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PROTECTING AMERICA'S PENSIONS ACT OF 2002

JULY 26, 2002.—Ordered to be printed

Mr. KENNEDY, from the Committee on Health, Education, Labor,
and Pensions, submitted the following

R E P O R T

together with

MINORITY VIEWS

[To accompany S. 1992]

The Committee on Health, Education, Labor, and Pensions, to which was referred the bill (S. 1992) to amend the Employee Retirement Income Security Act of 1974 to improve diversification of plan assets for participants in individual account plans, to improve disclosure, account access, and accountability under individual account plans, and for other purposes, having considered the same, reports favorably thereon with amendments and recommends that the bill (as amended) do pass.

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I. PURPOSE AND SUMMARY

S. 1992, the Protecting America's Pensions Act of 2002, is an important step in meaningful 401(k) reform to strengthen workers' rights and protections. The committee recognizes that retirement security is a particularly compelling issue for workers who rely on individual 401(k) accounts for their retirement security. Originally expected to merely supplement traditional defined benefit pension plans, today 401(k) plans are the primary retirement vehicle for 47 million American workers.

The loss of \$1 billion of retirement savings by thousands of Enron workers has focused attention on the need for a review of 401(k) plans, particularly on the risks of overinvesting in company stock and the need for asset diversification. Enron workers' 401(k) retirement accounts have vaporized because they consisted largely of Enron stock.

The committee held a hearing, "Protecting the Pensions of Working Americans: Lessons From the Enron Debacle" on February 7, 2002. At that hearing, the Committee reviewed the abuses at Enron that led to the loss of the Enron workers' retirement savings and concluded that greater protections were needed for worker 401(k) plans.

The committee believes that S. 1992 includes basic reforms that are necessary to ensure that there are no more Enrons. The bill achieves its goals by giving workers real investment choices without employer pressure or intimidation, by giving workers access to independent, unbiased investment advice, by giving workers expanded access to recover their investment losses, and by giving workers a voice on the boards that govern their 401(k) plans.

Diversification

S. 1992 permits employers to either contribute company stock to a 401(k) plan or offer company stock as an investment option, but not both. The bill makes an important exception for companies that also provide a substantial defined benefit pension plan. Because the goal is worker retirement security, greater investment risks are acceptable in a 401(k) plan if it is truly a supplemental plan and not the worker's primary retirement vehicle. The bill also addresses the "captive investor" problem that many workers face by giving them the right to sell company stock contributed by the employer after 3 years of service.

The committee believes that S. 1992 accomplishes this goal in a reasonable and moderate way. Instead of limiting workers' options with arbitrary caps on holdings of company stock, the bill is a targeted approach to dealing with the inherent conflict of interest for employers that include company stock in their 401(k) plans. Studies have consistently shown the power of the "endorsement effect"—that is, when employers make their own contributions to 401(k) plans in company stock, workers are likely to allocate as much as 40 percent of their own contributions to that same stock. This level of concentration in one stock would be unacceptable in any other investment arena.

Investment advice

While investment advisers agree that workers should limit their 401(k) investment in company stock, many workers never receive this advice. Because workers are responsible for choosing their own 401(k) investments, unbiased investment advice would improve their retirement security. Employers already exert both direct and indirect influence on workers to invest in company stock. S. 1992 gives workers access to independent, non-conflicted investment advisors who will impress on them the risks of over-investing in company stock.

Executive penalties

The bill provides real penalties for employers who mislead workers about their investments. The bill empowers workers to hold top executives accountable when they knowingly abuse workers' pensions. If workers lose their retirement savings due to deliberate corporate mismanagement, then they will have the legal right to hold those top executives accountable in a court of law, and recover what they lost.

The legislation also recognizes that workers deserve complete and accurate information in making their investment decisions. Among other things, workers must be informed of executive stock sales so that workers can make informed decisions about their own investments. The bill also makes clear that ERISA fiduciary rules prohibit an employer from providing false or misleading information.

Worker representation

Worker representation on pension boards is a common practice. Today, 65 percent of pension assets in the United States are managed with some form of worker representation on plan boards, and thousands of worker representatives sit on the boards of trustees that govern retirement plans in the public and private sectors.

Under S. 1992, workers will serve on the boards of pension plans and help decide what the investment options are in 401(k) plans. Worker representation leads to better results for pension funds and increases employee contributions to their 401(k) plans.

II. BACKGROUND AND HISTORY OF THE LEGISLATION

When the Studebaker automobile company shut down in the early 1960s, more than 4,000 workers lost their jobs and their pensions. The Studebaker collapse illustrated a fundamental flaw in the American pension system and led to the enactment of the Employee Retirement Income Security Act of 1974 (ERISA), the primary federal law to protect pensions. ERISA established minimum vesting, participation, and funding standards; required plan termination insurance for defined benefit pension plans; prohibited certain transactions; and established standards for fiduciary conduct. These protections were designed to ensure that workers would not lose the retirement benefits that they had worked for throughout their lifetimes.

The percentage of the private sector workforce that is covered by an employer-sponsored retirement plan has remained about 50 percent since the early 1970s. While the number of covered workers

has remained relatively unchanged, there has been a substantial shift in the type of retirement coverage—from defined benefit pension plans to defined contribution plans, including 401(k) plans.

At the same time that the number of defined benefit plans has declined, the number of 401(k) plans has grown dramatically in just over two decades. Today, there are an estimated 350,000 401(k) plans covering 47 million workers and holding more than \$2 trillion in assets.

Although there has been this profound shift in the type of pension coverage, pension law has not changed to keep up with this change. The collapse of Enron and the loss of more than \$1 billion of workers' retirement savings emphasizes the need for reform. After the collapse of Enron—at the time, the largest bankruptcy in U.S. history—some argued that it was an isolated instance of corporate greed. But in recent months, we have seen a jury convict the Arthur Andersen accounting firm of obstructing justice. We have seen Tyco Industries accused of falsifying merger information and its CEO indicted. And we have seen WorldCom admit that it misstated its financial condition by nearly \$4 billion and declare bankruptcy—now the largest bankruptcy in U.S. history.

