107TH CONGRESS
2d Session

HOUSE OF REPRESENTATIVES

REPT. 107–383
Part 1

PENSION SECURITY ACT OF 2002

APRIL 4, 2002.—Ordered to be printed

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

R E P O R T

together with

MINORITY VIEWS

[To accompany H.R. 3762]

[Including cost estimate of the Congressional Budget Office]

The Committee on Education and the Workforce, to whom was referred the bill (H.R. 3762) to amend title I of the Employee Retirement Income Security Act of 1974 and the Internal Revenue Code of 1986 to provide additional protections to participants and beneficiaries in individual account plans from excessive investment in employer securities and to promote the provision of retirement investment advice to workers managing their retirement income assets, and to amend the Securities Exchange Act of 1934 to prohibit insider trades during any suspension of the ability of plan participants or beneficiaries to direct investment away from equity securities of the plan sponsor, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment is as follows:

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE AND TABLE OF CONTENTS.

(a) SHORT TITLE.—This Act may be cited as the "Pension Security Act of 2002".

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

Sec. 1. Short title.

TITLE I—IMPROVEMENTS IN PENSION SECURITY

Sec. 101. Periodic pension benefits statements.
Sec. 102. Protection from suspensions, limitations, or restrictions on ability of participant or beneficiary to direct or diversify plan assets.
Sec. 103. Informational and educational support for pension plan fiduciaries.
Sec. 104. Limitations on restrictions of investments in employer securities.
Sec. 105. Prohibited transaction exemption for the provision of investment advice.

Sec. 106. Study regarding impact on retirement savings of participants and beneficiaries by requiring fiduciary consultants for individual account plans.
Sec. 107. Insider trades during pension plan suspension periods prohibited.
Sec. 108. Effective dates of title and related rules.

TITLE II—ADDITIONAL PROVISIONS

Sec. 201. Amendments to Retirement Protection Act of 1994.
Sec. 202. Notice and consent period regarding distributions.
Sec. 203. Annual report dissemination.
Sec. 204. Technical corrections to Saver Act.
Sec. 205. Missing participants.
Sec. 206. Reduced pbgc premium for new plans of small employers.
Sec. 207. Reduction of additional pbgc premium for new and small plans.
Sec. 208. Authorization for PBGC to pay interest on premium overpayment refunds.
Sec. 209. Substantial owner benefits in terminated plans.
Sec. 210. Benefit suspension notice.
Sec. 211. Studies.
Sec. 212. Interest rate range for additional funding requirements.
Sec. 213. Provisions relating to plan amendments.

TITLE I—IMPROVEMENTS IN PENSION SECURITY

SEC. 101. PERIODIC PENSION BENEFITS STATEMENTS.

(a) REQUIREMENTS.—

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

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

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

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

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

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

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

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

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

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

"(i) the total benefits accrued, and

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

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

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

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

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

(2) CONFORMING AMENDMENTS.—

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

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

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

(3) EFFECTIVE DATE OF SUBSECTION.—The amendments made by this subsection shall take effect for plan years beginning on or after January 1, 2003.

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

"(d)(1) The statements required to be provided at least quarterly under subsection (a) shall include (together with the information required in subsection (a)) the following:

"(A) the value of investments allocated to the individual account, including the value of any assets held in the form of employer securities, without regard to whether such securities were contributed by the plan sponsor or acquired at the direction of the plan or of the participant or beneficiary, and an explanation of any limitations or restrictions on the right of the participant or beneficiary to direct an investment; and

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

"(2) The value of any employer securities that are not readily tradable on an established securities market that is required to be reported under paragraph (1)(A) may be determined by using the most recent valuation of the employer securities.

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

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

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

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

(1) in subsection (a)(6), by striking "(5), or (6)" and inserting "(5), (6), or (7)";

(2) by redesignating paragraph (7) of subsection (c) as paragraph (8); and

(3) by inserting after paragraph (6) of subsection (c) the following new paragraph:

"(7) The Secretary may assess a civil penalty against any plan administrator of up to $1,000 a day from the date of such plan administrator's failure or refusal to provide participants or beneficiaries with a benefit statement on at least a quarterly basis in accordance with section 105(a)(1)(A)(iii).".

(e) MODEL STATEMENTS.—The Secretary of Labor shall, not later than January 1, 2003, issue initial guidance and a model benefit statement, written in a manner calculated to be understood by the average plan participant, that may be used by plan administrators in complying with the requirements of section 105 of the Employee Retirement Income Security Act of 1974. The Secretary may promulgate such interim final rules as the Secretary determines are appropriate to carry out the amendments made by this section.

SEC. 102. PROTECTION FROM SUSPENSIONS, LIMITATIONS, OR RESTRICTIONS ON ABILITY OF PARTICIPANT OR BENEFICIARY TO DIRECT OR DIVERSIFY PLAN ASSETS.

(a) NOTICE REQUIREMENTS.—

(1) IN GENERAL.—Section 101 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1021) is amended—

(A) by redesignating the second subsection (h) as subsection (j); and

(B) by inserting after the first subsection (h) the following new subsection:

"(i) NOTICE OF SUSPENSION, LIMITATION, OR RESTRICTION ON ABILITY OF PARTICIPANT OR BENEFICIARY TO DIRECT INVESTMENTS IN INDIVIDUAL ACCOUNT PLAN.—

"(1) IN GENERAL.—In the case of any action having the effect of temporarily suspending, limiting, or restricting any ability of participants or beneficiaries under an applicable individual account plan, which is otherwise available under the terms of such plan, to direct or diversify assets credited to their accounts, if such suspension, limitation, or restriction is for any period of more than 3 consecutive calendar days, the plan administrator shall—

"(A) in advance of taking such action, determine, in accordance with the requirements of part 4, that the expected period of suspension, limitation, or restriction is reasonable, and

"(B) after making the determination under subparagraph (A) and in advance of taking such action, notify the plan participants and beneficiaries of such action in accordance with this subsection.

"(2) NOTICE REQUIREMENTS.—

"(A) IN GENERAL.—The notices described in paragraph (1) shall be written in a manner calculated to be understood by the average plan participant and shall include—

"(i) the reasons for the suspension, limitation, or restriction,

"(ii) an identification of the investments affected,

"(iii) the expected period of the suspension, limitation, or restriction,

"(iv) a statement that the plan administrator has evaluated the reasonableness of the expected period of suspension, limitation, or restriction,

"(v) a statement that the participant or beneficiary should evaluate the appropriateness of their current investment decisions in light of their inability to direct or diversify assets credited to their accounts during the expected period of suspension, limitation, or restriction, and

"(vi) such other matters as the Secretary may include in the model notices issued under subparagraph (E).

"(B) PROVISION OF NOTICE.—Except as otherwise provided in this subsection, notices described in paragraph (1) shall be furnished to all participants and beneficiaries under the plan at least 30 days in advance of the action suspending, limiting, or restricting the ability of the participants or beneficiaries to direct or diversify assets.

"(C) EXCEPTION TO 30-DAY NOTICE REQUIREMENT.—In any case in which—

"(i) a fiduciary of the plan determines, in writing, that a deferral of the suspension, limitation, or restriction would violate the requirements of subparagraph (A) or (B) of section 404(a)(1), or

"(ii) the inability to provide the 30-day advance notice is due to events that were unforeseeable or circumstances beyond the reasonable control of the plan administrator,

subparagraph (B) shall not apply, and the notice shall be furnished to all participants and beneficiaries under the plan as soon as reasonably possible under the circumstances.

"(D) WRITTEN NOTICE.—The notice required to be provided under this subsection shall be in writing, except that such notice may be in electronic or other form to the extent that such form is reasonably accessible to the recipient.

"(E) MODEL NOTICES.—The Secretary shall issue model notices which meet the requirements of this paragraph.

"(3) EXCEPTION FOR SUSPENSIONS, LIMITATIONS, OR RESTRICTIONS WITH LIMITED APPLICABILITY.—In any case in which the suspension, limitation, or restriction described in paragraph (1)—

"(A) applies only to 1 or more individuals, each of whom is the participant, an alternate payee (as defined in section 206(d)(3)(K)), or any other beneficiary pursuant to a qualified domestic relations order (as defined in section 206(d)(3)(B)(i)), or

"(B) applies only to 1 or more participants or beneficiaries in connection with a merger, acquisition, divestiture, or similar transaction involving the plan or plan sponsor and occurs solely in connection with becoming or ceasing to be a participant or beneficiary under the plan by reason of such merger, acquisition, divestiture, or transaction,

the requirement of this subsection that the notice be provided to all participants and beneficiaries shall be treated as met if the notice required under paragraph (1) is provided to all the individuals referred to in subparagraph (A) or (B) to whom the suspension, limitation, or restriction applies as soon as reasonably practicable in advance of the suspension, limitation, or restriction.

"(4) CHANGES IN EXPECTED PERIOD OF SUSPENSION, LIMITATION, OR RESTRICTION.—If, following the furnishing of the notice pursuant to this subsection, there is a change in the expected period of the suspension, limitation, or restriction on the right of a participant or beneficiary to direct or diversify assets, the administrator shall provide affected participants and beneficiaries notice of the change as soon as reasonably practicable in advance of the change. Such notice shall meet the requirements of subparagraphs (A) and (D) of paragraph (2) in relation to the extended suspension, limitation, or restriction.

"(5) REGULATORY EXCEPTIONS.—The Secretary may provide by regulation for additional exceptions to the requirements of this subsection which the Secretary determines are in the interests of participants and beneficiaries.

"(6) GUIDANCE AND MODEL NOTICES.—The Secretary shall issue guidance and model notices which meet the requirements of this subsection.".

(2) ISSUANCE OF INITIAL GUIDANCE AND MODEL NOTICE.—The Secretary of Labor shall issue initial guidance and a model notice pursuant to section 101(i)(6) of the Employee Retirement Income Security Act of 1974 (as added by this subsection) not later than January 1, 2003. The Secretary may promulgate such interim final rules as the Secretary determines are appropriate to carry out the amendments made by this section.

(b) CIVIL PENALTIES FOR FAILURE TO PROVIDE NOTICE.—Section 502 of such Act (as amended by section 2(b)) is amended further—

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

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

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

"(8) The Secretary may assess a civil penalty against a plan administrator of up to $100 a day from the date of the plan administrator's failure or refusal to provide notice to participants and beneficiaries in accordance with section 101(i). For purposes of this paragraph, each violation with respect to any single participant or beneficiary, shall be treated as a separate violation.".

(c) INAPPLICABILITY OF RELIEF FROM FIDUCIARY LIABILITY DURING SUSPENSION OF ABILITY OF PARTICIPANT OR BENEFICIARY TO DIRECT INVESTMENTS.—Section 404(c)(1) of such Act (29 U.S.C. 1104(c)(1)) is amended—

(1) by redesignating subparagraphs (A) and (B) as clauses (i) and (ii), respectively, and by inserting "(A)" after "(c)(1)";

(2) in subparagraph (A)(ii) (as redesignated by paragraph (1)), by inserting before the period the following: ", except that this clause shall not apply in connection with such participant or beneficiary for any 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"; and

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

"(B) If the person referred to in subparagraph (A)(ii) authorizing a suspension meets the requirements of this title in connection with authorizing the suspension, such person shall not be liable under this title for any loss occurring during the suspension as a result of any exercise by the participant or beneficiary of control over assets in his or her account prior to the suspension. Matters to be considered in determining whether such person has satisfied the requirements of this title include whether such person—

"(i) has considered the reasonableness of the expected period of the suspension as required under section 101(i)(1)(A),

"(ii) has provided the notice required under section 101(i)(1)(B), and

"(iii) has acted solely in the interests of plan participants and beneficiaries in determining to enter into the suspension.

"(C) Any limitation or restriction that may govern the frequency of transfers between investment vehicles shall not be treated as a suspension referred to in subparagraph (A)(ii) to the extent such limitation or restriction is disclosed to participants or beneficiaries through the summary plan description or materials describing specific investment alternatives under the plan.".

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

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

"(e) The Secretary shall establish a program under which information and educational resources shall be made available on an ongoing basis to persons serving as fiduciaries under employee pension benefit plans so as to assist such persons in diligently and effectively carrying out their fiduciary duties in accordance with this part.".

SEC. 104. LIMITATIONS ON RESTRICTIONS OF INVESTMENTS IN EMPLOYER SECURITIES.

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

(1) IN GENERAL.—Section 407 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1107) is amended by adding at the end the following new subsection:

"(g)(1) An applicable individual account plan which holds employer securities that are readily tradable on an established securities market may not acquire or hold any employer securities with respect to which there is any restriction on divestment by a participant or beneficiary, unless the plan provides that the restriction—

"(A) is not applicable on or after a date which is not later than the date on which the participant has completed 3 years of service (as defined in section

203(b)(2)) with the employer or (if the plan so provides) 3 years of participation (as defined in section 204(b)(4)) in the plan, or

"(B) is not applicable, with respect to any employer security allocated to the individual account during any calendar quarter, after a date which is not later than 3 years after the end of such quarter.

"(2)(A) For purposes of paragraph (1), the term 'restriction on divestment' includes—

"(i) any failure to offer a broad range of investment alternatives (as may be determined by the Secretary) to which a participant or beneficiary may direct the proceeds from the divestment of employer securities, and

"(ii) any restriction on the ability of a participant or beneficiary to choose from a broad range of otherwise available investment options (as may be determined by the Secretary) to which such proceeds may be so directed, other than a restriction limiting such ability to so choose to a periodic, reasonable opportunity to so choose occurring no less frequently than on a quarterly basis.".

(2) CLERICAL AMENDMENTS.—The heading for section 407 of such Act is amended by striking "10 PERCENT" and the item relating to such section in the table of contents in section 1 of such Act is amended by striking "10 percent".

(3) TRANSITION RULE.—

(A) IN GENERAL.—The amendments made by this subsection shall apply only with respect to assets acquired on or after the effective date of such amendments. In the case of any applicable individual account plan which, on such effective date, holds assets acquired before such date on which there is any restriction on divestment by a participant or beneficiary, such plan shall, before the applicable effective date, provide for the removal of all such restrictions on the applicable percentage of such assets held on such date.

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

Plan years beginning in:	Applicable percentage:
2003	20 percent.
2004	40 percent.
2005	60 percent.
2006	80 percent.
2007 or thereafter	100 percent.

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

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

"(35) LIMITATIONS ON RESTRICTIONS UNDER APPLICABLE DEFINED CONTRIBUTION PLANS ON INVESTMENTS IN EMPLOYER SECURITIES.—

"(A) IN GENERAL.—A trust forming a part of an applicable defined contribution plan shall not constitute a qualified trust under this subsection if the plan acquires or holds any employer securities with respect to which there is any restriction on divestment by a participant or beneficiary on or after the date on which the participant has completed 3 years of participation (as defined in section 411(b)(4)) under the plan or (if the plan so provides) 3 years of service (as defined in section 411(a)(5)) with the employer.

"(B) DEFINITIONS.—For purposes of subparagraph (A)—

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

"(ii) RESTRICTION ON DIVESTMENT.—The term 'restriction on divestment' includes—

"(I) any failure to offer at least 3 diversified investment options in which a participant or beneficiary may direct the proceeds from the divestment of employer securities, and

"(II) any restriction on the ability of a participant or beneficiary to choose from all otherwise available investment options in which such proceeds may be so directed.".

(2) CONFORMING AMENDMENT.—Section 401(a)(28)(B) of such Code (relating to diversification of investments) is amended by adding at the end the following new clause:

"(v) EXCEPTION.—This subparagraph shall not apply to an applicable defined contribution plan (as defined in paragraph (35)(B)(i)).".

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

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

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

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

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

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

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

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

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

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

"(iii) the direct or indirect receipt of fees or other compensation by the fiduciary adviser or an affiliate thereof (or any employee, agent, or registered representative of the fiduciary adviser or affiliate) in connection with the provision of the advice or in connection with a sale, acquisition, or holding of a security or other property pursuant to the advice.".

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

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

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

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

"(i) of all fees or other compensation relating to the advice that the fiduciary adviser or any affiliate thereof is to receive (including compensation provided by any third party) in connection with the provision of the advice or in connection with the sale, acquisition, or holding of the security or other property,

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

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

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

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

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

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

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

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

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

"(2) STANDARDS FOR PRESENTATION OF INFORMATION.—

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

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

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

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

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

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

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

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

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

"(i) the advice is provided by a fiduciary adviser pursuant to an arrangement between the plan sponsor or other fiduciary and the fiduciary adviser for the provision by the fiduciary adviser of investment advice referred to in such section,

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

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

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

"(C) AVAILABILITY OF PLAN ASSETS FOR PAYMENT FOR ADVICE.—Nothing in this part shall be construed to preclude the use of plan assets to pay for

reasonable expenses in providing investment advice referred to in section 3(21)(A)(ii).

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

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

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

"(ii) a bank or similar financial institution referred to in section 408(b)(4), but only if the advice is provided through a trust department of the bank or similar financial institution which is subject to periodic examination and review by Federal or State banking authorities,

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

"(iii) the direct or indirect receipt of fees or other compensation by the fiduciary adviser or an affiliate thereof (or any employee, agent, or registered representative of the fiduciary adviser or affiliate) in connection with the provision of the advice or in connection with a sale, acquisition, or holding of a security or other property pursuant to the advice.

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

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

"(I) of all fees or other compensation relating to the advice that the fiduciary adviser or any affiliate thereof is to receive (including compensation provided by any third party) in connection with the provision of the advice or in connection with the sale, acquisition, or holding of the security or other property,

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

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

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

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

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

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

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

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

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

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

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

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

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

advice at a time reasonably contemporaneous to the material change in information.

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

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

"(i) the advice is provided by a fiduciary adviser pursuant to an arrangement between the plan sponsor or other fiduciary and the fiduciary adviser for the provision by the fiduciary adviser of investment advice referred to in such section,

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

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

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

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

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

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

"(II) a bank or similar financial institution referred to in subsection (d)(4),

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

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

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

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

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

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

SEC. 106. STUDY REGARDING IMPACT ON RETIREMENT SAVINGS OF PARTICIPANTS AND BENEFICIARIES BY REQUIRING FIDUCIARY CONSULTANTS FOR INDIVIDUAL ACCOUNT PLANS.

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

(1) the benefits to plan participants and beneficiaries of engaging independent fiduciary advisers to provide investment advice regarding the assets of the plan to persons who have fiduciary duties with respect to the management or disposition of such assets,

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

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

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

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

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

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

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

SEC. 107. INSIDER TRADES DURING PENSION PLAN SUSPENSION PERIODS PROHIBITED.

Section 16 of the Securities Exchange Act of 1934 (15 U.S.C. 78p) is amended by adding at the end the following new subsection:

"(h) INSIDER TRADES DURING PENSION PLAN SUSPENSION PERIODS PROHIBITED.—

"(1) PROHIBITION.—It shall be unlawful for any such beneficial owner, director, or officer of an issuer, directly or indirectly, to purchase (or otherwise acquire) or sell (or otherwise transfer) any equity security of such issuer (other than an exempted security), during any pension plan suspension period with respect to such equity security.

"(2) REMEDY.—Any profit realized by such beneficial owner, director, or officer from any purchase (or other acquisition) or sale (or other transfer) in violation of this subsection shall inure to and be recoverable by the issuer irrespective of any intention on the part of such beneficial owner, director, or officer in entering into the transaction.

"(3) RULEMAKING PERMITTED.—The Commission may issue rules to clarify the application of this subsection, to ensure adequate notice to all persons affected by this subsection, and to prevent evasion thereof.

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

"(A) PENSION PLAN SUSPENSION PERIOD.—The term 'pension plan suspension period' means, with respect to an equity security, any period during which the ability of a participant or beneficiary under an applicable individual account plan maintained by the issuer to direct the investment of assets in his or her individual account away from such equity security is suspended by the issuer or a fiduciary of the plan. Such term does not include any limitation or restriction that may govern the frequency of transfers between investment vehicles to the extent such limitation and restriction is disclosed to participants and beneficiaries through the summary plan description or materials describing specific investment alternatives under the plan.

"(B) APPLICABLE INDIVIDUAL ACCOUNT PLAN.—The term 'applicable individual account plan' has the meaning provided such term in section 3(42) of the Employee Retirement Income Security Act of 1974.".

SEC. 108. EFFECTIVE DATES OF TITLE AND RELATED RULES.

(a) IN GENERAL.—Except as provided in subsection (b), the amendments made by sections 101, 102, 103, 104, and 107 shall apply with respect to plan years beginning on or after January 1, 2003.

(b) SPECIAL RULE FOR COLLECTIVELY BARGAINED PLANS.—In the case of a plan maintained pursuant to 1 or more collective bargaining agreements between employee representatives and 1 or more employers ratified on or before the date of the enactment of this Act, subsection (a) shall be applied to benefits pursuant to, and individuals covered by, any such agreement by substituting for "January 1, 2003" the date of the commencement of the first plan year beginning on or after the earlier of—

(1) the later of—

(A) January 1, 2004, or

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

(2) January 1, 2005.

(c) PLAN AMENDMENTS.—If the amendments made by sections 101, 102, 103, and 104 of this Act 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 January 1, 2005, if—

(1) during the period after such amendments made by such sections take effect and before such first plan year, the plan is operated in accordance with the requirements of such amendments made by such sections, and

(2) such plan amendment applies retroactively to the period after such amendments made by such sections take effect and before such first plan year.

(d) AMENDMENTS RELATING TO INVESTMENT ADVICE.—The amendments made by section 104 shall apply with respect to advice referred to in section 3(21)(A)(ii) of the Employee Retirement Income Security Act of 1974 or section 4975(c)(3)(B) of the Internal Revenue Code of 1986 provided on or after January 1, 2003.

TITLE II—ADDITIONAL PROVISIONS

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

(a) TRANSITION RULE MADE PERMANENT.—Paragraph (1) of section 769(c) of the Retirement Protection Act of 1994 is amended—

(1) by striking "transition" each place it appears in the heading and the text, and

(2) by striking "for any plan year beginning after 1996 and before 2010".

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

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

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

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

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

(c) EFFECTIVE DATE.—The amendments made by this section shall apply to plan years beginning after December 31, 2001.

SEC. 202. NOTICE AND CONSENT PERIOD REGARDING DISTRIBUTIONS.

(a) EXPANSION OF PERIOD.—

(1) AMENDMENT OF ERISA.—

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

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

(2) EFFECTIVE DATE.—The amendment made by paragraph (1)(A) and the modification required by paragraph (1)(B) shall apply to years beginning after December 31, 2002.

(b) CONSENT REGULATION INAPPLICABLE TO CERTAIN DISTRIBUTIONS.—

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

(2) EFFECTIVE DATE.—

(A) IN GENERAL.—The modifications required by paragraph (1) shall apply to years beginning after December 31, 2002.

(B) REASONABLE NOTICE.—In the case of any description of such consequences made before the date that is 90 days after the date on which the Secretary of the Treasury issues a safe harbor description under paragraph (1), a plan shall not be treated as failing to satisfy the requirements of sec-

tion 205 of such Act by reason of the failure to provide the information required by the modifications made under paragraph (1) if the Administrator of such plan makes a reasonable attempt to comply with such requirements.

SEC. 203. ANNUAL REPORT DISSEMINATION.

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

(b) EFFECTIVE DATE.—The amendment made by this section shall apply to reports for years beginning after December 31, 2002.

SEC. 204. TECHNICAL CORRECTIONS TO SAVER ACT.

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

(1) in subsection (a), by striking "2001 and 2005 on or after September 1 of each year involved" and inserting "2002, 2006, and 2010";

(2) in subsection (b), by adding at the end the following new sentence: "To effectuate the purposes of this paragraph, the Secretary may enter into a cooperative agreement, pursuant to the Federal Grant and Cooperative Agreement Act of 1977 (31 U.S.C. 6301 et seq.), with any appropriate, qualified entity.";

(3) in subsection (e)(2)—

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

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

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

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

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

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

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

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

(4) in subsection (e)(3)—

(A) by striking "There shall be not more than 200 additional participants." in subparagraph (A) and inserting "The participants in the National Summit shall also include additional participants appointed under this subparagraph.";

(B) by striking "one-half shall be appointed by the President," in subparagraph (A)(i) and inserting "not more than 100 participants shall be appointed under this clause by the President,";

(C) by striking "one-half shall be appointed by the elected leaders of Congress" in subparagraph (A)(ii) and inserting "not more than 100 participants shall be appointed under this clause by the elected leaders of Congress";

(D) by redesignating subparagraph (B) as subparagraph (C); and

(E) by inserting after subparagraph (A) the following new subparagraph:

"(B) PRESIDENTIAL AUTHORITY FOR ADDITIONAL APPOINTMENTS.—The President, in consultation with the elected leaders of Congress referred to in subsection (a), may appoint under this subparagraph additional participants to the National Summit. The number of such additional participants appointed under this subparagraph may not exceed the lesser of 3 percent of the total number of all additional participants appointed under this paragraph, or 10. Such additional participants shall be appointed from persons nominated by the organization referred to in subsection (b)(2) which is made up of private sector businesses and associations partnered with Government entities to promote long term financial security in retirement through savings and with which the Secretary is required thereunder to consult and cooperate and shall not be Federal, State, or local government employees.";

(5) in subsection (e)(3)(C) (as redesignated), by striking "January 31, 1998" and inserting "3 months before the convening of each summit"

(6) in subsection (f)(1)(C), by inserting ", no later than 90 days prior to the date of the commencement of the National Summit," after "comment";

(7) in subsection (g), by inserting ", in consultation with the congressional leaders specified in subsection (e)(2)," after "report" the first place it appears;

(8) in subsection (i)—

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

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

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

(9) in subsection (k)—

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

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

SEC. 205. MISSING PARTICIPANTS.

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

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

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

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

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

"(A) to the corporation, or

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

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

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

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

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

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

"(i) to which the provisions of this section do not apply (without regard to this subsection), and

"(ii) which is not a plan described in paragraphs (2) through (11) of section 4021(b), and

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

"(i) has missing participants, and

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

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

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

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

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

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

SEC. 206. REDUCED PBGC PREMIUM FOR NEW PLANS OF SMALL EMPLOYERS.

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

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

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

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

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

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

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

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

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

(c) EFFECTIVE DATE.—The amendments made by this section shall apply to plans established after December 31, 2001.

SEC. 207. REDUCTION OF ADDITIONAL PBGC PREMIUM FOR NEW AND SMALL PLANS.

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

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

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

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

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

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

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

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

(b) SMALL PLANS.—Paragraph (3) of section 4006(a) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1306(a)), as amended by section 206(b), is amended—

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

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

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

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

(c) EFFECTIVE DATES.—

(1) SUBSECTION (a).—The amendments made by subsection (a) shall apply to plans established after December 31, 2001.

(2) SUBSECTION (b).—The amendments made by subsection (b) shall apply to plan years beginning after December 31, 2002.

SEC. 208. AUTHORIZATION FOR PBGC TO PAY INTEREST ON PREMIUM OVERPAYMENT REFUNDS.

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

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

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

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

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

SEC. 209. SUBSTANTIAL OWNER BENEFITS IN TERMINATED PLANS.

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

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

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

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

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

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

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

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

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

(b) MODIFICATION OF ALLOCATION OF ASSETS.—

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

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

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

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

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

(c) CONFORMING AMENDMENTS.—

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

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

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

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

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

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

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

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

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

(d) EFFECTIVE DATES.—

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

(A) under section 4041(c) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1341(c)) with respect to which notices of intent to terminate are provided under section 4041(a)(2) of such Act (29 U.S.C. 1341(a)(2)) after December 31, 2002, and

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

(2) CONFORMING AMENDMENTS.—The amendments made by subsection (c) shall take effect on January 1, 2003.

SEC. 210. BENEFIT SUSPENSION NOTICE.

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

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

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

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

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

(b) EFFECTIVE DATE.—The modification made under this section shall apply to plan years beginning after December 31, 2002.

SEC. 211. STUDIES.

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

(1) the most appropriate form or forms of—

(A) employee pension benefit plans which would—

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

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

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

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

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

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

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

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

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

(2) the levels of pension plan benefits generally,

(3) the quality of pension plan coverage generally,

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

(5) retirement security.

SEC. 212. INTEREST RATE RANGE FOR ADDITIONAL FUNDING REQUIREMENTS.

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

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

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

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

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

(c) EFFECTIVE DATE.—The amendments made by this section shall take effect as if included in the amendments made by Section 405 of the Job Creation and Worker Assistance Act of 2002.

