

105-34, title XV, §1524(a), Aug. 5, 1997, 111 Stat. 1071; Pub. L. 109-280, title IX, §901(b)(2), Aug. 17, 2006, 120 Stat. 1032.)

### Editorial Notes

#### REFERENCES IN TEXT

Section 1021(c)(2)(A) of the Revenue Act of 1987 (Public Law 100-203), referred to in subsec. (d)(5)(C), is set out as a note under section 7704 of Title 26, Internal Revenue Code.

#### AMENDMENTS

2006—Subsec. (b)(3)(D). Pub. L. 109-280 added subpar. (D).

1997—Subsec. (b)(2), (3). Pub. L. 105-34 added par. (2) and redesignated former par. (2) as (3).

1990—Subsec. (d)(5). Pub. L. 101-540 amended par. (5) generally. Prior to amendment, par. (5) read as follows: “The term ‘qualifying employer security’ means an employer security which is stock or a marketable obligation (as defined in subsection (e)). After December 17, 1987, in the case of a plan other than an eligible individual account plan, stock shall be considered a qualifying employer security only if such stock satisfies the requirements of subsection (f)(1).”

1989—Subsec. (d)(3)(A), (6)(A), (7). 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. (d)(3)(C). Pub. L. 101-239, §7881(l)(1), realigned margin.

Subsec. (d)(6)(A). Pub. L. 101-239, §7894(e)(2), substituted “money purchase plan” for “money purchase” and “employer securities” for “employee securities”.

Subsec. (d)(9). Pub. L. 101-239, §7881(l)(2), substituted “such individual account plan” for “such arrangement” and realigned margin.

Subsec. (f)(1). Pub. L. 101-239, §7881(l)(3)(A), (4), substituted “paragraph” for “subsection” and “if, immediately following the acquisition of such stock” for “if”.

Subsec. (f)(3). Pub. L. 101-239, §7881(l)(3)(B), struck out par. (3) which read as follows: “After December 17, 1987, no plan may acquire stock which does not satisfy the requirements of paragraph (1) unless the acquisition is made pursuant to a legally binding contract in effect on such date.”

1987—Subsec. (d)(3)(C). Pub. L. 100-203, §9345(a)(1), added subpar. (C).

Subsec. (d)(5). Pub. L. 100-203, §9345(b)(1), inserted at end “After December 17, 1987, in the case of a plan other than an eligible individual account plan, stock shall be considered a qualifying employer security only if such stock satisfies the requirements of subsection (f)(1).”

Subsec. (d)(9). Pub. L. 100-203, §9345(a)(2), added par. (9).

Subsec. (f). Pub. L. 100-203, §9345(b)(2), added subsec. (f).

### Statutory Notes and Related Subsidiaries

#### EFFECTIVE DATE OF 2006 AMENDMENT

Amendment by Pub. L. 109-280 applicable to plan years beginning after Dec. 31, 2006, with special rules for collectively bargained agreements and certain employer securities held in an ESOP, see section 901(c) of Pub. L. 109-280, set out as a note under section 401 of Title 26, Internal Revenue Code.

#### EFFECTIVE DATE OF 1997 AMENDMENT

Pub. L. 105-34, title XV, §1524(b), Aug. 5, 1997, 111 Stat. 1072, as amended by Pub. L. 107-16, title VI, §655(a), June 7, 2001, 115 Stat. 131, provided that:

“(1) IN GENERAL.—Except as provided in paragraph (2), the amendments made by this section [amending this

section] shall apply to elective deferrals for plan years beginning after December 31, 1998.

“(2) NONAPPLICATION TO PREVIOUSLY ACQUIRED PROPERTY.—The amendments made by this section shall not apply to any elective deferral which is invested in assets consisting of qualifying employer securities, qualifying employer real property, or both, if such assets were acquired before January 1, 1999.”

[Pub. L. 107-16, title VI, §655(b), June 7, 2001, 115 Stat. 131, provided that: “The amendment made by this section [amending section 1524(b) of Pub. L. 105-34, set out above] shall apply as if included in the provision of the Taxpayer Relief Act of 1997 [Pub. L. 105-34] to which it relates.”]

#### EFFECTIVE DATE OF 1990 AMENDMENT

Pub. L. 101-540, §2, Nov. 8, 1990, 104 Stat. 2379, provided that: “The amendment made by section 1 [amending this section] shall apply to interests in publicly traded partnerships acquired before, on, or after January 1, 1987.”

#### EFFECTIVE DATE OF 1989 AMENDMENT

Amendment by section 7881(l)(1)–(4) 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.

Amendment by section 7894(e)(2) 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 1987 AMENDMENT

Pub. L. 100-203, title IX, §9345(a)(3), Dec. 22, 1987, 101 Stat. 1330-373, provided that: “The amendments made by this subsection [amending this section] shall apply with respect to arrangements established after December 17, 1987.”

#### 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.

### § 1108. Exemptions from prohibited transactions

#### (a) Grant of exemptions

The Secretary shall establish an exemption procedure for purposes of this subsection. Pursuant to such procedure, he may grant a conditional or unconditional exemption of any fiduciary or transaction, or class of fiduciaries or transactions, from all or part of the restrictions imposed by sections 1106 and 1107(a) of this title. Action under this subsection may be taken only after consultation and coordination with the Secretary of the Treasury. An exemption granted under this section shall not relieve a fiduciary from any other applicable provision of this chapter. The Secretary may not grant an exemption under this subsection unless he finds that such exemption is—

(1) administratively feasible,

(2) in the interests of the plan and of its participants and beneficiaries, and

(3) protective of the rights of participants and beneficiaries of such plan.

Before granting an exemption under this subsection from section 1106(a) or 1107(a) of this title, the Secretary shall publish notice in the Federal Register of the pendency of the exemption, shall require that adequate notice be given to interested persons, and shall afford interested persons opportunity to present views. The Secretary may not grant an exemption under this subsection from section 1106(b) of this title unless he affords an opportunity for a hearing and makes a determination on the record with respect to the findings required by paragraphs (1), (2), and (3) of this subsection.

**(b) Enumeration of transactions exempted from section 1106 prohibitions**

The prohibitions provided in section 1106 of this title shall not apply to any of the following transactions:

(1) Any loans made by the plan to parties in interest who are participants or beneficiaries of the plan if such loans (A) are available to all such participants and beneficiaries on a reasonably equivalent basis, (B) are not made available to highly compensated employees (within the meaning of section 414(q) of title 26) in an amount greater than the amount made available to other employees, (C) are made in accordance with specific provisions regarding such loans set forth in the plan, (D) bear a reasonable rate of interest, and (E) are adequately secured. A loan made by a plan shall not fail to meet the requirements of the preceding sentence by reason of a loan repayment suspension described under section 414(u)(4) of title 26.

(2)(A) Contracting or making reasonable arrangements with a party in interest for office space, or legal, accounting, or other services necessary for the establishment or operation of the plan, if no more than reasonable compensation is paid therefor.

(B)(i) No contract or arrangement for services between a covered plan and a covered service provider, and no extension or renewal of such a contract or arrangement, is reasonable within the meaning of this paragraph unless the requirements of this clause<sup>1</sup> are met.

(ii)(I) For purposes of this subparagraph:

(aa) The term “covered plan” means a group health plan as defined section<sup>2</sup> 1191b(a) of this title.

(bb) The term “covered service provider” means a service provider that enters into a contract or arrangement with the covered plan and reasonably expects \$1,000 (or such amount as the Secretary may establish in regulations to account for inflation since December 27, 2020, as appropriate) or more in compensation, direct or indirect, to be received in connection with providing one or more of the following services, pursuant to the contract or arrangement, regardless of whether such services will be performed, or such compensation received, by the covered service provider, an affiliate, or a subcontractor:

(AA) Brokerage services, for which the covered service provider, an affiliate, or a subcontractor reasonably expects to receive indirect compensation or direct compensation described in item (dd), provided to a covered plan with respect to selection of insurance products (including vision and dental), recordkeeping services, medical management vendor, benefits administration (including vision and dental), stop-loss insurance, pharmacy benefit management services, wellness services, transparency tools and vendors, group purchasing organization preferred vendor panels, disease management vendors and products, compliance services, employee assistance programs, or third party administration services.