It is clear that these corporate scandals are not unique to one company or one industry. Like Studebaker, Enron and WorldCom are not isolated instances of corporate greed, but rather examples of the need for broader reform of “do-it-yourself” 401(k) plans, which have become the bedrock of America's modern pension system.

Enron Corporation

Enron, a Houston based company, was formed in 1985. Initially, Enron's business focused on buying electricity from generators and selling it to public utilities. However, with the deregulation of electrical power markets, Enron expanded into an energy broker, trading electricity and other commodities, and by the early 1990s Enron had become a major energy trading company. Enron entered into 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 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—the largest Chapter 11 bankruptcy in U.S. history.

Enron's 401(k) plan

During this time, Enron pressured its employees to invest in the company, both generally and through their 401(k) plans, and matched their 401(k) savings plan contributions with company stock. The 401(k) plan was the employees' 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 balance plan.

Enron matched 50 percent of employees' contributions with Enron stock. Employees were required to hold matching contributions in the form of company stock until age 50. Only then could employees diversify their shares and invest in one or more of the other investment options.

As of January 1, 2001, Enron's 21,000 workers had invested about 60 percent of the \$2.1 billion in their 401(k) plan accounts in company stock, even though workers had 18 other investment options to choose from. Investment experts agree that the best protection against market loss is a diversified portfolio of investments. However, because of intense company pressure to buy company stock, many Enron workers heavily invested in Enron stock. The result was that when the company's shares fell more than 95 percent during 2001, Enron workers lost more than \$1 billion of their retirement savings.

The inside tale of how Enron pressured employees to overinvest in Enron stock is enlightening, since so many companies use similar tactics with their employees today. Through pension plan materials, company e-mails, and employee meetings, Enron pressured employees to invest as much of their pension contributions 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 percent of employee contributions should be invested in employer stock. Ms. Olson's answer was "absolutely."

Furthermore, in company e-mails dated August 14 and August 21, 2001, just four months before the company's collapse, Enron CEO Ken 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."

As the value of Enron stock began a free fall, Enron executives tried to coerce Enron workers to buy more company stock in an effort to prop up the stock price. Although Enron executives were aware of the misleading financial statements and the company's vast liabilities that were hidden in off-the-books, offshore partnerships, Enron CEO Ken Lay and other executives continued to pressure workers to invest their retirement savings in Enron stock.

From October 26 to November 13, 2001, Enron instituted a “lockdown” which barred any 401(k) 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. Enron 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 company e-mails 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.

Unlike the Enron workers, Enron executives have fared much better. Knowing the truth about Enron’s true financial condition, company executives and board members sold more than \$1 billion of Enron stock in 2001.

The Enron debacle has focused attention on the need for a review of 401(k) plans and meaningful reform to strengthen workers’ rights and protections. The Enron scandal also highlights the dangers of forcing workers to tie their jobs and their retirement savings to the same company. Even as Enron was collapsing into the biggest bankruptcy in U.S. history, thousands of worker men and women lost their jobs, their life savings, and their pensions.

401(k) plans

Over the last 15 years, there has been a massive shift from traditional defined benefit pension plans to 401(k) and other “do-it-yourself” defined contribution plans. For more than half of all employees who have retirement plans, 401(k) plans have become their primary retirement plan. Yet, there has been little discussion about the impact of do-it-yourself pensions on the retirement security of workers.

In a traditional defined benefit pension plan: (1) retirement benefits do not depend on how much a worker is willing or able to contribute; (2) the employer bears the investment risk; (3) plan assets are professionally managed and must be diversified—no more than 10 percent of plan assets may be invested in any one investment—to minimize the risk of large losses; (4) benefits must be offered as an annuity for life with surviving spouse protection; and (5) benefits are insured by the Pension Benefit Guaranty Corporation.

In contrast, in a 401(k) plan: (1) retirement benefits depend on the willingness and ability of workers to contribute; (2) benefits also depend on workers’ investing skill or luck; (3) assets are not required to be diversified; (4) workers face the real possibility that they may outlive their retirement assets; and (5) benefits are not insured against loss.

The dramatic shift from defined benefit pension plans to 401(k) plans is not due to government regulation of defined benefit plans. Rather, employers choose to sponsor 401(k) plans in order to save pension costs. The 401(k) plan, in effect, allows companies to provide retirement benefits at about half the cost of traditional pension plans because workers bear the brunt of the costs. By replacing defined benefit plans with 401(k) plans, employers are able to shift both the investment risk—the risk of losses in the market—and the longevity risk—the risk that workers will outlive their assets—from the employer to the worker.

Although 401(k) plans have grown enormously, these plans have failed to provide the financial resources workers will need for a comfortable retirement. A recent study by economist Edward N. Wolff, published by the Economic Policy Institute, shows that the pension wealth of nearly two-thirds of American households did not increase between 1983 and 1998. While the very top income group saw their pension wealth increase by 176 percent, the retirement wealth of the households in the middle actually fell by 13 percent.

Congress provides two huge tax subsidies of more than \$100 billion a year for qualified pension plans. Both worker and employer contributions to these plans are tax deferred as well as any investment gains. The deductions and income deferrals for pension plans are the largest tax expenditure in the federal budget. Congress grants this tax subsidy to promote retirement savings and to ensure that workers will have retirement resources beyond Social Security. This government tax subsidy is designed to encourage retirement savings—not to encourage gambling on risky investments. Workers are free to use their own after-tax dollars for any risky investment they choose.

Companies prefer contributing stock rather than cash to 401(k) plans because there are significant economic and financial advantages to providing matching contributions in company stock and because it keeps the stock in friendly hands. More importantly, companies reap substantial tax benefits from stock contributions.

In addition to a tax deduction for the value of the shares, companies are also permitted to deduct the dividends on those shares, even though dividends otherwise are not deductible. For examples, the Wall Street Journal estimates that Procter & Gamble receives \$127 million in tax deductions for company stock held in its 401(k) plan. Similarly, they estimate that Abbott Laboratories receives \$28 million in tax deductions.