SEC. 213. PROVISIONS RELATING TO PLAN AMENDMENTS.

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

(1) such plan or contract shall be treated as being operated in accordance with the terms of the plan for purposes of the Employee Retirement Income Security Act of 1974 during the period described in subsection (b)(2)(A); and

(2) except as provided by the Secretary of the Treasury, such plan shall not fail to meet the requirements of section 204(g) of the Employee Retirement Income Security Act of 1974 by reason of such amendment.

(b) AMENDMENTS TO WHICH SECTION APPLIES.—

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

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

(B) on or before the last day of the first plan year beginning on or after January 1, 2005.

In the case of a governmental plan (as defined in section 414(d) of the Internal Revenue Code of 1986), this paragraph shall be applied by substituting "2007" for "2005".

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

(A) during the period—

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

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

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

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

PURPOSE

The purpose of H.R. 3762 is to restore worker confidence in America's pension system by establishing new 401(k) plan protec-

tions and giving workers new tools to protect and enhance their retirement savings. H.R. 3762 gives workers new freedom to diversify their investments, much greater access to quality investment advice, advance notice before blackout periods, more information about their pensions, and other tools they can use to maximize the potential of their 401(k) plans and ensure a secure retirement future.

COMMITTEE ACTION

Committee Chairman John Boehner, Subcommittee on Employer-Employee Relations Chairman Sam Johnson, Subcommittee Vice-Chairman Ernie Fletcher and 31 other co-sponsors introduced H.R. 3762 on February 14, 2002. The bill is the culmination of legislative activity, including hearings, bill introduction, mark-up, floor consideration started in the 106th Congress and continuing in the 107th, on a number of bills proposed to better serve the pension needs of American workers.

106TH CONGRESS

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

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

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

Fifteen provisions of Title VI of the bill, containing amendments to the Employee Retirement Income Security Act (ERISA), were added to H.R. 2488, the "Taxpayer Refund and Relief Act of 1999," which passed the House and Senate on August 5, 1999, but was ve-

toed by the President. The tax bill passed by Congress, but vetoed by the President, included provisions either identical or similar to sections 601–606, 611–612, 615–616, 618, 621–622, and 627–628 of H.R. 1102, as reported.

Subsequently, twenty-two ERISA provisions from H.R. 1102 were included in the "Retirement Savings and Pension Coverage Act of 2000," part of H.R. 2614, the "Taxpayer Relief Act of 2000" passed by the House on October 26, 2000 (but not acted upon by the Senate).

The Employer-Employee Relations Subcommittee also laid the framework for introducing H.R. 4747, the Retirement Security Advice Act of 2000 by holding a hearing in the second session of the 106th Congress entitled, "The Evolving Pension and Investment World after 25 Years of ERISA." The witnesses discussed the larger challenges facing the Employee Retirement Income Security Act (ERISA) and private pension plans now and in the future. The following individuals testified: Professor John H. Langbein, Chancellor Kent Professor of Law and Legal History, Yale Law School; Mr. Michael S. Gordon, Esquire, from the law offices of Michael S. Gordon, Washington, DC; Dr. John B. Shoven, Charles R. Schwab Professor of Economics, Stanford University; and Dr. Teresa Ghilarducci, Associate Professor of Economics at the University of Notre Dame.

The Subcommittee on Employer-Employee Relations also held two days of hearings on March 9 and 10, 2000 regarding H.R. 4747. Testifying at the March 9th hearing were: Mr. W. Allen Reed, President, General Motors Investment Management Company, on behalf of the Committee on Investment of Employee Benefit Assets (CIEBA) of the Financial Executives Institute; Mr. Daniel P. O'Connell, Corporate Director for Employee Benefits and HR Systems, United Technologies Corporation, on behalf of the ERISA Industry Committee (ERIC); Mr. Damon Silvers, Associate General Counsel of the AFL-CIO; Professor Joseph A. Grundfest, William A. Franke Professor of Law and Business and co-founder of Financial Engines, Incorporated; Ms. Eula Ossofsky, President of the Board of Directors, the Older Women's League; and Ms. Margaret Raymond, Assistant General Counsel, Fidelity Investments, on behalf of the Investment Company Institute.

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

On March 16, 2000, the Subcommittee held a hearing entitled "The Wealth through the Workplace Act: Worker Ownership in Today's Economy". The hearing focused on a bill introduced by then Subcommittee Chairman John A. Boehner, H.R. 3462, which made

stock options more available to ERISA participants. Testifying before the Subcommittee that day was Jane F. Greenman, Esquire, Deputy General Counsel, Human Resources, Honeywell on behalf of the American Benefits Counsel; Mr. Tim Byland, Senior Sales Executive, INTERVU, Inc., Fairfax, VA; and Mr. Patrick Von Bargen, Executive Director, National Commission on Entrepreneurship, Washington, DC.

On April 4, 2000, the Subcommittee on Employer-Employee Relations held a subsequent hearing laying the framework for H.R. 4747 entitled "Modernizing ERISA to Promote Retirement Security." The following individuals testified: the Honorable Leslie Kramerich, Acting Assistant Secretary of Labor for Pension and Welfare Benefits, U.S. Department of Labor; and the Honorable David M. Strauss, Executive Director of the Pension Benefit Guaranty Corporation.

On June 26, 2000, Representative John A. Boehner, then Chairman of the Subcommittee on Employer-Employee Relations, introduced H.R. 4747, the Retirement Security Advice Act of 2000. On July 19, 2000, the Subcommittee on Employer-Employee Relations ordered H.R. 4747 favorably reported, as amended, by voice vote. There was no further action taken on the legislation prior to the conclusion of the 106th Congress.

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

107TH CONGRESS

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

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

On April 26, 2001, the Committee on Education and the Workforce approved H.R. 10, as amended, by a voice vote, a quorum being present, and by voice vote ordered the bill favorably reported.

On May 5, 2001, the House of Representatives passed H.R. 10 on a vote of 407 yeas—24 nays. On May 16, 2001, H.R. 10 was included in H.R. 1836, the Economic Growth and Tax Relief Reconciliation Act, and passed by the House of Representatives on a vote of 230 yeas—197 nays. After a conference with the Senate, the House passed the Conference Report on May 26th, 2001, on a vote of 240 yeas—154 nays and the President signed the bill into law on June 7, 2001.[1] Due to the imposition of the "Byrd Rule" in the Senate,[2] some of the ERISA provisions contained in H.R. 10 were dropped from the bill and not included in final passage.

On June 21, 2001, Representative John A. Boehner, Chairman of the Committee on Education and the Workforce, introduced H.R. 2269, "The Retirement Security Advice Act of 2001," a bill to promote the provision of retirement investment advice to workers managing their retirement income assets. The bill was referred to the Committee on Education and Workforce, Employee-Employer Subcommittee and the Committee on Ways and Means. On July 17, 2001, the Subcommittee on Employer-Employee Relations held a hearing on the bill. Testifying before the Subcommittee were: the Honorable Ann L. Combs, Assistant Secretary for Pension and Welfare Benefits, U.S. Department of Labor; Ms. Betty Shepard, Human Resources Administrator, Mohawk Industries, Inc.; Mr. Damon Silvers, Associate General Counsel, AFL–CIO; Mr. Richard A. Hiller, Vice President, Western Division, of TIAA–CREF; Mr. Joseph Perkins, Immediate Past Present of the American Association for Retired Persons; and Mr. Jon Breyfogle, Principal, The Groom Law Group, on behalf of the American Council of Life Insurers.

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

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

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

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

and Ms. Teresa Ghilarducci, Associate Professor, Department of Economics, University of Notre Dame.

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

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

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

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

COMMITTEE STATEMENT AND VIEWS

A. BACKGROUND AND NEED FOR LEGISLATION

The Employee Retirement Income Security Act ("ERISA")[3] was enacted in 1974 to provide a safe, honest and efficient structure for protecting pension benefits for America's private sector employees. ERISA created federal standards and remedies for pensions with U.S. Department of Labor oversight. As demonstrated at a number of bipartisan hearings held by the Committee on Education and the Workforce, (hereinafter the "Committee") and the Subcommittee on Employer-Employee Relations during the 107th Congress, as well as hearings held by the Subcommittee during the 106th Congress, ERISA has been largely successful in protecting the integrity of privately managed pension plans.

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

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

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

> The fiduciary provisions of Title I of ERISA, which are administered by the Labor Department, were enacted to address public concern that funding, vesting and management of plan assets were inadequate. ERISA's enactment was the culmination of a long line of legislative proposals concerned with the labor and tax aspects of employee benefit plans. Since its enactment in 1974, ERISA has been strengthened and amended to meet the changing retirement and health care needs of employees and their families. The Department's Pension and Welfare Benefits Administration is charged with interpreting and enforcing the statute. The Office of the Inspector General also has some criminal enforcement responsibilities regarding certain ERISA covered plans.
>
> Under ERISA, the Department has enforcement and interpretative authority over issues related to pension plan coverage, reporting, disclosure and fiduciary responsibilities of those who handle plan funds. Additionally, the Labor Department regularly works in coordination with other state and federal enforcement agencies including the

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[3] 29 U.S.C. §1001, et seq.

[4] Hearing on "The Enron Collapse and Its Implications for Worker Retirement Security" before the Committee on Education and the Workforce, U.S. House of Representatives, 107th Congress, Second Session, February 6, 2002 (to be published).

> Internal Revenue Service, Federal Bureau of Investigation, and the Securities and Exchange Commission. Another agency with responsibility for private pensions is the Pension Benefit Guaranty Corporation, which insures defined-benefit pensions.
>
> ERISA focuses on the conduct of persons (fiduciaries) who are responsible for operating pension and welfare benefit plans. Such persons must operate the plans solely in the interests of the participants and beneficiaries. If a fiduciary's conduct fails to meet ERISA's standard, the fiduciary is personally liable for plan losses attributable to such failure.[5]

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

In response to the Enron situation, the Committee held three hearings to examine the facts of the Enron situation and whether it demonstrated any broader implications for pension reforms. The facts in the Enron bankruptcy showed that 57% of Enron's 401(k) plan assets were invested in company stock, which fell in value by 98.8% during 2001.[7] Most of these plan assets were voluntarily directed by participants into Enron stock. Enron contributed an employer match of up to 3% of the employee's contribution in Enron stock. The employer match was restricted from trading until age 50—meaning that employees could not divest the company stock contributed by Enron until they reached age 50. Otherwise, the investment allocations in the Enron plan were unrestricted and could

[5] Hearing on "The Enron Collapse and Its Implications for Worker Retirement Security" before the Committee on Education and the Workforce, U.S. House of Representatives, 107th Congress, Second Session, February 6, 2002 (to be published).

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

[7] Hearing on "Enron and Beyond: Legislative Solutions" before the Subcommittee on Employer Employee Relations, U.S. House of Representatives, 107th Congress, Second Session, February 13, 2002 (to be published).

be traded daily.[8] A further complicating factor in the Enron situation was that prior to Enron announcing bankruptcy, Enron's 401(k) plan changed plan record keepers.[9] The change of plan record keepers required the plan to enter into an eleven business day trading suspension period during which Enron employees could not have access to their accounts. During the suspension period, Enron announced a $600 million loss. Enron stock consequently dropped during that period, from approximately $13 to $8. In the year prior to the suspension period, Enron stock had dropped from $81.39 in January 2001 to $20.65 in October 2001.

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

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

> Based on what we were told—repeatedly by the men at the top—I never dreamed that this disaster could have happened. We are not Wall Street analysts. I am sure that most Enron employees manage their investments themselves, like * * * I did. The fact remains, though, that good investment decisions require honest information. We all know now that the information that we were given was false.[10]

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

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[8] Hearing on "The Enron Collapse and Its Implications for Worker Retirement Security" before the Committee on Education and the Workforce, U.S. House of Representatives, 107th Congress, Second Session, February 7, 2002 (to be published).

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

[10] Hearing on "The Enron Collapse and Its Implications for Worker Retirement Security" before the Committee on Education and the Workforce, U.S. House of Representatives, 107th Congress, Second Session, February 7, 2002 (to be published).

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

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

Ms. Rath explained what happened during the lockdown period:

> Enron, Northern Trust, and Hewitt worked together to shorten [the] time period as much as possible without sacrificing the integrity of participants' accounts. Ultimately, the trading suspension encompassed eleven trading days from October 29 to November 13, 2001. Enron mailed a brochure to all participants some three weeks before the trading suspension, explaining the transition and notifying them of the temporary suspension. Enron employees with email accounts received additional reminders in the days leading up to the transition.
>
> Unfortunately, as the Committee is no doubt aware, the commencement of the transition coincided with certain bad news about the state of Enron's finances. We considered postponing the transition but found it was not feasible to notify more than 20,000 participants in a timely fashion. As the Enron news continued to break, we and the plan's Administrative Committee again considered stopping the transition. However, in addition to the problem of notifying participants, it would actually take longer to reverse the transition than to finish it. Ultimately, we worked with Hewitt to shave one week off the transition and we implemented a process for notifying participants of the early resumption of trading.[11]

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

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

[11] Hearing on "The Enron Collapse and Its Implications for Worker Retirement Security" before the Committee on Education and the Workforce, U.S. House of Representatives, 107th Congress, Second Session, February 7, 2002 (to be published).

> are restricted in their ability to deposit or withdraw funds or to change their investments.[12]

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

> [T]he blackout period for loans, withdrawals, etc. actually began after the close of trading on October 19, 2001. The blackout period for changes in investment options including the Enron Corp. stock fund, was scheduled to begin after the close of trading on October 26, 2001.
>
> On October 25, 2001, almost a week into the first phase of the blackout period, a member of the Enron Benefits Department contacted Hewitt and posed a few questions. Specifically, we were asked about the systems issues and similar practical consequences of accelerating the live date by shortening the blackout period. * * * Enron mentioned the possibility that they could postpone the whole conversion and wait until the following February or March.
>
> Enron asked that we respond to these questions that same day and we did so. With respect to accelerating the live date, we pointed out a series of risk considerations. These risks included the adverse effects on plan participants of commencing our record keeping activities with incorrect plan data due to a shortened review period and the possible compromising of the quality of the services we could provide to plan participants. In addition, we noted that similar data quality issues could arise with respect to the new trustee's reconciliation process. * * * Finally, we discussed some of the factors Enron would want to consider in deciding whether to delay the transition period in its entirety. These factors include extra cost, staffing implications, and the inability to predict whether the Enron stock would be any less volatile. We also made clear that we would work with Enron to accommodate any changes it might decide to make in the schedule.
>
> Later on October 25, 2001, a member of Enron's Benefit Resources Department called to notify us that a determination had been made that the transition would go forward on the then current schedule. We subsequently learned that Enron had been advised by its legal counsel that it should not alter the blackout schedule. As a result, restrictions on changes in investment allocations took effect at the close of business on the next day, October 26, 2001.[13]

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

> On November 16, 2001, over two weeks before Enron declared bankruptcy, the Department launched an investiga-

[12] Hearing on "The Enron Collapse and Its Implications for Worker Retirement Security" before the Committee on Education and the Workforce, U.S. House of Representatives, 107th Congress, Second Session, February 7, 2002 (to be published).

[13] Hearing on "The Enron Collapse and Its Implications for Worker Retirement Security" before the Committee on Education and the Workforce, U.S. House of Representatives, 107th Congress, Second Session, February 7, 2002 (to be published).

tion into the activities of Enron's pension plans. Our investigation is fact intensive with our investigators conducting document searches and interviews. The investigation is examining the full range of relevant issues to determine whether violations of ERISA occurred, including Enron's treatment of their recent blackout period.

In early December, it became apparent that Enron would enter bankruptcy. Because the health and pension benefits of workers were at risk, we initiated our rapid response participant assistance program to provide as much help as possible to individual workers.

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

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

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

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

Determining whether ERISA has been violated often requires a finding of a breach of fiduciary responsibility. Fiduciaries include the named fiduciary of a plan, as well as

> those individuals who exercise discretionary authority in the management of employee benefits plans, individuals who give investment advice for compensation, and those who have discretionary responsibility for administration of the pension plan.
>
> ERISA holds fiduciaries to an extremely high standard of care, under which the fiduciary must act in the sole interest of the plan, its participants and beneficiaries, using the care, skill and diligence of an expert—the "prudent expert" rule. The fiduciary also must follow plan documents to the extent consistent with the law. Fiduciaries may be held personally liable for damages and equitable relief, such as disgorgement of profits, for breaching their duties under ERISA.
>
> While a participant or beneficiary can sue on their behalf of the plan, the Secretary of the Labor can also sue on behalf of the plan, and pursue civil penalties. We have 683 enforcement and compliance personnel and 65 attorneys who work on ERISA matters. In calendar year 2001, the Department closed approximately 4,800 civil cases and recovered over $662 million. There were also 77 criminal indictments during the year, as well as 42 convictions and 49 guilty pleas.[14]

Secretary Chao also detailed principles for a legislative proposal announced by President George W. Bush. She explained, at the President's direction, a Task Force comprised of the Department of Labor, Treasury and Commerce, had studied the broader implications of the Enron situation in regard to retirement security, and made recommendations to the President. Secretary Chao summarized the President's plan as follows: "The President's Retirement Security Plan, announced on February 1, would strengthen workers' ability to manage their retirement funds more effectively by giving them freedom to diversify, better information, and access to professional investment advice. It would ensure that senior executives are held to the same restrictions as American workers during temporary blackout periods and that employers assume full fiduciary responsibility during such times."[15]

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

Dr. Jack VanDerhei, testifying on behalf of the Employee Benefits Research Institute (EBRI), explained that EBRI has maintained a database on 35,367 401(k) plans from 1996 through 2000. Of the approximately 36,000 plans in the EBRI database, only 2.9% of 401(k) plans include company stock, however of that small number of plans, Dr. VanDerhei noted that the plans that hold com-

[14] Hearing on "The Enron Collapse and Its Implications for Worker Retirement Security" before the Committee on Education and the Workforce, U.S. House of Representatives, 107th Congress, Second Session, February 6, 2002 (to be published).

[15] Hearing on "The Enron Collapse and Its Implications for Worker Retirement Security" before the Committee on Education and the Workforce, U.S. House of Representatives, 107th Congress, Second Session, February 6, 2002 (to be published).

pany stock represented 42% of the participants in the database. Dr. VanDerhei also observed that "[p]revious research has shown that the availability and level of a company match is a primary impetus for at least some employees to make contributions to their 401(k) plan." [16]

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

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

> Employees clearly need good information and investment advice to ensure that they make intelligent decisions; once they receive such information and advice, they should not be prevented from accepting company stock from employers or investing their own assets in company stock. Obviously many individuals make well-informed choices to invest much of their assets in farms or small businesses that they operate, which are often very risky assets. Limiting workers' involvement in employee ownership plans due to a concern about their financial risk would be akin to preventing individuals from owning their own farms or small businesses. Substantial new restrictions on employee ownership of stock would very likely cut back a potentially lucrative benefit for employees, without providing anything of value in return since employees generally do not sacrifice pay or other benefits when they participate in employee ownership plans.[17]

Additionally, Rebecca Miller, Managing Director for Employee Benefits Practice Policy, RSM McGladrey, Inc., testified that employee ownership was a positive tool and resulted in increases in productivity and performance for companies, and better benefits and higher retirement income and wages for employees.[18] Ms. Miller recommended that if any legislative change should be made, "[t]he first focus of change in the retirement plan rules should be on investment education and assistance. It is clear from Enron, Lucent and other recent experiences with participant directed 401(k) plans—employees are generally unsophisticated investors. They need a better understanding of risk management, diversification, etc."

As a result of the hearings held by the Committee and Subcommittee, on February 14, 2002, Chairman John Boehner and Subcommittee Chairman Sam Johnson introduced H.R. 3762, the Pension Security Act, embodying the principles set forth by the

[16] Hearing on "Enron and Beyond: Enhancing Worker Retirement Security" before the Subcommittee on Employer-Employee Relations, Committee on Education and the Workforce, U.S. House of Representatives, 107th Congress, Second Session, February 13, 2002 (to be published).

[17] Hearing on "Enron and Beyond: Enhancing Worker Retirement Security" before the Subcommittee on Employer-Employee Relations, Committee on Education and the Workforce, U.S. House of Representatives, 107th Congress, Second Session, February 13, 2002 (to be published).

[18] Hearing on "Enron and Beyond: Enhancing Worker Retirement Security" before the Subcommittee on Employer-Employee Relations, Committee on Education and the Workforce, U.S. House of Representatives, 107th Congress, Second Session, February 13, 2002 (to be published).

President.[19] Following introduction of the bill, the Subcommittee on Employer-Employee Relations held a hearing on February 27, 2002 on the legislative solutions to Enron.[20] Interest groups expressed support for H.R. 3762, but also cautioned the Subcommittee to tread carefully in creating additional regulations for employers.

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

> [O]ne cannot examine the realities of the 401(k) system without concluding that overly aggressive legislative change could unintentionally harm the very people that Congress hopes to protect. Chairman Johnson and Chairman Boehner, you both understand the delicate balance of regulation and incentives upon which the success of our voluntary, employer-sponsored pension system depends, and we appreciate your sensitivity to these issues as you lead this Committee's response to the Enron bankruptcy. In order to avoid unintended harms, the Council believes that retirement policy responses to Enron should focus on ensuring that 401(k) participants have the information, education and professional advice they need to wisely exercise their investment responsibility. Chairman Johnson, this is the course that you and Chairman Boehner have charted.[21]

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

> There is an ongoing need to educate all employees in the basics of investing. Congress should work with employers to encourage financial education for employees and identify and remove barriers that deter many employers from making professional investment advice available to workers. The advice provision in H.R. 3762 will help some plan sponsors, as will a provision in H.R. 3669, cosponsored by Representatives Portman and Cardin, that will allow workers to purchase financial advice with pre-tax dollars.[22]

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

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[19] The substance of H.R. 3762 is explained more thoroughly *infra* n. ________.

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

[21] Hearing on "Enron and Beyond: Legislative Solutions" before the Subcommittee on Employer-Employee Relations, Committee on Education and the Workforce, U.S. House of Representatives, 107th Congress, Second Session, February 27, 2002 (to be published).

[22] Hearing on "Enron and Beyond: Legislative Solutions" before the Subcommittee on Employer-Employee Relations, Committee on Education and the Workforce, U.S. House of Representatives, 107th Congress, Second Session, February 27, 2002 (to be published).

> One of our * * * concerns about H.R. 3657 is that, unlike the Boehner/Johnson legislation (H.R. 3762), it does not advance targeted responses to the specific issues raised by Enron but rather seeks to make wide-ranging and fundamental changes to our nation's defined contribution plan retirement system. The bill would fundamentally alter the governance system for 401(k) and other defined contribution plans, radically change the enforcement mechanism applicable to all ERISA claims (not those just in the pension area) and substantially revise the rules on vesting of employer contributions. The results would be increased workplace conflict, hampered plan administration, more litigation, fewer employer contributions and, for many employees, no retirement plan at all. These changes would undermine the 401(k) system's current success and should be rejected.[23]

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

> ERIC also strongly opposes proposals that have been made for the joint trusteeship of individual account plans. Joint trusteeship will be divisive, disruptive, and counterproductive. It will politicize fiduciary responsibility. It will create employee relations strife. It will allow unions to speak for nonunion workers. It will require employers to spend resources on conducting [plan] elections rather than on discharging fiduciary responsibilities. It will disrupt, rather than strengthen, plan management. And because it will discourage employers from setting up plans, it will reduce retirement savings.[24]

David G. Evans from the Independent Insurance Agents of America echoed Ms. Reynolds' testimony and added that over-regulation would lead to employers offering plans that are not subject to ERISA's same fiduciary standards. Mr. Evans noted that other plans including IRA, SEP (Simplified Employer Pension) or SIMPLE IRAs do not have fiduciary liability exposure as it relates to investments because employees can move their account to any investment vehicle. "This ability becomes a two-edged sword because they can choose to take monies out of these accounts even though they have to pay an excise tax in addition to ordinary income tax. Yet, some employees will do this, damaging their future standard of living in retirement, in order to get their hands on the money."[25]

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[23] Hearing on "Enron and Beyond: Legislative Solutions" before the Subcommittee on Employer-Employee Relations, Committee on Education and the Workforce, U.S. House of Representatives, 107th Congress, Second Session, February 27, 2002 (to be published).

[24] Hearing on "Enron and Beyond: Legislative Solutions" before the Subcommittee on Employer-Employee Relations, Committee on Education and the Workforce, U.S. House of Representatives, 107th Congress, Second Session, February 27, 2002 (to be published).

[25] Hearing on "Enron and Beyond: Legislative Solutions" before the Subcommittee on Employer-Employee Relations, Committee on Education and the Workforce, U.S. House of Representatives, 107th Congress, Second Session, February 27, 2002 (to be published).

B. LEGISLATION

As described supra, improving the retirement security of American workers has been the subject of considerable Committee attention during the current, and past Congress. The Enron bankruptcy and the tragic losses to retirement savings faced by Enron employees sharpened the focus on some immediate needs to shore up the pension laws that govern 42 million American workers with individual account pension plans. More than $2.0 trillion are currently held in retirement assets by American workers.

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

- Provide workers with greater freedom to diversify and manage their own retirement funds;
- Ensure that senior corporate executives are held to the same restrictions as average American workers during "blackout periods" and that employers assume full fiduciary responsibility during these times;
- Give workers quarterly information about their investments and rights to diversify them; and
- Expand workers' access to investment advice.[26]

As outlined, President Bush envisioned new protections for workers so that they would have the freedom to diversify employer contributions to their individual accounts after three years. To ensure parity between the top floor and the shop floor, the President's proposal would preclude senior executives from selling company stock outside of the company 401(k) while workers were unable to diversify their plan assets during a blackout. In order to ensure that employer plan administrators made sound decisions about blackouts, the President's plan would hold them liable if they violated their duty to act in the interests of workers when they created the blackout period. The President's plan proposed to increase the information workers receive about their pension benefits and their notice as to the limiting of their rights during a blackout. The final prong of the President's plan was his call for the Senate to pass the Retirement Security Advice Act, H.R. 2269, which encouraged employers to make investment advice available to their workers.[27]

H.R. 3762, the Pension Security Act, embodies the principles set out by the President. Committee Chairman John Boehner and Subcommittee Chairman Sam Johnson introduced it Feb. 14, 2002 with bipartisan support.

The legislation builds on the rights and protections contained in Title I of the Employee Retirement Income Security Act of 1974 (ERISA). Section 2(b)[28] of ERISA sets forth this Congressional Finding and Declaration of Policy:

> It is hereby declared to be the policy of this Act to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with re-

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

[27] Ibid; see also discussion of H.R. 2269, Committee Action, infra n. 31–32.

[28] 29 U.S.C. § 1001(b).

> spect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions and ready access to the Federal courts.[29]

Title I of ERISA contains these fundamental protections for participants and beneficiaries of employee benefit plans. Part 1 of Title I[30] sets forth the duties of plan administrators to notify participants and beneficiaries of the terms of the benefit plans in which they participate, their rights under these plans, the benefits which have accrued under the terms of their plans, and any changes which may be made to these benefits or rights.

Equally important, Part 4 of Title I of ERISA[31] explains the fundamental duties of fiduciaries to employee benefit plans. In short, fiduciaries are to act solely in the interest of participants and beneficiaries with care, skill, prudence and diligence. Fiduciaries are to diversify the investments of employee benefit plans so as to minimize the risk of large losses, and are to act in accordance with the terms of the plan.[32]

In 1974, the Congressional crafters of ERISA noted the lack of employee information and safeguards with regard to employee benefit plans and provided for such disclosure and safeguards as would protect employees' interests.[33] In 1974, however, pension plans were primarily in the form of traditional defined benefit plans, which typically guaranteed specific monthly pension payments for the duration of a participant's lifetime. In this context, ERISA's one per year limit on the reports that outlined the total and nonforfeitable pension benefits that had accrued to the participant was more than adequate.[34]

Likewise, in 1974 the fiduciary duty to diversify the investments of the plan was an adequate safeguard to minimize the risk of large losses to defined benefit plans where risk is borne by the sponsor.[35]

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

Individual account plans necessitate different safeguards and standards for information disclosure in order to provide the same level of retirement security for participants and beneficiaries that were envisioned in 1974. As such, the provisions of H.R. 3762 rep-

[29] Ibid.
[30] 29 U.S.C. § 1021, 1022, 1024, 1025.
[31] 29 U.S.C. §1104.
[32] ERISA has included an general exception to the diversification requirement with respect to employer securities in individual account plans in order to accommodate employee stock option plans (ESOPs).
[33] 29 U.S.C. §1001(a).
[34] 29 U.S.C. §1025(b).
[35] 29 U.S.C. §1104(a)(1)(C).

resent a logical upgrade to the provisions of Title I of ERISA to ensure adequate retirement protection for today's workforce.