(BB) Consulting, for which the covered service provider, an affiliate, or a subcontractor reasonably expects to receive indirect compensation or direct compensation described in item (dd), related to the development or implementation of plan design, insurance or insurance product selection (including vision and dental), recordkeeping, medical management, benefits administration selection (including vision and dental), stop-loss insurance, pharmacy benefit management services, wellness design and management services, transparency tools, group purchasing organization agreements and services, participation in and services from preferred vendor panels, disease management, compliance services, employee assistance programs, or third party administration services.

(cc) The term “affiliate”, with respect to a covered service provider, means an entity that directly or indirectly (through one or more intermediaries) controls, is controlled by, or is under common control with, such provider, or is an officer, director, or employee of, or partner in, such provider.

(dd)(AA) The term “compensation” means anything of monetary value, but does not include non-monetary compensation valued at \$250 (or such amount as the Secretary may establish in regulations to account for inflation since December 27, 2020, as appropriate) or less, in the aggregate, during the term of the contract or arrangement.

(BB) The term “direct compensation” means compensation received directly from a covered plan.

(CC) The term “indirect compensation” means compensation received from any source other than the covered plan, the plan sponsor, the covered service provider, or an affiliate. Compensation received from a subcontractor is indirect compensation, unless it is received in connection with services performed under a contract or arrangement with a subcontractor.

(ee) The term “responsible plan fiduciary” means a fiduciary with authority to cause the covered plan to enter into, or extend or renew, the contract or arrangement.

(ff) The term “subcontractor” means any person or entity (or an affiliate of such person or entity) that is not an affiliate of the

<sup>1</sup> So in original. Probably should be “this subparagraph”.

<sup>2</sup> So in original. Probably should be preceded by “in”.

covered service provider and that, pursuant to a contract or arrangement with the covered service provider or an affiliate, reasonably expects to receive \$1,000 (or such amount as the Secretary may establish in regulations to account for inflation since December 27, 2020, as appropriate) or more in compensation for performing one or more services described in item (bb) under a contract or arrangement with the covered plan.

(II) For purposes of this subparagraph, a description of compensation or cost may be expressed as a monetary amount, formula, or a per capita charge for each enrollee or, if the compensation or cost cannot reasonably be expressed in such terms, by any other reasonable method, including a disclosure that additional compensation may be earned but may not be calculated at the time of contract if such a disclosure includes a description of the circumstances under which the additional compensation may be earned and a reasonable and good faith estimate if the covered service provider cannot otherwise readily describe compensation or cost and explains the methodology and assumptions used to prepare such estimate. Any such description shall contain sufficient information to permit evaluation of the reasonableness of the compensation or cost.

(III) No person or entity is a “covered service provider” within the meaning of subclause (I)(bb) solely on the basis of providing services as an affiliate or a subcontractor that is performing one or more of the services described in subitem (AA) or (BB) of such subclause under the contract or arrangement with the covered plan.

(iii) A covered service provider shall disclose to a responsible plan fiduciary, in writing, the following:

(I) A description of the services to be provided to the covered plan pursuant to the contract or arrangement.

(II) If applicable, a statement that the covered service provider, an affiliate, or a subcontractor will provide, or reasonably expects to provide, services pursuant to the contract or arrangement directly to the covered plan as a fiduciary (within the meaning of section 1002(21) of this title).

(III) A description of all direct compensation, either in the aggregate or by service, that the covered service provider, an affiliate, or a subcontractor reasonably expects to receive in connection with the services described in subclause (I).

(IV)(aa) A description of all indirect compensation that the covered service provider, an affiliate, or a subcontractor reasonably expects to receive in connection with the services described in subclause (I)—

(AA) including compensation from a vendor to a brokerage firm based on a structure of incentives not solely related to the contract with the covered plan; and

(BB) not including compensation received by an employee from an employer on account of work performed by the employee.

(bb) A description of the arrangement between the payer and the covered service provider, an affiliate, or a subcontractor, as applicable, pursuant to which such indirect compensation is paid.

(cc) Identification of the services for which the indirect compensation will be received, if applicable.

(dd) Identification of the payer of the indirect compensation.

(V) A description of any compensation that will be paid among the covered service provider, an affiliate, or a subcontractor, in connection with the services described in subclause (I) if such compensation is set on a transaction basis (such as commissions, finder’s fees, or other similar incentive compensation based on business placed or retained), including identification of the services for which such compensation will be paid and identification of the payers and recipients of such compensation (including the status of a payer or recipient as an affiliate or a subcontractor), regardless of whether such compensation also is disclosed pursuant to subclause (III) or (IV).

(VI) A description of any compensation that the covered service provider, an affiliate, or a subcontractor reasonably expects to receive in connection with termination of the contract or arrangement, and how any prepaid amounts will be calculated and refunded upon such termination.

(iv) A covered service provider shall disclose to a responsible plan fiduciary, in writing a description of the manner in which the compensation described in clause (iii), as applicable, will be received.

(v)(I) A covered service provider shall disclose the information required under clauses (iii) and (iv) to the responsible plan fiduciary not later than the date that is reasonably in advance of the date on which the contract or arrangement is entered into, and extended or renewed.

(II) A covered service provider shall disclose any change to the information required under clause (iii) and (iv) as soon as practicable, but not later than 60 days from the date on which the covered service provider is informed of such change, unless such disclosure is precluded due to extraordinary circumstances beyond the covered service provider’s control, in which case the information shall be disclosed as soon as practicable.

(vi)(I) Upon the written request of the responsible plan fiduciary or covered plan administrator, a covered service provider shall furnish any other information relating to the compensation received in connection with the contract or arrangement that is required for the covered plan to comply with the reporting and disclosure requirements under this chapter.

(II) The covered service provider shall disclose the information required under clause (iii)(I) reasonably in advance of the date upon which such responsible plan fiduciary or covered plan administrator states that it is required to comply with the applicable reporting or disclosure requirement, unless such disclo-

sure is precluded due to extraordinary circumstances beyond the covered service provider's control, in which case the information shall be disclosed as soon as practicable.

(vii) No contract or arrangement will fail to be reasonable under this subparagraph solely because the covered service provider, acting in good faith and with reasonable diligence, makes an error or omission in disclosing the information required pursuant to clause (iii) (or a change to such information disclosed pursuant to clause (v)(II)) or clause (vi), provided that the covered service provider discloses the correct information to the responsible plan fiduciary as soon as practicable, but not later than 30 days from the date on which the covered service provider knows of such error or omission.

(viii)(I) Pursuant to subsection (a), subparagraphs (C) and (D) of section 1106(a)(1) of this title shall not apply to a responsible plan fiduciary, notwithstanding any failure by a covered service provider to disclose information required under clause (iii), if the following conditions are met:

(aa) The responsible plan fiduciary did not know that the covered service provider failed or would fail to make required disclosures and reasonably believed that the covered service provider disclosed the information required to be disclosed.

(bb) The responsible plan fiduciary, upon discovering that the covered service provider failed to disclose the required information, requests in writing that the covered service provider furnish such information.

(cc) If the covered service provider fails to comply with a written request described in subclause (II) within 90 days of the request, the responsible plan fiduciary notifies the Secretary of the covered service provider's failure, in accordance with subclauses (II) and (III).