Most employers make matching contributions to their company 401(k) plans in cash. But many of the largest U.S. employers—companies like Enron, Coca-Cola, Lucent Technologies, Procter & Gamble, Polaroid, Gillette, Cisco Systems, and Walt Disney—force their workers to invest in company stock because they contribute company stock instead of cash to their 401(k) plans, and then restrict their workers from selling the stock until they are near retirement age, making them “captive investors.”

Abuses of company-sponsored retirement plans are nothing new, and the debate over whether additional regulation of 401(k) and other defined contribution plans is needed is a long standing one. Enron is simply the latest and largest warning that pension laws that favor employers over workers need to be reformed.

There have been other well-publicized cases of companies whose employees also held a high percentage of employer stock in their retirement plans. When the stocks lost much of their value, employees’ 401(k) accounts were significantly reduced.

Like the workers at Enron, workers at Global Crossing, Polaroid, Lucent Technologies, and Ikon Office Solutions have sued their employers over their 401(k) plans. The workers allege that the companies knew their stock was inappropriate for workers’ retirement accounts yet continued to encourage workers to load up on the shares.

Like the executives at Enron, executives at Global Crossing also dumped hundreds of millions of dollars of company stock as their company was spiraling into financial disaster. Executives at Global Crossing, too, acted on insider knowledge for their personal benefit—and to the detriment of rank-and-file workers—when they sold company stock valued at \$1.3 billion and cashed out executive pension plans. While thousands of Enron and Global Crossing employees were laid off, company executives were protected by a variety of corporate perks and company-funded executive pension arrangements.

Like Enron workers, Polaroid workers' retirement accounts were heavily invested in company stock. Polaroid required workers to invest 8 percent of their pay in company stock through the company's employee stock ownership plan (ESOP), and barred workers from selling until they retired. As Polaroid went bankrupt, the workers lost virtually their entire retirement savings. Like Enron, Polaroid also had a 401(k) plan with a variety of investment options, but many Polaroid workers did not participate in the 401(k) plan because they were already required to contribute 8 percent of their pay into the ESOP.

Another recent example is Lucent Technologies where workers had invested about 30 percent of their 401(k) savings in company stock. Like Enron, Lucent made matching contributions in company stock and restricted the sale of this stock until workers reached the age of 55. Lucent's stock value has plummeted 90 percent over the past two years, wiping out more than \$1 billion of workers' retirement savings. Employees are now suing Lucent alleging breach of fiduciary duty. Lucent workers say that company executives pressured them to invest in company stock as a way of showing their loyalty.

Similarly, at Ikon Office Solutions, workers are suing the company alleging that the company breached its fiduciary duty by pushing its volatile stock. Like Enron, when the stock price dropped dramatically in the mid-1990s, management told workers that it was "on sale" and encouraged them to buy even more.

There are many companies with similar situations. Over the past two years, AT&T stock fell from a high of \$44 to \$14 a share. Over the same two-year period, General Electric's stock lost nearly half of its value, falling from \$58 a share to \$32. Pfizer, Anheuser-Busch, General Electric, Texas Instruments, Dell Computer, and McDonald's are all firms where more than 70 percent of 401(k) assets are held in company stock. And the price of these companies' shares has fallen from between 21 percent to 56 percent within the past year. Clearly, it is a risky strategy to count on the rising stock price of a single company to fund long-term retirement savings.

Among the changes that are needed are new rules to govern 401(k) plans and the investment of retirement savings in company stock. Theodore Benna, president of the 401(k) Association and the person credited with developing the 401(k) plan more than two decades ago, has commented:

We should continue to permit employers to contribute as much company stock as they want to these plans, because matching contributions in company stock are much better than no company contribution * * * We should, however,

prohibit employees from investing their own contributions to 401(k)s and ESOPs in company stock.¹

Diversification

Over-concentration of employer stock in 401(k) plans is common today. Thousands of Enron workers lost their jobs and at the same time lost \$1 billion of their retirement savings. The high concentration of 401(k) investments in Enron stock that created this disaster is a dramatic example of why 401(k) plan investments must be diversified. About 60 percent of the 401(k) assets were invested in Enron stock. The heavy investment in employer stock was permitted under ERISA, and until Congress changes ERISA, these kinds of losses will hurt other workers.

The loss of \$1 billion of retirement savings by Enron workers has focused attention on the need for asset diversification in 401(k) plans, especially with respect to employer securities. The Congressional Research Service report, *The Enron Bankruptcy and Employer Stock in Retirement Plans*, found that many 401(k) plans hold substantial percentages of plan assets in employer stock. (See Table 1.)

Table 1.—Company Stock as a Percentage of 401(k) Plan Assets: DC Plan Investing Survey

	<i>Percent</i>
Procter & Gamble	94.7
Sherwin-Williams	91.6
Abbott Laboratories	90.2
Pfizer	85.5
BB&T	81.7
Anheuser-Busch	81.6
Coca-Cola	81.5
General Electric	77.4
Texas Instruments	75.7
William Wrigley, Jr	75.6
Williams	75.0
McDonald's	74.3
Home Depot	72.0
McKesson HBOC	72.0
Marsh & McLennan	72.0
Duke Energy	71.3
Textron	70.0
Kroger	65.3
Target	64.0
Household International	63.7

Source: DC Plan Investing, December 12, 2001.

The fact that Enron's stock represented a majority of total plan assets is not unusual. According to a study by the Profit Sharing/401(k) Council of America, employer stock accounted for 39.2 percent of 401(k) assets in 2000. The percentage is even higher in large companies. In firms with more than 5,000 401(k) participants, more than 43 percent of assets were in company stock.² Similarly, more than half of the Fortune 50 companies had 25 percent or more of their 401(k) assets invested in company stock. This

¹ Company Stock Changes Needed to Protect Employees, Ted Benna, 401kHelpCenter.Com, Mpower, 2002.

² Enron Debacle Will Force Clean Up of Company Stock Use in DC Plans, DC Plan Investing, Dec. 11, 2001.

lack of diversification could prove devastating for tens of thousands of workers who rely on their 401(k) plans for a secure retirement.