H.R. 3762's investment education and benefit statement

H.R. 3762 amends ERISA to require plan administrators of "applicable individual account plan" to provide a quarterly notice to plan participants and beneficiaries of the value of investments allocated to their individual account. Building upon ERISA's current requirement to provide an annual notice of benefits at the request of participants and beneficiaries,[36] the new provision will increase the benefit information available to participants who may be making real time investment decisions about the assets held in their "applicable individual account plans." Provisions from H.R. 10, the Comprehensive Retirement Security and Pension Reform Act of 2001, were also incorporated into H.R. 3762 to require plan administrators of all individual account plans, as defined by Section 3 (34) of ERISA to provide a pension benefit statement at least annually.

H.R. 3762 defines "applicable individual account plan" by limiting the existing definition of individual account plan in ERISA[37] to exclude employee stock ownership plans (ESOP)[38] unless there are any contributions to such plan or earnings held within such plan that are subject to subsection (k)(3) or (m)(2) of section 401 of the Internal Revenue Code of 1986. The Committee considered limiting the definition of applicable individual account plan only to those accounts that hold employer securities that are readily tradable on an established securities market because the value assigned to employer securities that are not traded on an established securities market depend upon valuations or appraisals obtained from third party experts that are generally made on an annual basis. The Committee rejected limiting the quarterly statement only to publicly traded companies because it believes that all participants and beneficiaries should receive more regular information about their accounts. The Committee, however, does not intend to regulate corporate accounting practices through this legislation. Thus, the Committee clarified that the quarterly benefits statement does not require that the value of non-publicly traded stock held in an individual account plan be determined quarterly. Rather, the bill provides that the quarterly statement will give the value of any employer securities that are not readily tradable on an established securities market based upon the most recent valuation of such employer securities.

Additional provisions from H.R. 10 which were added to H.R. 3762 require administrators of traditional defined benefit plans to furnish a benefit statement to each participant of a defined benefit plan at least once every three years and to a plan participant or beneficiary upon written request. In the case of a defined benefit plan, if administrators annually provide participants with a notice of the availability of a pension benefit statement, the new requirements are treated as having been met.

Because many participants and beneficiaries have on-line access to their accounts, H.R. 3762 specifies that the new notices may be

[36] 29 U.S.C. § 1025(a).
[37] 29 U.S.C. § 1102 (34).
[38] 26 U.S.C. § 4975 (e)(7).

provided in electronic or other appropriate form provided that such form is reasonably accessible to the recipient.

H.R. 3762 gives participants new rights to diversify the assets that are contributed to their account in the form of employer securities. Because of this new right, the new quarterly benefit statement for applicable individual accounts will include an explanation of any limitations or restrictions on the right of the participant or beneficiary to direct an investment, including their right to diversify any assets held in employer securities. Because Section 105 of ERISA was created not only to report on the benefits of participants and beneficiaries, but also to report on the rights of participants and beneficiaries under their benefit plans, this new diversification right is correctly placed in Section 105 of ERISA.

As shown by the concentration of Enron securities held by Enron pension plan participants, American workers need assistance in recognizing the importance of diversification to a well-balanced and secure retirement account. Because of this, the benefit statement will also include an explanation of the importance of a diversified investment portfolio, including the risk of holding substantial portions of a portfolio in any one security, such as employer securities. As in the case of the Enron employees, participants of individual account pension plans all too frequently depart from the principles of diversification by holding more than one fourth of their retirement portfolio in employer securities, particularly in pension plans that have more than 5,000 participants.[39] Because of this, the required educational information about the importance of diversification is appropriately placed in the same statement that specifies the participant's right to diversify assets held in employer securities.

During Committee consideration of H.R. 3762, Representative Tim Roemer offered and withdrew an amendment that would have required plan administrators to issue a warning to participants and beneficiaries if 25 percent of their individual account was concentrated in any one security. The Committee believes that such a requirement would be extremely difficult to administer given the daily fluctuation of securities and is concerned that even if such provision were enacted, it could result in participants receiving potentially confusing information that could be outdated in a matter of days. H.R. 3762 already requires a quarterly reminder about the importance of diversification, which would also provide appropriate information about the participant's account without reducing its overall efficacy. However, the Committee views the principle of diversification very seriously and will work to strengthen the diversification education principles contained in the notice in the spirit of Representative Roemer's amendment.

In order to help plan sponsors and administrators comply with the bill's requirements relating to investment education and benefit statements, the Secretary of Labor shall issue guidance and model notices that include the value of investments, the rights of employees to diversify any employer securities and an explanation of the importance of a diversified investment portfolio. This initial guid-

[39] Testimony of Jack L. VanDerhei, Ph.D., CEBS, EBRI Fellow, Hearing on "Enron and Beyond: Enhancing Worker Retirement Security" before the Subcommittee on Employer-Employee Relations, Committee on Education and the Workforce, U.S. House of Representatives, 107th Congress, Second Session, February 13, 2002 (to be published).

ance will be promulgated no later than January 1, 2003. So that plan sponsors and administrators are able to comply in a timely fashion, the Secretary may also issue interim model guidance.

Consistent with current law civil penalties of $1000 for a plan administrator's failure to file an annual report,[40] H.R. 3762 amends Section 502 of ERISA[41] to allow the Secretary to assess a civil penalty against a plan administrator of up to $1,000 a day from the date of such plan administrator's failure to provide participants and beneficiaries with a benefit statement on a quarterly basis.

H.R. 3762's protection from restrictions on participants' ability to diversify plan assets

In order to protect against large losses, ERISA places a duty on plan fiduciaries to diversify assets.[42] In the case of individual account pension plans that permit participants and beneficiaries to exercise control over the assets in their account, Section 404(c) of ERISA specifies that fiduciaries are not liable for any loss that results from such participant's or beneficiary's exercise of control.[43] As such, the responsibility to diversify to protect against large losses passes from the fiduciary to the participant or beneficiary. This presents a unique challenge when plan administrators interrupt the otherwise available ability of participants and beneficiaries to direct or diversify assets, as in the case of a "blackout" or "lockdown" where participants are unable to access their accounts while the administration of the plan is switched from one service provider to another or plan investment options are changed. In order to protect the retirement security of pension plan participants in these cases, the Committee believes that additional duties for plan administrators, and additional information to plan beneficiaries and participants are needed.

In any case in which the plan administrator temporarily suspends, limits, or restricts the ability of participants or beneficiaries to direct or diversify assets, H.R. 3762 requires that the administrator must first make a determination that the expected period of the suspension is reasonable. The Committee intends this duty to determine the reasonableness of the period of suspension to be read in the context of part 4 of ERISA[44] which requires that plan fiduciaries discharge their duties prudently and solely in the interest of participants and beneficiaries—the highest duty of loyalty known to the law.[45] Like fiduciary conduct in general, whether a fiduciary meets these requirement is determined by evaluating the conduct of the fiduciary ex ante, rather than ex post, with the benefit of 20–20 hindsight. Plan administrators should evaluate the amount of time that the participants' ability to direct or diversify will be suspended and the potential impact of this suspension on the participants' accounts in light of the need for the suspension and its potential benefits for participants and the plan. The Committee understands that there are many good reasons that may justify a suspension period, including hiring a more efficient record-

[40] 29 U.S.C. § 1132 (c)(2).
[41] 29 U.S.C. § 1132.
[42] 29 U.S.C. § 1104(a)(1)(C).
[43] 29 U.S.C. § 1104(c)(1)(B).
[44] 29 U.S.C. § 1104(a)(1).
[45] See, e.g., *Donovan* v. *Bierwith,* 680 F.2d 263, 272 n.8 (2d Cir.1982).

keeper, reducing plan administrative expenses, and enhancing plan investment options by making available more choices or better performing, lower expense investments.

Rather than defining a term such as "blackout," H.R. 3762 requires plan administrators to make a determination of reasonableness for any action that would have the effect of temporarily suspending, limiting, or restricting any ability of participants or beneficiaries of individual account plans to direct or diversify assets credited to their accounts. In order to trigger the notice requirement and determination of reasonableness, the suspension must be more than three consecutive calendar days on which the ability to diversify is otherwise available under the terms of the plan.

Once a plan administrator has made a determination of reasonableness, H.R. 3762 requires plan administrators to notify plan participants and beneficiaries of the upcoming suspension, limitation or restriction on the ability of participants to trade. The new notice shall be issued 30 days prior to any suspension of participants' and beneficiaries' ability to direct or diversify assets. H.R. 3762 specifies that the notice must contain the reasons for the suspension, an identification of the investments affected, the expected period of the suspension, a statement that the administrator has evaluated the reasonableness of the expected period, and a statement that the participant should evaluate the appropriateness of their current investment decisions in light of their inability to direct or diversify assets during the expected period of suspension. Based on this notice, if they deem it appropriate participants may reallocate their investments away from more volatile investments, including employer securities, during the suspension period.

As was clearly the case in the Enron situation, employees did not take appropriate action to diversify their accounts in advance of the "blackout."[46] Because the stock market and the Enron securities specifically were in an extremely volatile state, a warning to participants and beneficiaries about their own responsibilities may have protected the Enron employees from some of their losses. In the view of the Committee, it is only when participants and beneficiaries have been provided with this notice that they are adequately prepared to be responsible for their own individual accounts in the event of a blackout.

The Committee believes that the determination of reasonableness with respect to a "blackout" and the provision of additional information to participants and beneficiaries about their own duty to evaluate the appropriateness of their current investment decisions are fundamental to the fiduciary protection from liability contained in 404(c) of ERISA.[47] Generally, participants and beneficiaries of applicable individual account plans bear the risk of their own accounts. The Committee believes that during a suspension, the plan fiduciary and the plan participants and beneficiaries each have responsibilities that amount to a shared risk. H.R. 3762 balances this shared responsibility by requiring plan administrators to make a determination of reasonableness and to provide information to par-

[46] Testimony of Mr. Thomas O. Padgett, Senior Lab Analyst at EOTT (An Enron subsidiary), Hearing on "The Enron Collapse and its Implications for Worker Retirement Security" before the Committee on Education and the Workforce, U.S. House of Representatives, 107th Congress, Second Session, February 7, 2002 (to be published).

[47] 29 U.S.C. § 1104(c)(1)(B).

ticipants and beneficiaries, and by educating participants and beneficiaries so that they can adequately evaluate the appropriateness of their investment decisions in light of their inability to direct or diversify during a suspension. As H.R. 3762 indicates, it is only then that fiduciaries are relieved of their own liability and granted the 404(c)[48] liability protection.

H.R. 3762 amends section 404(c) of ERISA to clarify that the protection afforded plan fiduciaries under this section will be lost in the event of a suspension period unless the fiduciary acts in a manner consistent with the requirements of title 1 of ERISA in entering into the suspension period. The intention of the provision is to ensure that plan fiduciaries address suspension periods in a manner that ensures the interests of plan participants are protected. In the Committee's view, even prior to this amendment, plan fiduciaries generally had a fiduciary duty to act solely in the interest of participants and beneficiaries when taking the actions that typically lead to a suspension period, such as hiring a new record keeper or selecting new plan investment options.[49] The amendment makes clear that among the factors the Department or a court should consider in evaluating whether a fiduciary met its fiduciary obligations include whether the fiduciary considered in advance the reasonableness of the expected suspension period, provided the suspension notice required by H.R. 3762 and acted solely in the interest of participants and beneficiaries in determining whether or not to enter into the suspension. The Committee notes that the duty to act solely in the interest of participants is one of the several duties set forth in section 404(a)(1) of ERISA that have applied to all fiduciary decisions since ERISA's enactment. Of course, in entering into a suspension period a plan fiduciary must meet the other applicable requirements of part 4 of ERISA, including the duty to act prudently and follow the terms of the plan (where consistent with the requirements of title I).

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

[48] Ibid.

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

formed of the default selections) and elects not to make an affirmative direction selecting new investment options. It is the Committee's expectation that information regarding new plan investment options, including default investments for participants, may be included in connection with the notice of an upcoming suspension, limit or restriction on trading. It is the Committee's further view that by providing for both affirmative and negative election, participants will generally exercise investment control over the selection of new investment options when a plan fiduciary or service provider employs common processes such as "fund mapping" (i.e., matching the plan's new investment options to the plan's prior investment options) provided proper advance notice is provided. The Committee notes that both the Department of Labor and the courts have on numerous occasions endorsed the concept of negative consent, concluding that both plan fiduciaries and plan participants may exercise control over plan investments through negative consent.[50]

H.R. 3762 provides for specific exceptions from the duty to notice all participants and beneficiaries under the plan. In the event of a qualified domestic relations order, or a blackout period caused by a merger, acquisition, divestiture or other such action by the plan sponsor or plan, only those employees who are impacted by the event will receive the notice. The Committee intends this exception to cover instances where a single employer plan is merged with a multi-employer plan. In these instances, as in the case with many mergers and acquisitions, the new participants and beneficiaries will not have been a part of the plan 30 days prior to the suspension of their ability to direct assets. Rather, the suspension will occur as they are joining the plan. For this reason, H.R. 3762 specifies that such notice shall be given as soon as reasonably practicable in advance of the change. The bill provides that the Secretary of Labor may provide for additional exceptions to the requirements that are in the interest of participants and beneficiaries.

In any case where the inability to provide the notice is due to events that were unforeseeable or circumstances beyond the reasonable control of the plan administrator, the notice shall be furnished to all participants and beneficiaries under the plan as soon as reasonably possible under the circumstances. Among other cases, the Committee intends this exception to apply in the case of participants and beneficiaries who have moved and left no forwarding address. In such cases, a plan administrator's notification to the last known address shall meet the notice requirements of this section.

Should there be a change in the expected period of the suspension, H.R. 3762 requires the plan administrator to provide notice to affected participants and beneficiaries as soon as reasonably practicable in advance of the change.

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

H.R. 3762 provides that the Secretary of Labor shall issue guidance and model notices that include the above factors and such other provisions the Secretary may specify. The initial guidance will be promulgated no later than January 1, 2003. In order to assist plan administrators in complying with the new requirements in a timely fashion, the Secretary may issue interim model guidance.

H.R. 3762 amends Section 502 of ERISA[51] to allow the Secretary to assess a civil penalty against a plan administrator of up to $100 a day from the date of the plan administrator's failure or refusal to provide notice to participants and beneficiaries in accordance with the new notice requirements.

H.R. 3762's provision for fiduciary education

During Committee consideration of H.R. 3762, the Committee adopted an amendment offered by Representative Marge Roukema that directed the Department of Labor to establish a program to make information and educational resources available to pension plan fiduciaries on an ongoing basis in order to assist them in diligently and efficiently carrying out their fiduciary duties with respect to the plan.

The fiduciary duty of loyalty—the highest duty of loyalty known to the law,[52] is a protection to participants and beneficiaries only if the fiduciary understands the responsibilities and implications of this duty. As such, the Committee unanimously agreed that the provision of educational information to pension plan fiduciaries is of the utmost importance.

H.R. 3762's right to diversify

H.R. 3762 amends ERISA to reduce the period of time in which companies can require workers to hold company stock to three years. Currently, ERISA limits to 10 percent the amount of company stock that can be held in a pension plan.[53] The Internal Revenue Code provides that for employer stock contributions made in an ESOP, the time these securities can be required to be held is until the participant is age 55 and has at least 10 years of participation in the plan.[54]

H.R. 3762 gives employees a new right to diversify employer securities in their individual account after three years of service with the employer or three years after receiving employer stock in their individual account plan. In a survey conducted by EBRI of the International Society of Certified Employee Benefit Specialist members, of the plans where employer contributions were required to be in company stock, 60% of them reported that the stock was restricted until a specified age and/or service requirement is met.[55] Current law has encouraged employers to offer employer securities as part of ERISA plans and the Committee has received a great deal of testimony regarding the benefits of increasing employee

[51] 29 U.S.C. §1132.
[52] See, e.g., *Donovan* v. *Bierwith,* 680 F.2d 263, 272 n.8 (2d Cir. 1982).
[53] See 29 U.S.C. §1107, 1114.
[54] 26 U.S.C. §401(a)(28).
[55] Testimony of Dr. Jack VanDerhei, Hearing on "Enron and Beyond: Enhancing Worker Retirement Security" before the Subcommittee on Employer Employee Relations, U.S. House of Representatives, 107th Congress, Second Session, February 13, 2002 (to be published).

ownership through employer securities.[56] In light of the recent events of Enron, which demonstrated the problems with over-concentration in one particular investment, the Committee recognizes that requiring employees to hold employer securities for long periods of time may run counter to an employee's objective of a diversified retirement portfolio. The Committee believes that the three-year diversification rule will provide employees the flexibility to choose how to invest their savings while continuing to encourage employers to make matching contributions.

The President specifically outlined this proposal in his plan and stated that: "Employers should be encouraged to make generous contributions to workers" 401(k) plans, including the option to use company stock to make matching contributions. However, workers must be free to choose how to invest their retirement savings. The President's proposal will ensure that workers can sell company stock and diversify into other investment options after they have participated in the 401(k) plan for three years. While many companies already allow rapid diversification, others impose holding periods which can last for decades."[57]

The Committee believes that employees should have greater options in determining if and when to diversify from employer securities. The Committee also wants to continue to encourage employers to offer matching contributions and employee stock ownership programs. To that end, the Committee requires employers that have publicly traded employer securities to permit employees to diversify from employer securities into other investments either three years after they begin to participate in the plan or three years after the employer contribution is credited to the participant's account. The three-year time period tracks the new three-year vesting rules implemented by the Economic Growth and Tax Relief Act, H.R. 1836, passed by Congress last year. Allowing plan sponsors to require the employee to hold the security for three years preserves the benefits of employee ownership while still providing employees much more flexibility than currently allowed. The Committee also continues to encourage employee stock ownership plans ("ESOPs") by exempting "stand alone" ESOPs from the bill's diversification provisions.[58] The Committee believes this strikes a balance between preserving the incentives for employers to offer employer stock to their employees while allowing employees the freedom to make greater investment decisions. Finally, the Committee exempts privately held companies from the diversification requirement. The Committee believes that the three-year rule for privately held companies would be too onerous and would discourage them from offering contributions because the companies would be required to hold cash in reserve to purchase back any stock contributions. This could result in serious financial strain on these companies. The Committee be-

[56] See Hearing on "Enron and Beyond: Enhancing Worker Retirement Security" before the Subcommittee on Employer Employee Relations, Committee on Education and the Workforce, U.S. House of Representatives, 107th Congress, Second Session, February 13, 2002 (to be published); Hearing on Enron and Beyond: Legislative Solutions" before the Subcommittee on Employer Employee Relations, Committee on Education and the Workforce, U.S. House of Representatives, 107th Congress, Second Session, February 27, 2002 (to be published).

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

[58] A "stand-alone" ESOP does not contain employer matching or employee pre-tax or after-tax contributions.

lieves, however, that employers who have publicly traded stock do not feel the same financial burden.

At the time diversification is required to be permitted by the employer, the Committee has specified that employers must offer a "broad range of investment alternatives" to the employees. The Committee does not want to be overly prescriptive by specifying the types of investment vehicles into which employers may offer re-investment. However, the Committee intends that employers should offer a range of investment options that would be acceptable to meet section 404(c) standards.[59] If necessary, the Department of Labor may issue clarifications on how the investment alternatives of 404(c) relate to this provision.

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

Among the amendments the Committee made at the mark-up, is the option for plans to administer the three-year diversification requirement through a cliff or a rolling vehicle. In the cliff situation, once the participant completed three years of service with the employer, all employer security contributions made by the employer will be immediately diversifiable. For the rolling option, the plan may require the participant to hold the employer security for three years once the security has been credited to the participant's account. Although the three-year rolling option would be more difficult to administer, the employer community has expressed a strong desire to provide them with the option. The rolling option will apply only to those contributions made after the effective date of the amendment, i.e., plan years beginning on or after January 1, 2003. The Committee believes the rolling option provides employers a continued incentive to make matches while still providing diversification rights to employees within a short period of time.

The Committee has provided a five-year transition rule with respect to the diversification of amounts held in an applicable individual account plan as of the effective date of the provision. Under this transition rule, applicable individual account plans must allow assets invested in employer securities on which there are restrictions on divestment to be reinvested in other investments over a five-year period based on an applicable percentage of such amounts. The transition rule applies only to contributions that

[59] 29 C.F.R. § 2550.404(c)–1(b)(2)(ii)(C).

exist in plan participant accounts on the day of enactment. The transition rule does not apply to contributions that are received after the day of enactment. The Committee also intends that the three-year holding requirement not apply to employer contributions that are subject to the five-year transition rule.

H.R. 3762's Department of Labor study on requiring fiduciary consultants to plans

During Committee Consideration of H.R. 3762, the Committee considered and adopted an amendment by Representative Marge Roukema that required the Secretary of Labor to undertake a study of the costs and benefits to participants and beneficiaries of requiring independent consultants to advise plan fiduciaries in connection with the administration of individual account plans.

The Committee believes that independent consultants to the fiduciaries of individual account pension plans could help protect plan participants' assets because plan managers would receive advice and guidance from an independent source regarding the management or disposition of plan assets. However, the Committee is concerned that a requirement to obtain such counsel could add to plan costs that may be borne by participants and beneficiaries, and even more seriously, impact the availability of individual account plans altogether. Because of this, the Committee has determined that a study to determine the relative costs and benefits of such a new requirement is the appropriate action to take in order to allow the Committee to make an informed decision about a new requirement.

Other proposals offered

The Committee also considered other substantive changes to the administration of pension plans. During consideration of H.R. 3762 the Committee considered and rejected two amendments that would have required that any plan which permits employee control of investment decisions must have a joint board of trustees to act as fiduciaries of the plan. This board would be comprised of both employer and employee representative.

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

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

H.R. 3762's investment advice provision

The Pension Security Act also provides for employees to have greater access to investment advice in making investment decisions. H.R. 3762 incorporates the Retirement Security Advice Act, H.R. 2269, which passed the House in the fall of 2001 with a large bipartisan vote. Although ERISA has been largely successful in protecting the integrity of privately managed pension plans, its drafters did not contemplate the explosive growth of defined contribution plans. In particular, provisions of ERISA have resulted in a huge shift of responsibility to plan participants for investing individual assets effectively without a corresponding shift in investment advice.

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

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

In order to nurture a dynamic, competitive, and consumer-responsive market for employer-provided investment advice, the bill seeks to give providers, sponsors, and participants flexibility within which to be innovative while protecting participants through strong and clear expressions of the adviser's overarching fiduciary duty—the highest duty of loyalty known to the law[60]—and through rigorous but practical disclosures of any potential conflicts of interest.

The bill establishes a new statutory exemption from ERISA's prohibited transaction rules for certain comprehensively regulated entities to provide advice services to plan fiduciaries or plan participants ("fiduciary advisers"). The Committee intends the exemption to specifically provide relief from both the party in interest restrictions (section 406(a)) and conflict of interest rules (section 406(b)) and is therefore broader than the Department of Labor has construed other statutory exemptions.[61]

The Committee intends that the investment advice provision in this bill incorporate the substantive provisions and report language

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

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

of H.R. 2269, as reported by this Committee on October 31, 2001, with three distinctions. In the floor debate on November 15, 2001, Chairman Boehner engaged in a colloquy with Representative Earl Pomeroy wherein Chairman Boehner agreed to add three provisions to the bill. The investment advice provision in H.R. 3762 contains those additional provisions and further discussion about them is provided below.

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

Two Improvements to the Disclosure Form.—In response to Chairman Boehner's and Representative Pomeroy's colloquy regarding H.R. 2269, the Committee has made two other improvements to the disclosure form in H.R. 3762 required to be provided to participants prior to the advice. First, the Committee has required the Secretary of Labor to issue a model disclosure. The Committee intends that this model disclosure will promote uniformity among the disclosures, which should assure that the disclosures are readily understandable to the average plan participant. Second, the Committee has added a disclosure that requires the fiduciary adviser to remind plan participants that they are free to seek advice elsewhere and that the other advisor may be unaffiliated with the plan and its investment options. The purpose of this disclosure is to remind participants that independent advice can be sought outside of the plan context.

With the addition of these three provisions, the investment advice provision contained in H.R. 3762 bill will empower workers with the information they need to make the most of the retirement savings and investment opportunities afforded them by today's 401(k)-type plans. This legislation will foster a competitive, dynamic investment advice marketplace that serves worker needs but also establish a strong, protective framework that safeguards their interests.

H.R. 3762's prohibition of insider trades during pension plan suspension periods

H.R. 3762 amends Section 16 of the Securities and Exchange Act of 1934[62] to prohibit beneficial owners, directors or officers of an issuer of an equity from purchasing or selling any equity security of such issuer while plan participants and beneficiaries are precluded from directing or diversifying their accounts during a "blackout" period. The bill also directs that any profit from a prohibited sale shall be recoverable by the issuer.

[62] 15 U.S.C. § 78p.

The Committee believes that this provision institutes true parity between the top floor and the shop floor. In the case of the Enron blackout period, while employees were prohibited from directing their own assets, company executives profited from sales of company stock. The Committee believes such actions to be fundamentally unfair and has drafted H.R. 3762 in order to prevent events like this in the future.

Because the amendment to Section 16 of the Securities Exchange Act is not within the jurisdiction of the Education and the Workforce Committee, the Committee was not able to modify the introduced language in any way. The Committee would note its intention to remedy concerns about the difficulty of administering a prohibition on insider trades with regard to beneficial owners. The Committee also intends to clarify that the prohibition on insider trades would only be triggered by a suspension of the ability of a majority of plan participants and beneficiaries to direct or diversify assets. The Committee does not intend for the prohibition to be triggered by mergers or acquisitions of the plan sponsor unless they are of such magnitude as to impact the majority of plan participants and beneficiaries.

During Committee consideration of H.R. 3762, the Committee considered and rejected an amendment offered by Representative George Miller that would have required senior executives and named fiduciaries to report insider sales of $10,000 to $1 million to their pension plan administrator within one day of the sale. Following such reports, the plan administrator would have been required to notify each participant and beneficiary within three business days of any insider trades that were either greater than $100,000 or reached that level in a series of transactions over a one year period. These provisions were to be enforced by a civil penalty of $1,000 per day, imposed on any person who fails to provide the notice.

The Committee notes that the Securities and Exchange Commission (SEC) governs the corporate disclosure requirements of company insiders. As a part of an effort to improve the financial reporting system, the SEC is considering a variety of ways to improve public disclosure of trading activities and plans to propose rules that require insiders to notify the SEC of any sale within 7–8 business days. As a part of this initiative, the SEC intends to provide for electronic filing of these insider transaction reports.[63]

The Committee was greatly concerned by the new reporting regime that would have been imposed by the Miller amendment. The Committee fears that such additional reporting requirements for plan administrators as proposed by the Miller amendment, would result in greater confusion for participants as well as being complicated and burdensome to implement. The Committee notes that the transactions to be reported, although of definite interest to plans and plan participants, are not, strictly speaking, transactions involving plan assets. Rather, they are transactions that affect all investors and the entire marketplace. Because of this, the Committee views the Securities and Exchange Commission, rather than the Department of Labor, as the appropriate agency to deal with such transactions.

[63] February 13, 2002 Press Release, U.S. Securities and Exchange Commission.

H.R. 3762's modification of funding rules for plans sponsored by interurban or interstate bus service companies

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

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

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

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

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

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

H.R. 3762 modifies the special funding rule for plans sponsored by a company engaged primarily in interurban or interstate passenger bus service. Currently, plans must use the fixed mortality assumption under the General Agreement on Tariffs and Trade (GATT) legislation. Recognizing this situation, Congress temporarily exempted this industry from these rules in the Taxpayer Relief Act of 1997,[64] and requiring them to comply with the normal funding rules of ERISA apply to them. In addition, the modification of the current rule provides that (1) the funded current liability percentage of a plan to which the rule applies is treated as not less than 90 percent for purposes of the minimum funding rules appli-

[64] P.L. 105–34.

cable to underfunded plans, and (2) the funded current liability percentage of a plan to which the rule applies is treated as not less than 100 percent for purposes of the quarterly contribution requirement. The provision is effective with respect to plan years beginning after December 31, 2001.