(II) A notice described in subclause (I)(cc) shall contain—

- (aa) the name of the covered plan;
- (bb) the plan number used for the annual report on the covered plan;
- (cc) the plan sponsor's name, address, and employer identification number;
- (dd) the name, address, and telephone number of the responsible plan fiduciary;
- (ee) the name, address, phone number, and, if known, employer identification number of the covered service provider;
- (ff) a description of the services provided to the covered plan;
- (gg) a description of the information that the covered service provider failed to disclose;
- (hh) the date on which such information was requested in writing from the covered service provider; and
- (ii) a statement as to whether the covered service provider continues to provide services to the plan.

(III) A notice described in subclause (I)(cc) shall be filed with the Department not later than 30 days following the earlier of—

- (aa) The covered service provider's refusal to furnish the information requested by the

written request described in subclause (I)(bb); or

(bb) 90 days after the written request referred to in subclause (I)(cc) is made.

(IV) If the covered service provider fails to comply with the written request under subclause (I)(bb) within 90 days of such request, the responsible plan fiduciary shall determine whether to terminate or continue the contract or arrangement under section 1104 of this title. If the requested information relates to future services and is not disclosed promptly after the end of the 90-day period, the responsible plan fiduciary shall terminate the contract or arrangement as expeditiously as possible, consistent with such duty of prudence.

(ix) Nothing in this subparagraph shall be construed to supersede any provision of State law that governs disclosures by parties that provide the services described in this section, except to the extent that such law prevents the application of a requirement of this section.

(3) A loan to an employee stock ownership plan (as defined in section 1107(d)(6) of this title), if—

(A) such loan is primarily for the benefit of participants and beneficiaries of the plan, and

(B) such loan is at an interest rate which is not in excess of a reasonable rate.

If the plan gives collateral to a party in interest for such loan, such collateral may consist only of qualifying employer securities (as defined in section 1107(d)(5) of this title).

(4) The investment of all or part of a plan's assets in deposits which bear a reasonable interest rate in a bank or similar financial institution supervised by the United States or a State, if such bank or other institution is a fiduciary of such plan and if—

(A) the plan covers only employees of such bank or other institution and employees of affiliates of such bank or other institution, or

(B) such investment is expressly authorized by a provision of the plan or by a fiduciary (other than such bank or institution or affiliate thereof) who is expressly empowered by the plan to so instruct the trustee with respect to such investment.

(5) Any contract for life insurance, health insurance, or annuities with one or more insurers which are qualified to do business in a State, if the plan pays no more than adequate consideration, and if each such insurer or insurers is—

(A) the employer maintaining the plan, or

(B) a party in interest which is wholly owned (directly or indirectly) by the employer maintaining the plan, or by any person which is a party in interest with respect to the plan, but only if the total premiums and annuity considerations written by such insurers for life insurance, health insurance, or annuities for all plans (and their employers) with respect to which such insurers are parties in interest (not including premiums or annuity considerations written by the employer maintaining the plan) do not ex-

ceed 5 percent of the total premiums and annuity considerations written for all lines of insurance in that year by such insurers (not including premiums or annuity considerations written by the employer maintaining the plan).

(6) The providing of any ancillary service by a bank or similar financial institution supervised by the United States or a State, if such bank or other institution is a fiduciary of such plan, and if—

(A) such bank or similar financial institution has adopted adequate internal safeguards which assure that the providing of such ancillary service is consistent with sound banking and financial practice, as determined by Federal or State supervisory authority, and

(B) the extent to which such ancillary service is provided is subject to specific guidelines issued by such bank or similar financial institution (as determined by the Secretary after consultation with Federal and State supervisory authority), and adherence to such guidelines would reasonably preclude such bank or similar financial institution from providing such ancillary service (i) in an excessive or unreasonable manner, and (ii) in a manner that would be inconsistent with the best interests of participants and beneficiaries of employee benefit plans.

Such ancillary services shall not be provided at more than reasonable compensation.

(7) The exercise of a privilege to convert securities, to the extent provided in regulations of the Secretary, but only if the plan receives no less than adequate consideration pursuant to such conversion.

(8) Any transaction between a plan and (i) a common or collective trust fund or pooled investment fund maintained by a party in interest which is a bank or trust company supervised by a State or Federal agency or (ii) a pooled investment fund of an insurance company qualified to do business in a State, if—

(A) the transaction is a sale or purchase of an interest in the fund,

(B) the bank, trust company, or insurance company receives not more than reasonable compensation, and

(C) such transaction is expressly permitted by the instrument under which the plan is maintained, or by a fiduciary (other than the bank, trust company, or insurance company, or an affiliate thereof) who has authority to manage and control the assets of the plan.

(9) The making by a fiduciary of a distribution of the assets of the plan in accordance with the terms of the plan if such assets are distributed in the same manner as provided under section 1344 of this title (relating to allocation of assets).

(10) Any transaction required or permitted under part 1 of subtitle E of subchapter III.

(11) 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 1411 of this title.

(12) The sale by a plan to a party in interest on or after December 18, 1987, of any stock, if—

(A) the requirements of paragraphs (1) and (2) of subsection (e) are met with respect to such stock,

(B) on the later of the date on which the stock was acquired by the plan, or January 1, 1975, such stock constituted a qualifying employer security (as defined in section 1107(d)(5) of this title as then in effect), and

(C) such stock does not constitute a qualifying employer security (as defined in section 1107(d)(5) of this title as in effect at the time of the sale).

(13) Any transfer made before January 1, 2033, of excess pension assets from a defined benefit plan to a retiree health account in a qualified transfer permitted under section 420 of title 26 (as in effect on December 29, 2022).

(14) Any transaction in connection with the provision of investment advice described in section 1002(21)(A)(ii) of this title to a participant or beneficiary of an individual account plan that permits such participant or beneficiary to direct the investment of assets in their individual account, if—

(A) the transaction is—

(i) the provision of the investment advice to the participant or beneficiary of the plan with respect to a security or other property available as an investment under the plan,

(ii) the acquisition, holding, or sale of a security or other property available as an investment under the plan pursuant to the investment advice, or

(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 an acquisition, holding, or sale of a security or other property available as an investment under the plan pursuant to the investment advice; and

(B) the requirements of subsection (g) are met.

(15)(A) Any transaction involving the purchase or sale of securities, or other property (as determined by the Secretary), between a plan and a party in interest (other than a fiduciary described in section 1002(21)(A) of this title) with respect to a plan if—

(i) the transaction involves a block trade,

(ii) at the time of the transaction, the interest of the plan (together with the interests of any other plans maintained by the same plan sponsor), does not exceed 10 percent of the aggregate size of the block trade,

(iii) the terms of the transaction, including the price, are at least as favorable to the plan as an arm's length<sup>3</sup> transaction, and

(iv) the compensation associated with the purchase and sale is not greater than the compensation associated with an arm's length<sup>3</sup> transaction with an unrelated party.

(B) For purposes of this paragraph, the term "block trade" means any trade of at least

<sup>3</sup> So in original. Probably should be "arm's-length".

10,000 shares or with a market value of at least \$200,000 which will be allocated across two or more unrelated client accounts of a fiduciary.

(16) Any transaction involving the purchase or sale of securities, or other property (as determined by the Secretary), between a plan and a party in interest if—

(A) the transaction is executed through an electronic communication network, alternative trading system, or similar execution system or trading venue subject to regulation and oversight by—

(i) the applicable Federal regulating entity, or

(ii) such foreign regulatory entity as the Secretary may determine by regulation,

(B) either—

(i) the transaction is effected pursuant to rules designed to match purchases and sales at the best price available through the execution system in accordance with applicable rules of the Securities and Exchange Commission or other relevant governmental authority, or

(ii) neither the execution system nor the parties to the transaction take into account the identity of the parties in the execution of trades,

(C) the price and compensation associated with the purchase and sale are not greater than the price and compensation associated with an arm's length<sup>3</sup> transaction with an unrelated party,

(D) if the party in interest has an ownership interest in the system or venue described in subparagraph (A), the system or venue has been authorized by the plan sponsor or other independent fiduciary for transactions described in this paragraph, and

(E) not less than 30 days prior to the initial transaction described in this paragraph executed through any system or venue described in subparagraph (A), a plan fiduciary is provided written or electronic notice of the execution of such transaction through such system or venue.

