, set out as a note under section 72 of Title 26, Internal Revenue Code.

##### EFFECTIVE DATE OF 2008 AMENDMENT

Amendment by Pub. L. 110-458 effective as if included in the provisions of Pub. L. 109-280 to which the amendment relates, except as otherwise provided, see section 112 of Pub. L. 110-458, set out as a note under section 72 of Title 26, Internal Revenue Code.

##### EFFECTIVE DATE OF 2006 AMENDMENT

Pub. L. 109-280, title VI, §621(b), Aug. 17, 2006, 120 Stat. 979, provided that:

"(1) IN GENERAL.—The amendments made by this section [amending this section] shall apply to plan years beginning after December 31, 2007.

"(2) SPECIAL RULE FOR COLLECTIVELY BARGAINED AGREEMENTS.—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 [Aug. 17, 2006], paragraph (1) shall be applied to benefits pursuant to, and individuals covered by, any such agreement by substituting for 'December 31, 2007' the earlier of—

"(A) the later of—

"(i) December 31, 2008, or

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

"(B) December 31, 2009."

Pub. L. 109-280, title VI, §624(b), Aug. 17, 2006, 120 Stat. 980, provided that:

"(1) IN GENERAL.—The amendments made by this section [amending this section] shall apply to plan years beginning after December 31, 2006.

"(2) REGULATIONS.—Final regulations under section 404(c)(5)(A) of the Employee Retirement Income Security Act of 1974 [29 U.S.C. 1104(c)(5)(A)] (as added by this section) shall be issued no later than 6 months after the date of the enactment of this Act [Aug. 17, 2006]."

##### EFFECTIVE DATE OF 2002 AMENDMENT

Amendment by Pub. L. 107-147 effective as if included in the provisions of the Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. 107-16, to which such amendment relates, see section 411(x) of Pub. L. 107-147, set out as a note under section 25B of Title 26, Internal Revenue Code.

#### EFFECTIVE DATE OF 2001 AMENDMENT

Amendment by Pub. L. 107-16 applicable to distributions made after Mar. 28, 2005, see section 657(d) of Pub. L. 107-16, set out as a note under section 401 of Title 26, Internal Revenue Code.

#### EFFECTIVE DATE OF 1996 AMENDMENT

Amendment by Pub. L. 104-188 applicable to taxable years beginning after Dec. 31, 1996, see section 1421(e) of Pub. L. 104-188, set out as a note under section 72 of Title 26, Internal Revenue Code.

#### EFFECTIVE DATE OF 1990 AMENDMENT

Amendment by Pub. L. 101-508 applicable to reversions occurring after Sept. 30, 1990, but not applicable to any reversion after Sept. 30, 1990, if (1) in the case of plans subject to subchapter III of this chapter, notice of intent to terminate under such subchapter was provided to participants (or if no participants, to Pension Benefit Guaranty Corporation) before Oct. 1, 1990, (2) in the case of plans subject to subchapter I of this chapter (and not subchapter III), notice of intent to reduce future accruals under section 1054(h) of this title was provided to participants in connection with termination before Oct. 1, 1990, (3) in the case of plans not subject to subchapter I or III of this chapter, a request for a determination letter with respect to termination was filed with Secretary of the Treasury or Secretary's delegate before Oct. 1, 1990, or (4) in the case of plans not subject to subchapter I or III of this chapter and having only one participant, a resolution terminating the plan was adopted by employer before Oct. 1, 1990, see section 12003 of Pub. L. 101-508, set out as a note under section 4980 of Title 26, Internal Revenue Code.

#### EFFECTIVE DATE OF 1980 AMENDMENT

Amendment by Pub. L. 96-364 effective Sept. 26, 1980, except as specifically provided, see section 1461(e) of this title.

#### REGULATIONS

Pub. L. 109-280, title VI, §625, Aug. 17, 2006, 120 Stat. 980, provided that:

"(a) IN GENERAL.—Not later than 1 year after the date of the enactment of this Act [Aug. 17, 2006], the Secretary of Labor shall issue final regulations clarifying that the selection of an annuity contract as an optional form of distribution from an individual account plan to a participant or beneficiary—

"(1) is not subject to the safest available annuity standard under Interpretive Bulletin 95-1 (29 CFR 2509.95-1), and

"(2) is subject to all otherwise applicable fiduciary standards.

"(b) EFFECTIVE DATE.—This section shall take effect on the date of enactment of this Act [Aug. 17, 2006]."

Secretary authorized, effective Sept. 2, 1974, to promulgate regulations wherever provisions of this part call for the promulgation of regulations, see sections 1031 and 1114 of this title.