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

H.R. 3762's notice and consent period regarding distributions

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

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

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

H.R. 3762 requires qualified retirement plans to provide the applicable distribution notice no less than 30 days and no more than 180 days before the date distribution commences. The Secretary of

the Treasury is directed to modify the applicable regulations to reflect the extension of the notice period to 180 days and to provide that the description of a participant's right, if any, to defer receipt of a distribution shall also describe the consequences of failing to defer such receipt. The provision is effective for years beginning after December 31, 2002.

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

H.R. 3762's annual report dissemination

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

The bill requires that plan administrators furnish a summary annual report would be satisfied if the report were made reasonably available through electronic means or other new technology. This provision would be interpreted consistent with the regulations of the Departments of Labor and Treasury. The change applies to reports for years beginning after December 31, 2002.

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

H.R. 3762's technical corrections to the SAVER Act

The Savings Are Vital to Everyone's Retirement (SAVER) Act of 1997 (P.L. 105–92), in addition to establishing an ongoing program by the Department of Labor on retirement savings education and outreach [65] convenes a National Summit on Retirement Savings at the White House, co hosted by the President and the bipartisan Congressional leadership.[66] Summits were held in 1998 and 2002. The National Summit brings together experts in the fields of employee benefits and retirement savings, key leaders of government, and interested parties from the private sector and general public. The Congressional leadership and the President select the delegates. The National Summit is a public-private partnership, receiving substantial funding from private sector contributions. The goals of the National Summits are to: (1) advance the public's knowledge and understanding of retirement savings and facilitate the development of a broad-based, public education program; (2) identify the barriers which hinder workers from setting aside adequate savings

[65] P.L. 105–92, sec. 516
[66] Ibid. sec. 517.

for retirement and impede employers, especially small employers, from assisting their workers in accumulating retirement savings; and (3) develop specific recommendations for legislative, executive, and private sector actions to promote retirement income savings among American workers.

This section of H.R. 3762 makes technical amendments to the SAVER Act regarding the administration of future statutorily created National Summits on Retirement Savings. It clarifies that National Summits shall be held in 2002 and 2006, and adds an additional National Summit in 2010. To facilitate the administration of future National Summits, the DOL is given authority to enter into cooperative agreements (pursuant to the Federal Grant and Cooperative Agreement Act of 1977) with any appropriate, qualified entity.

Six new statutory delegates are added to future summits: the Chairman and Ranking Member of the House Ways and Means Committee, the Senate Finance Committee, and the Subcommittee on Employer-Employee Relations of the House Education and the Workforce Committee, respectively. Further, the President, in consultation with the Congressional leadership, may appoint up to 3% of the delegates (not to exceed 10) from a list of nominees provided by the private sector partner in Summit administration. The section also clarifies that new delegates are to be appointed for each future National Summit (as was the intent of the original legislation) and sets deadlines for their appointment.

H.R. 3762 also sets deadlines for DOL to publish the Summit agenda, gives DOL limited reception and representation authority, and mandates that DOL consult with the Congressional leadership in drafting the post-Summit report. The section is effective upon date of enactment.

H.R. 3762 clarifies the administration of future National Summits and is designed to assist in their planning and execution. It is also intended to clarify issues regarding the selection of delegates to future National Summits.

H.R. 3762's missing participants

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

H.R. 3762 directs the PBGC to prescribe rules for terminating multiemployer plans similar to the present-law missing participant rules applicable to terminating single employer plans that are subject to Title IV of ERISA. The missing participants program is also extended to defined contribution plans, defined benefit plans that

do not have more than 25 active participants and are maintained by professional service employers, and the portions of defined benefit plans that provide benefits based upon the separate accounts of participants and therefore are treated as defined contribution plans under ERISA.

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

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

H.R. 3762's reduction of PBGC premium for new plans of small employers

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

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

Under the provision in H.R. 3762, for the first five plan years of a new single-employer plan of a small employer, the flat-rate PBGC premium is $5 per plan participant.

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

A new plan means a defined benefit plan maintained by a contributing sponsor if, during the 36–month period ending on the date of adoption of the plan, such contributing sponsor (or controlled group member or a predecessor of either) has not established or maintained a plan subject to PBGC coverage with respect to which benefits were accrued for substantially the same employees as are in the new plan. The provisions relating to new plans are effective for plans established after December 31, 2001.

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

H.R. 3762's reduction of additional PBGC premium for new and small plans

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

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

H.R. 3762 amends ERISA sec. 4006(a)(3) to provide that the variable premium is phased in for new defined benefit plans over a six-year period starting with the plan's first plan year. The amount of the variable premium is a percentage of the variable premium otherwise due, as follows: 0 percent of the otherwise applicable variable premium in the first plan year; 20 percent in the second plan year; 40 percent in the third plan year; 60 percent in the fourth plan year; 80 percent in the fifth plan year; and 100 percent in the sixth plan year (and thereafter).

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

to which benefits were accrued to substantially the same employees as in the new plan.

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

The provision relating to premiums for new plans is effective for plans established after December 31, 2001. The provision reducing the PBGC variable premium for small plans is effective for years beginning after December 31, 2002.

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

H.R. 3762's authorization for PBGC to pay interest on premium overpayment refunds

Under Sec. 4007(b) of ERISA, the PBGC charges interest on underpayments of premiums, but is not authorized to pay interest on overpayments. The provision in H.R. 3762 allows the PBGC to pay interest on overpayments made by premium payers. Interest paid on overpayments is to be calculated at the same rate and in the same manner as interest is charged on premium underpayments. The provision is effective with respect to interest accruing for periods beginning not earlier than the date of enactment.

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

H.R. 3762's substantial owner benefits in terminated plans

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

H.R. 3762 provides that the 60–month phase-in of guaranteed benefits applies to a substantial owner with less than 50 percent

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

The provision is effective for plan terminations with respect to which notices of intent to terminate are provided, or for which proceedings for termination are instituted by the PBGC, after December 31, 2002.

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

H.R. 3762's benefit suspension notice

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

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

H.R. 3762 directs the Secretary of Labor to revise the regulations relating to the benefit suspension notice to generally permit the information currently required to be set forth in a suspension notice to be included in the summary plan description. The provision also directs the Secretary of Labor to eliminate the requirement that the notice include a copy of relevant plan provisions. However, individuals reentering the workforce to resume work with a former employer—or with an employer that belongs to the same multiemployer pension plan—after they have begun to receive benefits will still receive the notification of the suspension of benefits (and a copy of the plan's provisions relating to suspension of payments). In addition, if a reduced rate of future benefit accrual will apply to a returning employee (as of his or her first date of participation in the plan after returning to work) who has begun to receive benefits, the notice must include a statement that the rate of future benefit accrual will be reduced. The individual benefit-suspension

statement only need include such notice of reduction of future benefit accrual where the reduction is the result of a plan amendment covered under section 204(h). Such notice should include a description of the change and the date it took effect.

The modification made under this section shall apply to plan years beginning after December 31, 2002.

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

H.R. 3762's studies

Study on small employer group plans: H.R. 3762 directs the Department of Labor, in consultation with the Treasury Department, to conduct a study to determine (1) the most appropriate form(s) of pension plans that would be simple to create and easy to maintain by multiple small employers, while providing ready portability of benefits for all participants and beneficiaries, (2) how such arrangements could be established by employer or employee associations, (3) how such arrangements could provide for employees to contribute independent of employer sponsorship, and (4) appropriate methods and strategies for making such pension plan coverage more widely available to American workers.

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

Study on pension coverage: H.R. 3762 also directs the Secretary of Labor to report to the Committee on Education and the Workforce of the House of Representatives and the Committee on Health, Education, Labor and Pensions of the Senate regarding the effect of the bill on pension coverage, including: the extent of pension plan coverage for low and middle-income workers, the levels of pension plan benefits generally, the quality of pension plan coverage generally, worker's access to and participation in pension plans, and retirement security. This report is required to be submitted no later than five years after the date of enactment. This section is effective upon enactment.

The Committee believes that the possibility of small employer pooling for pension coverage is worthy of study and consideration. During Committee hearings, witnesses have focused on the problem of low pension plan sponsorship rates by small employers. Some have proposed a possible solution of allowing individual small employers to join together to sponsor pension plans or to join into an existing group pension plan vehicle (similar to the "association

health plan" concept reported out by the Employer-Employee Relations Subcommittee in the 106th Congress in H.R. 2047).

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

H.R. 3762's interest rate range for additional funding requirements

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

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

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

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

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

In the case of an underfunded plan, additional PBGC premiums are required based on the amount of unfunded vested benefits. These premiums are referred to as "variable rate premiums." In determining the amount of unfunded vested benefits, the interest rate

used is 85 percent of the interest rate on 30-year Treasury securities for the month preceding the month in which the plan year begins.

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

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

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

Under the provisions of H.R. 3762, the special interest rate rule for 2002 and 2003 would apply also in determining the amount of additional contributions for the 2001 plan year that must be contributed to the plan within 8½ months after the end of the plan year (e.g., by September 15, 2002). The proposal would not affect quarterly contributions required to be made for the 2001 plan year.

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

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

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

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

alistic interest rate assumption when calculating necessary contributions to defined benefit plans.

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

(The valuation of lump sum distributions from pension plans is not affected by this change.)

H.R. 3762's provisions relating to plan amendments

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

H.R. 3762 eases this burden on plans by permitting certain plan amendments made pursuant to the changes made by the bill (or regulations issued under the provisions of the bill) to be retroactively effective. If the plan amendment meets the requirements of the bill, then the plan is treated as being operated in accordance with its terms and the amendment does not violate the prohibition of reductions of accrued benefits. In order for this treatment to apply, the plan amendment must be made on or before the last day of the first plan year beginning on or after January 1, 2004.

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

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

SUMMARY

Title I of ERISA contains fundamental protections for participants and beneficiaries of employee benefit plans. Part 1 of Title I sets forth the duties of plan administrators to notify participants and beneficiaries of the terms of the benefit plans in which they participate, their rights under these plans, and the benefits which have accrued under the terms of their plans. Part 4 of Title I explains the fundamental duty of fiduciaries to act in the sole interest of participants and beneficiaries of employee benefit plans.

When ERISA was enacted in 1974, Congress provided for such disclosure and safeguards as would protect employees' retirement security. In 1974, pension plans were primarily in the form of defined benefit plans, which made specific guarantees for retirement payments to ensure the retirement security of participants and beneficiaries.

Today's workforce is very different than the workforce in 1974. Today's retirement plan context is largely one of pension plans that are individual in nature where participants have the ability to direct their own accounts, choosing investments that best meet their retirement needs.

Individual account plans necessitate different safeguards and standards for information disclosure in order to provide the same level of retirement security for participants and beneficiaries that was envisioned in 1974. As such, the provisions of H.R. 3762 represent a logical upgrade to the provisions of Title I of ERISA to ensure adequate retirement protection for today's workforce.

The bill requires the plan administrator to provide a quarterly notice to plan participants and beneficiaries of the value of investments allocated to their individual account, including their rights to diversify any assets held in employer securities. The notice will also include an explanation of the importance of a diversified investment portfolio including a risk of holding substantial portions of a portfolio in any one security, such as employer securities.

In the event of a suspension of participant and beneficiary's ability to direct or diversify assets, H.R. 3762 requires that plan administrators shall determine that any suspension, limitation or restriction is reasonable. Once this determination has been made, the bill requires plan administrators to notify participants and beneficiaries 30 days prior to the suspension. The notice must contain the reasons for the suspension, the investments that will be affected, the likely period of the suspension, a statement that the administrator has evaluated the reasonableness of the expected period, and a statement that the participant should evaluate the appropriateness of their current investment decisions in light of their inability to direct or diversify assets during the expected period of suspension.

The bill clarifies that fiduciaries are not liable for losses during a period of suspension provided that fiduciaries satisfy their fiduciary duty with regard to the interruption of participant and beneficiary's ability to direct or diversify assets. H.R. 3762 outlines relevant considerations in determining the satisfaction of fiduciary duty, such as the provision of the blackout notice, the fiduciary's consideration of the reasonableness of the period of suspension, and the fiduciary's actions solely in the interest of participants and beneficiaries. If fiduciaries meet these requirements, the bill protects them from any losses sustained by participants and beneficiaries during a period of suspension.

In order to promote education of fiduciaries as to their fiduciary duty, the bill requires the Department of Labor to establish a program to make information and educational resources available to pension plan fiduciaries on an ongoing basis in order to assist them in diligently and efficiently carrying out their fiduciary duties with respect to the plan.

H.R. 3762 mandates that employees must be able to diversify contributions to their account that are in the form of employer securities after three years. The bill provides for the option of a rolling three-year diversification of employer securities. In this case employer securities may be diversified three years after the calendar quarter in which they were contributed. The bill also sets forth a five-year transition rule for the allowable diversification of

employer securities held in individual account plans as of the date of enactment. The bill exempts individual account plans that do not hold employer securities that are readily tradable on an established securities market from the diversification requirements.

H.R. 3762 requires the Secretary of Labor to undertake a study of the costs and benefits to participants and beneficiaries of requiring independent consultants to advise plan fiduciaries in connection with the administration of individual account plans.

The bill includes the text of H.R. 2269, the Retirement Security Advice Act, which, as modified, provides increased availability of investment advisors to assist plan participants in making good decisions about their retirement assets.

H.R. 3762 amends Section 16 of the Securities and Exchange Act of 1934 to prohibit beneficial owners, directors or officers of an issuer of an equity from purchasing or selling any equity security of such issuer while plan participants and beneficiaries are precluded from directing or diversifying their accounts during a "blackout" period. The bill also directs that any profit from a prohibited sale shall be recoverable by the issuer.

The bill also includes provisions contained in H.R. 10 from the first session of the 107th Congress which were excluded because of a Senate procedural rule affecting the Conference Report of H.R. 1836, the "Economic Growth and Tax Relief Reconciliation Act." H.R. 3762 provides incentives to small businesses to offer pension plans to their workers by lowering Pension Benefit Guaranty Corporation (PBGC) premiums for new small business defined benefit plans. The bill allows the PBGC to pay employers interest if they over pay their premiums to it. Furthermore, the bill also expands the missing participant program administered by the PBGC to include defined contribution plans so that individuals may locate 401(k) money they may have left with a previous employer. The bill also modifies the rules of the PBGC for small business owners when plans terminate.

H.R. 3762 extends the notice and consent period for distributions to allow individuals to plan for and request a pension distribution further in advance, while also modifying the rules dealing with the distribution of the Benefit Suspension Notice to those employees who although they have reached retirement age, continue to work for their employer.

Part 5 of Title I of ERISA provides for the holding of National Summits on Retirement Savings to advance the public's knowledge and awareness of the importance of saving for their future retirement. The bill provides for Summits in 2006 and 2010 and modifies the appointment procedure for delegate selection.

The bill also provides for a study on small employer group plans and the effect of the legislation on pension plans.

Finally, the bill also includes provisions dealing with problems that have arisen due to the change in status of the 30 year Treasury Bond and certain mortality tables as a benchmark for certain pension calculations.

On this last point, ERISA requires defined benefit plans to make annual contributions based upon calculations that take into account the liability of the plan to pay benefits to participants. A statutory factor in these calculations is the 30-year Treasury bond. With the government buy back of some of these bonds in the past

few years in response to the budget surplus and the announcement by the Department of Treasury in the fall of 2001 that they were no longer going to issue these instruments, its validity as a statutory benchmark has been brought into question.

The mortality tables used by defined benefit pension plans to determine funding requirements can sometimes be inappropriate for certain pension plans. In 1997, Congress granted interim relief to certain frozen (no new participants) plans of inter-city bus companies because these tables did not accurately reflect the mortality experience of the plan. The bill specifies that this relief is permanent.

SECTION-BY-SECTION ANALYSIS

Section 1. Short title and table of contents

"Pension Security Act of 2002."

TITLE I—IMPROVEMENTS IN PENSION SECURITY

Section 101. Periodic pension benefits statements

H.R. 3762 amends ERISA to require plan administrators to provide a quarterly notice to plan participants and beneficiaries of the value of investments allocated to their applicable individual account. Provisions from H.R. 10 were also incorporated into H.R. 3762 to require plan administrators of all individual account plans to provide a pension benefit statement at least annually. For purposes of the quarterly benefit statement, the value of such securities that are not readily tradable on an established securities market may be determined by using the most recent valuation of the employer securities.

The bill also requires administrators of defined benefit plans to furnish a benefit statement to each participant of a defined benefit plan at least once every three years and to a plan participant or beneficiary upon written request. In the case of a defined benefit plan, if administrators annually provide participants with a notice of the availability of a pension benefit statement, the new requirements are treated as having been met.

H.R. 3762 specifies that the new notices may be provided in electronic or other appropriate form provided that such form is reasonably accessible to the recipient.

The new quarterly benefit statement for applicable individual accounts will include a statement of each participant's right to diversify any assets held in employer securities. The benefit statement will also include an explanation of the importance of a diversified investment portfolio including the risk of holding substantial portions of a portfolio in any one security, such as employer securities.

Applicable individual account plans are defined by limiting the definition of individual account plan in ERISA to exclude employee stock ownership plans unless there are any contributions to such plan or earnings held within such plan that are subject to subsection (k)(3) or (m)(2) of section 401 of the IRS Code of 1986.

The Secretary shall issue guidance and model notices that include the value of investments, the rights of employees to diversify any employer securities and an explanation of the importance of a diversified investment portfolio by January 1, 2003. The Secretary may also issue interim model guidance.

The bill amends Section 502 of ERISA to allow the Secretary to assess a civil penalty against a plan administrator of up to $1,000 a day from the date of such plan administrator's failure to provide participants and beneficiaries with a benefit statement on a quarterly basis.

Section 102. Protection from suspensions, limitations, or restrictions on ability of participant or beneficiary to direct or diversify plan assets

H.R. 3762 amends Section 101 of ERISA to add a requirement that in the case of any action that would have the effect of temporarily suspending, limiting, or restricting any ability of participants or beneficiaries of individual account plans to direct or diversify assets credited to their accounts. The suspension must be more than three consecutive calendar days on which the ability to diversify is otherwise available under the terms of the plan.

Once a plan administrator has made a determination of reasonableness, H.R. 3762 requires plan administrators to notify plan participants and beneficiaries of such action. The new notice shall be issued 30 days prior to any suspension of participants and beneficiaries ability to direct or diversify assets. H.R. 3762 specifies that the notice must contain the reasons for the suspension, an identification of the investments affected, the expected period of the suspension, a statement that the administrator has evaluated the reasonableness of the expected period, and a statement that the participant should evaluate the appropriateness of their current investment decisions in light of their inability to direct or diversify assets during the expected period of suspension.

H.R. 3762 provides for specific exceptions from the duty to notice all participants and beneficiaries under the plan. In the event of a qualified domestic relations order, or a blackout period caused by a merger, acquisition, divestiture or other such action by the plan sponsor or plan, only those employees who are impacted by the event will receive the notice. The bill provides that the Secretary may provide for additional exceptions to the requirements that are in the interest of participants and beneficiaries.

In any case where the inability to provide the notice is due to events that were unforeseeable or circumstances beyond the reasonable control of the plan administrator, the notice shall be furnished to all participants and beneficiaries under the plan as soon as reasonably possible under the circumstances.

Should there be a change in the expected period of the suspension, H.R. 3762 requires the plan administrator to provide notice to affected participants and beneficiaries as soon as reasonably practicable in advance of the change.

H.R. 3762 provides that the Secretary shall issue guidance and model notices that include the above factors and such other provisions the Secretary may specify. The initial guidance will be promulgated no later than January 1, 2003. The Secretary may also issue interim model guidance.

H.R. 3762 amends Section 502 of ERISA to allow the Secretary to assess a civil penalty against a plan administrator of up to $100 a day from the date of the plan administrator's failure or refusal to provide notice to participants and beneficiaries in accordance with the new notice requirements.

H.R. 3762 amends Section 404(c)(1) of ERISA to state that the exemption from liability shall not apply in connection with any period where a participant or beneficiary's ability to direct the investment of the assets in his or her account is suspended by a plan sponsor or fiduciary. The bill also adds another paragraph that specifies that if fiduciaries meet certain requirements, they shall not be liable in a suspension period. The bill adds relevant matters to be considered in determining whether or not a fiduciary has met their obligations. These include the consideration of the reasonableness of the suspension period and the provision of notice to participants and beneficiaries. The bill also restates the implicit fiduciary duty to act in the sole interest of participants and beneficiaries in determining to enter into the suspension as another matter to be considered. As H.R. 3762 indicates, it is only then that fiduciaries are relieved of their own liability and granted the 404(c) liability protection.

Section 103. Information and educational support for pension plan fiduciaries

As modified by the adoption of an amendment offered by Representative Marge Roukema, H.R. 3762 amends Section 404 of ERISA to direct the Department of Labor to establish a program to make information and educational resources available to pension plan fiduciaries on an ongoing basis in order to assist them in diligently and efficiently carrying out their fiduciary duties with respect to the plan.

Section 104. Limitations on restrictions of investments in employer securities

The bill creates a diversification right for individual account plans that hold employer securities readily tradable on an established securities market. After a participant in such a plan has completed three years of participation as defined by ERISA section 204(a)(4), the plan may not restrict divestment of any employer security held by the participant or it may not restrict divestment of any employer security later than 3 years during a calendar quarter after the employer security is allocated to the individual account.

A plan must offer a broad range of investment alternatives as determined by the Secretary in which the plan participant must be allowed to re-allocate and the plan participant must be given the right to re-allocate on a periodic, reasonable basis, but no less frequently than on a quarterly basis.

Plans holding employer securities as of the date of enactment, must provide for the removal of all trading restrictions on those securities on an increasing percentage basis annually and requiring complete diversification by the plan year beginning 2007.

Section 105. Prohibited transaction exemption for the provision of investment advice

The bill provides a statutory exemption from the prohibited transaction rules of the Employee Retirement Income Security Act (ERISA) and the Internal Revenue Code (a new §408(b)(14) of ERISA and a new §4975(d)(14) of the IRC) for: (1) the provision of investment advice regarding plan assets subject to the direction of plan participants and beneficiaries plan to a plan, its participants

and beneficiaries, (2) the sale, acquisition, or holding of securities or other property pursuant to such investment advice, and (3) the direct or indirect receipt of fees or other compensation in connection with providing the advice.

In order to qualify for the exemption, an entity must be a "fiduciary adviser" and must meet a series of detailed requirements. The bill defines the following regulated entities to qualify as fiduciary advisers: registered investment advisers, the trust department of banks or similar institutions, insurance companies, registered broker-dealers, and the affiliates, employees, agents, or registered representatives of those entities who satisfy the requirements of the applicable insurance, banking and securities laws with respect to the provision of such advice.

The fiduciary adviser, at a time reasonably contemporaneous with the initial delivery of investment advice on a security or other property, must provide a clear and conspicuous written (including electronic) disclosure of: (1) the fees or other compensation that the fiduciary adviser and its affiliates receive relating to the provision of investment advice or a resulting sale or acquisition of securities or other property (including from third parties), (2) any interest of the fiduciary adviser (and its affiliates) in any security or other property recommended, purchased or sold, (3) any limitation placed on the fiduciary's ability to provide advice, (4) the advisory services offered, and (5) that the adviser is acting as a fiduciary of the plan in connection with the provision of such advice; (6) any information required to be disclosed under applicable securities laws and (7) that the plan participant may seek advice from an unaffiliated adviser. This disclosure must be written in a way that the average plan participant could understand the information. This material must be maintained in currently accurate form. The Secretary of Labor will issue a model disclosure form.

Any investment advice provided to participants or beneficiaries may be implemented (through a purchase or sale of securities or other property) only at their direction.

The terms of the transaction must be at least as favorable to the plan as an arm's length transaction would be, and the compensation received by the fiduciary adviser (and its affiliates) in connection with any transaction must be reasonable. The fiduciary adviser must also provide a written acknowledgement that it is acting as a fiduciary of the plan to the plan sponsor.

Fiduciary advisers must comply with a six-year record-keeping requirement (for records necessary to determine whether the conditions of the exemption have been met).

A plan sponsor or other fiduciary that arranges for a fiduciary adviser to provide investment advice to participants and beneficiaries has no duty to monitor the specific investment advice given by the fiduciary adviser to any particular recipient of advice. The plan sponsor or other fiduciary retains the duty of prudent selection and periodic review of the fiduciary adviser. The fiduciary adviser must acknowledge in writing to the plan sponsor that it is acting as a fiduciary of the plan with respect to the advice provided. Plan assets may be used to pay for the expenses of providing investment advice to participants and beneficiaries.

Section 106. Study regarding impact on retirement savings of participants and beneficiaries by requiring fiduciary consultants for individual account plans

As modified by an amendment adopted in Committee, H.R. 3762 requires the Secretary of Labor to undertake a study of the costs and benefits to participants and beneficiaries of requiring independent consultants to advise plan fiduciaries in connection with the administration of individual account plans.

The study shall address the merit of a requirement, as well as relationship to such a requirement to the expenses borne by participants and beneficiaries, and the availability of individual account plans.

Section 107. Insider trades during pension plan suspension periods prohibited

H.R. 3762 amends Section 16 of the Securities and Exchange Act of 1934 to prohibit beneficial owners, directors or officers of an issuer of an equity from purchasing or selling any equity security of such issuer while plan participants and beneficiaries are precluded from directing or diversifying their accounts during a "blackout" period. The bill also directs that any profit from a prohibited sale shall be recoverable by the issuer.

Section 108. Effective dates of title and related rules

The effective dates of these titles are on or after January 1, 2003.

TITLE II—ADDITIONAL PROVISIONS

Section 201. Amendments to Retirement Protection Act of 1994

Retirement plans sponsored by interstate bus companies are facing inappropriate funding obligations that do not accurately reflect the economic realities underlying these plans or the interstate bus transportation industry. This situation has arisen, in part, due to the decline and elimination of the 30 year Treasury bond and the fixed mortality assumption that these plans must use under the General Agreement on Tariffs and Trade (GATT) legislation. Recognizing this situation, Congress temporarily exempted this industry from these rules in the Taxpayer Relief Act of 1997, thus having the normal funding rules of ERISA apply to them. This section makes that exemption from the GATT funding rules permanent.

Section 202. Notice and consent period regarding distributions

Generally, benefits cannot be distributed before the later of age 62 or normal retirement age unless the participant consents no more than 90 days before benefit commencement. Also, information on the tax implications of rollovers must be given to the employee within 90 days of distribution. Under this provision, the notice and consent period regarding distributions would be expanded from 90 days to 180 days.

Section 203. Annual report dissemination

Within 210 days after the close of a plan's fiscal year, the plan administrator must provide certain information to participants in a summary annual report (SAR). Under this section, Summary An-

nual Reports could now be distributed through electronic means (including Internet) or via other new technologies.

Section 204. Technical corrections to the SAVER Act

The Savings Are Vital to Everyone's Retirement (SAVER) Act of 1997 convenes a National Summit on Retirement Savings at the White House, which will be co-hosted by the executive and legislative branches in 2006 and 2010. The National Summit brings together experts in the fields of employee benefits and retirement savings, key leaders of government, and interested parties from the private sector and general public. The Congressional leadership and the President select the delegates. The National Summit is a public-private partnership, receiving substantial funding from private sector contributions. This section provides for technical amendments to the SAVER Act, regarding the administration of and delegate selection to future statutorily created National Summits on Retirement Savings.

Section 205. Expansion of missing participants program

The PBGC acts as a clearinghouse for benefits due to participants who cannot be located. When a defined benefit plan terminates, the plan may transfer the benefits of the missing participant to the PBGC, which then attempts to locate the participant. Under this section, the PBGC's missing participant program would be expanded to cover defined contribution plans. This expansion would be voluntary at the election of the plan sponsor.

Section 206. Reduced PBGC premiums for new plans

Defined benefit plans are subject to a flat-rate premium of $19 per participant. Underfunded defined benefit plans are subject to an additional variable rate premium. There is no variable rate premium for the first year of a new defined benefit plan. Under this provision, new defined benefit plans established by employers with 100 employees or less would only have to pay a $5 per participant PBGC premium for the first 5 years of the plan. No variable rate premium would be assessed during this period.