Over-concentration of employer stock in 401(k) plans leads to higher risk with lower returns. A new Congressional Research Service report, “Employer Stock in Retirement Plans: Investment Risk and Retirement Security,”³ finds that when workers allocate a large percentage of their retirement savings to a single security—such as employer stock—those workers assume more risk and consistently earn lower returns. Of the 278 large, publicly traded corporations in the CRS study, only 66 “beat the market” over the 3-year period 1997 to 1999. The remaining 212 companies—76 percent—underperformed the market. That means that workers at over three-quarters of these companies would have earned higher returns with much lower risk by investing in the S&P 500 index fund rather than employer stock.

Today, approximately 11 million workers hold employer stock that exceeds 20 percent of their 401(k) accounts, and 5 million workers hold employer stock that exceeds 60 percent of their accounts. As a result, these accounts are dangerously over-concentrated in employer stock.

Diversification is a principle of sound investment practice. There is universal agreement among financial economists—including Nobel prize winners—that diversification is the foundation of sound financial planning and investment practice. Yet, current ERISA exemptions continue to permit workers to concentrate 401(k) investments in employer stock.

The duty to diversify investments is a standard principle of sound fiduciary investing practice. This duty comes from the common law of trusts, and is included in the Restatement (Second) of Trusts (1959). Law and practice also promote diversification as a foundational principle of sound financial management.

Congress recognized the importance of these investment fundamentals. As a result, ERISA limits the amount of employer stock that can be held in a defined benefit pension plan to 10 percent of plan assets. But ERISA imposes no general diversification rules on 401(k) plans. Instead, ERISA provides an exception to its diversification requirements for certain types of defined contribution plans, including 401(k) plans—which were originally intended to be supplemental savings plans not pension plans.

Although lately some companies have become concerned about the lack of diversification in their workers’ 401(k) accounts, a recent Employee Benefits Research Institute survey reports that only 14 percent of plans with company stock as an investment option limit the amount or percentage of company stock that workers may hold in their 401(k) accounts.⁴

Diversification limits are imposed by law or practice in other investment situations. Like private defined benefit plans, public employee retirement funds also have diversification limits—generally with less than 2.5 percent of the fund invested in any one company. Similar to the ERISA limits, the Investment Company Act of 1940 imposes diversification limits on mutual funds. Under this law,

³ Employer Stock in Retirement Plans: Investment Risk and Retirement Security, Congressional Research Service, June 2002.

⁴ Company Stock in 401(k) Plans: Results of a Survey of ISCEBS Members, EBRI Special Report, Employee Benefit Research Institute, Jan. 31, 2002.

fund managers have a fiduciary duty to maintain a diverse portfolio to spread risk and balance fluctuations in the market. The Investment Company Act limits the amount of a single investment that can be held in a mutual fund to 5 percent of plan assets. Investment managers at all the major investment firms also diversify their investments, even though they are not required by law to do so. Most have self-imposed limits of 10 percent.

The Uniform Prudent Investor Act, adopted by 35 states, also imposes the duty to diversify investments on all trust fiduciaries. This diversification requirement extends to fiduciaries of charitable and pension trusts, as well as to other fiduciaries such as executors, conservators, and guardians of property.

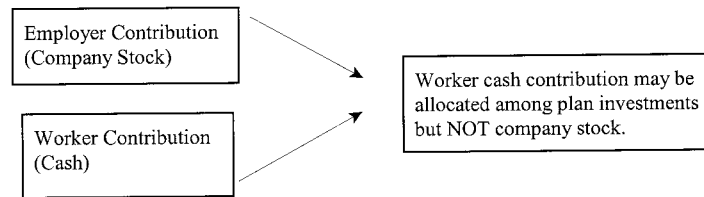
The “either/or” provision in the Committee bill ensures diversification for 401(k) plans. The most effective way to ensure diversification of 401(k) assets is to impose a percentage limit on the value of the investment an employee can have in any one stock. The committee recognized, however, that percentage limits have been opposed by both the business community and workers.

As an alternative, S. 1992 takes a more moderate and administratively simpler approach to diversification. S. 1992 will continue to permit companies to make matching 401(k) contributions in company stock, but it will encourage diversification by permitting employers to either: (1) make employer 401(k) contributions in company stock, or (2) offer company stock as an investment option in 401(k) plans, but not both. This restriction applies (regardless of whether the employer stock is publicly traded or closely held) to all defined contribution plans except: (1) traditional ESOPs that do not hold employee elective contributions or employer matching contributions; and (2) defined contribution plans of an employer that also sponsors a qualified defined benefit plan.

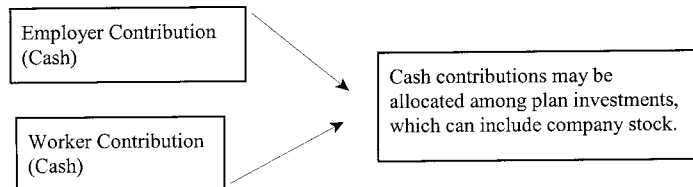
As noted, the bill provides a diversification safe harbor for employers with strong defined benefit retirement plans. A defined benefit plan is qualified for the exemption if it covers at least 90 percent of the employees covered by the defined contribution plan and if it provides an accrued benefit that is the actuarial equivalent of at least 1.5 percent of the participant’s final pay times years of service (up to at least 20 years). An actuarially equivalent flat-dollar or cash balance plan would be a qualified defined benefit plan.

Either:

1. If the employer limits workers' choice by making contributions to the 401(k) in company stock, the Committee's bill steps in to provide protections against pressure to overinvest in company stock.

**OR**

2. If the employer gives workers freedom by making contributions to the 401(k) in cash, then the Committee's bill offers the workers complete freedom to select among the investment options offered by the employer, including company stock.



The committee believes that this “either/or” approach will reduce the pressure on workers to buy company stock and lead to greater diversification of 401(k) plans. Employer pressure to buy company stock was at the heart of the Enron debacle. Enron executives relentlessly pressured Enron workers to buy company stock, resulting in the loss of more than \$1 billion of their retirement savings.

To further counter employer pressure to buy company stock, S. 1992 requires 401(k) plans to provide workers with quarterly account statements that inform workers of extent of their employer stock holdings, and give workers notice of the importance of diversification. Employers must also issue a special warning for workers with more than 20 percent of their 401(k) assets in company stock.