(17)(A) Transactions described in subparagraphs (A), (B), and (D) of section 1106(a)(1) of this title between a plan and a person that is a party in interest other than a fiduciary (or an affiliate) who has or exercises any discretionary authority or control with respect to the investment of the plan assets involved in the transaction or renders investment advice (within the meaning of section 1002(21)(A)(ii) of this title) with respect to those assets, solely by reason of providing services to the plan or solely by reason of a relationship to such a service provider described in subparagraph (F), (G), (H), or (I) of section 1002(14) of this title, or both, but only if in connection with such transaction the plan receives no less, nor pays no more, than adequate consideration.

(B) For purposes of this paragraph, the term "adequate consideration" means—

(i) in the case of a security for which there is a generally recognized market—

(I) the price of the security prevailing on a national securities exchange which is registered under section 6 of the Securities

Exchange Act of 1934 [15 U.S.C. 78f], taking into account factors such as the size of the transaction and marketability of the security, or

(II) if the security is not traded on such a national securities exchange, a price not less favorable to the plan than the offering price for the security as established by the current bid and asked prices quoted by persons independent of the issuer and of the party in interest, taking into account factors such as the size of the transaction and marketability of the security, and

(ii) in the case of an asset other than a security for which there is a generally recognized market, the fair market value of the asset as determined in good faith by a fiduciary or fiduciaries in accordance with regulations prescribed by the Secretary.

(18) FOREIGN EXCHANGE TRANSACTIONS.—Any foreign exchange transactions, between a bank or broker-dealer (or any affiliate of either), and a plan (as defined in section 1002(3) of this title) with respect to which such bank or broker-dealer (or affiliate) is a trustee, custodian, fiduciary, or other party in interest, if—

(A) the transaction is in connection with the purchase, holding, or sale of securities or other investment assets (other than a foreign exchange transaction unrelated to any other investment in securities or other investment assets),

(B) at the time the foreign exchange transaction is entered into, the terms of the transaction are not less favorable to the plan than the terms generally available in comparable arm's length<sup>3</sup> foreign exchange transactions between unrelated parties, or the terms afforded by the bank or broker-dealer (or any affiliate of either) in comparable arm's-length foreign exchange transactions involving unrelated parties,

(C) the exchange rate used by such bank or broker-dealer (or affiliate) for a particular foreign exchange transaction does not deviate by more than 3 percent from the interbank bid and asked rates for transactions of comparable size and maturity at the time of the transaction as displayed on an independent service that reports rates of exchange in the foreign currency market for such currency, and

(D) the bank or broker-dealer (or any affiliate of either) does not have investment discretion, or provide investment advice, with respect to the transaction.

(19) CROSS TRADING.—Any transaction described in sections 1106(a)(1)(A) and 1106(b)(2) of this title involving the purchase and sale of a security between a plan and any other account managed by the same investment manager, if—

(A) the transaction is a purchase or sale, for no consideration other than cash payment against prompt delivery of a security for which market quotations are readily available,

(B) the transaction is effected at the independent current market price of the security (within the meaning of section 270.17a-7(b) of title 17, Code of Federal Regulations),

(C) no brokerage commission, fee (except for customary transfer fees, the fact of which is disclosed pursuant to subparagraph (D)), or other remuneration is paid in connection with the transaction,

(D) a fiduciary (other than the investment manager engaging in the cross-trades or any affiliate) for each plan participating in the transaction authorizes in advance of any cross-trades (in a document that is separate from any other written agreement of the parties) the investment manager to engage in cross trades at the investment manager's discretion, after such fiduciary has received disclosure regarding the conditions under which cross trades may take place (but only if such disclosure is separate from any other agreement or disclosure involving the asset management relationship), including the written policies and procedures of the investment manager described in subparagraph (H),

(E) each plan participating in the transaction has assets of at least \$100,000,000, except that if the assets of a plan are invested in a master trust containing the assets of plans maintained by employers in the same controlled group (as defined in section 1107(d)(7) of this title), the master trust has assets of at least \$100,000,000,

(F) the investment manager provides to the plan fiduciary who authorized cross trading under subparagraph (D) a quarterly report detailing all cross trades executed by the investment manager in which the plan participated during such quarter, including the following information, as applicable: (i) the identity of each security bought or sold; (ii) the number of shares or units traded; (iii) the parties involved in the cross-trade; and (iv) trade price and the method used to establish the trade price,

(G) the investment manager does not base its fee schedule on the plan's consent to cross trading, and no other service (other than the investment opportunities and cost savings available through a cross trade) is conditioned on the plan's consent to cross trading,

(H) the investment manager has adopted, and cross-trades are effected in accordance with, written cross-trading policies and procedures that are fair and equitable to all accounts participating in the cross-trading program, and that include a description of the manager's pricing policies and procedures, and the manager's policies and procedures for allocating cross trades in an objective manner among accounts participating in the cross-trading program, and

(I) the investment manager has designated an individual responsible for periodically reviewing such purchases and sales to ensure compliance with the written policies and procedures described in subparagraph (H), and following such review, the individual shall issue an annual written report no later than 90 days following the period to which it relates signed under penalty of perjury to the plan fiduciary who authorized cross trading under subparagraph (D) describing the

steps performed during the course of the review, the level of compliance, and any specific instances of non-compliance.

The written report under subparagraph (I) shall also notify the plan fiduciary of the plan's right to terminate participation in the investment manager's cross-trading program at any time.

(20)(A) Except as provided in subparagraphs (B) and (C), a transaction described in section 1106(a) of this title in connection with the acquisition, holding, or disposition of any security or commodity, if the transaction is corrected before the end of the correction period.

(B) Subparagraph (A) does not apply to any transaction between a plan and a plan sponsor or its affiliates that involves the acquisition or sale of an employer security (as defined in section 1107(d)(1) of this title) or the acquisition, sale, or lease of employer real property (as defined in section 1107(d)(2) of this title).

(C) In the case of any fiduciary or other party in interest (or any other person knowingly participating in such transaction), subparagraph (A) does not apply to any transaction if, at the time the transaction occurs, such fiduciary or party in interest (or other person) knew (or reasonably should have known) that the transaction would (without regard to this paragraph) constitute a violation of section 1106(a) of this title.

(D) For purposes of this paragraph, the term "correction period" means, in connection with a fiduciary or party in interest (or other person knowingly participating in the transaction), the 14-day period beginning on the date on which such fiduciary or party in interest (or other person) discovers, or reasonably should have discovered, that the transaction would (without regard to this paragraph) constitute a violation of section 1106(a) of this title.

(E) For purposes of this paragraph—

(i) The term "security" has the meaning given such term by section 475(c)(2) of title 26 (without regard to subparagraph (F)(iii) and the last sentence thereof).

(ii) The term "commodity" has the meaning given such term by section 475(e)(2) of title 26 (without regard to subparagraph (D)(iii) thereof).

(iii) The term "correct" means, with respect to a transaction—

(I) to undo the transaction to the extent possible and in any case to make good to the plan or affected account any losses resulting from the transaction, and

(II) to restore to the plan or affected account any profits made through the use of assets of the plan.

(21) The provision of a de minimis financial incentive described in section 401(k)(4)(A) or section 403(b)(12)(A) of title 26.