Section 207. Reduction of additional PBGC premiums

Defined benefit plans are subject to a flat-rate premium of $19 per participant. Underfunded defined benefit plans are subject to an additional variable rate premium. There is no variable rate premium for the first year of a new defined benefit plan. Under this section, any variable rate premium that might be assessed against a new defined benefit plan established by a larger employer would be phased-in as follows: 0% for the first plan year; 20% for the second; 40% for the third; 60% for the fourth; 80% for the fifth, and 100% for the sixth and succeeding plan years. For employers who have 25 or fewer employees on the first day of the plan year, the additional premium for each participant would not exceed $5 multiplied by the number of participants in the plan as of the close of the preceding plan year.

Section 208. Authorization for PBGC to pay interest on premium overpayment refunds

This would allow the PBGC to pay interest on overpayments made by premium payers. Interest paid on overpayments would be calculated at the same rate and in the same manner as interest is charged on premium underpayments.

Section 209. Substantial owner benefits in terminated plans

"Substantial owners" are individuals who own more than 10% of a business. ERISA contains complicated rules governing the benefit earned by substantial owners when a plan is terminating. Under this section, the same five-year phase-in that currently applies to a participant who is not a substantial owner would apply to a substantial owner with less than a 50% ownership interest. For a majority owner, the phase-in would depend on the number of years the plan has been in effect, rather than on the number of years the owner has been a participant and the initial plan benefit.

Section 210. Benefit suspension notice

When an employee continues to work beyond normal retirement age, or is reemployed after commencing benefits, a defined benefit plan may provide for a suspension of pension payments during the post normal retirement age employment period. DOL regulations require that affected participants be notified in writing of such suspension and that such notice include a copy of the relevant plan provisions. Under this section, DOL would be required to modify its regulations regarding suspension of benefits rules to eliminate the requirement of a written individual notice and instead require that the suspension of benefits rules be outlined in the summary plan description, except for individuals reentering the workforce. Those rejoining a former employer would still receive the existing notice of suspension, along with a notice of any reduction in the rate of future benefit accrual.

Section 211. Studies.

(1) Model Small Employer Group Plans: Under this section, the DOL is directed to conduct a study to determine (1) the most appropriate form(s) of pension plans that would be simple to create and easy to maintain by multiple small employers, while providing ready portability of benefits for all participants and beneficiaries, (2) how such arrangements could be established by employer or employee associations, (3) how such arrangements could provide for employees to contribute independent of employer sponsorship, and (4) appropriate methods and strategies for making such pension plan coverage more widely available to American workers.

(2) Pension Coverage: This section also directs the DOL to conduct a study regarding the effect of the bill on pension coverage, including: the extent of pension plan coverage for low and middle-income workers, the levels of pension plan benefits generally, the quality of pension plan coverage generally, worker's access to and participation in pension plans, and retirement security.

Section 212. Interest rate range for additional funding requirements

The decline in yield and elimination of the 30 year Treasury bond has forced defined benefit pension plan sponsors to artificially

increase their contributions due to inaccurately low rate of the 30 year Treasuries that are used as the basis of the statutory formula that determines acceptable funding levels. Furthermore, this flawed formula might cause some companies to also have to pay to the PBGC a penalty for under funding under the formula but in reality there is no under funding. This section gives plans an expanded formula which takes into consideration the low rate of the 30 year Treasury bonds for plan years 2001, 2002 and 2003.

Section 213. Provisions relating to plan amendments

Generally, there is a short time within which to make plan amendments to reflect amendments to the law. In addition, the anti-cutback rules can have the unintended consequence of preventing an employer from amending its plan to reflect a change in the law. Under this section, amendments to a plan or annuity contract made pursuant to any amendment made by the Act would not be required to be made before the last day of the first plan year beginning on or after January 1, 2003. Operational compliance would, of course, be required with respect to all plans as of the applicable effective date of any amendment made by the Act. In addition, timely amendments to a plan or annuity contract made pursuant to any amendment made by the Act would be deemed to satisfy the anti-cutback rules.

EXPLANATION OF AMENDMENTS

The provisions of the substitute are explained in this report.

ROLLCALL VOTES

COMMITTEE ON EDUCATION AND THE WORKFORCE

ROLL CALL 1 **BILL** H.R. 3762 **DATE** March 20, 2002

AMENDMENT NUMBER 4 **Defeated** 21 – 24

SPONSOR/AMENDMENT Mr. Miller / substitute amendment to the amendment in the nature of a substitute

MEMBER	AYE	NO	PRESENT	NOT VOTING
Mr. BOEHNER, Chairman		X		
Mr. PETRI, Vice Chairman		X		
Mrs. ROUKEMA				X
Mr. BALLENGER		X		
Mr. HOEKSTRA		X		
Mr. McKEON		X		
Mr. CASTLE		X		
Mr. JOHNSON		X		
Mr. GREENWOOD		X		
Mr. GRAHAM		X		
Mr. SOUDER		X		
Mr. NORWOOD				X
Mr. SCHAFFER				X
Mr. UPTON		X		
Mr. HILLEARY		X		
Mr. EHLERS		X		
Mr. TANCREDO		X		
Mr. FLETCHER		X		
Mr. DEMINT		X		
Mr. ISAKSON		X		
Mr. GOODLATTE		X		
Mrs. BIGGERT		X		
Mr. PLATTS		X		
Mr. TIBERI		X		
Mr. KELLER		X		
Mr. OSBORNE		X		
Mr. CULBERSON		X		
Mr. MILLER	X			
Mr. KILDEE	X			
Mr. OWENS	X			
Mr. PAYNE	X			
Mrs. MINK	X			
Mr. ANDREWS	X			
Mr. ROEMER	X			
Mr. SCOTT	X			
Ms. WOOLSEY	X			
Ms. RIVERS	X			
Mr. HINOJOSA	X			
Mrs. McCARTHY				X
Mr. TIERNEY	X			
Mr. KIND	X			
Ms. SANCHEZ	X			
Mr. FORD	X			
Mr. KUCINICH	X			
Mr. WU	X			
Mr. HOLT	X			
Ms. SOLIS	X			
Ms. DAVIS	X			
Ms. McCOLLUM	X			
TOTALS	21	24		4

COMMITTEE ON EDUCATION AND THE WORKFORCE

ROLL CALL 2 (en bloc vote) **BILL H.R. 3762** **DATE** March 20, 2002

AMENDMENT NUMBERS: Amendment #6 – regarding mandated employee representation on pension boards, offered by Mr. Miller; Amendment #7 – regarding insider sales notification, offered by Mr. Owens; Amendment #8 – restricting executive compensation as a holding of the company, offered by Ms. Woolsey; Amendment #10 - regarding employee diversification, offered by Mr. Holt (en bloc); Amendment #11 – requiring direct reporting of certain events, offered by Mr. Payne; and Amendment #12 – regarding written documentation of employee election to hold employer stock, offered by Mr. Andrews

Amendments numbered 6, 7, 8, 10, 11 and 12 were defeated by a vote of 21 – 25

MEMBER	AYE	NO	PRESENT	NOT VOTING
Mr. BOEHNER, Chairman		X		
Mr. PETRI, Vice Chairman		X		
Mrs. ROUKEMA		X		
Mr. BALLENGER		X		
Mr. HOEKSTRA		X		
Mr. McKEON		X		
Mr. CASTLE		X		
Mr. JOHNSON		X		
Mr. GREENWOOD		X		
Mr. GRAHAM		X		
Mr. SOUDER		X		
Mr. NORWOOD				X
Mr. SCHAFFER				X
Mr. UPTON		X		
Mr. HILLEARY		X		
Mr. EHLERS		X		
Mr. TANCREDO		X		
Mr. FLETCHER		X		
Mr. DEMINT		X		
Mr. ISAKSON		X		
Mr. GOODLATTE		X		
Mrs. BIGGERT		X		
Mr. PLATTS		X		
Mr. TIBERI		X		
Mr. KELLER		X		
Mr. OSBORNE		X		
Mr. CULBERSON		X		
Mr. MILLER	X			
Mr. KILDEE	X			
Mr. OWENS	X			
Mr. PAYNE	X			
Mrs. MINK	X			
Mr. ANDREWS	X			
Mr. ROEMER	X			
Mr. SCOTT	X			
Ms. WOOLSEY	X			
Ms. RIVERS	X			
Mr. HINOJOSA	X			
Mrs. McCARTHY				X
Mr. TIERNEY	X			
Mr. KIND	X			
Ms. SANCHEZ	X			
Mr. FORD	X			
Mr. KUCINICH	X			
Mr. WU	X			
Mr. HOLT	X			
Ms. SOLIS	X			
Ms. DAVIS	X			
Ms. McCOLLUM	X			
TOTALS	21	25		3

COMMITTEE ON EDUCATION AND THE WORKFORCE

ROLL CALL 3 **BILL H.R. 3762** **DATE** March 20, 2002
AMENDMENT NUMBER 9 **Defeated 17 - 29**
SPONSOR/AMENDMENT Mr. Holt / en bloc amendment regarding one-year vesting and diversification

MEMBER	AYE	NO	PRESENT	NOT VOTING
Mr. BOEHNER, Chairman		X		
Mr. PETRI, Vice Chairman		X		
Mrs. ROUKEMA		X		
Mr. BALLENGER		X		
Mr. HOEKSTRA		X		
Mr. McKEON		X		
Mr. CASTLE		X		
Mr. JOHNSON		X		
Mr. GREENWOOD		X		
Mr. GRAHAM		X		
Mr. SOUDER		X		
Mr. NORWOOD		X		
Mr. SCHAFFER				X
Mr. UPTON		X		
Mr. HILLEARY		X		
Mr. EHLERS		X		
Mr. TANCREDO		X		
Mr. FLETCHER		X		
Mr. DEMINT		X		
Mr. ISAKSON		X		
Mr. GOODLATTE		X		
Mrs. BIGGERT		X		
Mr. PLATTS		X		
Mr. TIBERI		X		
Mr. KELLER		X		
Mr. OSBORNE		X		
Mr. CULBERSON		X		
Mr. MILLER	X			
Mr. KILDEE	X			
Mr. OWENS	X			
Mr. PAYNE	X			
Mrs. MINK	X			
Mr. ANDREWS	X			
Mr. ROEMER		X		
Mr. SCOTT	X			
Ms. WOOLSEY	X			
Ms. RIVERS	X			
Mr. HINOJOSA	X			
Mrs. McCARTHY				X
Mr. TIERNEY				X
Mr. KIND	X			
Ms. SANCHEZ	X			
Mr. FORD	X			
Mr. KUCINICH	X			
Mr. WU	X			
Mr. HOLT	X			
Ms. SOLIS	X			
Ms. DAVIS		X		
Ms. McCOLLUM		X		
TOTALS	17	29		3

COMMITTEE ON EDUCATION AND THE WORKFORCE

ROLL CALL 4 **BILL H.R. 3762** **DATE** March 20, 2002

AMENDMENT NUMBER 14 **Defeated 20 - 26**

SPONSOR/AMENDMENT Mr. Andrews / amendment regarding independent investment advice

MEMBER	AYE	NO	PRESENT	NOT VOTING
Mr. BOEHNER, Chairman		X		
Mr. PETRI, Vice Chairman		X		
Mrs. ROUKEMA		X		
Mr. BALLENGER		X		
Mr. HOEKSTRA		X		
Mr. McKEON		X		
Mr. CASTLE		X		
Mr. JOHNSON		X		
Mr. GREENWOOD		X		
Mr. GRAHAM		X		
Mr. SOUDER		X		
Mr. NORWOOD		X		
Mr. SCHAFFER				X
Mr. UPTON		X		
Mr. HILLEARY		X		
Mr. EHLERS		X		
Mr. TANCREDO		X		
Mr. FLETCHER		X		
Mr. DEMINT		X		
Mr. ISAKSON		X		
Mr. GOODLATTE		X		
Mrs. BIGGERT		X		
Mr. PLATTS		X		
Mr. TIBERI		X		
Mr. KELLER		X		
Mr. OSBORNE		X		
Mr. CULBERSON		X		
Mr. MILLER	X			
Mr. KILDEE	X			
Mr. OWENS	X			
Mr. PAYNE	X			
Mrs. MINK	X			
Mr. ANDREWS	X			
Mr. ROEMER	X			
Mr. SCOTT	X			
Ms. WOOLSEY	X			
Ms. RIVERS	X			
Mr. HINOJOSA	X			
Mrs. McCARTHY				X
Mr. TIERNEY				X
Mr. KIND	X			
Ms. SANCHEZ	X			
Mr. FORD	X			
Mr. KUCINICH	X			
Mr. WU	X			
Mr. HOLT	X			
Ms. SOLIS	X			
Ms. DAVIS	X			
Ms. McCOLLUM	X			
TOTALS	20	26		3

COMMITTEE ON EDUCATION AND THE WORKFORCE

ROLL CALL 5 **BILL H.R.** 3762 **DATE** March 20, 2002

H.R. 3762 was favorably reported as amended by a vote of 28 - 19

Mr. Petri / motion to report the bill to the House with an amendment and with the recommendation that the bill as amended do pass

MEMBER	AYE	NO	PRESENT	NOT VOTING
Mr. BOEHNER, Chairman	X			
Mr. PETRI, Vice Chairman	X			
Mrs. ROUKEMA	X			
Mr. BALLENGER	X			
Mr. HOEKSTRA	X			
Mr. McKEON	X			
Mr. CASTLE	X			
Mr. JOHNSON	X			
Mr. GREENWOOD	X			
Mr. GRAHAM	X			
Mr. SOUDER	X			
Mr. NORWOOD	X			
Mr. SCHAFFER				X
Mr. UPTON	X			
Mr. HILLEARY	X			
Mr. EHLERS	X			
Mr. TANCREDO	X			
Mr. FLETCHER	X			
Mr. DEMINT	X			
Mr. ISAKSON	X			
Mr. GOODLATTE	X			
Mrs. BIGGERT	X			
Mr. PLATTS	X			
Mr. TIBERI	X			
Mr. KELLER	X			
Mr. OSBORNE	X			
Mr. CULBERSON	X			
Mr. MILLER		X		
Mr. KILDEE		X		
Mr. OWENS		X		
Mr. PAYNE		X		
Mrs. MINK		X		
Mr. ANDREWS		X		
Mr. ROEMER		X		
Mr. SCOTT		X		
Ms. WOOLSEY		X		
Ms. RIVERS		X		
Mr. HINOJOSA		X		
Mrs. McCARTHY	X			
Mr. TIERNEY				X
Mr. KIND		X		
Ms. SANCHEZ		X		
Mr. FORD		X		
Mr. KUCINICH		X		
Mr. WU	X			
Mr. HOLT		X		
Ms. SOLIS		X		
Ms. DAVIS		X		
Ms. McCOLLUM		X		
TOTALS	28	19		2

CORRESPONDENCE

CONGRESS OF THE UNITED STATES,
HOUSE OF REPRESENTATIVES,
Washington, DC, April 4, 2002.

Hon. JOHN BOEHNER,
Chairman, Committee on Education and the Workforce,
Rayburn House Office Building, Washington, DC.

DEAR MR. CHAIRMAN: Due to legislative duties, I was unavoidably detained during Committee Consideration of H.R. 3762, the Pension Security Act of 2002. Consequently, I missed roll call number 1 on the substitute amendment offered by Representative Miller. Had I been present, I would have voted no on the amendment.

I would appreciate your including this letter in the Committee Report to accompany H.R. 3762. Thank you for your attention to this matter.

Sincerely,

MARGE ROUKEMA,
Member of Congress.

APPLICATION OF LAW TO THE LEGISLATIVE BRANCH

Section 102(b)(3) of Public Law 104–1 requires a description of the application of this bill to the legislative branch. This bill gives workers new freedom to diversify their investments, much greater access to quality investment advice, advance notice before blackout periods, more information about their pensions, and other tools they can use to maximize the potential of their 401(k) plans and ensure a secure retirement future through amendments to the Employee Retirement Income Security Act (ERISA) and complementary amendments to the Internal Revenue Code. Since ERISA excludes governmental plans, the bill does not apply to legislative branch employees. As public employees, legislative branch employees are eligible to participate in the Federal Employee Retirement System.

STATEMENT OF OVERSIGHT FINDINGS AND RECOMMENDATIONS OF THE COMMITTEE

In compliance with clause 3(c)(1) of rule XIII and clause (2)(b)(1) of rule X of the Rules of the House of Representatives, the Committee's oversight findings and recommendations are reflected in the body of this report.

UNFUNDED MANDATE STATEMENT

Section 423 of the Congressional Budget and Impoundment Control Act (as amended by Section 101(a)(2) of the Unfunded Mandates Reform Act, P.L. 104–4) requires a statement of whether the provisions of the reported bill include unfunded mandates. This bill gives workers new freedom to diversify their investments, much greater access to quality investment advice, advance notice before blackout periods, more information about their pensions, and other tools they can use to maximize the potential of their 401(k) plans and ensure a secure retirement future through amendments to the Employee Retirement Income Security Act (ERISA). In compliance

with this requirement, the Committee has received a letter from the Congressional Budget Office included herein.

BUDGET AUTHORITY AND CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

With respect to the requirements of clause 3(c)(2) of rule XIII of the House of Representatives and section 308(a) of the Congressional Budget Act of 1974 and with respect to requirements of 3(c)(3) of Rule XIII of the House of Representatives and section 402 of the Congressional Budget Act of 1974, the Committee has received the following cost estimate for H.R. 3762 from the Director of the Congressional Budget Office:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, April 4, 2002.

Hon. JOHN A. BOEHNER,
Chairman, Committee on Education and the Workforce,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed estimate for H.R. 3762, the Pension Security Act of 2002.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Geoffrey Gerhardt.

Sincerely,

BARRY B. ANDERSON
(For Dan L. Crippen, Director).

Enclosure.

H.R. 3762—Pension Security Act of 2002

Summary: H.R. 3762 would make numerous changes to the Employee Retirement Income Security Act of 1974 (ERISA) that would affect the operations of private pension plans. These include new reporting requirements, limitations on certain investments, modifications in premiums paid to the Pension Benefit Guaranty Corporation (PBGC), and other changes.

CBO estimates that the bill would increase direct spending by $36 million in 2003, by $127 million over the 2003–2007 period, and by $185 million over the 2003–2012 period. Discretionary spending would also increase by $24 million over the 2003–2007 period, assuming appropriation of the necessary amounts. CBO and the Joint Committee on Taxation (JCT) estimate that the bill would have a negligible effect on revenues. Since this bill would affect direct spending and revenues, pay-as-you-go procedures would apply.

State, local, and tribal governments are exempt from the requirements of ERISA that H.R. 3762 would amend, and other provisions of the bill would impose no requirements on those governments. Consequently, the bill contains no intergovernmental mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would impose no costs on state, local, or tribal governments.

The bill contains several private-sector mandates on sponsors, administrators, and fiduciaries of private pension plans. CBO estimates that the direct cost of those new requirements would exceed

the annual threshold specified in UMRA ($115 million in 2002, adjusted annually for inflation), but we do not have sufficient information to provide a precise estimate of the aggregate cost.

Estimated cost to the Federal Government: The estimated budgetary impact of H.R. 3762 is shown in the following table. The costs of this legislation would fall within budget function 600 (income security).

	By fiscal year, in millions of dollars—					
	2002	2003	2004	2005	2006	2007
DIRECT SPENDING						
Reduced PBGC Flat-Rate Premiums	0	1	1	2	2	2
Changes in PBGC Variable Premiums	0	32	−7	76	....	3
Payments of Interest on Overpayments of PBGC Premiums	0	3	3	3	3	3
Benefits Paid to Substantial Owners	0	*	*	*	*	*
Total Additional Outlays	0	36	−3	81	5	8
SPENDING SUBJECT TO APPROPRIATION						
Studies by the Department of Labor:						
Estimated Authorizations	0	2	0	0	0	0
Estimated Outlays	0	*	1	*	*	*
Information and Educational Support for Pension Plan Fiduciaries:						
Estimated Authorizations	0	5	5	5	5	6
Estimated Outlays	0	3	5	5	5	5
Total Spending Subject to Appropriation:						
Estimated Authorizations	0	7	5	5	5	5
Estimated Outlays	0	3	6	5	5	5
Memorandum:						
Changes in Revenues Resulting from Enactment of Both H.R. 3762 and H.R. 3669 [1]	994	994	−270	−593	−485	−327

[1] These revenue effects reflect changes in pension plan funding and were included in CBO's estimate for H.R. 3669, the Employee Retirement Saving Bill of Rights. Enactment of H.R. 3762 alone would not affect revenues.

Notes.—* =Less than $500,000.

Basis of estimate

Revenues

All estimates of the provisions in the bill that affect revenues, except the civil penalties under section 102, were provided by JCT. JCT estimates that none of those provisions would have significant effects on revenue collections. Based on information from the Department of Labor, CBO expects that additional civil penalties resulting from section 102 would be less than $500,000 annually.

If the bill were enacted in combination with H.R. 3669, the Employee Retirement Savings Bill of Rights, which was reported by the Committee on Ways and means on march 20, 2002, JCT estimates that federal revenues would be increased by $994 million in 2002, but would be reduced by $991 million over the 2002–2012 period. These revenue effects were included in CBO's estimate for H.R. 3669. According to JCT, the revenue effects depend on conforming changes to both the Internal Revenue Code and ERISA, and JCT's estimates for H.R. 3669 assumed that the conforming changes would be enacted.

Direct spending

Reduced Flat-Rate Premiums Paid to the PBGC. Under current law, defined benefit pension plans operated by a single employer pay two types of annual premiums to the Pension Benefit Guaranty Corporation. All covered plans are subject to a flat-rate premium

of $19 per participant. In addition, underfunded plans must also pay a variable-rate premium that depends on the amount by which the plan's liabilities exceed its assets.

The bill would reduce the flat-rate premium from $19 to $5 per participant for plans established by employers with 100 or fewer employees during the first five years of the plan's operation. According to information obtained from the PBGC, approximately 7,500 plans would eventually qualify for this reduction. Those plans cover an average of about 10 participants each. CBO estimates that the change would reduced the PBGC's premium income by about $1 million in 2003, $8 million over the 2003–2007 period, and $18 million from 2003 through 2012. Since PBGC premiums are offsetting collections to a mandatory spending account, reductions in premium receipts are reflected as increases in direct spending.

Changes in Variable Premiums Paid to the PBGC. H.R. 3762 would make several changes affecting the variable-rate premium paid by underfunded plans. CBO estimates, in total, this section will decrease receipts from those premiums by $32 million in 2003, $104 million over the 2003–2007 period, and $137 million during the 2003–2012 period.

First, for all new plans that are underfunded, the bill would phase in the variable-rate premium. In the first year, plans would pay nothing. In the succeeding four years, they would pay 20 percent, 40 percent, 60 percent, and 80 percent, respectively, of the full amount. In the sixth and later years, they would pay the full variable-rate premium determined by their funding status. On the basis of information from the PBGC, CBO estimates that this change would affect the premiums of approximately 250 plans each year. It would reduce the PBGC's total premium receipts by about $19 million over the 2003–2007 period and $46 million over the 2003–2012 period.

Second, the bill would reduce the variable-rate premium paid by all underfunded plans (not just new plans) established by employers with 25 or fewer employees. Under the bill, the variable-rate premium per participant paid by those plans would not exceed $5 multiplied by the number of participants in the plan. CBO estimates that approximately 2,500 plans would have their premium payments to the PBGC reduced by this provision beginning in 2003. As a result, premium receipts would decline by $1 million in 2004, $4 million during the 2004–2007 period, and $10 million over the 2003–2012 period.

Third, the bill would alter the pension funding requirements in ERISA, which would allow plans to become more underfunded in plan year 2001 without subjecting them to tax and other penalties. JCT estimates that this provision would initially cause employers to reduce pension plan contributions, but later increase these contributions until funding returns to baseline levels. Some plans would have to pay higher premiums because their level of underfunding would increase. Other plans, however, would qualify for a special exemption and not be required to pay the variable premium for plan-year 2001. Based on information from the PBGC, CBO estimates that the net effect would be a decrease of $30 million in premium receipts in 2003. CBO estimates H.R. 3762 would increase plan underfunding by about $1.2 billion in 2002, leading to

an increase in premium receipts of $11 million in 2004. Over the 2003–2007 period, CBO estimates this provision would cause receipts to decrease by a net of $1 million.

Finally, H.R. 3762 would amend the underlying formula used to determine variable-rate premiums. Changes to ERISA made by the Job Creation and Worker Assistance Act (P.L. 107–147) require that, during plan-years 2002 and 2003, the interest rate used to calculate plans' liabilities be 100 percent of the interest rate on 30-year Treasury securities in the month preceding the month in which the plan year begins. This interest rate will return to 85 percent of the Treasury rate unless and until the Department of the Treasury issues new mortality tables for pension beneficiaries, at which time the liability calculation will be set at 100 percent. Instead, section 212 would set the interest rate at 115 percent of the 30-year bond rate once the new mortality tables are issued, but only through the remainder of plan-years 2002 and 2003, at which time the interest rate would return to 100 percent. As part of its latest baseline projections CBO anticipates that the new mortality tables will be issued immediately before the start of plan-year 2003. Therefore, under CBO's assumptions about when the new mortality tables will be issue, the bill would allow plans to use 115 percent of the 30-year bond rate to determine liabilities in plan-year 2003 before being set at 100 percent of the bond rate thereafter.

Increasing the interest rate effectively lowers the measured amount of underfunding among plans because using higher interest rates reduces projected liabilities, which are calculated on a present-value basis. By reducing the measured level of underfunding, CBO estimates that this provision of section 212 would reduce premium collections by $80 million in 2005.

Authorization for the PBGC to Pay Interest on Premium Overpayment Refunds. The legislation would authorize the PBGC to pay interest to plan sponsors on premium overpayments. Interest paid on overpayments would be calculated at the same rate as interest charged on premium underpayments. On average, the PBGC receives $19 million per year in premium overpayments, charges an interest rate of 8 percent for underpayments, and experiences a two-year lag between the receipt of payments and the issuance of refunds. Based on this information, CBO estimates that direct spending would increase by $3 million annually.

Substantial Owner Benefits in Terminated Plans. H.R. 3762 would simplify the rules by which the PBGC pays benefits to substantial owners (those with an ownership interest of at least 10 percent) of terminated pension plans. Only about one-third of the plans taken over by the PBGC involve substantial owners, and the change in benefits paid to owner employees under this provision would be less than $500,000 annually.

National Summit on Retirement Income Security. H.R. 3762 would extend the authorization for the National Summit on Retirement Income Security so that meetings would be held in 2006 and 2010. The most recent summit was held in January 2002. Based on donations received for that summit, CBO estimates that the Department of Labor would receive about $500,000 in private donations for each future summit, which would be spent to defray part of the costs of the conferences. Therefore, this provision would in-

crease revenues and direct spending by the same amounts and would have no net impact on the budget surplus.

Discretionary spending

Studies by the Department of Labor. H.R. 3762 would direct the Department of Labor (DOL) to undertake three studies: one to determine the most appropriate forms of private pension plans, one on the impact of H.R. 3762 on various aspects of pension coverage, and one on the impact of requiring fiduciary consultants for individual account plans. Based on the costs of studies with comparable requirements, CBO estimates these studies would cost about $2 million over the 2003–2007 period.

Informational and Educational Support for Pension Plan Fiduciaries. The bill also would require DOL to provide information and educational resources to persons serving as fiduciaries for employee pension benefit plans. Based on a review of other federal programs that provide consumer-related and technical information to the public, CBO estimates that providing this support would cost about $5 million per year.

National Summit on Retirement Income Security. H.R. 3762 would amend the authorization for the National Summit on Retirement Security to require the President to convene a conference on national savings in 2006 rather than in 2005, and to hold an additional summit in 2010. The appropriation of such sums as may be necessary is authorized for that purpose. The Secretary of Labor is also authorized to accept private donations to defray the costs of the conference, and must spend the donated funds prior to spending the appropriated funds. Based upon the experience of the 1998 and 2002 National Summits, CBO estimates that future summits would cost less than $1 million and that more than one-half of the expenses would be offset by private donations.

Pay-as-you-go considerations: The Balanced Budget and Emergency Deficit Control Act sets up pay-as-you-go procedures for legislation affecting direct spending or receipts. The net changes in outlays and governmental receipts that are subject to pay-as-you-go procedures are shown in the following table. For the purposes of enforcing pay-as-you-go procedures, only the effects through 2006 are counted.