The “either/or” approach to 401(k) diversification gives workers greater freedom and security. Most workers with employer-provided 401(k) plans are not free to invest as they choose. Employer contributions may be automatically invested in company stock and workers may be restricted from selling company stock for many years. Similarly, worker contributions may be invested only in the employer-selected options provided by the 401(k) plan. When those investment options include company stock, workers are frequently subjected to employer pressure to invest their own contributions in company stock. Under the “either/or” approach, if the employer gives workers freedom by making contributions to the 401(k) in cash, then the committee’s bill offers the workers complete freedom to select among the investment options offered by the employer. On the other hand, if the employer limits workers’ choice by making contributions to the 401(k) in company stock, the committee’s bill steps in to provide protections against pressure to overinvest in company stock.

The right to sell employer matching contributions of company stock will not ensure diversification. Many companies that make pension contributions in company stock place harsh restrictions on the ability of workers to diversify these contributions into other plan investments. Workers who become “captive investors” find their retirement savings vulnerable to their employers’ solvency and profitability.

A recent Hewitt Associates survey shows that 56 percent of the 401(k) plans that match employee contributions with employer stock require participants to reach a certain age—typically 50 or 55—before they can sell. Of the firms that match with employer stock, only 14 percent allow their employees to sell the stock immediately, while 21 percent do not permit diversification before termination of employment.⁵

This “captive investor” problem affects millions of workers. According to the Employee Benefit Research Institute (EBRI), these large plans cover about 2.8 million workers and include 11 percent of all 401(k) plan assets.⁶ These restrictions limit workers’ ability to properly diversify their retirement investments to limit risk.

S. 1992 requires defined contribution plans (except traditional ESOPs) to allow workers to diversify all employer contributions of publicly traded company stock after three years of service. The bill also requires defined contribution plans to notify workers of their

⁵Survey Findings: Hot Topics in 401(k) Plans 2002, Hewitt Associates LLC.

⁶401(k) Plan Asset Allocation, Account Balances, and Loan Activity 2000, EBRI Issue Brief, Employee Benefit Research Institute, Nov. 2001.

diversification rights and to inform them of the importance of diversifying assets.

The right to sell employer matching contributions if company stock is not enough to ensure that 401(k) plans do not become dangerously overinvested in company stock. All across the country companies like Enron, have explicitly cajoled or coerced their workers into putting a high proportion of their retirement savings in their employers' own stock. Other companies have implicitly encouraged investment in company stock through the "endorsement effect."

Several studies show that workers are much more likely to invest their own contributions in company stock when the employer makes matching contributions in stock. Workers perceive the match as implicit advice that employer stock is a good investment.⁷ Although these shares can be sold, many workers do not sell either out of loyalty to their employer or ignorance about the need for diversification.

The "endorsement effect" was clearly seen in the Enron 401(k) plan. The problem with the Enron 401(k) plan that made it possible for these losses to occur was the high concentration of investment in employer stock. About 63 percent of the 401(k) assets were invested in Enron stock. Only about 11 percent of that stock came from the employer match and was subject to the age 50 restriction. The remaining 89 percent of the employer stock was purchased by the workers with their own 401(k) contributions.

A recent CRS study also confirms the widespread use of corporate pressure on workers to buy employer stock with their own 401(k) contributions.⁸ Across the country many companies have explicitly cajoled or coerced their worker into investing a high proportion of their retirement savings in their employers' stock, and many other companies have implicitly encouraged investment in company stock.

The Administration has proposed only to allow workers to sell employer matching contributions of company stock after three years. While the Committee's bill includes the President's proposal, the committee believes it will not ensure real diversification of 401(k) accounts. Efforts to limit the committee's more comprehensive and effective diversification proposal were defeated.

Investment advice

Most workers with 401(k) plans have little experience with or understanding of investment principles. Many of these workers are new investors and many have no other investments aside from their 401(k) plan savings. Even workers who have some investment experience often do not have the time to analyze their investment options and determine which investments are appropriate for themselves.

Workers deserve to have access to quality investment advice and that advice should be provided free from financial conflicts of interest. Advisors with conflicts of interest are more prone to steer in-

⁷ Excessive Extrapolation and the Allocation of 401(k) Accounts to Company Stock, Shlomo Benartzi, *The Journal of Finance*, Vol. 56, No. 5, Oct. 2001; 401(k) Plan Asset Allocation, Account Balances and Loan Activity in 2000, EBRI Issue Brief, Employee Benefit Research Institute, Nov. 2001.

⁸ Employer Stock in Retirement Plans: Investment Risk and Retirement Security, Congressional Research Service, June 2002.

vestors toward a particular company's products, instead of toward an array of investments that are in the best interest of a particular worker.

Workers need a truly independent, non-conflicted financial advisor who would not benefit from implementing the investment decisions of the workers. ERISA has long recognized that financial conflicts of interest give rise to divided localities and therefore pose the risk that actions will not be taken solely in the interest of plan participants.

Under current law, financial institutions and other investment firms may provide advice to participants on investment products in which they do not have a financial interest. A recent 401(k) survey by Hewitt Associates indicates that about one out of every five plans now provides web-based investment advice to plan participants.⁹ In addition, the number of large financial service providers that have developed alliances with an independent, non-conflicted investment advisor is growing, and most of the large 401(k) providers now have an independent, non-conflicted investment advisor available.

The majority of employers who do not now offer independent, non-conflicted investment advice to 401(k) plan participants do not offer the advice because they are worried about employer liability. In Interpretive Bulletin 96-1, the Department of Labor indicated that an employer's designation of an investment advisor for plan participants would not give rise to fiduciary liability that is the result of an individual's exercise of control over plan assets. However, the employer would be responsible for the prudent selection and periodic monitoring of the advisor.

In an effort to encourage employers to provide independent, non-conflicted investment advice to workers, S. 1992 codifies the Department's interpretive bulletin and clarifies that the employer will not be liable for specific investment advice as long as the employer used due diligence in selecting and monitoring the advice provider. The bill creates a safe harbor from fiduciary liability for plan sponsors that provide independent, unbiased investment advice to workers.

Executive accountability

To protect the pensions and retirement savings of all workers from the threat of future Enrons, corporate executives must not be permitted to cash in and take home millions while their worker's retirement savings disappear.