**(c) Fiduciary benefits and compensation not prohibited by section 1106**

Nothing in section 1106 of this title shall be construed to prohibit any fiduciary from—

(1) receiving any benefit to which he may be entitled as a participant or beneficiary in the

plan, so long as the benefit is computed and paid on a basis which is consistent with the terms of the plan as applied to all other participants and beneficiaries;

(2) receiving any reasonable compensation for services rendered, or for the reimbursement of expenses properly and actually incurred, in the performance of his duties with the plan; except that no person so serving who already receives full time pay from an employer or an association of employers, whose employees are participants in the plan, or from an employee organization whose members are participants in such plan shall receive compensation from such plan, except for reimbursement of expenses properly and actually incurred; or

(3) serving as a fiduciary in addition to being an officer, employee, agent, or other representative of a party in interest.

**(d) Owner-employees; family members; shareholder employees**

(1) Section 1107(b) of this title and subsections (b), (c), and (e) of this section shall not apply to a transaction in which a plan directly or indirectly—

(A) lends any part of the corpus or income of the plan to,

(B) pays any compensation for personal services rendered to the plan to, or

(C) acquires for the plan any property from, or sells any property to,

any person who is with respect to the plan an owner-employee (as defined in section 401(c)(3) of title 26), a member of the family (as defined in section 267(c)(4) of such title) of any such owner-employee, or any corporation in which any such owner-employee owns, directly or indirectly, 50 percent or more of the total combined voting power of all classes of stock entitled to vote or 50 percent or more of the total value of shares of all classes of stock of the corporation.

(2)(A) For purposes of paragraph (1), the following shall be treated as owner-employees:

(i) A shareholder-employee.

(ii) A participant or beneficiary of an individual retirement plan (as defined in section 7701(a)(37) of title 26).

(iii) An employer or association of employees which establishes such an individual retirement plan under section 408(c) of such title.

(B) Paragraph (1)(C) shall not apply to a transaction which consists of a sale of employer securities to an employee stock ownership plan (as defined in section 1107(d)(6) of this title) by a shareholder-employee, a member of the family (as defined in section 267(c)(4) of such title) of any such owner-employee, or a corporation in which such a shareholder-employee owns stock representing a 50 percent or greater interest described in paragraph (1).

(C) For purposes of paragraph (1)(A), the term “owner-employee” shall only include a person described in clause (ii) or (iii) of subparagraph (A).

(3) For purposes of paragraph (2), the term “shareholder-employee” means an employee or officer of an S corporation (as defined in section

1361(a)(1) of such title) who owns (or is considered as owning within the meaning of section 318(a)(1) of such title) more than 5 percent of the outstanding stock of the corporation on any day during the taxable year of such corporation.

**(e) Acquisition or sale by plan of qualifying employer securities; acquisition, sale, or lease by plan of qualifying employer real property**

Sections 1106 and 1107 of this title shall not apply to the acquisition or sale by a plan of qualifying employer securities (as defined in section 1107(d)(5) of this title) or acquisition, sale or lease by a plan of qualifying employer real property (as defined in section 1107(d)(4) of this title)—

(1) if such acquisition, sale, or lease is for adequate consideration (or in the case of a marketable obligation, at a price not less favorable to the plan than the price determined under section 1107(e)(1) of this title),

(2) if no commission is charged with respect thereto, and

(3) if—

(A) the plan is an eligible individual account plan (as defined in section 1107(d)(3) of this title), or

(B) in the case of an acquisition or lease of qualifying employer real property by a plan which is not an eligible individual account plan, or of an acquisition of qualifying employer securities by such a plan, the lease or acquisition is not prohibited by section 1107(a) of this title.

**(f) Applicability of statutory prohibitions to mergers or transfers**

Section 1106(b)(2) of this title shall not apply to any merger or transfer described in subsection (b)(11).

**(g) Provision of investment advice to participant and beneficiaries**

**(1) In general**

The prohibitions provided in section 1106 of this title shall not apply to transactions described in subsection (b)(14) if the investment advice provided by a fiduciary adviser is provided under an eligible investment advice arrangement.

**(2) Eligible investment advice arrangement**

For purposes of this subsection, the term “eligible investment advice arrangement” means an arrangement—

(A) which either—

(i) provides that any fees (including any commission or other compensation) received by the fiduciary adviser for investment advice or with respect to the sale, holding, or acquisition of any security or other property for purposes of investment of plan assets do not vary depending on the basis of any investment option selected, or

(ii) uses a computer model under an investment advice program meeting the requirements of paragraph (3) in connection with the provision of investment advice by a fiduciary adviser to a participant or beneficiary, and

(B) with respect to which the requirements of paragraph (4), (5), (6), (7), (8), and (9) are met.



**(3) Investment advice program using computer model**

**(A) In general**

An investment advice program meets the requirements of this paragraph if the requirements of subparagraphs (B), (C), and (D) are met.

**(B) Computer model**

The requirements of this subparagraph are met if the investment advice provided under the investment advice program is provided pursuant to a computer model that—

(i) applies generally accepted investment theories that take into account the historic returns of different asset classes over defined periods of time,

(ii) utilizes relevant information about the participant, which may include age, life expectancy, retirement age, risk tolerance, other assets or sources of income, and preferences as to certain types of investments,

(iii) utilizes prescribed objective criteria to provide asset allocation portfolios comprised of investment options available under the plan,

(iv) operates in a manner that is not biased in favor of investments offered by the fiduciary adviser or a person with a material affiliation or contractual relationship with the fiduciary adviser, and

(v) takes into account all investment options under the plan in specifying how a participant's account balance should be invested and is not inappropriately weighted with respect to any investment option.

**(C) Certification**

**(i) In general**

The requirements of this subparagraph are met with respect to any investment advice program if an eligible investment expert certifies, prior to the utilization of the computer model and in accordance with rules prescribed by the Secretary, that the computer model meets the requirements of subparagraph (B).

**(ii) Renewal of certifications**

If, as determined under regulations prescribed by the Secretary, there are material modifications to a computer model, the requirements of this subparagraph are met only if a certification described in clause (i) is obtained with respect to the computer model as so modified.

**(iii) Eligible investment expert**

The term “eligible investment expert” means any person—

(I) which meets such requirements as the Secretary may provide, and

(II) does not bear any material affiliation or contractual relationship with any investment adviser or a related person thereof (or any employee, agent, or registered representative of the investment adviser or related person).

**(D) Exclusivity of recommendation**

The requirements of this subparagraph are met with respect to any investment advice program if—

(i) the only investment advice provided under the program is the advice generated by the computer model described in subparagraph (B), and

(ii) any transaction described in subsection (b)(14)(A)(ii) occurs solely at the direction of the participant or beneficiary.

Nothing in the preceding sentence shall preclude the participant or beneficiary from requesting investment advice other than that described in subparagraph (A), but only if such request has not been solicited by any person connected with carrying out the arrangement.

**(4) Express authorization by separate fiduciary**

The requirements of this paragraph are met with respect to an arrangement if the arrangement is expressly authorized by a plan fiduciary other than the person offering the investment advice program, any person providing investment options under the plan, or any affiliate of either.

**(5) Annual audit**

The requirements of this paragraph are met if an independent auditor, who has appropriate technical training or experience and proficiency and so represents in writing—

(A) conducts an annual audit of the arrangement for compliance with the requirements of this subsection, and

(B) following completion of the annual audit, issues a written report to the fiduciary who authorized use of the arrangement which presents its specific findings regarding compliance of the arrangement with the requirements of this subsection.

For purposes of this paragraph, an auditor is considered independent if it is not related to the person offering the arrangement to the plan and is not related to any person providing investment options under the plan.