	By fiscal year, in millions of dollars—										
	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012
Changes in receipts [1]	0	0	0	0	0	0	0	0	0	0	0
Changes in outlays	0	36	−3	81	5	8	11	11	12	12	12

[1] Enactment of H.R. 3762 alone would not affect revenues, though there would be a revenue effect if the bill were enacted in conjunction with H.R. 3669.

Estimated impact on state, local, and tribal governments: State, local, and tribal governments are exempt from the requirements of ERISA that H.R. 3762 would mend, and other provisions of the bill would impose no requirements on those governments. Consequently, the bill contains no intergovernmental mandates as defined in UMRA and would impose no costs on state, local, or tribal governments.

Estimated impact on the private sector: With only limited exceptions, private employers who provide pension plans for their workers must follow rules specified in ERISA. Therefore, CBO considers

changes in ERISA that expand those rules to be private-sector mandates under UMRA. H.R. 3762 would make several such changes to ERISA that would affect sponsors, administrators, and fiduciaries of pension plans. CBO estimates that the direct cost to affected entities of the new requirements in H.R. 3762 would exceed the annual threshold specified in UMRA ($115 million in 2002, adjusted annually for inflation), but does not have sufficient information to provide a precise estimate of the aggregate cost.

Benefit Statements. Section 101 of the bill would require administrators of private, individual-account (defined contribution) pension plans to provide quarterly statements to participants and beneficiaries. Those statements would have to contain several items, including the amount of accrued benefits, the amount of nonforfeitable benefits, the value of any assets held in the form of securities of the employing firm, an explanation of any limitations or restrictions on the right of the participant or beneficiary to direct an investment, and an explanation of the importance of a well-balanced and diversified portfolio. Currently, plans must provide more limited statements to participants upon request.

CBO estimates that the direct cost of this new requirement on private plans would be about $100 million annually. An estimated 70 million people will participate in private, individual-account pension plans in 2003. According to industry sources, the majority of plans sponsored by large employers already provide pension statements on a quarterly basis, and it is becoming increasingly common for plans sponsored by smaller employers to do so as well. Thus, CBO estimates that about 30 million participants would newly receive statements four times per year under the bill. The average cost of providing each statement would be small because plans are now required to provide benefit statements on request. Thus, the bill would result in added costs largely for producing and delivering the new statements. Written statements would have to be provided to most participants, but the bill would allow statements to be provided electronically to participants with access to the Internet. (Census Bureau information indicates that in 1997 about 15 percent of workers had access to the Internet at their workplace.)

Section 101 of the bill would also require administrators of private, defined-benefit pension plans to provide vested participants currently employed by the sponsor with a benefit statement at least once every three years, or to provide notice to participants of the availability of benefit statements on an annual basis. CBO estimates that the added cost of this provision would be less than $5 million per year.

Notice of Restriction Periods. Currently, participants in individual-account plans occasionally experience time periods (called "blackout" periods) when they are unable to direct the investment of assets in their accounts. Such periods may occur for administrative reasons—for example, when a plan changes recordkeepers. Section 102 of the bill generally would require plan administrators to provide affected participants with 30 days notice before an anticipated suspension, limitation, or restriction on the ability of participants to direct investments in their accounts. Notice would have to be in writing unless participants had access to the Internet.

CBO estimates that the direct cost to private plans of providing advance notice of upcoming blackout periods would be about $15 million annually. According to a survey conducted by the American Society for Pension Actuaries, blackout periods typically occur for a plan about once every three to four years. Data for the Bureau of Labor Statistics indicate that most participants in individual-account plans are in plans that allow at least some direction of assets and, thus, would be affected by those periods.

Fiduciaries' Liability. Currently plan fiduciaries generally are not liable for investment decisions made by participants, nor are they liable for the inability of participants to alter their investments during blackout periods. Section 102 of the bill would potentially expand the personal liability of plan fiduciaries during blackouts by removing the current limitation on liability and adding specific new requirements under which they could avoid liability.

Fiduciaries would be required to consider the reasonableness of the length of the blackout period, provide 30 days notice to participants, and act solely in the interest of participants in entering the blackout. This provision would impost a direct cost on the affected entities by increasing their financial exposure during blackouts. CBO does not have sufficient information to estimate that added cost, however, but expects that abiding by the new requirements to avoid liability would add little to their costs.

Investment in Employers' Securities. Section 103 of the bill would require individual-account plans to allow participants to sell securities issued by their employer and acquired through elective deferrals after three years of participation in the plan (or, if the plan so provides, after three years of service with the employer). Participants would also be allowed to sell securities issued by their employers and allocated to their accounts three years after they are allocated to them. (The bill would phase in the requirement in 20 percent annual increments for assets acquired before the effective date of the bill.) Section 103 would also require plans that offer participants securities issued by employers to offer a broad range of investment opportunities.

Both the expansion of participants' allowable investments of future contributions and the phase-in for past contributions would increase the administrative and record-keeping costs of affected pension plans. According to a small survey sponsored by the Employee Benefit Research Institute, 48 percent of surveyed 401(k) plans had company stock as an investment option for participants, and 43 percent of plans with such an option required the employer's contributions to be invested in company stock. CBO estimates that the added administrative costs attributable to these provisions could easily be $20 million annually, with larger amounts in the first year. In addition, the potential sale of the employer's stock by plan participants as a result of these new requirements could temporarily reduce the stock's price, especially for companies whose stock is thinly traded. Finally, requiring plans to offer a range of investment options would probably add little to plan costs because many plans now abide by a safe harbor provision in ERISA that has similar requirements.

Insider Trades. Section 105 of the bill would prohibit certain owners and officers of a company from trading securities issued by that company during a period when participants in the retirement

plan are restricted in their ability to direct investments. This restriction would increase the financial exposure of affected owners and officers and, thus, impose a cost on them. CBO does not have sufficient information to estimate the amount of that cost.

Previous CBO estimate: On March 20, 2002, CBO provided the Committee on Ways and Means with a cost estimate for H.R. 3669, the Employee Retirement Savings Bill of Rights. That bill contained a number of changes affecting ERISA's treatment of private pension plans, including some adjustments to the PBGC's premium formulas, that are similar those contained in H.R. 3762. Although many of the budgetary effects are similar, the estimated change in variable-rate premiums is different. For H.R. 3762, the estimated decrease in receipts from variable-rate premiums is $137 million during the 2003–2012 period, while for H.R. 3669 the estimated decrease is $56 million over the same period. The estimate for H.R. 3669 also reflected changes in pension plan funding that would increase revenues by $994 million in 2002 but reduce them by $991 million over the 2002–2012 period. The JCT revenue estimate for the pension funding effects of H.R. 3669 assumed the conforming changes to ERISA's that are included in H.R. 3762. H.R. 3669 also included changes to the Internal Revenue Code, the Federal Insurance Contribution Act, and the Federal Unemployment Tax Act that would reduce revenues by $23.4 billion over the 2003–2012 period.

Estimate prepared by: Federal Revenues: Erin Whitake; Outlays of the Pension Benefit Guaranty Corporation: Geoff Gerhardt; Other Spending by the Department of Labor: Christina Hawley Sadoti; Impact on State, Local, and Tribal Governments: Leo Lex; and Impact on the Private Sector: Bruce Vavrichek.

Estimate approved by: Robert A. Sunshine, Assistant Director for Budget analysis and G. Thomas Woodward, Assistant Director for Tax Analysis.

STATEMENT OF GENERAL PERFORMANCE GOALS AND OBJECTIVES

In accordance with Clause (3)(c) of House Rule XIII, the goals of H.R. 3762 to give workers new freedom to diversify their investments, much greater access to quality investment advice, advance notice before blackout periods, more information about their pensions, and other tools they can use to maximize the potential of their 401(k) plans and ensure a secure retirement future though amendments to the Employee Retirement Income Security Act (ERISA) and complementary amendments to the Internal Revenue Code. The Committee expects the Department of Labor and Department of Treasury to implement the changes to the law in accordance with these stated goals.

CONSTITUTIONAL AUTHORITY STATEMENT

Under clause 3(d)(1) of rule XIII of the Rules of the House of Representatives, the Committee must include a statement citing the specific powers granted to Congress in the Constitution to enact the law proposed by H.R. 3762. The Employee Retirement Income Security Act (ERISA) has been determined by the federal courts to be within Congress' Constitutional authority. In *Commercial Mortgage Insurance, Inc.* v. *Citizens National Bank of Dallas*,

526 F.Supp. 510 (N.D. Tex. 1981), the court held that Congress legitimately concluded that employee benefit plans so affected interstate commerce as to be within the scope of Congressional powers under Article 1, Section 8, Clause 3 of the Constitution of the United States. In *Murphy* v. *Wal-Mart Associates' Group Health Plan*, 928 F.Supp. 700 (E.D. Tex 1996), the court upheld the preemption provisions of ERISA. Because H.R. 3762 modifies but does not extend the federal regulation of pensions, the Committee believes that the Act falls within the same scope of Congressional authority as ERISA.

COMMITTEE ESTIMATE

Clause 3(d)(2) of rule XIII of the Rules of the House of Representatives requires an estimate and a comparison by the Committee of the costs that would be incurred in carrying out H.R. 3762. However, clause 3(d)(3)(B) of that rule provides that this requirement does not apply when the Committee has included in its report a timely submitted cost estimate of the bill prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974

SHORT TITLE AND TABLE OF CONTENTS

SECTION 1. This Act may be cited as the "Employee Retirement Income Security Act of 1974".

TABLE OF CONTENTS

Sec. 1. Short title and table of contents.

TITLE I—PROTECTION OF EMPLOYEE BENEFIT RIGHTS

Subtitle A—General Provisions

* * * * * * *

PART 4—FIDUCIARY RESPONSIBILITY

Sec. 401. Coverage.

* * * * * * *

Sec. 407. 【10 percent】 limitation with respect to acquisition and holding of employer securities and employer real property by certain plans.

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TITLE I—PROTECTION OF EMPLOYEE BENEFIT RIGHTS

SUBTITLE A—GENERAL PROVISIONS

* * * * * * *

DEFINITIONS

SEC. 3. For purposes of this title:
(1) * * *

* * * * * * *

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

* * * * * * *

SUBTITLE B—REGULATORY PROVISIONS

PART 1—REPORTING AND DISCLOSURE

DUTY OF DISCLOSURE AND REPORTING

SEC. 101. (a) * * *

* * * * * * *

(i) NOTICE OF SUSPENSION, LIMITATION, OR RESTRICTION ON ABILITY OF PARTICIPANT OR BENEFICIARY TO DIRECT INVESTMENTS IN INDIVIDUAL ACCOUNT PLAN.—

(1) IN GENERAL.—In the case of any action having the effect of temporarily suspending, limiting, or restricting any ability of participants or beneficiaries under an applicable individual account plan, which is otherwise available under the terms of such plan, to direct or diversify assets credited to their accounts, if such suspension, limitation, or restriction is for any period of more than 3 consecutive calendar days, the plan administrator shall—

(A) in advance of taking such action, determine, in accordance with the requirements of part 4, that the expected period of suspension, limitation, or restriction is reasonable, and

(B) after making the determination under subparagraph (A) and in advance of taking such action, notify the plan participants and beneficiaries of such action in accordance with this subsection.

(2) NOTICE REQUIREMENTS.—

(A) IN GENERAL.—The notices described in paragraph (1) shall be written in a manner calculated to be understood by the average plan participant and shall include—

(i) the reasons for the suspension, limitation, or restriction,

(ii) an identification of the investments affected,

(iii) the expected period of the suspension, limitation, or restriction,

(iv) a statement that the plan administrator has evaluated the reasonableness of the expected period of suspension, limitation, or restriction,

(v) a statement that the participant or beneficiary should evaluate the appropriateness of their current in-

vestment decisions in light of their inability to direct or diversify assets credited to their accounts during the expected period of suspension, limitation, or restriction, and

(vi) such other matters as the Secretary may include in the model notices issued under subparagraph (E).

(B) PROVISION OF NOTICE.—Except as otherwise provided in this subsection, notices described in paragraph (1) shall be furnished to all participants and beneficiaries under the plan at least 30 days in advance of the action suspending, limiting, or restricting the ability of the participants or beneficiaries to direct or diversify assets.

(C) EXCEPTION TO 30-DAY NOTICE REQUIREMENT.—In any case in which—

(i) a fiduciary of the plan determines, in writing, that a deferral of the suspension, limitation, or restriction would violate the requirements of subparagraph (A) or (B) of section 404(a)(1), or

(ii) the inability to provide the 30-day advance notice is due to events that were unforeseeable or circumstances beyond the reasonable control of the plan administrator,

subparagraph (B) shall not apply, and the notice shall be furnished to all participants and beneficiaries under the plan as soon as reasonably possible under the circumstances.

(D) WRITTEN NOTICE.—The notice required to be provided under this subsection shall be in writing, except that such notice may be in electronic or other form to the extent that such form is reasonably accessible to the recipient.

(E) MODEL NOTICES.—The Secretary shall issue model notices which meet the requirements of this paragraph.

(3) EXCEPTION FOR SUSPENSIONS, LIMITATIONS, OR RESTRICTIONS WITH LIMITED APPLICABILITY.—In any case in which the suspension, limitation, or restriction described in paragraph (1)—

(A) applies only to 1 or more individuals, each of whom is the participant, an alternate payee (as defined in section 206(d)(3)(K)), or any other beneficiary pursuant to a qualified domestic relations order (as defined in section 206(d)(3)(B)(i)), or

(B) applies only to 1 or more participants or beneficiaries in connection with a merger, acquisition, divestiture, or similar transaction involving the plan or plan sponsor and occurs solely in connection with becoming or ceasing to be a participant or beneficiary under the plan by reason of such merger, acquisition, divestiture, or transaction,

the requirement of this subsection that the notice be provided to all participants and beneficiaries shall be treated as met if the notice required under paragraph (1) is provided to all the individuals referred to in subparagraph (A) or (B) to whom the suspension, limitation, or restriction applies as soon as reasonably practicable in advance of the suspension, limitation, or restriction.

(4) CHANGES IN EXPECTED PERIOD OF SUSPENSION, LIMITATION, OR RESTRICTION.—If, following the furnishing of the notice pursuant to this subsection, there is a change in the expected period of the suspension, limitation, or restriction on the right of a participant or beneficiary to direct or diversify assets, the administrator shall provide affected participants and beneficiaries notice of the change as soon as reasonably practicable in advance of the change. Such notice shall meet the requirements of subparagraphs (A) and (D) of paragraph (2) in relation to the extended suspension, limitation, or restriction.

(5) REGULATORY EXCEPTIONS.—The Secretary may provide by regulation for additional exceptions to the requirements of this subsection which the Secretary determines are in the interests of participants and beneficiaries.

(6) GUIDANCE AND MODEL NOTICES.—The Secretary shall issue guidance and model notices which meet the requirements of this subsection.

[(h)] *(j)* CROSS REFERENCE.—

For regulations relating to coordination of reports to the Secretaries of Labor and the Treasury, see section 3004.

* * * * * * *

FILING WITH SECRETARY AND FURNISHING INFORMATION TO PARTICIPANTS

SEC. 104. (a) * * *

(b) Publication of the summary plan descriptions and annual reports shall be made to participants and beneficiaries of the particular plan as follows:

(1) * * *

* * * * * * *

(3) Within 210 days after the close of the fiscal year of the plan, the administrators shall furnish to each participant, and to each beneficiary receiving benefits under the plan, a copy of the statements and schedules, for such fiscal year, described in subparagraphs (A) and (B) of section 103(b)(3) and such other material (including the percentage determined under section 103(d)(11)) as is necessary to fairly summarize the latest annual report. *The requirement to furnish information under the previous sentence with respect to an employee pension benefit plan shall be satisfied if the administrator makes such information reasonably available through electronic means or other new technology.*

* * * * * * *

REPORTING OF PARTICIPANT'S BENEFIT RIGHTS

SEC. 105. [(a) Each administrator of an employee pension benefit plan shall furnish to any plan participant or beneficiary who so requests in writing, a statement indicating, on the basis of the latest available information—

[(1) the total benefits accrued, and

[(2) the nonforfeitable pension benefits, if any, which have accrued, or the earliest date on which benefits will become nonforfeitable.

[(b) In no case shall a participant or beneficiary be entitled under this section to receive more than one report described in subsection (a) during any one 12-month period.]

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

(i) to each plan participant at least annually,

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

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

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

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

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

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

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

(i) the total benefits accrued, and

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

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

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

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

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

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

* * * * * * *

[(d) Subsection (a) of this section shall apply to a plan to which more than one unaffiliated employer is required to contribute only

to the extent provided in regulations prescribed by the Secretary in coordination with the Secretary of the Treasury.]

(d)(1) The statements required to be provided at least quarterly under subsection (a) shall include (together with the information required in subsection (a)) the following:

(A) the value of investments allocated to the individual account, including the value of any assets held in the form of employer securities, without regard to whether such securities were contributed by the plan sponsor or acquired at the direction of the plan or of the participant or beneficiary, and an explanation of any limitations or restrictions on the right of the participant or beneficiary to direct an investment; and

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

(2) The value of any employer securities that are not readily tradable on an established securities market that is required to be reported under paragraph (1)(A) may be determined by using the most recent valuation of the employer securities.

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

* * * * * * *

PART 2—PARTICIPATION AND VESTING

* * * * * * *

REQUIREMENT OF JOINT AND SURVIVOR ANNUITY AND PRERETIREMENT SURVIVOR ANNUITY

SEC. 205. (a) * * *

* * * * * * *

(c)(1) * * *

* * * * * * *

(7) For purposes of this subsection, the term "applicable election period" means—

(A) in the case of an election to waive the qualified joint and survivor annuity form of benefit, the [90-day] *180-day* period ending on the annuity starting date, or

* * * * * * *

OTHER PROVISIONS RELATING TO FORM AND PAYMENT OF BENEFITS

SEC. 206. (a) * * *

* * * * * * *

(f) MISSING PARTICIPANTS IN TERMINATED PLANS.—In the case of a plan covered by [title IV] *section 4050*, [the plan shall provide that,] upon termination of the plan, benefits of missing participants shall be treated in accordance with section 4050.

* * * * * * *

PART 3—FUNDING

* * * * * * *

MINIMUM FUNDING STANDARDS

SEC. 302. (a) * * *

* * * * * * *

(d) ADDITIONAL FUNDING REQUIREMENTS FOR PLANS WHICH ARE NOT MULTIEMPLOYER PLANS.—

(1) * * *

* * * * * * *

(7) CURRENT LIABILITY.—For purposes of this subsection—

(A) * * *

* * * * * * *

(C) INTEREST RATE AND MORTALITY ASSUMPTIONS USED.—Effective for plan years beginning after December 31, 1994—

(i) INTEREST RATE.—

(I) * * *

* * * * * * *

(III) SPECIAL RULE FOR [2002 AND 2003] *2001, 2002, OR 2003*.—For a plan year beginning in [2002 or 2003] *2001, 2002, or 2003*, notwithstanding subclause (I), in the case that the rate of interest used under subsection (b)(5) exceeds the highest rate permitted under subclause (I), the rate of interest used to determine current liability under this subsection may exceed the rate of interest otherwise permitted under subclause (I); except that such rate of interest shall not exceed 120 percent of the weighted average referred to in subsection (b)(5)(B)(ii).

* * * * * * *

PART 4—FIDUCIARY RESPONSIBILITY

* * * * * * *

FIDUCIARY DUTIES

SEC. 404. (a) * * *

* * * * * * *

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

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

[(B)] *(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 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 the person referred to in subparagraph (A)(ii) authorizing a suspension meets the requirements of this title in connection with authorizing the suspension, such person shall not be liable under this title for any loss occurring during the suspension as a result of any exercise by the participant or beneficiary of control over assets in his or her account prior to the suspension. Matters to be considered in determining whether such person has satisfied the requirements of this title include whether such person—

(i) has considered the reasonableness of the expected period of the suspension as required under section 101(i)(1)(A),

(ii) has provided the notice required under section 101(i)(1)(B), and

(iii) has acted solely in the interests of plan participants and beneficiaries in determining to enter into the suspension.

(C) Any limitation or restriction that may govern the frequency of transfers between investment vehicles shall not be treated as a suspension referred to in subparagraph (A)(ii) to the extent such limitation or restriction is disclosed to participants or beneficiaries through the summary plan description or materials describing specific investment alternatives under the plan.

* * * * * * *

(e) The Secretary shall establish a program under which information and educational resources shall be made available on an ongoing basis to persons serving as fiduciaries under employee pension benefit plans so as to assist such persons in diligently and effectively carrying out their fiduciary duties in accordance with this part.

* * * * * * *

[10 PERCENT] LIMITATION WITH RESPECT TO ACQUISITION AND HOLDING OF EMPLOYER SECURITIES AND EMPLOYER REAL PROPERTY BY CERTAIN PLANS

SEC. 407. (a) * * *

* * * * * * *

(g)(1) An applicable individual account plan which holds employer securities that are readily tradable on an established securities market may not acquire or hold any employer securities with respect to which there is any restriction on divestment by a participant or beneficiary, unless the plan provides that the restriction—

(A) is not applicable on or after a date which is not later than the date on which the participant has completed 3 years of service (as defined in section 203(b)(2)) with the employer or (if the plan so provides) 3 years of participation (as defined in section 204(b)(4)) in the plan, or

(B) is not applicable, with respect to any employer security allocated to the individual account during any calendar quarter, after a date which is not later than 3 years after the end of such quarter.

(2)(A) For purposes of paragraph (1), the term "restriction on divestment" includes—

(i) any failure to offer a broad range of investment alternatives (as may be determined by the Secretary) to which a participant or beneficiary may direct the proceeds from the divestment of employer securities, and

(ii) any restriction on the ability of a participant or beneficiary to choose from a broad range of otherwise available investment options (as may be determined by the Secretary) to which such proceeds may be so directed, other than a restriction limiting such ability to so choose to a periodic, reasonable opportunity to so choose occurring no less frequently than on a quarterly basis.

EXEMPTIONS FROM PROHIBITED TRANSACTIONS

SEC. 408. (a) * * *

(b) The prohibitions provided in section 406 shall not apply to any of the following transactions:

(1) * * *

* * * * * * *

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

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

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

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

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

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

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

(iii) the direct or indirect receipt of fees or other compensation by the fiduciary adviser or an affiliate thereof (or any employee, agent, or registered representative of the fiduciary adviser or affiliate) in connection with the provision of the advice or in connection with a sale, acquisition, or holding of a security or other property pursuant to the advice.

* * * * * * *

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

(1) IN GENERAL.—The requirements of this subsection are met in connection with the provision of investment advice referred to in section 3(21)(A)(ii), provided to an employee benefit plan or a participant or beneficiary of an employee benefit plan by a fiduciary adviser with respect to the plan in connection with

any sale, acquisition, or holding of a security or other property for purposes of investment of amounts held by the plan, if—

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

(i) of all fees or other compensation relating to the advice that the fiduciary adviser or any affiliate thereof is to receive (including compensation provided by any third party) in connection with the provision of the advice or in connection with the sale, acquisition, or holding of the security or other property,

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

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

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

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

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

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

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

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

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

(2) STANDARDS FOR PRESENTATION OF INFORMATION.—

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

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

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

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

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

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

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

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

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

(i) the advice is provided by a fiduciary adviser pursuant to an arrangement between the plan sponsor or other fiduciary and the fiduciary adviser for the provision by the fiduciary adviser of investment advice referred to in such section,

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

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

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

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

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

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

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

(ii) a bank or similar financial institution referred to in section 408(b)(4), but only if the advice is provided through a trust department of the bank or similar financial institution which is subject to periodic examination and review by Federal or State banking authorities,

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

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

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

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

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

(C) REGISTERED REPRESENTATIVE.—The term "registered representative" of another entity means a person described in section 3(a)(18) of the Securities Exchange Act of 1934

(15 U.S.C. 78c(a)(18)) (substituting the entity for the broker or dealer referred to in such section) or a person described in section 202(a)(17) of the Investment Advisers Act of 1940 (15 U.S.C. 80b–2(a)(17)) (substituting the entity for the investment adviser referred to in such section).

* * * * * * *

PART 5—ADMINISTRATION AND ENFORCEMENT

* * * * * * *

CIVIL ENFORCEMENT

SEC. 502. (a) A civil action may be brought—

(1) * * *

* * * * * * *

(6) by the Secretary to collect any civil penalty under paragraph (2), (4), ⟦(5), or (6)⟧ *(5), (6), (7), or (8)* of subsection (c) or under subsection (i) or (l);

* * * * * * *

(c)(1) * * *

* * * * * * *

(7) The Secretary may assess a civil penalty against any plan administrator of up to $1,000 a day from the date of such plan administrator's failure or refusal to provide participants or beneficiaries with a benefit statement on at least a quarterly basis in accordance with section 105(a)(1)(A)(iii).

(8) The Secretary may assess a civil penalty against a plan administrator of up to $100 a day from the date of the plan administrator's failure or refusal to provide notice to participants and beneficiaries in accordance with section 101(i). For purposes of this paragraph, each violation with respect to any single participant or beneficiary, shall be treated as a separate violation.

⟦(7)⟧ *(9)* The Secretary and the Secretary of Health and Human Services shall maintain such ongoing consultation as may be necessary and appropriate to coordinate enforcement under this subsection with enforcement under section 1144(c)(8) of the Social Security Act.

* * * * * * *

NATIONAL SUMMIT ON RETIREMENT SAVINGS

SEC. 517. (a) AUTHORITY TO CALL SUMMIT.—Not later than July 15, 1998, the President shall convene a National Summit on Retirement Income Savings at the White House, to be co-hosted by the President and the Speaker and the Minority Leader of the House of Representatives and the Majority Leader and Minority Leader of the Senate. Such a National Summit shall be convened thereafter in ⟦2001 and 2005 on or after September 1 of each year involved⟧ *2002, 2006, and 2010*. Such a National Summit shall—

(1) * * *

(b) PLANNING AND DIRECTION.—The National Summit shall be planned and conducted under the direction of the Secretary, in consultation with, and with the assistance of, the heads of such other Federal departments and agencies as the President may designate.

Such assistance may include the assignment of personnel. The Secretary shall, in planning and conducting the National Summit, consult with the congressional leaders specified in subsection (e)(2). The Secretary shall also, in carrying out the Secretary's duties under this subsection, consult and coordinate with at least one organization made up of private sector businesses and associations partnered with Government entities to promote long-term financial security in retirement through savings. *To effectuate the purposes of this paragraph, the Secretary may enter into a cooperative agreement, pursuant to the Federal Grant and Cooperative Agreement Act of 1977 (31 U.S.C. 6301 et seq.), with any appropriate, qualified entity.*

* * * * * * *

(e) NATIONAL SUMMIT PARTICIPANTS.—

(1) * * *

(2) STATUTORILY REQUIRED PARTICIPATION.—The participants in the National Summit shall include the following individuals or their designees:

(A) * * *

* * * * * * *

(D) the Chairman and ranking Member of the ❲Committee on Labor and Human Resources❳ *Committee on Health, Education, Labor, and Pensions* of the Senate;

* * * * * * *

❲(F) the Chairman and ranking Member of the Subcommittees on Labor, Health and Human Services, and Education of the Senate and House of Representatives; and❳

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

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

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

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

❲(G)❳ *(J)* the parties referred to in subsection (b).

(3) ADDITIONAL PARTICIPANTS.—

(A) IN GENERAL.—❲There shall be not more than 200 additional participants.❳ *The participants in the National Summit shall also include additional participants appointed under this subparagraph.* Of such additional participants—

(i) ❲one-half shall be appointed by the President,❳ *not more than 100 participants shall be appointed under this clause by the President,* in consultation with

the elected leaders of the President's party in Congress (either the Speaker of the House of Representatives or the Minority Leader of the House of Representatives, and either the Majority Leader or the Minority Leader of the Senate; and

(ii) ❲one-half shall be appointed by the elected leaders of Congress❳ *not more than 100 participants shall be appointed under this clause by the elected leaders of Congress* of the party to which the President does not belong (one-half of that allotment to be appointed by either the Speaker of the House of Representatives or the Minority Leader of the House of Representatives, and one-half of that allotment to be appointed by either the Majority Leader or the Minority Leader of the Senate).