#### PERFORMANCE BENCHMARKS FOR ASSET ALLOCATION FUNDS

Pub. L. 117-328, div. T, title III, §318(a), Dec. 29, 2022, 136 Stat. 5353, provided that: Not later than 2 years after the date of enactment of this Act [Dec. 29, 2022], the Secretary of Labor shall promulgate regulations under section 404 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1104) providing that, in the case of a designated investment alternative that contains a mix of asset classes, the administrator of a plan may, but is not required to, use a benchmark that is a blend of different broad-based securities market indices if—

"(1) the blend is reasonably representative of the asset class holdings of the designated investment alternative;

"(2) for purposes of determining the blend's returns for 1-, 5-, and 10-calendar-year periods (or for the life

of the alternative, if shorter), the blend is modified at least once per year if needed to reflect changes in the asset class holdings of the designated investment alternative;

“(3) the blend is furnished to participants and beneficiaries in a manner that is reasonably calculated to be understood by the average plan participant; and

“(4) each securities market index that is used for an associated asset class would separately satisfy the requirements of such regulation for such asset class.”

PLAN AMENDMENTS NOT REQUIRED UNTIL  
JANUARY 1, 1998

For provisions directing that if any amendments made by subtitle D [§§1401–1465] of title I of Pub. L. 104–188 require an amendment to any plan or annuity contract, such amendment shall not be required to be made before the first day of the first plan year beginning on or after Jan. 1, 1998, see section 1465 of Pub. L. 104–188, set out as a note under section 401 of Title 26, Internal Revenue Code.

**§ 1105. Liability for breach of co-fiduciary**

**(a) Circumstances giving rise to liability**

In addition to any liability which he may have under any other provisions of this part, a fiduciary with respect to a plan shall be liable for a breach of fiduciary responsibility of another fiduciary with respect to the same plan in the following circumstances:

(1) if he participates knowingly in, or knowingly undertakes to conceal, an act or omission of such other fiduciary, knowing such act or omission is a breach;

(2) if, by his failure to comply with section 1104(a)(1) of this title in the administration of his specific responsibilities which give rise to his status as a fiduciary, he has enabled such other fiduciary to commit a breach; or

(3) if he has knowledge of a breach by such other fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach.

**(b) Assets held by two or more trustees**

(1) Except as otherwise provided in subsection (d) and in section 1103(a)(1) and (2) of this title, if the assets of a plan are held by two or more trustees—

(A) each shall use reasonable care to prevent a co-trustee from committing a breach; and

(B) they shall jointly manage and control the assets of the plan, except that nothing in this subparagraph (B) shall preclude any agreement, authorized by the trust instrument, allocating specific responsibilities, obligations, or duties among trustees, in which event a trustee to whom certain responsibilities, obligations, or duties have not been allocated shall not be liable by reason of this subparagraph (B) either individually or as a trustee for any loss resulting to the plan arising from the acts or omissions on the part of another trustee to whom such responsibilities, obligations, or duties have been allocated.

(2) Nothing in this subsection shall limit any liability that a fiduciary may have under subsection (a) or any other provision of this part.

(3)(A) In the case of a plan the assets of which are held in more than one trust, a trustee shall not be liable under paragraph (1) except with respect to an act or omission of a trustee of a trust of which he is a trustee.

(B) No trustee shall be liable under this subsection for following instructions referred to in section 1103(a)(1) of this title.

**(c) Allocation of fiduciary responsibility; designated persons to carry out fiduciary responsibilities**

(1) The instrument under which a plan is maintained may expressly provide for procedures (A) for allocating fiduciary responsibilities (other than trustee responsibilities) among named fiduciaries, and (B) for named fiduciaries to designate persons other than named fiduciaries to carry out fiduciary responsibilities (other than trustee responsibilities) under the plan.

(2) If a plan expressly provides for a procedure described in paragraph (1), and pursuant to such procedure any fiduciary responsibility of a named fiduciary is allocated to any person, or a person is designated to carry out any such responsibility, then such named fiduciary shall not be liable for an act or omission of such person in carrying out such responsibility except to the extent that—

(A) the named fiduciary violated section 1104(a)(1) of this title—

(i) with respect to such allocation or designation,

(ii) with respect to the establishment or implementation of the procedure under paragraph (1), or

(iii) in continuing the allocation or designation; or

(B) the named fiduciary would otherwise be liable in accordance with subsection (a).

(3) For purposes of this subsection, the term “trustee responsibility” means any responsibility provided in the plan’s trust instrument (if any) to manage or control the assets of the plan, other than a power under the trust instrument of a named fiduciary to appoint an investment manager in accordance with section 1102(c)(3) of this title.

**(d) Investment managers**

(1) If an investment manager or managers have been appointed under section 1102(c)(3) of this title, then, notwithstanding subsections (a)(2) and (3) and subsection (b), no trustee shall be liable for the acts or omissions of such investment manager or managers, or be under an obligation to invest or otherwise manage any asset of the plan which is subject to the management of such investment manager.

(2) Nothing in this subsection shall relieve any trustee of any liability under this part for any act of such trustee.

(Pub. L. 93–406, title I, § 405, Sept. 2, 1974, 88 Stat. 878.)

**§ 1106. Prohibited transactions**

**(a) Transactions between plan and party in interest**

Except as provided in section 1108 of this title:

(1) A fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect—

(A) sale or exchange, or leasing, of any property between the plan and a party in interest;