In the wake of Enron's collapse, there is growing recognition that a successful free enterprise economy depends on a framework of laws and institutions to make it work. Enron executives were some of the leading cheerleaders for deregulation, arguing against any kind of government oversight. Now it has become clear that this approach leaves no meaningful protections for America's workers.

If the Enron scandal teaches us anything it's that we must stop ignoring corporate misbehavior. Employers who mislead workers when it comes to their investments will face real penalties. The bill empowers workers to hold top executives accountable when they knowingly abuse workers' pensions. If workers lose their retire-

⁹ Survey Findings: Hot Topics in 401(k) Plans 2002, Hewitt Associates LLC.

ment savings due to deliberate corporate mismanagement, then they should have the legal right to hold those top executives accountable in a court of law, and recover what they lost. This right could make the difference for a worker between an impoverished retirement and a comfortable retirement.

Insider Liability.—Under current law, only ERISA fiduciaries are liable for damages for fiduciary breaches. Under the ERISA definition of fiduciary, it is unlikely that the Enron executives or the Enron accounting firm could be held liable for workers' losses in the 401(k) plan. S. 1992 provides new penalties for non-fiduciary executives who mislead workers. The bill clarifies that it is a violation of ERISA for executives to give workers misleading information or fail to provide material information about the company stock.

The bill amends existing ERISA section 409 by providing that an "insider" with respect to a 401(k) plan that holds publicly traded company stock and who knowingly participates in a fiduciary breach or knowingly conceals a breach will be liable for the breach as if he or she were a fiduciary. An "insider" is defined as a corporate officer or director or the independent public accountant for the plan and the plan sponsor. The new provision will allow 401(k) plans and participants to recover only lost retirement savings. It is not intended to be construed as permitting the recovery by a participant or beneficiary of any consequential economic losses or punitive damages.

Fiduciary Claims by 401(k) Participants.—Many Federal courts have relied on *Varity Corp. v. Howe*, 516 U.S. 489 (1996), to dismiss claims for breach of fiduciary duty under ERISA section 502(a)(3) where a plan participant has also asserted a claim for benefits under ERISA section 501(a)(1)(B). To correct this situation, S. 1992 creates new ERISA section 409A.

This new section provides that 401(k) fiduciaries who breach their fiduciary duties are personally liable to make good to each participant any losses resulting from the breach and to restore any profits made by the fiduciaries through the use of plan assets. The fiduciaries are also subject to other equitable or remedial relief, as a court deems appropriate. The new provision will allow 401(k) plans and participants to recover only lost retirement savings. It is not intended to be construed as permitted the recovery by a participant or beneficiary of any consequential economic losses or punitive damages. Any rights under new ERISA section 409A are in addition to any rights of a participant under existing ERISA section 409 or section 502.

Disclosure of Insider Trading.—At the same time that Enron executives were selling more than \$1 billion of Enron stock, those executives were urging Enron workers to continue to buy company stock in their 401(k) accounts. The Enron executives reported their insider stock sales to the Securities and Exchange Commission, but the Enron workers did not have access to the reports and were unaware of their sales. Despite Securities and Exchange Commission reporting requirements, most workers do not have access to information about executive stock sales. Although that information is publicly available, most workers do not know that the information exists or how to get it.

Recognizing that workers deserve complete and accurate information in making their investment decisions, S. 1992 amends ERISA to provide that if the Securities and Exchange Commission requires any disclosure of the sale of employer stock by a corporate officer, director, or an affiliated person (generally a 5 percent shareholder), the plan sponsor must, within two business days after the disclosure is made, make the disclosure available on any corporate internal web site maintained by the plan sponsor. This disclosure must be given in writing or electronically to employees without access to the web site.

Worker representation

Worker representation on pension boards is a common practice. Today, 65 percent of pension assets in the United States are managed with some form of worker representation on plan boards, and thousands of worker representatives sit on the boards of trustees that govern retirement plans in the public and private sectors. Worker representatives serve on multi-employer pension boards, on the boards of credit unions and public pension funds, and on health and safety committees.

State law prescribes a specific role for both active workers and retirees on most funds in the \$2.8 trillion public pension world. In the private sector, more than 3,000 collectively bargained retirement plans are jointly trusted by worker and employer representatives. Some of the nation's largest and most innovative pension plans have worker representatives.

For example, the Teachers Insurance Annuity Association and College Retirement Equities Fund, now known as TIAA-CREF, has elected faculty representatives and may be one of the most successful defined contribution plans in the world. It is the largest defined contribution plan, covering 11,000 institutions of higher education and research. TIAA-CREF fees are low, worker voluntary contributions are high, and investment choices have changed in response to the pressure of the faculty representatives.

Worker representation leads to better greater pension security for workers. Between 1984 and 1996, joint trusted multi-employer plans grew by 26 percent versus just 6 percent in corporate defined benefit plans. Workers keep fees low and ensure that all the investment options are responsible.

The Enron debacle makes clear the fact that a pension board formed exclusively of management executives does not provide adequate safeguards to protect the interests of workers. These executives, who had no special training or experience as pension fiduciaries, took no action to ensure the continued prudence of the investment options offered to workers. This is especially startling given the fact that at least some of the management trustees failed to take the necessary actions to protect the workers' retirement savings. If worker representatives had been in place, it is highly unlikely that the free fall in worker retirement savings would have gone so unquestioned. As University of Notre Dame economist Teresa Ghilarducci comments: "Only pension plans that incorporate

the effective representation of workers as a group preserve retirement security.”¹⁰

Workers also contribute more to pension funds with worker representatives, because worker representatives help to educate other workers about the benefits of participating in the pension plan. According to a study by University of Notre Dame economist Teresa Ghilarducci, pension funds with worker representatives consistently had higher worker contribution.¹¹ Thus, worker representation will lead to both greater worker involvement and investment in their pension funds.