(B) PRESIDENTIAL AUTHORITY FOR ADDITIONAL APPOINTMENTS.—The President, in consultation with the elected leaders of Congress referred to in subsection (a), may appoint under this subparagraph additional participants to the National Summit. The number of such additional participants appointed under this subparagraph may not exceed the lesser of 3 percent of the total number of all additional participants appointed under this paragraph, or 10. Such additional participants shall be appointed from persons nominated by the organization referred to in subsection (b)(2) which is made up of private sector businesses and associations partnered with Government entities to promote long term financial security in retirement through savings and with which the Secretary is required thereunder to consult and cooperate and shall not be Federal, State, or local government employees.

❲(B)❳ *(C)* APPOINTMENT REQUIREMENTS.—The additional participants described in subparagraph (A) shall be—

(i) appointed not later than ❲January 31, 1998❳ *3 months before the convening of each summit*;

(ii) selected without regard to political affiliation or past partisan activity; and

(iii) representative of the diversity of thought in the fields of employee benefits and retirement income savings.

* * * * * * *

(f) NATIONAL SUMMIT ADMINISTRATION.—

(1) ADMINISTRATION.—In administering this section, the Secretary shall—

(A) * * *

* * * * * * *

(C) make available for public comment*, no later than 90 days prior to the date of the commencement of the National Summit,* a proposed agenda for the National Summit that reflects to the greatest extent possible the purposes for the National Summit set out in this section;

* * * * * * *

(g) REPORT.—The Secretary shall prepare a report, *in consultation with the congressional leaders specified in subsection (e)(2),* describing the activities of the National Summit and shall submit the report to the President, the Speaker and Minority Leader of the House of Representatives, the Majority and Minority Leaders of the Senate, and the chief executive officers of the States not later than 90 days after the date on which the National Summit is adjourned.

* * * * * * *

(i) AUTHORIZATION OF APPROPRIATIONS.—

(1) IN GENERAL.—There is authorized to be appropriated ⟦for fiscal years beginning on or after October 1, 1997,⟧ such sums as are necessary to carry out this section.

* * * * * * *

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

* * * * * * *

(k) CONTRACTS.—The Secretary may enter into contracts to carry out the Secretary's responsibilities under this section. The Secretary ⟦shall enter into a contract on a sole-source basis⟧ *may enter into a contract on a sole-source basis* to ensure the timely completion of the National Summit ⟦in fiscal year 1998⟧.

* * * * * * *

TITLE IV—PLAN TERMINATION INSURANCE

SUBTITLE A—PENSION BENEFIT GUARANTY CORPORATION

* * * * * * *

PREMIUM RATES

SEC. 4006. (a)(1) * * *

* * * * * * *

(3)(A) Except as provided in subparagraph (C), the annual premium rate payable to the corporation by all plans for basic benefits guaranteed under this title is—

(i) in the case of a single-employer plan, *other than a new single-employer plan (as defined in subparagraph (F)) maintained by a small employer (as so defined),* for plan years beginning after December 31, 1990, an amount equal to the sum of $19 plus the additional premium (if any) determined under subparagraph (E) for each individual who is a participant in such plan during the plan year;

* * * * * * *

(iii) in the case of a multiemployer plan, for plan years beginning after the date of enactment of the Multiemployer Pension Plan Amendments Act of 1980, an amount equal to—

(I) * * *

* * * * * * *

(IV) $2.60 for each participant, for the ninth plan year, and for each succeeding plan year【.】*, and*

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

* * * * * * *

(E)(i) 【The】 *Except as provided in subparagraph (G), the* additional premium determined under this subparagraph with respect to any plan for any plan year shall be an amount equal to the amount determined under clause (ii) divided by the number of participants in such plan as of the close of the preceding plan year.

* * * * * * *

(iii) For purposes of clause (ii)—

(I) * * *

* * * * * * *

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

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

* * * * * * *

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

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

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

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

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

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

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

benefits were accrued for substantially the same employees as are in the new plan.

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

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

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

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

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

* * * * * * *

PAYMENT OF PREMIUMS

SEC. 4007. (a) * * *

(b)*(1)* If any basic benefit premium is not paid when it is due the corporation is authorized to assess a late payment charge of not more than 100 percent of the premium payment which was not timely paid. The preceding sentence shall not apply to any payment of premium made within 60 days after the date on which payment is due, if before such date, the designated payor obtains a waiver from the corporation based upon a showing of substantial hardship arising from the timely payment of the premium. The corporation is authorized to grant a waiver under this subsection upon application made by the designated payor, but the corporation may not grant a waiver if it appears that the designated payor will be unable to pay the premium within 60 days after the date on which it is due. If any premium is not paid by the last date prescribed for a payment, interest on the amount of such premium at the rate imposed under section 6601(a) of the Internal Revenue Code of 1986 (relating to interest on underpayment, nonpayment, or exten-

sions of time for payment of tax) shall be paid for the period from such last date to the date paid.

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

* * * * * * *

Subtitle B—Coverage

PLANS COVERED

SEC. 4021. (a) * * *

(b) This section does not apply to any plan—

(1) * * *

* * * * * * *

(9) which is established and maintained exclusively for substantial owners ⟦as defined in section 4022(b)(6)⟧;

* * * * * * *

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

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

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

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

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

SINGLE-EMPLOYER PLAN BENEFITS GUARANTEED

SEC. 4022. (a) * * *

(b)(1) * * *

* * * * * * *

⟦(5)(A) For purposes of this title, the term "substantial owner" means an individual who—

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

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

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

For purposes of clause (iii) the constructive ownership rules of section 1563(e) of the Internal Revenue Code of 1986 shall apply (de-

termined without regard to section 1563(e)(3)(C)). For purposes of this title an individual is also treated as a substantial owner with respect to a plan if, at any time within the 60 months preceding the date on which the determination is made, he was a substantial owner under the plan.

【(B) In the case of a participant in a plan under which benefits have not been increased by reason of any plan amendments and who is covered by the plan as a substantial owner, the amount of benefits guaranteed under this section shall not exceed the product of—

【(i) a fraction (not to exceed 1) the numerator of which is the number of years the substantial owner was an active participant in the plan, and the denominator of which is 30, and

【(ii) the amount of the substantial owner's monthly benefits guaranteed under subsection (a) (as limited under paragraph (3) of this subsection).

【(C) In the case of a participant in a plan, other than a plan described in subparagraph (B), who is covered by the plan as a substantial owner, the amount of the benefit guaranteed under this section shall, under regulations prescribed by the corporation, treat each benefit increase attributable to a plan amendment as if it were provided under a new plan. The benefits guaranteed under this section with respect to all such amendments shall not exceed the amount which would be determined under subparagraph (B) if subparagraph (B) applied.】

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

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

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

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

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

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

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

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

* * * * * * *

Subtitle C—Terminations

* * * * * * *

REPORTABLE EVENTS

SEC. 4043. (a) * * *

* * * * * * *

(c) For purposes of this section a reportable event occurs—

(1) * * *

* * * * * * *

(7) when there is a distribution under the plan to a participant who is a substantial owner as defined in section [4022(b)(6)] *4021(d)* if—

(A) * * *

* * * * * * *

ALLOCATION OF ASSETS

SEC. 4044. (a) In the case of the termination of a single-employer plan, the plan administrator shall allocate the assets of the plan (available to provide benefits) among the participants and beneficiaries of the plan in the following order:

(1) * * *

* * * * * * *

(4) Fourth—

(A) * * *

(B) to the additional benefits (if any) which would be determined under subparagraph (A) if section [4022(b)(5)] *4022(b)(5)(B)* did not apply.

* * * * * * *

(b) For purposes of subsection (a)—

(1) * * *

(2) If the assets available for allocation under any paragraph of subsection (a) (other than paragraphs [(5)] *(4), (5),* and (6)) are insufficient to satisfy in full the benefits of all individuals which are described in that paragraph, the assets shall be allocated pro rata among such individuals on the basis of the present value (as of the termination date) of their respective benefits described in that paragraph.

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

[(3)] *(4)* This paragraph applies if the assets available for allocation under paragraph (5) of subsection (a) are not sufficient to satisfy in full the benefits of individuals described in that paragraph.

(A) * * *

* * * * * * *

⟦(4)⟧ *(5)* If the Secretary of the Treasury determines that the allocation made pursuant to this section (without regard to this paragraph) results in discrimination prohibited by section 401(a)(4) of the Internal Revenue Code of 1986 then, if required to prevent the disqualification of the plan (or any trust under the plan) under section 401(a) or 403(a) of such Code, the assets allocated under subsections (a)(4)(B), (a)(5), and (a)(6) shall be reallocated to the extent necessary to avoid such discrimination.

⟦(5)⟧ *(6)* The term "mandatory contributions" means amounts contributed to the plan by a participant which are required as a condition of employment, as a condition of participation in such plan, or as a condition of obtaining benefits under the plan attributable to employer contributions. For this purpose, the total amount of mandatory contributions of a participant is the amount of such contributions reduced (but not below zero) by the sum of the amounts paid or distributed to him under the plan before its termination.

⟦(6)⟧ *(7)* A plan may establish subclasses and categories within the classes described in paragraphs (1) through (6) of subsection (a) in accordance with regulations prescribed by the corporation.

* * * * * * *

SEC. 4050. MISSING PARTICIPANTS.

(a) * * *

* * * * * * *

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

(d) PLANS NOT OTHERWISE SUBJECT TO TITLE.—

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

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

(A) to the corporation, or

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

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

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

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

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

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

(i) to which the provisions of this section do not apply (without regard to this subsection), and

(ii) which is not a plan described in paragraphs (2) through (11) of section 4021(b), and

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

(i) has missing participants, and

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

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

[(c)] *(e)* REGULATORY AUTHORITY.—The corporation shall prescribe such regulations as are necessary to carry out the purposes of this section, including rules relating to what will be considered a diligent search, the amount payable to the corporation, and the amount to be paid by the corporation.

* * * * * * *

INTERNAL REVENUE CODE OF 1986

Subtitle A—Income Taxes

CHAPTER 1—NORMAL TAXES AND SURTAXES

* * * * * * *

Subchapter D—Deferred Compensation, Etc.

PART I—PENSION, PROFIT-SHARING, STOCK BONUS PLANS, ETC.

Subpart A—General Rule

SEC. 401. QUALIFIED PENSION, PROFIT-SHARING, AND STOCK BONUS PLANS.

(a) REQUIREMENTS FOR QUALIFICATION.—A trust created or organized in the United States and forming part of a stock bonus, pension, or profit-sharing plan of an employer for the exclusive benefit of his employees or their beneficiaries shall constitute a qualified trust under this section—

(1) * * *

* * * * * * *

(28) ADDITIONAL REQUIREMENTS RELATING TO EMPLOYEE STOCK OWNERSHIP PLANS.—

(A) * * *

(B) DIVERSIFICATION OF INVESTMENTS.—

(i) * * *

(v) EXCEPTION.—This subparagraph shall not apply to an applicable defined contribution plan (as defined in paragraph (35)(B)(i)).

* * * * * * *

(35) LIMITATIONS ON RESTRICTIONS UNDER APPLICABLE DEFINED CONTRIBUTION PLANS ON INVESTMENTS IN EMPLOYER SECURITIES.—

(A) IN GENERAL.—A trust forming a part of an applicable defined contribution plan shall not constitute a qualified trust under this subsection if the plan acquires or holds any employer securities with respect to which there is any restriction on divestment by a participant or beneficiary on or after the date on which the participant has completed 3 years of participation (as defined in section 411(b)(4)) under the plan or (if the plan so provides) 3 years of service (as defined in section 411(a)(5)) with the employer.

(B) DEFINITIONS.—For purposes of subparagraph (A)—

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

(ii) RESTRICTION ON DIVESTMENT.—The term "restriction on divestment" includes—

(I) any failure to offer at least 3 diversified investment options in which a participant or beneficiary may direct the proceeds from the divestment of employer securities, and

(II) any restriction on the ability of a participant or beneficiary to choose from all otherwise available investment options in which such proceeds may be so directed.

* * * * * * *

Subtitle D—Miscellaneous Excise Taxes

* * * * * * *

CHAPTER 43—QUALIFIED PENSION, ETC., PLANS

* * * * * * *

SEC. 4975. TAX ON PROHIBITED TRANSACTIONS.

(a) * * *

* * * * * * *

(d) EXEMPTIONS.—Except as provided in subsection (f)(6), the prohibitions provided in subsection (c) shall not apply to—

(1) * * *

* * * * * * *

(14) any transaction required or permitted under part 1 of subtitle E of title IV or section 4223 of the Employee Retirement Income Security Act of 1974, but this paragraph shall not apply with respect to the application of subsection (c)(1) (E) or (F); [or]

(15) a merger of multiemployer plans, or the transfer of assets or liabilities between multiemployer plans, determined by the Pension Benefit Guaranty Corporation to meet the requirements of section 4231 of such Act, but this paragraph shall not apply with respect to the application of subsection (c)(1) (E) or (F)[.]*; or*

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

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

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

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

* * * * * * *

(f) OTHER DEFINITIONS AND SPECIAL RULES.—For purposes of this section—

(1) * * *

* * * * * * *

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

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

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

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

(iii) the direct or indirect receipt of fees or other compensation by the fiduciary adviser or an affiliate thereof (or any employee, agent, or registered representative of the fiduciary adviser or affiliate) in connection with the provision of the advice or in connection with a sale, acquisition, or holding of a security or other property pursuant to the advice.

(B) REQUIREMENTS RELATING TO PROVISION OF INVESTMENT ADVICE BY FIDUCIARY ADVISERS.—The requirements of this subparagraph (referred to in subsection (d)(16)(C)) are met in connection with the provision of investment advice referred to in subsection (e)(3)(B), provided to a plan or a participant or beneficiary of a plan by a fiduciary adviser

with respect to the plan in connection with any sale, acquisition, or holding of a security or other property for purposes of investment of amounts held by the plan, if—

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

(I) of all fees or other compensation relating to the advice that the fiduciary adviser or any affiliate thereof is to receive (including compensation provided by any third party) in connection with the provision of the advice or in connection with the sale, acquisition, or holding of the security or other property,

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

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

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

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

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

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

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

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

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

(D) EXEMPTION CONDITIONED ON MAKING REQUIRED INFORMATION AVAILABLE ANNUALLY, ON REQUEST, AND IN THE EVENT OF MATERIAL CHANGE.—The requirements of sub-

paragraph (B)(i) shall be deemed not to have been met in connection with the initial or any subsequent provision of advice described in subparagraph (B) to the plan, participant, or beneficiary if, at any time during the provision of advisory services to the plan, participant, or beneficiary, the fiduciary adviser fails to maintain the information described in subclauses (I) through (IV) of subparagraph (B)(i) in currently accurate form and in the manner required by subparagraph (C), or fails—

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

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

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

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

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

(i) the advice is provided by a fiduciary adviser pursuant to an arrangement between the plan sponsor or other fiduciary and the fiduciary adviser for the provision by the fiduciary adviser of investment advice referred to in such section,

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

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

(iv) the requirements of part 4 of subtitle B of title I of the Employee Retirement Income Security Act of

1974 are met in connection with the provision of such advice.

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

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

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

(II) a bank or similar financial institution referred to in subsection (d)(4),

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

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

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

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

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

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

* * * * * * *

SECTION 16 OF THE SECURITIES EXCHANGE ACT OF 1934

DIRECTORS, OFFICERS, AND PRINCIPAL STOCKHOLDERS

SEC. 16. (a) * * *

* * * * * * *

(h) INSIDER TRADES DURING PENSION PLAN SUSPENSION PERIODS PROHIBITED.—

(1) PROHIBITION.—It shall be unlawful for any such beneficial owner, director, or officer of an issuer, directly or indirectly, to

purchase (or otherwise acquire) or sell (or otherwise transfer) any equity security of such issuer (other than an exempted security), during any pension plan suspension period with respect to such equity security.

(2) REMEDY.—Any profit realized by such beneficial owner, director, or officer from any purchase (or other acquisition) or sale (or other transfer) in violation of this subsection shall inure to and be recoverable by the issuer irrespective of any intention on the part of such beneficial owner, director, or officer in entering into the transaction.

(3) RULEMAKING PERMITTED.—The Commission may issue rules to clarify the application of this subsection, to ensure adequate notice to all persons affected by this subsection, and to prevent evasion thereof.

(4) DEFINITIONS.—For purposes of this subsection—

(A) PENSION PLAN SUSPENSION PERIOD.—The term "pension plan suspension period" means, with respect to an equity security, any period during which the ability of a participant or beneficiary under an applicable individual account plan maintained by the issuer to direct the investment of assets in his or her individual account away from such equity security is suspended by the issuer or a fiduciary of the plan. Such term does not include any limitation or restriction that may govern the frequency of transfers between investment vehicles to the extent such limitation and restriction is disclosed to participants and beneficiaries through the summary plan description or materials describing specific investment alternatives under the plan.

(B) APPLICABLE INDIVIDUAL ACCOUNT PLAN.—The term "applicable individual account plan" has the meaning provided such term in section 3(42) of the Employee Retirement Income Security Act of 1974.

SECTION 769 OF THE RETIREMENT PROTECTION ACT OF 1994

SEC. 769. SPECIAL FUNDING RULES FOR CERTAIN PLANS.

(a) * * *

* * * * * * *

(c) [TRANSITION] RULES FOR CERTAIN PLANS.—

(1) IN GENERAL.—In the case of a plan that—

(A) * * *

* * * * * * *

(C) is sponsored by a company that is engaged primarily in the interurban or interstate passenger bus service,

the [transition] rules described in paragraph (2) shall apply [for any plan year beginning after 1996 and before 2010].

[(2) TRANSITION RULES.—The transition rules described in this paragraph are as follows:

[(A) For purposes of section 412(l)(9)(A) of the Internal Revenue Code of 1986 and section 302(d)(9)(A) of the Employee Retirement Income Security Act of 1974—

[(i) the funded current liability percentage for any plan year beginning after 1996 and before 2005 shall be treated as not less than 90 percent if for such plan year the funded current liability percentage is at least 85 percent, and

[(ii) the funded current liability percentage for any plan year beginning after 2004 and before 2010 shall be treated as not less than 90 percent if for such plan year the funded current liability percentage satisfies the minimum percentage determined according to the following table:

[In the case of a plan year beginning in:	The minimum percentage is:
[2005	86 percent
[2006	87 percent
[2007	88 percent
[2008	89 percent
[2009 and thereafter	90 percent.

[(B) Sections 412(c)(7)(E)(i)(I) of such Code and 302(c)(7)(E)(i)(I) of such Act shall be applied—

[(i) by substituting "85 percent" for "90 percent" for plan years beginning after 1996 and before 2005, and

[(ii) by substituting the minimum percentage specified in the table contained in subparagraph (A)(ii) for "90 percent" for plan years beginning after 2004 and before 2010.

[(C) In the event the funded current liability percentage of a plan is less than 85 percent for any plan year beginning after 1996 and before 2005, the transition rules under subparagraphs (A) and (B) shall continue to apply to the plan if contributions for such a plan year are made to the plan in an amount equal to the lesser of—

[(i) the amount necessary to result in a funded current liability percentage of 85 percent, or

[(ii) the greater of—

[(I) 2 percent of the plan's current liability as of the beginning of such plan year, or

[(II) the amount necessary to result in a funded current liability percentage of 80 percent as of the end of such plan year.

For the plan year beginning in 2005 and for each of the 3 succeeding plan years, the transition rules under subparagraphs (A) and (B) shall continue to apply to the plan for such plan year only if contributions to the plan for such plan year equal at least the expected increase in current liability due to benefits accruing during such plan year.]

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

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

(B) For purposes of section 302(e) of the Employee Retirement Income Security Act of 1974, the funded current li-

ability percentage for any plan year shall be treated as not less than 100 percent.

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

* * * * * * *

MINORITY VIEWS

INTRODUCTION

Employees at Enron and Global Crossing suffered a devastating blow when their life savings were decimated by the misconduct and excess of company officials, and by pension trustees who knew the company was in peril, but failed to act.

The Enron scandal has exposed weaknesses in our pension laws that allow runaway executive pensions, lock employees out of decisions affecting their retirement nest eggs, and fail to hold pension plan officials accountable when there is wrongdoing. We believe Congress must take urgent steps to restore confidence in the pension system for millions of Americans who are asking themselves, can this happen again?

Unfortunately, the Majority's bill fails to include basic reforms that are necessary to ensure that there are no more Enrons, despite repeated efforts by Democratic members to strengthen employee protections. The Wall Street Journal aptly summarized the committee markup:

> The Republican-led panel rejected a dozen Democratic amendments that would have offered workers greater protections and imposed stricter rules on employer-sponsors of 401(k) and other defined-contribution plans.[1]

Enron employees lost over $1 billion dollars of their retirement nest eggs through a quagmire of conflicts of interest and self-dealing by company officials. Rather than slamming the door on rules that allow executives to dump company stock and gain excessive corporate perks, this bill:

(1) fails to give employees a choice between investment advice offered by an independent advisor or advice offered by an advisor with potential conflicts of interest that could further jeopardize employee retirement savings;

(2) fails to allow employees to fully and timely diversify their company matched stock contributions;

(3) fails to allow employees to participate in safeguarding their pensions through participation on pension trustee boards;

(4) fails to alert employees when company officials are dumping stock; and

(5) fails to hold plan officials accountable if they violate the law.

BACKGROUND

Enron Corporation (Enron), a Houston based company was formed in 1985. Initially, Enron profited by buying electricity from

[1] "House Committee Approves Plan Aimed at Safeguarding Pensions," Wall Street Journal; March 21, 2002.

generators and selling it to the public utilities. However, with the deregulation of electrical power markets, Enron expanded into an energy broker, trading electricity and other commodities. By the early 1990s, Enron became a major energy trading company. Enron entered contracts with both the buyer and the seller and made money on the undisclosed difference between the selling price and the buying price of various commodities.

In addition to its commodities business, Enron has another division called Assets and Investments that involves building power plants around the world, operating them, selling off pieces of them, investing in debt and equity securities of energy and communications-related businesses, and similar transactions. As its services became more complex and its stock soared, Enron created various partnerships. It appears that Enron used these partnerships to routinely shift debts off its books, resulting in gross over-valuing of Enron stock.

By mid-2001, Enron's complex partnerships were beginning to unravel. On October 16, 2001, Enron announced a $618 million loss for the third quarter and the value of its stock plunged. On October 31, 2001, Enron announced an SEC investigation of the company. Just a few days later on November 8, 2001, Enron announced that it had overstated earnings over the past four years by $586 million and that it was responsible for up to $3 billion in obligations to various partnerships. With this announcement, the bottom fell out of the value of Enron's stock. On December 2, 2001, Enron filed Chapter 11 bankruptcy in federal court in New York.

Enron encouraged employees to invest in the company, both generally and through their pension plans, and matched their 401(k) savings plan contributions with company stock. The savings plan was the employee's primary retirement plan as Enron had previously converted its once sound defined benefit plan, first to a floor-offset plan tied to employer stock, and then to a cash balanced plan. As of December 31, 2001, approximately 60% of the assets in Enron's 401(k) plan were invested in Enron stock. Nearly 90% of the Enron stock in the savings plan resulted from employee contributions. The fact that Enron's stock represented a majority of total plan assets is not unusual. A recent survey found that the concentration of employer stock in a large number of 401(k) plans is greater than 60% of total plan assets (appendix attachment 1). Many prominent economist and academics contend that where the company matches employee contributions with employer stock, employees are implicitly encouraged to, and tend to, invest more of their own contributions in company stock.

Enron matched 50% of employee's contributions with Enron stock. Employees were required to hold those matched contributions in the form of company stock until age 50. Under Enron's plan, only upon reaching age 50 could employees diversify their shares and invest in one or more of the other investment options. Once again, Enron's policy was similar to policies in other companies. A recent Hewitt Associates survey shows that 56% of the 401(k) plans that match employee contributions with employer stock require participants to reach a certain age—typically 50 or 55, or according to ESOP rules—before they can sell. Of the firms that match with employer stock, only 15% allow their employees to

sell the stock immediately, while 19% do not permit diversification at any time.

In addition, Enron, through pension plan materials, emails, and employee meetings, encouraged employees to invest as much of their pension monies as possible in company stock. At a December 1999, all-employee meeting, Cindy Olson, vice president for human resources and a pension plan fiduciary, was asked by an employee if 100% of employee contributions should be invested in employer stock. Ms. Olson's answer was "absolutely." Furthermore, in emails dated August 14 and August 21, 2001, Enron CEO Key Lay wrote to employees,

> * * * I want to assure you that I have never felt better about the prospects for the company * * * One of my top priorities will be to restore a significant amount of the stock value we have lost as soon as possible. Our performance has never been stronger * * *" and "* * *one of my highest priorities is to restore investor confidence in Enron. This should result in a significantly higher stock price * * * I ask your continued help and support as we work together to achieve this goal.

From October 26 to November 13, 2001, Enron barred any retirement plan transactions by employees; effectively requiring employees to hold on to Enron stock while it was losing value. Enron stock fell from $15.40 at the start of the lockdown to $9.98 at the end. Envon contends that it was simply changing plan administrators and the restrictions had nothing to do with the fact that Enron stock was falling. However, Enron materials and emails about the lockdown were unclear as to exactly when the lockdown would begin and end. Employees asked Enron pension plan administrators to delay the lockdown, but the company declined to do so.

LESSONS LEARNED FROM ENRON

The Enron Scandal has brought to light practices common among pension plans that must be addressed as part of any real reform. Some of these issues include:

Failure of Savings Plans to Permit Diversification.—Many companies that make their pension contributions in employer stock place onerous restrictions on the ability of employees to rescue their savings if the company is failing, or diversify these contributions, once vested, into other plan investment options. According to the Employee Benefit Research Institute (EBRI), less than 3% of all 401(k) pension plans hold employer stock, but they are many of the largest U.S. companies; covering 6% of all pension plan participants and 10% of all pension plan assets. According to Hewitt Associates, a survey of Fortune 500 companies revealed that approximately 85% of employers with employer stock in their pension plans restrict employee ability to invest freely. A survey reported by the Congressional Research Service shows many 401(k) plans dangerously over loaded with investments in company stock; such as Proctor and Gamble, Home Depot, and Pfizer, whose company stock accounts for over 80% of their 401(k) plan. Several of these companies do not provide a guarantee defined benefit pension plan

to their employees, leaving them completely vulnerable to the company's solvency and profitability.

Failure of Pension Plans to Give Employees a Voice in Their Financial Future.—Enron stacked its pension board with management executives to act as fiduciaries to the pension plan. These top-level executives—who has no training or experience as pension fiduciaries—took no action to act prudently or in the interests of the pension plan participants. Key fiduciaries often missed pension plan administrative committee meetings, never considered the prudence of employer stock as a plan investment, ignored warnings of company financial problems, and never obtained timely legal advice to protect the pension plan participants. These trustees consistently failed to take actions necessary to protect the irreplaceable life savings of Enron participants.

Failure of Plans to Provide Honest Information and Advice.—Research shows that generally, companies: fail to provide employees with access to meaningful and understandable independent financial advice; fail to warn employees of the risks of holding excessive employer stock; fail to clearly notify employee's of periods in which they are limited from changing investment options; and fail to inform employees of the employer's financial status and that of its stock.

Failure to Alert Employees When Executives are Dumping Company Stock.—Companies do not alert employees when top company officials are dumping company stock. Company executives at Enron and Global Crossing were dumping hundreds of millions of dollars of company stock as their companies were spiraling into financial disaster. Additionally, company executives were advising and recommending that employees continue to hold and buy additional company stock in their pension plan, while those same executives were selling their own stock. (appendix attachment 2)

Failure of Current Pension Rules to Provide Fairness Between Executives and Rank-and-File Employees.—While thousands of Enron and Global Crossing employees were laid off—and in the case of Enron, locked out of their savings plans as the company was failing—company executives were protected by a variety of corporate perks and company funded executive pension compensation arrangements. Loopholes in the Employee Retirement Income Security Act (ERISA) and the Internal Revenue Code have permitted companies to maneuver to safeguard executive pensions and perks, while regular employees are left to fend for themselves if the company fails.

Failure of Current Pension Laws to Provide Relief for Employees Who Lost Their Nest Egg.—As a result of likely corporate misconduct by Enron executives and its auditors, over 5,000 hardworking employees have lost their jobs and many of the approximately 20,000 employees, retirees, and their families have lost the bulk of their retirement savings. Because of ERISA's flawed remedy provisions and bankruptcy law weaknesses, Enron pension plan participants stand last in line to recover $1 billion in plan losses—and are left with a bankrupt company that has only $85 million in fiduciary insurance.