**(6) Disclosure**

The requirements of this paragraph are met if—

(A) the fiduciary adviser provides to a participant or a beneficiary before the initial provision of the investment advice with regard to any security or other property offered as an investment option, a written notification (which may consist of notification by means of electronic communication)—

(i) of the role of any party that has a material affiliation or contractual relationship with the fiduciary adviser in the development of the investment advice program and in the selection of investment options available under the plan,

(ii) of the past performance and historical rates of return of the investment options available under the plan,

(iii) 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,

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

(v)<sup>4</sup> the manner, and under what circumstances, any participatory or beneficiary information provided under the arrangement will be used or disclosed,

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

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

(viii) 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, and

(B) at all times during the provision of advisory services to the participant or beneficiary, the fiduciary adviser—

(i) maintains the information described in subparagraph (A) in accurate form and in the manner described in paragraph (8),

(ii) provides, without charge, accurate information to the recipient of the advice no less frequently than annually,

(iii) provides, without charge, accurate information to the recipient of the advice upon request of the recipient, and

(iv) provides, without charge, accurate information to the recipient of the advice concerning any material change to the information required to be provided to the recipient of the advice at a time reasonably contemporaneous to the change in information.

#### **(7) Other conditions**

The requirements of this paragraph are met if—

(A) 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,

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

(C) 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

(D) 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<sup>3</sup> transaction would be.

#### **(8) Standards for presentation of information**

##### **(A) In general**

The requirements of this paragraph are met if the notification required to be provided to participants and beneficiaries under paragraph (6)(A) is written in a clear and conspicuous manner and in a manner cal-

culated to be understood by the average plan participant and is 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 (6)(A)(iii) which meets the requirements of subparagraph (A).

#### **(9) Maintenance for 6 years of evidence of compliance**

The requirements of this paragraph are met if a fiduciary adviser who has provided advice referred to in paragraph (1) maintains, for a period of not less than 6 years after the provision of the advice, 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 1106 of this title 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.

#### **(10) 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 1002(21)(A)(ii) of this title (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 eligible investment advice 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 eligible investment advice arrangement require compliance by the fiduciary adviser with the requirements of this subsection, and

(iii) the terms of the eligible investment advice 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 eligible investment advice arrangement for the provision of investment advice referred to in section 1002(21)(A)(ii) of

<sup>4</sup> So in original. The word "of" probably should appear.

this title. 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 1002(21)(A)(ii) of this title.

**(11) 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 referred to in section 1002(21)(A)(ii) of this title by the person to a participant or beneficiary of the plan 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 (b)(4) or a savings association (as defined in section 1813(b)(1) of title 12), 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 clauses (i) through (v) who satisfies the requirements of applicable insurance, banking, and securities laws relating to the provision of the advice.

For purposes of this part, a person who develops the computer model described in paragraph (3)(B) or markets the investment advice program or computer model shall be treated as a person who is a fiduciary of the plan by reason of the provision of investment advice referred to in section 1002(21)(A)(ii) of this title to a participant or beneficiary and shall be treated as a fiduciary adviser for purposes of this subsection and subsection (b)(14), except that the Secretary may prescribe rules under which only 1 fiduciary adviser may elect to be treated as a fiduciary with respect to the plan.

**(B) Affiliate**

The term “affiliate” of another entity means an affiliated person of the entity (as defined in section 80a-2(a)(3) of title 15).

**(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).

**(h) Provision of pharmacy benefit services**

**(1) In general**

Provided that all of the conditions described in paragraph (2) are met, the restrictions imposed by subsections (a), (b)(1), and (b)(2) of section 1106 of this title shall not apply to—

(A) the offering of pharmacy benefit services to a group health plan that is sponsored by an entity described in section 1002(37)(G)(vi) of this title or to any other group health plan that is sponsored by a regional council, local union, or other labor organization affiliated with such entity;

(B) the purchase of pharmacy benefit services by plan participants and beneficiaries of a group health plan that is sponsored by an entity described in section 1002(37)(G)(vi) of this title or of any other group health plan that is sponsored by a regional council, local union, or other labor organization affiliated with such entity; or

(C) the operation or implementation of pharmacy benefit services by an entity described in section 1002(37)(G)(vi) of this title or by any other group health plan that is sponsored by a regional council, local union, or other labor organization affiliated with such entity,

in any arrangement where such entity described in section 1002(37)(G)(vi) of this title or any related organization or subsidiary of such entity provides pharmacy benefit services that include prior authorization and appeals, a retail pharmacy network, pharmacy benefit administration, mail order fulfillment, formulary support, manufacturer payments, audits, and specialty pharmacy and goods, to any such group health plan.

**(2) Conditions**

The conditions described in this paragraph are the following:

(A) The terms of the arrangement are at least as favorable to the group health plan as such group health plan could obtain in a similar arm's length arrangement with an unrelated third party.

(B) At least 50 percent of the providers participating in the pharmacy benefit services offered by the arrangement are unrelated to the contributing employers or any other party in interest with respect to the group health plan.

(C) The group health plan retains an independent fiduciary who will be responsible for monitoring the group health plan's consultants, contractors, subcontractors, and other service providers for purposes of pharmacy benefit services described in paragraph (1)

offered by such entity or any of its related organizations or subsidiaries and monitors the transactions of such entity and any of its related organizations or subsidiaries to ensure that all conditions of this exemption are satisfied during each plan year.

(D) Any decisions regarding the provision of pharmacy benefit services described in paragraph (1) are made by the group health plan's independent fiduciary, based on objective standards developed by the independent fiduciary in reliance on information provided by the arrangement.

(E) The independent fiduciary of the group health plan provides an annual report to the Secretary and the congressional committees of jurisdiction attesting that the conditions described in subparagraphs (C) and (D) have been met for the applicable plan year, together with a statement that use of the arrangement's services are in the best interest of the participants and beneficiaries in the aggregate for that plan year compared to other similar arrangements the group health plan could have obtained in transactions with an unrelated third party.

(F) The arrangement is not designed to benefit any party in interest with respect to the group health plan.

### (3) Violations

In the event an entity described in section 1002(37)(G)(vi) of this title or any affiliate of such entity violates any of the conditions of such exemption, such exemption shall not apply with respect to such entity or affiliate and all enforcement and claims available under this chapter shall apply with respect to such entity or affiliate.

### (4) Rule of construction

Nothing in this subsection shall be construed to modify any obligation of a group health plan otherwise set forth in this chapter.

### (5) Group health plan

In this subsection, the term "group health plan" has the meaning given such term in section 1191b(a) of this title.

(Pub. L. 93-406, title I, § 408, Sept. 2, 1974, 88 Stat. 883; Pub. L. 96-364, title III, § 308, Sept. 26, 1980, 94 Stat. 1295; Pub. L. 97-354, § 5(a)(43), Oct. 19, 1982, 96 Stat. 1697; Pub. L. 99-514, title XI, § 1114(b)(15)(B), title XVIII, § 1898(i)(1), Oct. 22, 1986, 100 Stat. 2452, 2957; Pub. L. 101-239, title VII, §§ 7881(l)(5), 7891(a), 7894(e)(4)(A), Dec. 19, 1989, 103 Stat. 2443, 2445, 2450; Pub. L. 101-508, title XII, § 12012(b), Nov. 5, 1990, 104 Stat. 1388-571; Pub. L. 103-465, title VII, § 731(c)(4)(C), Dec. 8, 1994, 108 Stat. 5004; Pub. L. 104-188, title I, § 1704(n)(2), Aug. 20, 1996, 110 Stat. 1886; Pub. L. 105-34, title XV, § 1506(b)(2), Aug. 5, 1997, 111 Stat. 1066; Pub. L. 106-170, title V, § 535(a)(2)(C), Dec. 17, 1999, 113 Stat. 1934; Pub. L. 107-16, title VI, § 612(b), June 7, 2001, 115 Stat. 100; Pub. L. 108-218, title II, § 204(b)(3), Apr. 10, 2004, 118 Stat. 609; Pub. L. 108-357, title VII, § 709(a)(3), Oct. 22, 2004, 118 Stat. 1551; Pub. L. 109-280, title I, § 108(a)(11), formerly § 107(a)(11), title VI, §§ 601(a)(1), (2), 611(a)(1), (c)(1), (d)(1), (e)(1), (g)(1), 612(a), Aug. 17, 2006, 120 Stat. 819, 952, 953, 967-969, 971, 972, 975, renumbered Pub. L. 111-192, title II,

§ 202(a), June 25, 2010, 124 Stat. 1297; Pub. L. 110-458, title I, § 106(a)(1), (b)(1), Dec. 23, 2008, 122 Stat. 5106; Pub. L. 112-141, div. D, title II, § 40241(b), July 6, 2012, 126 Stat. 859; Pub. L. 114-41, title II, § 2007(b), July 31, 2015, 129 Stat. 459; Pub. L. 116-94, div. P, title XIII, § 1302(a), Dec. 20, 2019, 133 Stat. 3204; Pub. L. 116-260, div. BB, title II, § 202(a), Dec. 27, 2020, 134 Stat. 2894; Pub. L. 117-328, div. T, title I, § 113(d), title VI, § 606(b)(3), Dec. 29, 2022, 136 Stat. 5296, 5397.)