Recognizing that electing worker representatives on pensions boards is the best way to insure that pension trustees are accountable, S. 1992 requires that the assets of defined contribution plans with 100 or more participants be held in a joint trust with equal representation of the interests of the employer and the employees. In the case of a plan maintained by a collective bargaining agreement, the employee representatives may be designated by an election process organized by the union. For all other plans, the employee representatives must be elected by the participants pursuant to Department of Labor regulations. Elections of worker representatives can be accomplished with limited expense and organizational capacity. With electronic mail, even companies with far flung offices can easily hold elections.

To further strengthen the pension rights of workers, the bill also creates an Office of Participant Advocate within the Department of Labor to help workers facing pension abuse. Today, there is no official advocate to protect workers’ pensions and to advocate on behalf of workers with respect to their pension plans. The demand for a participant advocate is great, as measured by the more than 80,000 pension-related calls the Department of Labor receives through its national hotline and ten regional offices. Workers deserve an Office of Participant Advocate to identify shortfalls in the pension system to help resolve participant problems.

III. COMMITTEE ACTION

On February 7, 2002, the Senate Committee on Health, Labor, and Pensions held a hearing on Protecting the Pensions of Working Americans: Lessons From the Enron Debacle. Witnesses at the hearing included Senator Barbara Boxer; Senator Jon Corzine; Representative Ken Bentsen; Secretary of Labor, Elaine Chao; Steve Lacey, a Portland General Electric worker; Jan Fleetham, a former Enron worker; Karl V. Farmer, a former Polaroid worker; James Prentice, Chairman of the Administrative Committee on the Enron Corp. Savings Plan; Professor Alicia Munnell, Peter F. Drucker, Chair in Management Sciences, Boston College; and Dallas Salisbury, President and Chief Executive Officer, Employee Benefit Research Institute.

On March 6, 2002, Senators Kennedy, Bingaman, Corzine, Boxer, Daschle, Harkin, Mikulski, Reed, Clinton, and Durbin introduced S. 1992, the Protecting America’s Pensions Act of 2002.

¹⁰ Who Controls Labor’s Capital and Why It Matters, Teresa Ghilarducci, University of Notre Dame, 2002.

¹¹ Small Benefits, Big Pension Funds, and How Governance Reforms Can Close the Gap, Teresa Ghilarducci, Working Capital: The Power of Labor’s Pensions, Cornell University Press, 2002.

On March 20 and 21, 2001, the Senate Committee on Health, Labor, and Pensions considered S. 1992 and on March 21 ordered it reported by an 11 to 10 vote.

IV. EXPLANATION OF THE BILL AND COMMITTEE VIEWS

The committee seeks to protect workers against retirement disasters by improving diversification of plan assets in individual account plans; providing access to independent, non-conflicted investment advice; improving disclosure and accountability under individual account plans; penalizing executives for misleading workers; and giving workers a voice in their retirement savings plans.

INSURING DIVERSIFICATION: ENDING CAPTIVE INVESTOR REQUIREMENTS

Section 101. Elimination of employer requirements that assets be invested in employer securities

Many companies that make pension contributions in company stock place harsh restrictions on the ability of workers to diversify these contributions into other plan investments, making workers captive investors. A survey by the Congressional Research Service shows many 401(k) plans dangerously over invested in company stock, leaving workers' retirement savings vulnerable to their employer's solvency and profitability.

Section 101 eliminates employer requirements that retirement assets must remain invested in employer stock. Workers with three years of service have the right to diversify any contributions to the plan made on their behalf in the form of employer stock. Although this provision applies only to employer stock that is publicly traded, the Department of Labor is directed to conduct a study on the feasibility of extending the diversification requirements to closely-held stock. Section 101 also gives workers the right to vote any employer stock held in their 401(k) accounts.

INSURING REAL CHOICE: ENDING EMPLOYER PRESSURE

Section 102. Rules relating to plan investment in employer stock

Employer pressure to buy company stock was at the heart of the Enron debacle. Enron executives relentlessly pressured Enron workers to buy company stock, resulting in the loss of more than \$1 billion of their retirement savings. S. 1992 offers workers real investment choice, without employer pressure or intimidation.

Employers can no longer have it both ways: they can either match in company stock or offer company stock as an investment option, but not both. Section 102 permits a defined contribution plan to either: (1) permit employees' elective contributions to be invested in company stock; or (2) make the employer's contribution in company stock, but not both. This restriction applies to all defined contribution plans except: (1) traditional ESOPs that do not hold employee elective contributions or employer matching contributions; and (2) defined contribution plans of an employer that also sponsors a qualified defined benefit plan.

A defined benefit plan is qualified if it covers at least 90 percent of the employees covered by the defined contribution plan and if it provides an accrued benefit that is the actuarial equivalent of at

least 1.5 percent of the participant's final pay times years of service (up to at least 20 years. An actuarially equivalent flat-dollar or cash balance plan would be a qualified defined benefit plan.

This provision applies regardless of whether the employer stock is publicly traded or closely held.

INSURING INDEPENDENT INVESTMENT ADVICE: NO MORE CONFLICTS

Section 103. Fiduciary rules for plan sponsors designating independent investment advisers

Section 103 encourages employers to provide independent, non-conflicted investment advice to workers by codifying the Department of Labor's Interpretive Bulletin 96-1 and clarifying that employers will not be liable to specific investment advice as long as employers used due diligence in selecting and monitoring the advice provider.

Section 103 creates a safe harbor for plan sponsors to satisfy their fiduciary obligations with respect to providing investment advice to participants. Plan sponsors who meet this safe harbor will be: (1) deemed to have satisfied their responsibilities to prudently designate and periodically review the choice of investment advisor; (2) not be liable for any losses resulting from the provision of investment advice; and (3) not be liable for any co-fiduciary breach resulting from a breach by the investment advisor.

The safe harbor requires the use of a "qualified investment advisor" who is a registered investment advisor, bank, insurance company, or any other comparable entity as determined by the Department of Labor. Any individual employees or agents of a qualified investment advisor who provide investment advice must also be registered investment advisors, registered broker/dealers, registered representatives, or any other comparable qualified individual as determined by the Department of Labor.

The qualified investment advisor must annually provide written verification to the plan sponsor that the advisor: (1) is qualified and is a fiduciary with respect to the plan; (2) has reviewed the plan and has determined that its relationship with the plan is not a prohibited transaction; (3) will, in providing advice, consider any employer securities or employer real property allocated to the participant's account; and (4) has adequate fiduciary insurance coverage in case of a claim.