THE COMMITTEE PASSED BILL

Bad Investment Advice for Employees

The bill reported out of Committee allows for self-interested investment advice to be provided to employees without assuring an independent alternative. For the first time since ERISA was enacted almost three decades ago, investment firms would be permitted to serve both as principal financial advisor and investment managers to employees. As Jane Bryant Quinn aptly stated in a March 4, 2002, Newseek column: "Post-Enron, how can anyone even think of creating such conflicts of interest? You might as well turn the system over to an ice-skating judge." (referring to the ice-skating judging impartially scandal at the 2002 Winter Olympics.) (appendix attachment 3)

The Committee bill eliminates current ERISA rules that prohibit conflicts of interest that protect plan participants from self-interested investment advisors. The bill would permit investment advisers to recommend their firm's products and earn additional fees on recommended products, upon disclosure of their financial conflict. It does not require access to independent advice or assure any independent oversight. The proposal would actually take ERISA backward and jeopardize the retirement savings of millions of workers and their families if financial service salespersons market investment products that may be good for their bottom line, but not necessarily the retirement savings of working families.

During our hearings, no Enron employees or representatives in any way suggested that if only they had access to any form of investment advice would their retirement security have been protected. Rather, the testimony of Enron employees and others demonstrated how employees were provided misleading advice by company officials to continue to hold and buy additional Enron employer stock; which advice they ultimately relied upon to their detriment. The lesson of Enron is not to open the door to self-interested players, but rather to tighten the rules to ensure that individuals are not misinformed or misled by individuals with financial conflicts of interest and offer them independent advice. The Enron debacle painfully demonstrates how accountants were unable to offer unvarnished advice to one of their largest clients for their other financial services and how Enron management officials were unable to protect their interests of pension plan participants because if conflicted with their corporate interests.

The issue of investment advice is subject to a variety of misnomers. First, there is a subtle difference between what is investment education and investment advice. Employers are free to provide investment education with few restrictions and over 90% do so. Investment advice, which more strongly involves specific investment recommendations, is also readily provided by a growing number of employers.

The financial services industry has, by and large, been providing either investment education and/or advice to pension plans and participants. There is a fairly well developed market of independent advisors and most of the large financial investment firms have contracted with independent firms to provide advice. The only group that remains restricted is those companies who wish to pro-

vide specific investment advice on their own products in which they receive varying financial benefit depending on the investment selected.

According to a 2001 study conducted by Mercer of plan sponsors found that 33% of firms offer investment advice to plan participants. The study also found that 93% of employers held meetings to educate and communicate with employees on retirement issues.

Those employers that have declined to make investment education or advice available have stated two reasons for their decision: either excessive cost or fear of liability if imprudent advice is provided. An Institute of Management & Administrative (IOMA) study of 401(k) plan sponsors found that 89% of employers/sponsors did not provide advice because they were concerned with fidicuiary liability.

Additional concerns have been raised about the qualification of investment advisors under the Committee reported bill. Currently, ERISA limits investment advisors to federally or state regulated advisors or broker/dealers. The Committee reported bill would weaken investment advisor qualification requirements and permit non-licensed individuals to provide investment advice. The Inspector General (IG) to the Department of Labor, in a letter dated March 18, 2002, to Congressman George Miller, stated that, "H.R. 3762 does not contain provisions relative to fiduciary adviser qualifications." The IG further stated, * * * DOL and plan participants would be in a better position to monitor and oversee the advice given, if minimum standards for qualification and disclosure were established * * * "[2]

Since last year's debate on legislation to expand investment advice, the Department of Labor has issued an advisory opinion (known as Sun America) which would allow employers to provide full-service management within their 401(k) plans, as long as there is an independent safeguard to protect participants from self-dealing by financial advisors.

Under the Sun America opinion, companies can contract with financial service firms to provide two different types of investment advice services—either automatic enrollment in a professionally managed investment account that is invested according to a participant's needs and preferences or discretionary investment advice on investment options.

Under both types of services, if the advice provider provides advice on its proprietary funds, then it would be required to contract with an independent investment firm to program its investment recommendations. Sun America provides a new avenue for firms that would otherwise be subject to conflicts of interest to provide investment advice. It has been publicly reported that a number of large financial service firms are considering using the DOL opinion to provide investment advice.

We have long been concerned about opening ERISA to conflicts without guaranties of independence, and post-Enron, there is greater reason for caution. Conflicted investment advice would not have protected Enron's employees and their retirement savings. Most in-

[2] March 18, 2002, Letter from Office of Inspector General, U.S. Department of Labor to Representative George Miller.

vestment advisors do not provide advice on employer stock and the Committee bill specifically permits them to limit the scope of their advice. Post-Enron we should do everything possible to ensure that workers' 401(k) money is subject to the highest standards of care, not the lowest.

The Committee Bill Fails to Give Employees Control of Their Nest Egg

The Committee bill continues to lock employees into company matched stock for 3 years after the contributions have been made, and does not permit billions of dollars in existing company stock currently owned by employees to be fully divested until 2007. At a time when markets move at lightning speed, and company fortunes—like Enron, Global Crossing, and myriad other companies—can spiral downward in months, such a limitation is unconscionable and continues to leave employees at risk of losing all of their retirement savings.

The Republican proposal creates an unworkable morass of inadequate employee protections. The Committee bill would permit companies to restrict employee diversification of existing contributions for 5 years, and limit diversification of future contributions to an annual 3-year diversification rule (new contributions made in 2002 would not be eligible for diversification until 2005, contributions made in 2003 would be eligible in 2006, and so on). Companies will continue to be able to tie the hands of employees by subjecting them to different and administratively complex rules depending on when contributions are made. According to the most recent Bureau of Labor Statistics data on employee tenure, average job tenure for all employees 16 and over is 3.5 years, and for employees ages 25–34 is 2.6 years. For millions of employees, the Republican proposal will not change their ability to protect their individual savings. By comparison, the Democratic Substitute would allow all company-matched stock to be diversified after one year of employment.

The Democratic Substitute would significantly revamp ERISA. The goal of ERISA is to protect the interests of participants and their beneficiaries in employee benefit plan. However, when ERISA was enacted, 401(k) plans did not exist, and changes to ERISA have not kept pace with trends in retirement plans. Under current law, plan sponsors can require participants to hold on to employer stock contributed by the employer until retirement age. The Democratic Substitute allows employees to have immediate control over their own contributions to their 401(k) plans and requires that employees be able to control their employer contribution after one year of service in the plan.

Enron, like many companies, matched employee contributions with company stock. Despite the rapid decline in the value of Enron stock, employees were prohibited from protecting their own retirement security by an outright prohibition on selling company contributions until reaching age 50. Enron is not the only company compelling employees to invest pension savings in their own company—or bar them for transferring shares out, or punishing them if they do. At K-Mart and other companies, if you sell company stock in your 401(k) plan before a certain age, the company with-

holds its employer contribution to your plan for six months. There should be no such restriction or penalty.

As previously stated, a recent Hewitt Associates survey shows that 56% of 401(k) plans that match employee contributions with employer stock require participants to reach a certain age—typically 50 or 55, or according to ESOP rules—before they can sell. Of the firms that match employee contributions with employer stock, only 15% allow their employees to sell the stock immediately, while 19% do not permit diversification at any time. Employees' retirement nest eggs should not be threatened by arbitrary restrictions on their ability to sell company stock contributed by the employer. Employees must be given the opportunity to diversify their investments—and where necessary—rescue their savings when the company's fortunes turn bad.

According to Department of Labor data reported in 1997, 29% of all employees currently have immediate full vesting. A recent survey done by Hewitt Associates of 25% of Fortune 500 companies regarding the vesting requirements for employer contributions in 401(k) plans found that 33% of plans had immediate vesting. Further, only 3% of plans tied diversification rights to vesting periods. A number of notable companies state that they do not restrict employee ability to diversify, including Abbott Laboratories, Chevron, Coca Cola, McDonald's, Pfizer and Proctor and Gamble.

Professor Shlomo Bernartzi of UCLA, who has done extensive research on the issue of company stock as a 401(k) investment, has stated, "Since you already have all your human capital invested in the company, my rule of thumb is, don't invest any of your plan assets in the company."

The Democratic Substitute would provide employees total control over the investment of money that they earned and contributed to their retirement plans, and that their employer contributed to their plans as part of their compensation, after one year of service. This change is critical to help avoid the problem we just witnessed with Enron. It will provide employees the ability to rescue their nest eggs, as well as diversify and manage their investments consistent with the advice of financial professionals and the goals of their families. These investments are the employee's money. They should be the ones who decide where and how to invest them.

The Committee Bill Fails to Require Companies to Provide Notice to Employees Who Are Dumping Company Stock

The Committee's hearings confirmed that Enron company executives—with inside information about the real financial condition of the company—were dumping millions of dollars in company stock while employees were left in the dark and locked out of their savings. Similarly, it appears that executives at Global Crossing were also acting on insider knowledge for their exclusive benefit—and to the detriment of rank-and-file employees—when they sold company stock valued at $1.3 billion and cashed out executive pension plans. Current SEC rules permit inside stock sale disclosures to lag anywhere from 40 days to a year, depending on the nature of the disclosure. Such information is not readily available to the public. Ken Lay, Enron's CEO, trading almost daily, sold Enron stock 350 times and received $101.3 million. Between early 1999 and July

2001, Lay sold 1.8 million Enron shares back to the company and was able to avoid prompt disclosure—none of the 350 transactions required timely notice.

The Committee bill fails to address this issue. Furthermore, the Majority defeated a Democratic Amendment that requires insiders to immediately report stock sales to the pension trustees. The trustees would then be required to notify plan participants of any stock sale over $100,000 (or series of sales over $100,000) within only 3 business days. The amendment was designed to complement new SEC rules being developed that would require immediate disclosure to investors.

The Committee Bill Fails to Provide Employees a Voice in Their Own Retirement Savings

At Enron there was a catastrophic failure by its pension plan trustees to protect the irreplaceable life savings of thousands of Enron employees, despite conclusive evidence that a number of the trustees were aware or should have been aware that the company was covering up serious financial problems. The actions of Cindy Olson, an Enron executive appointed to sit on the pension plan administrative committee, is a clear case of the inherent conflict of interest where the executive is charged with presiding as a pension trustee—with legal responsibility to act solely in the plan interests—while at the same time serving the company with the sole focus of promoting the company in the most favorable light and maximizing the corporate bottom line.

Ms. Olson testified before this Committee that she had personal knowledge that there was significant risk and trouble in holding Enron stock through the receipt of Sherron Watkins' memorandum in August of 2001.[3] She also knew that there was a huge concentration of investment of Enron stock, both in the voluntary contributions from the employees and obviously in the employer match, in the pension plan. Ms. Olson, acting as both a fiduciary and an executive, made a decision not to inform other plan fiduciaries so that they might consider warning the employees or otherwise educating them. Ms. Olson further testified that while she chose not to educate employees, she was divesting herself of shares that she held in her own personal account. Ms. Olson also missed four trustee meetings during the critical period in which Enron stock was in freefall.

Another trustee, Todd Lindholm, missed at least eight trustee meetings in 2001. Mr. Lindholm signed the approval sheets for Enron's LJMI partnership, one of a number of investment schemes to hid Enron debts.[4]

Another trustee, Paula H. Reicker, worked in investment relations where she regularly fielded concerns by investors over Enron's tangled financial statements, as well as concerns about Andrew Fastow's conflicted relationships as an Enron employee and investor in Enron partnerships.[5]

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[3] Sherron Watkins memo, distributed anonymously to employees at Enron in August of 2001, warned that Enron "will implode in a wave of accounting scandals.

[4] From minutes of Enron Administrative Committee Meetings conducted in 2001.

[5] Vinson and Elkins Interviews; confidential interviews with selected Enron officials, 2001.

Pensions have changed dramatically in recent years. We are no longer operating in a defined benefit pension plan world where employers make all or most of the contributions to a pooled fund of monies. Now, most workers are in defined contribution plans, such as 401(k) plans, where they contribute their own salaries to their pension plans. It is simply unconscionable that we permit employers 100% control over monies that are generally 67% or more of employee salary deferrals. The Committee bill does nothing to let employees decide what to do with their monies or protect themselves if financial circumstances change. In the case of Enron, we saw that company executives were unable to separate the workers' interests from those of the company. It is common practice among state and local pensions, multi-employer union pensions, non-profit organization pensions, and international pensions for employees to be involved in their own funds. For example 6 out of 9 members on the board of Ohio's Public Employees Retirement System, 3 out of 6 members on the board of Texas' Employee Retirement System, and 6 out of 13 members on the board of California's Public Employee Retirement System are elected by active and retired employees/participants in the respective plans. It is time to bring ERISA into the 21st century. If 401(k)'s put the risk of retirement saving on employees, then employees should have the ability to manage and make decisions about their own investments.

The Republican bill keeps the status quo on pension boards by denying employees a voice on pension boards. By contrast, the Democratic Substitute would require employee representatives on pension boards.

Dr. Teresa Ghilarducci, an economics professor at the University of Notre Dame, testified before this Committee and urged Committee members to require that employees have representatives on boards that oversee retirement plans. Dr. Ghilarducci testified that "the United States is the only industrialized nation that does not require employee representation on a pension board." In pension plans that permit employees to direct control of their pension investments, the Democratic Substitute would require the plan to include an equal number of employer and employee trustees to oversee the plan. Despite research showing that plans with employee trustees experience a higher rate of savings and investment by employees, have more active involvement by employees in investment decisions, and that such representation helps solve inherent conflict of interests, many plans today have no employee trustees overseeing employees' pension funds.

If equal representation of employee and employer trustees had been on the Enron board, it is likely that the board would have carried out ERISA requirements to manage the plans solely for the benefit of the employees and losses may have been mitigated. The Democratic Substitute is narrowly tailored to defined contribution plans that hold employee monies. It is patently unfair that these plans, which primarily contain deferred worker salaries, are 100% controlled by employers. It's the workers money, they should have at least an equal say in how it is invested and managed.

The Committee Bill Continues Special Treatment for Company Executives Pensions at the Expense of Rank-and File Employees.

Enron and Global Crossing have brought attention to serious inequities in pension rules for executives and rank and file employees. As Enron began to implode in a wave of accounting scandals, company executives, such as CEO Ken Lay, were able to not only cash out millions in company stock, but also protected themselves through a number of executives type 401(k) plans that are not subject to attack by Enron's numerous general creditors. Enron agreed to pay Mr. Lay a total of $1.25 million in life insurance premiums on a $12 million dollar policy. These agreements—commonly referred to as "split-dollar" policies—are used to give executives tax-free pensions benefits, and place such benefits beyond the reach of creditors. Mr. Lay also received a guaranteed return of 12% on a special deferred compensation plan, and a pension estimated at approximately $482,000 a year for life. By contrast, employees must stand in line behind even the company's general creditors to get any recovery of their hard earned savings—a prospect that is quite unlikely. Neither ERISA nor the Internal Revenue Code intended to permit executives to protect their financial security through questionably funded executive pension plan arrangements. As President Bush has frequently states: "what's good for the top floor should be good for the shop floor." The Committee bill does nothing to address this great inequity.

The Committee Bill Fails to Hold Company Officials Responsible for Misconduct and Fails to Enhance Plan Accountability

The Majority bill fails to include a number of critical accountability provisions that are designed to prohibit future scandals and ensure that employers don't skirt responsibility for wrongdoing.

Because of weak remedy provisions in current law, Enron employees who had their life savings decimated will likely never recover their funds in court. Employees who get cheated out of their retirement funds as a result of misconduct by company officials should be able to make them pay for their misdeeds.

Over 50 million workers currently participate in 401(k) type and similar plans, representing almost $2 trillion worth of investments. However, current law does not provide adequate redress for the workers at Enron or Global Crossing, and millions of others like them who lose their retirement savings. Current pension law interpretations severely limit the ability of employees to collect damages resulting from the misconduct of company officials. Current law primarily limits liability to fiduciaries that fail to act solely in the interests of the plan participants. Fiduciaries are those persons formally named to oversee the plan, or any individual who has control over plan assets. Non-fiduciaries who participate in a violation of the law have limited liability.

Additionally, liability is currently limited by the courts to equitable relief, which means employees can only receive the pension they were wrongfully denied. Many courts will not award aggrieved employees any interest for the years they did not timely received their benefits. Furthermore, many courts will not award them attorneys' fees and court costs. And no court will award them recov-

ery for other monetary losses, such as the value of foreclosed homes or loans incurred to make ends meet.

The Democratic Substitute clarifies ERISA remedies to that in cases of a breach of duty by a fiduciary, or breach by a knowing participant, the plan or employees may be made whole. Additionally, the Democratic Substitute requires that employers may not require participants to sign waivers of statutory pension rights as part of a termination or severance agreement. ERISA was enacted to protect workers and retirees. When workers' retirement funds are misused, Congress must ensure that workers will get timely and adequate redress.

Additional critical accountability provisions offered by Democrats, but rejected by the Majority include:

Direct Reporting to the Department of Labor in Cases of Fraud or Abuse.—For over a decade the Inspector General of the Labor Department has recommended Urgent Legislative Action that would require pension plan accountants to report suspected pension fraud or abuse directly to the DOL. The current system provides the Secretary of Labor with no information regarding irregularities by pension plans and leads to after-the-fact enforcement actions by the Secretary where only a fraction of the money is recovered.[6]

Assurance That Plan Fiduciaries Have Insurance or be Bonded.—Such coverage is critical to cover financial losses due to breach of fiduciary duty as determined by the Secretary of Labor. It is a significant weakness of ERISA that it does not require pension plan fiduciaries to obtain insurance.

Strong Prohibitions Against Providing False and Misleading Information to Plan Participants.—Employees should be protected against false and misleading information provided by pension plan officials. The Committee bill requires quarterly statements, but does nothing to prevent executives from misleading employees, nor does it require executives to notify employees of critical decisions affecting the performance of the company.

Prohibition on Waivers of Legal Rights.—Employers should not be permitted to skirt responsibility for wrongdoing by coercing employees to sign waivers giving away their federal pension rights. It is alleged that Enron required employees to waiver their rights to file ERISA claims in order to receive severance benefits. Recently, their have been a spate of court cases in which companies attempted to deny workers their statutory legal rights through boilerplant contract waiver language. ERISA never intends these types of abrogation of statutory rights and they should be explicitly prohibited.

Improved Labor Department Assistance.—The Department of Labor shall establish an office of the Participant Advocate to monitor potential abuses of employee pension plan rights and assist pension plan participants in preventing loss of retirement savings. It has been a longstanding concern that the Department of Labor generally does not act proactively or prophylactically to assist employees in protecting their pensions and other employee benefits or

[6] March 18, 2002, Letter from Office of Inspector General, U.S. Department of Labor to Representative George Miller.

to prevent pension plan abuses. Future Enrons could be averted if the Department were more active and zealous in protecting the interests of pension plan participants and their families.

APPENDIX

Item #1

EMPLOYER STOCK IN SELECTED DEFINED CONTRIBUTION RETIREMENT PLANS

Company name	Company stock as a percentage of defined contribution plan's assets	Does company have a defined benefit plan?	Closing stock price at the end of						Total percentage change
			1996	1997	1998	1999	2000	2001	
Procter & Gamble	91.5	No	52.89	77.97	89.47	107.72	76.60	78.75	48.9
Anheuser-Busch	81.6	Yes	17.49	19.99	31.34	34.54	44.81	45.03	157.5
Coca-Cola	81.0	Yes	49.60	64.23	65.14	57.03	60.40	47.15	−4.9
Abbott Laboratories	80.0	Yes	23.6	31.10	46.57	34.54	47.41	55.54	140.8
General Electric	77.4	Yes	16.29	24.08	33.62	51.20	46.94	39.72	143.8
William Wrigley, Jr	75.0	Yes	24.97	37.21	42.86	40.21	47.35	51.18	105.0
Pfizer	74.8	Yes	13.28	24.09	41.16	31.51	45.43	39.72	199.1
Home Depot	72.0	No	25.78	29.68	54.09	83.93	47.08	49.41	91.7
BB&T (Branch Banking & Trust)	69.6	Yes	15.68	30.16	37.72	25.53	36.33	36.11	130.3
Texas Instruments	69.0	Yes	7.77	11.03	21.27	48.19	47.27	27.98	260.1
Duke Energy	67.9	Yes	18.06	23.70	29.14	23.28	41.94	38.98	115.8
Target	66.0	Yes	9.29	16.51	26.63	36.42	31.97	40.99	341.2
Textron	65.0	Yes	43.67	57.04	72.08	74.09	45.20	41.13	−5.8
Reliant Energy	64.5	Yes	14.75	20.38	27.19	19.50	41.44	26.15	77.3
Kroger	63.6	Yes	11.09	17.94	27.28	16.00	24.63	24.60	121.8
Southern Company	62.8	Yes	1.83	6.38	10.91	6.69	17.78	25.02	1,267.2
ExxonMobil	62.0	Yes	22.67	29.50	34.50	40.08	43.47	37.84	66.9
Household International	61.4	Yes	29.02	41.34	37.20	35.49	53.96	57.72	98.9
Sherwin-Williams	59.1	Yes	26.65	25.56	27.63	19.74	25.59	27.36	2.7
BellSouth	57.9	Yes	19.11	27.02	23.80	45.10	39.99	37.96	98.6
Merck	57.5	Yes	35.70	49.96	71.70	64.20	91.56	58.10	62.7
Williams	57.0	Yes	16.97	13.01	29.16	29.13	39.11	25.32	49.2
McDonald's	56.8	No	22.47	23.66	38.19	39.87	33.78	26.47	17.8
TXU (Texas Utilities)	56.3	Yes	28.15	31.55	38.37	29.56	40.71	45.95	63.2
Dell Computer	53.4	No	1.66	10.50	36.59	51.00	17.44	27.18	1,537.3
Ford Motor Company	5.2	Yes	30.78	47.09	57.24	51.86	22.29	15.62	−49.3

1. Stock prices have been adjusted for stock splits and dividends. From 12/31/96 to 12/31/01, the total return on the S&P 500 was 65.7%.
Source: Company filings of S.E.C. Forms 10–K and 11–K and company spokespersons for retirement plans; finance.yahoo.com for stock prices.

Item #2

Selling High

J. Clifford Baxter was one of 13 Enron executives or directors who sold shares worth more than $30 million between October 1998 and November 2001.

Eron official	Title (most recent)	Stock proceeds (millions)
Lou Pai	Chairman, Enron Accelerator	$353.7
Kenneth Lay	Chairman	101.3
Rebecca Mark-Jusbasche	Director	79.5
Ken Harrison	CEO, Portland General Electric *	75.2
Kenneth Rice	Chairman, Enron Broadband	72.8
Jeffrey Skilling	Director (former CEO)	66.9
Robert Belfer	Director	51.1

Eron official	Title (most recent)	Stock proceeds (millions)
Mark Frevert	Chairman, Enron Wholesale	50.3
Stanley Horton	Chairman, Enron Transportation	45.5
Joseph Sutton	Vice Chairman	40.1
J. Clifford Baxter	Vice Chairman	35.2
Joseph Hirko	ECO, Enron Broadband	35.2
Andrew Fastow	Chief financial officer	30.5

* Subsidiary.
Source: Court documents.

Item #3

[From Newsweek, Mar. 4, 2002]

HELP! I'M SCARED FOR MY 401(k)

Enron shows that employees need investment advice. It's time for companies to step up.

(By Jane Bryant Quinn)

At the end of the day, what would really help employees manage their 401(k)s? Good investment advice, that's what. Your company may distribute an educational booklet that shows pretty pie charts and defines words like "diversification." But after all the reading is done—after you decide whether you're a conservative, moderate or aggressive investor—two questions remain: How should you invest your money and should you own company stock?

Post-Enron, a laser beam has been turned on America's investing skills. What we see isn't pretty. By now the public has read a ton of stories about diversification, yet most people still don't get it. Even if you own mutual funds, you aren't diversified if they focus on a single industry (remember when we were all tech, all the time?).

Most corporations think that your 401(k) is entirely your problem. If you make mistakes—well, better luck in the next life. But this life is not a dress rehearsal. Most top executives get company-paid advice to help them manage their multimillions. Why shouldn't the grunts with just 401(k)s get a few suggestions, too?

At some companies, they do. These include such well-known names as Merck, Xerox, 3M, Hewlett-Packard, Continental Airlines, Mattel and H&R Block. But plenty of CEOs won't even consider offering advice because they're afraid you'll sue them if it doesn't work out. Congress could end that worry by making just one little change in the pension law. But when lawmakers tinker, trouble starts. They're going for bigger changes that help the industry, not you.

I'll get to that in a moment. First let me tell you about the galloping movement by good guys to offer 401(k) advice. Three online advisory firms dominate this business today: Financial Engines in Palo Alto, Calif., offered directly by 600 employee plans; mPower in San Francisco, with 250 plans, and Morningstar's ClearFuture in Chicago, with 400 plans. All three serve many other corporate and public-sector plans through financial institutions such as the Vanguard Group (Financial Engines) and T. Rowe Price (ClearFuture).

Computerized online advisers work roughly—very roughly—the same way. Employees log on to the Web site, supply some personal and financial information, then enter the income they're aiming for when they retire. The program advises them on which specific funds in their 401(k) will serve them best.

Markets, of course, never work out the way we think. Financial Engines was the first to explain this kind of risk to investors. Its program looks at your savings rate, your investments and the years you have left to work. Then it calculates your odds of retiring with the income you want. You might be startled to learn that your plan has only a 40 percent chance of success—or, badly, a 60 percent chance of falling short. To reduce that risk, you'd have to save more and invest it less aggressively. Alternatively, you might decide to plan on a lower income at 65.

mPower takes the same approach, although it's not as clear about explaining risk. ClearFuture shows you 21 possible mixes of stocks and bonds, aggressive to conservative. It picks funds from your 401(k) to match the level of risk you choose.

I ran two simple all-stock portfolios through all three systems. Each made different suggestions—no surprise there. But all were diversified, which is the first step to wisdom. Two added bonds. All showed that my sample employee wasn't saving enough.

I also checked how the three programs treated a heavy investment in your company's stock. mPower usually tells you to sell the entire position, because a single stock is always riskier than a diversified fund. ClearFuture suggests that you put no more than 10 percent of your money there. Financial Engines shows you how various positions in company stock raise or lower your total amount of investment risk. In their separate voices, they're all saying "beware."

By the way, you can also use these services independently. Try financialengines.com ($39.95 per quarter for advice); mPower on MSN Money ($20 a year), or ClearFuture at morningstar.com—$30 today, but starting in early April sold only as part of a $109 package.

By now, you're probably asking the same question I did: with so many companies contracting for 401(k) advice, what's with those CEOs who say they don't dare in case they're sued? It comes down to how they read the pension law. The Department of Labor, which administers the law, has issued advisory opinions encouraging advice. "It's perfectly legal," says former DOL official Olena Berg Lacy. But Washington attorney Richard McHugh says that most of his clients won't provide it unless the Congress specifically says OK.

Fine—let's do it. But alas, the industry sees this as its chance to chip away at some of the law's consumer-protection rules. For example, the DOL has always insisted that companies offer independent advice. But the House just passed a contrary bill sponsored by Ohio Republican John Boehner. It lets the financial-service firms that provide your 401(k)—such as brokers, fund groups and insurers—advise you on whether to buy their own funds and even which ones.

Post-Enron, how can anyone even think of creating such conflicts of interest? You might as well turn the system over to an ice-skat-

ing judge. Boehner helped his bill sweep through by claiming, wrongly, that current law "prohibits" employers from hiring 401(k) advisers. The president backs Boehner. Ann Combs, DOL's assistant secretary for pension and welfare benefits, says she's sure that the conflicts could be managed, with disclosure. (Why don't I feel comforted?)

In the Senate, a bill from New Mexico Democrat Jeff Bingaman would end the time-tested rule that employers be liable for choosing advisers "prudently" and monitoring what they do. To encourage more 401(k) advice, he'd create less encompassing liability rules. But it's risky to be loosening this standard now.

There's one last reason companies might not want to bother with 401(k) advice, says Gerry O'Connor, of the Chicago-based consultant Spectrem Group. Employees say they want it but may not use it when it's there. Companies have to believe in it and promote it to make it work. And you have to step up to the plate yourself.

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