## Editorial Notes

### REFERENCES IN TEXT

This chapter, referred to in subsecs. (a), (b)(2)(B)(vi)(I), and (h)(3), (4), was in the original "this Act", meaning Pub. L. 93-406, known as the Employee Retirement Income Security Act of 1974. Titles I, III, and IV of such Act are classified principally to this chapter. For complete classification of this Act to the Code, see Short Title note set out under section 1001 of this title and Tables.

The Investment Advisers Act of 1940, referred to in subsec. (g)(11)(A)(i), is title II of act Aug. 22, 1940, ch. 686, 54 Stat. 847, which is classified generally to subchapter II (§ 80b-1 et seq.) of chapter 2D of Title 15, Commerce and Trade. For complete classification of this Act to the Code, see section 80b-20 of Title 15 and Tables.

The Securities Exchange Act of 1934, referred to in subsec. (g)(11)(A)(iv), is act June 6, 1934, ch. 404, 48 Stat. 881, which is classified principally to chapter 2B (§ 78a et seq.) of Title 15, Commerce and Trade. For complete classification of this Act to the Code, see section 78a of Title 15 and Tables.

### AMENDMENTS

2022—Subsec. (b)(13). Pub. L. 117-328, § 606(b)(3), substituted "January 1, 2033" for "January 1, 2026" and "(as in effect on December 29, 2022)" for "(as in effect on July 31, 2015)".

Subsec. (b)(21). Pub. L. 117-328, § 113(d), added par. (21).

2020—Subsec. (b)(2). Pub. L. 116-260 designated existing provisions as subpar. (A) and added subpar. (B).

2019—Subsec. (h). Pub. L. 116-94 added subsec. (h).

2015—Subsec. (b)(13). Pub. L. 114-41 substituted "January 1, 2026" for "January 1, 2022" and "July 31, 2015" for "July 6, 2012". The latter substitution was executed to reflect the probable intent of Congress notwithstanding an extra closing quotation mark in the directory language.

2012—Subsec. (b)(13). Pub. L. 112-141 substituted "January 1, 2022" for "January 1, 2014" and "July 6, 2012" for "August 17, 2006".

2008—Subsec. (b)(18)(C). Pub. L. 110-458, § 106(b)(1), struck out "or less" after "deviate by more".

Subsec. (g)(3)(D)(ii). Pub. L. 110-458, § 106(a)(1)(A), substituted "subsection (b)(14)(A)(ii)" for "subsection (b)(14)(B)(ii)".

Subsec. (g)(6)(A)(i). Pub. L. 110-458, § 106(a)(1)(B), substituted "fiduciary adviser" for "financial adviser".

Subsec. (g)(11)(A). Pub. L. 110-458, § 106(a)(1)(C), substituted "a participant" for "the participant" in introductory and concluding provisions and "subsection (b)(4)" for "section 1108(b)(4) of this title" in cl. (ii).

2006—Subsec. (b)(13). Pub. L. 109-280, § 108(a)(11), formerly § 107(a)(11), as renumbered by Pub. L. 111-192, substituted "August 17, 2006" for "October 22, 2004".

Subsec. (b)(14). Pub. L. 109-280, § 601(a)(1), added par. (14).

Subsec. (b)(15) to (19). Pub. L. 109-280, § 611(a)(1), (c)(1), (d)(1), (e)(1), (g)(1), added pars. (15) to (19).

Subsec. (b)(20). Pub. L. 109-280, § 612(a), added par. (20).

Subsec. (g). Pub. L. 109-280, § 601(a)(2), added subsec. (g).

2004—Subsec. (b)(13). Pub. L. 108-357 substituted "October 22, 2004" for "April 10, 2004".

Pub. L. 108-218 substituted "January 1, 2014" for "January 1, 2006" and "April 10, 2004" for "December 17, 1999".

2001—Subsec. (d)(2)(C). Pub. L. 107-16 added subpar. (C).

1999—Subsec. (b)(13). Pub. L. 106-170 substituted “made before January 1, 2006” for “in a taxable year beginning before January 1, 2001” and “December 17, 1999” for “January 1, 1995”.

1997—Subsec. (d). Pub. L. 105-34 amended subsec. (d) generally, substituting present provisions for provisions exempting transactions involving an owner-employee, a member of the family, or a corporation controlled by any such owner-employee through the ownership, directly or indirectly, of 50 percent or more of the total combined voting power of all classes of stock entitled to vote or 50 percent or more of the total value of shares of all classes of stock of the corporation.

1996—Subsec. (b)(1). Pub. L. 104-188 inserted at end “A loan made by a plan shall not fail to meet the requirements of the preceding sentence by reason of a loan repayment suspension described under section 414(u)(4) of title 26.”

1994—Subsec. (b)(13). Pub. L. 103-465 substituted “2001” for “1996” and “1995” for “1991”.

1990—Subsec. (b)(13). Pub. L. 101-508 added par. (13).

1989—Subsec. (b)(12). Pub. L. 101-239, § 7881(i)(5), added par. (12).

Subsec. (d). Pub. L. 101-239, § 7891(a)(1), in last sentence, substituted “section 401(c)(3) of the Internal Revenue Code of 1986” for “section 401(c)(3) of the Internal Revenue Code of 1954”, which for purposes of codification was translated as “section 401(c)(3) of title 26” thus requiring no change in text.

Pub. L. 101-239, § 7891(a)(2), in last sentence, substituted “section 408 of the Internal Revenue Code of 1986” for “section 408 of the Internal Revenue Code of 1954” and “section 408(c) of the Internal Revenue Code of 1986” for “section 408(c) of such Code” which for purposes of codification were translated as “section 408 of title 26” and “section 408(c) of title 26”, respectively, thus requiring no change in text.

Pub. L. 101-239, § 7894(e)(4)(A), in last sentence, substituted “individual retirement account or individual retirement annuity described in section 408 of title 26 or a retirement bond described in section 409 of title 26 (as effective for obligations issued before January 1, 1984)” for “individual retirement account, individual retirement annuity, or an individual retirement bond (as defined in section 408 or 409 of title 26)” and “section 408(c) of such Code” for “section 408(c) of such code”, which for purposes of codification was translated as “section 408(c) of title 26” thus requiring no change in text.

1986—Subsec. (b)(1)(B). Pub. L. 99-514, § 1114(b)(15)(B), substituted “highly compensated employees (within the meaning of section 414(q) of title 26)” for “highly compensated employees, officers, or shareholders”.

Subsec. (d). Pub. L. 99-514, § 1898(i)(1), struck out “(a),” before “(b),” in introductory provisions.

1982—Subsec. (d). Pub. L. 97-354 substituted “section 1379 of title 26 as in effect on the day before the date of the enactment of the Subchapter S Revision Act of 1982” for “section 1379 of title 26”.

1980—Subsec. (b)(10), (11). Pub. L. 96-364, § 308(a), added pars. (10) and (11).

Subsec. (f). Pub. L. 96-364, § 308(b), added subsec. (f).

#### Statutory Notes and Related Subsidiaries

##### EFFECTIVE DATE OF 2022 AMENDMENT

Amendment by section 113(d) of Pub. L. 117-328 applicable with respect to plan years beginning after Dec. 29, 2022, see section 113(e) of Pub. L. 117-328, set out as a note under section 401 of Title 26, Internal Revenue Code.

Amendment by section 606(b)(3) of 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 2020 AMENDMENT

Pub. L. 116-260, div. BB, title II, § 202(e), Dec. 27, 2020, 134 Stat. 2900, provided that: “The amendments made

by subsections (a) and (c) [enacting section 300gg-46 of Title 42, The Public Health and Welfare, and amending this section] shall apply beginning 1 year after the date of enactment of this Act [Dec. 27, 2020].”

##### 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

Amendment by section 108(a)(11) of 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.

Pub. L. 109-280, title VI, § 601(a)(3), Aug. 17, 2006, 120 Stat. 958, provided that: “The amendments made by this subsection [amending this section] shall apply with respect to advice referred to in section 3(21)(A)(ii) of the Employee Retirement Income Security Act of 1974 [29 U.S.C. 1002(21)(A)(ii)] provided after December 31, 2006.”

Amendment by section 611(a)(1), (c)(1), (d)(1), (e)(1), (g)(1) of Pub. L. 109-280 applicable to transactions occurring after Aug. 17, 2006, see section 611(h)(1) of Pub. L. 109-280, set out as a note under section 4975 of Title 26, Internal Revenue Code.

Amendment by section 612(a) of Pub. L. 109-280 applicable to any transaction which the fiduciary or disqualified person discovers, or reasonably should have discovered, after Aug. 17, 2006, constitutes a prohibited transaction, see section 612(c) of Pub. L. 109-280, set out as a note under section 4975 of Title 26, Internal Revenue Code.

##### EFFECTIVE DATE OF 2001 AMENDMENT

Amendment by Pub. L. 107-16 applicable to years beginning after Dec. 31, 2001, see section 612(c) of Pub. L. 107-16, set out as a note under section 4975 of Title 26, Internal Revenue Code.

##### 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 1997 AMENDMENT

Amendment by Pub. L. 105-34 applicable to taxable years beginning after Dec. 31, 1997, see section 1506(c) of Pub. L. 105-34, set out as a note under section 409 of Title 26, Internal Revenue Code.

##### EFFECTIVE DATE OF 1996 AMENDMENT

Amendment by Pub. L. 104-188 effective as of Dec. 12, 1994, see section 1704(n)(3) of Pub. L. 104-188, set out as a note under section 414 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(i)(5) 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) 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)(4)(B) of Pub. L. 101-239 provided that: “The amendments made by subparagraph (A) [amending this section] shall take effect as if originally included in section 491(b) of the Deficit Reduction Act of 1984 [Pub. L. 98-369].”

#### EFFECTIVE DATE OF 1986 AMENDMENT

Amendment by section 1114(b)(15)(B) of Pub. L. 99-514 applicable to years beginning after Dec. 31, 1988, see section 1114(c)(3) of Pub. L. 99-514, set out as a note under section 414 of Title 26, Internal Revenue Code.

Section 1898(i)(2) of Pub. L. 99-514 provided that: “The amendment made by paragraph (1) [amending this section] shall apply to transactions after the date of the enactment of this Act [Oct. 22, 1986].”

#### EFFECTIVE DATE OF 1982 AMENDMENT

Amendment by Pub. L. 97-354 applicable to taxable years beginning after Dec. 31, 1982, see section 6(a) of Pub. L. 97-354, set out as a note under section 1361 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, §611(g)(3), Aug. 17, 2006, 120 Stat. 975, provided that: “No later than 180 days after the date of the enactment of this Act [Aug. 17, 2006], the Secretary of Labor, after consultation with the Securities and Exchange Commission, shall issue regulations regarding the content of policies and procedures required to be adopted by an investment manager under section 408(b)(19) of the Employee Retirement Income Security Act of 1974 [29 U.S.C. 1108(b)(19)].”

Secretary of the Treasury or his delegate to issue before Feb. 1, 1988, final regulations to carry out amendments made by section 1114 of Pub. L. 99-514, see section 1141 of Pub. L. 99-514, set out as a note under section 401 of Title 26, Internal Revenue Code.

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 EXISTING REGULATIONS

Pub. L. 116-260, div. BB, title II, §202(b), Dec. 27, 2020, 134 Stat. 2899, provided that: “Nothing in the amendments made by subsection (a) [amending this section] shall be construed to affect the applicability of section 2550.408b-2 of title 29, Code of Federal Regulations (or any successor regulations), with respect to any applicable entity other than a covered plan or a covered service provider (as defined in section 408(b)(2)(B)(ii) of the Employee Retirement Income Security Act of 1974 [29 U.S.C. 1108(b)(2)(B)(ii)], as amended by subsection (a)).”

#### TRANSITION RULE

Pub. L. 116-260, div. BB, title II, §202(d), Dec. 27, 2020, 134 Stat. 2900, provided that: “No contract executed prior to the effective date described in subsection (e) [see Effective Date of 2020 Amendment note above] by a group health plan subject to the requirements of section 408(b)(2)(B) of the Employee Retirement Income Security Act of 1974 [29 U.S.C. 1108(b)(2)(B)] (as amended by subsection (a)) or by a health insurance issuer subject to the requirements of section 2746 of the Public Health Service Act [42 U.S.C. 300gg-46] (as added by subsection (c)) shall be subject to the requirements of such section 408(b)(2)(B) or such section 2746, as applicable.”

#### APPLICABILITY OF AMENDMENTS BY PUB. L. 116-94

With respect to a group health plan subject to subsec. (h) of this section and section 4975(c) of Title 26, Inter-

nal Revenue Code, as amended by section 1302(a), (b) of div. P of Pub. L. 116-94, beginning at the end of the fifth plan year of such group health plan that begins after Dec. 20, 2019, subsec. (h) of this section and section 4975(c) of Title 26 to have no force or effect, see section 1302(c) of div. P of Pub. L. 116-94, set out as a note under section 4975 of Title 26.

#### 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.

#### COORDINATION OF 2006 AMENDMENT WITH EXISTING EXEMPTIONS

Any exemption under subsec. (b) of this section provided by amendment by section 601(a)(1), (2) of Pub. L. 109-280 not to alter existing individual or class exemptions provided by statute or administrative action, see section 601(c) of Pub. L. 109-280, set out as a note under section 4975 of Title 26, Internal Revenue Code.

#### PLAN AMENDMENTS NOT REQUIRED UNTIL JANUARY 1, 1989

For provisions directing that if any amendments made by subtitle A or subtitle C of title XI [§§1101-1147 and 1171-1177] or title XVIII [§§1800-1899A] of Pub. L. 99-514 require an amendment to any plan, such plan amendment shall not be required to be made before the first plan year beginning on or after Jan. 1, 1989, see section 1140 of Pub. L. 99-514, as amended, set out as a note under section 401 of Title 26, Internal Revenue Code.

### § 1109. Liability for breach of fiduciary duty

(a) Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 1111 of this title.

(b) No fiduciary shall be liable with respect to a breach of fiduciary duty under this subchapter if such breach was committed before he became a fiduciary or after he ceased to be a fiduciary.

(Pub. L. 93-406, title I, §409, Sept. 2, 1974, 88 Stat. 886.)

### § 1110. Exculpatory provisions; insurance

(a) Except as provided in sections 1105(b)(1) and 1105(d) of this title, any provision in an agreement or instrument which purports to relieve a fiduciary from responsibility or liability for any responsibility, obligation, or duty under this part shall be void as against public policy.

(b) Nothing in this subpart<sup>1</sup> shall preclude—

(1) a plan from purchasing insurance for its fiduciaries or for itself to cover liability or

<sup>1</sup> So in original. This part does not contain subparts.