IMPROVING PENSION PLAN DISCLOSURES TO WORKERS

S. 1992 plan insures that workers will be given the best information regarding their pension plans and their 401(k) investments. Executives will have to disclose to workers the same information that every other shareholders is entitled to receive. S. 1992 plan also requires executives to disclose their insider sales of company stock to alert workers to the decisions of those with the best information about the company.

Section 201. Pension benefit information

Pension plan participants often are unaware that they can request a benefit statement or do not know who to ask to get one. Section 201 will insure that workers in both defined benefit and de-

defined contribution plans will get regular pension benefit statements.

Defined Contribution Plans.—A benefit statement must be provided to defined contribution participants at least quarterly if the plan permits participants to direct investments. Quarterly statements must include an explanation of any restrictions on the right to direct investments. In addition, if more than 20 percent of a participant's account is invested in employer stock, the quarterly statement must include a warning that the account may be over invested in employer stock.

Defined Benefit Plans.—A benefit statement must be provided to defined benefit participants at least once every three years or upon request. The benefit statement may be based on reasonable estimates.

Electronic Delivery.—Statements for both defined contribution and defined benefit plans may be provided by electronic means.

Section 202. Provision to participants and beneficiaries of material investment information in accurate form

Section 202 imposes a specific fiduciary duty on the plan sponsor and the plan administrator under ERISA to provide participants with all material investment information to the extent the information must be provided by the plan sponsor to outside investors under applicable securities laws.

Section 203. Electronic disclosure of insider trading

At the same time that Enron executives were selling more than \$1 billion of Enron stock, those executives were urging Enron workers to continue to buy company stock in their 401(k) accounts. The Enron executives reported their insider stock sales to the Securities and Exchange Commission, but the Enron workers did not have access to the reports and were unaware of their sales. Despite Securities and Exchange Commission reporting requirements, most workers do not have access to information about executives stock sales. Although that information is publicly available, most workers do not know that the information exists or how to get it.

Section 203 amends ERISA to provide that if the Securities and Exchange Commission requires any disclosure of the sale of employer stock by a corporate officer, director, or an affiliated person (generally a 5 percent shareholder), the plan sponsor must, within 2 business days after the disclosure is made, make the disclosure available on any corporate internal web site maintained by the plan sponsor. This disclosure must be given in wiring or electronically to employees without access to the web site.

EXECUTIVE WRONGDOING: PENALTIES FOR MISLEADING WORKERS

Section 304. Liability for breach of fiduciary duty

Under S. 1992, executives will be penalized for misleading workers. The bill clarifies that it is a violation of ERISA for executives to give workers misleading information or fail to provide material information about the company stock.

Section 304 creates new ERISA section 409A providing that 401(k) fiduciaries who breach their fiduciary duties are personally liable to make good to each participant any losses resulting from

the breach and to restore any profits made by the fiduciaries through the use of plan assets. The fiduciaries are also subject to other equitable or remedial relief, as a court deems appropriate. Any rights under new ERISA section 409A are in addition to any rights of a participant under existing ERISA section 409 or section 502.

Section 304 also amends existing ERISA section 409 by providing that an “insider” with respect to a defined contribution plan that holds employer securities that are publicly traded and who knowingly participates in a fiduciary breach or knowingly conceals a breach will be liable for the breach as if he or she were a fiduciary. An “insider” is defined as a corporate officer or director or the independent public accountant for the plan sponsor.

PENSION REPRESENTATION: GIVING WORKERS A VOICE

Section 305. Participation of participants in trusteeship of individual account plans

Under S. 1992, workers will serve on the boards of pension plans and help decide what the investment options are in 401(k) plans. Worker representation leads to better results for pension funds and increases employee contributions to their 401(k) plans. Workers deserve real choice, which means a say over what the investment options are.

Defined contribution plans with more than 100 participants must be held in trust by a joint board of trustees consisting of two or more trustees representing on an equal basis the interest of the employer and the employees.

In the case of a plan maintained pursuant to a collective bargaining agreement, the employee representatives may be designated by an election process organized by the union. For all other plans, the employee representatives must be elected by the participants pursuant to Department of Labor regulations.

Employee representatives may not be highly compensated employees (as defined under Internal Revenue Code section 414(q)). The Department of Labor is directed to issue regulations (within 90 days after the date of enactment) for resolving tie votes among the trustees and otherwise implementing this provision.

RETALIATION: PROTECTING PENSION WHISTLE BLOWERS

Section 310. Provisions relating to whistle blower action involving pension plans

Section 310 encourages individuals who have knowledge of unlawful actions of decisions regarding pension plan management or funding to come forward by strengthening the basic legal rights and protections currently afforded pension plan whistle blowers. While ERISA section 510 provides clear protection against the discrimination or discharge or “any person” who has given information, testified, or is about to testify in a formal proceeding, it does not protect those who suffer retaliation for informal protests against plan changes—or even inquiries regarding plan management or their rights under the plan.

Section 310 broadens protected activities beyond the formal giving of information or testifying to cover any person who has opposed any unlawful pension plan practice. It also gives any person

who is protected against retaliation the right to legal recourse under ERISA Section 502, a right that is currently granted only to plan participants and beneficiaries.

V. SECTION-BY-SECTION ANALYSIS

Section 1. Short title

Section 1 provides that the Act may be cited as the “Protecting America’s Pensions Act of 2002.”

TITLE—IMPROVEMENTS IN DIVERSIFICATION OF PLAN ASSETS

Section 101. Elimination of employer requirements that assets be invested in employer securities

Section 101 requires defined contribution plans (except traditional ESOPs) to allow participants to diversify all employer contributions of publicly traded company stock after 3 years of service. Section 101 requires defined contribution plans to notify participants of their diversification rights and to inform them of the importance of diversifying assets. Defined contribution plans are also required to give participants voting rights on company stock. The Department of Labor is directed to study and report on options for diversification of company stock that is not publicly traded.

Section 102. Rules relating to plan investment in employer stock

Section 102 permits a defined contribution plan to either: (1) permit employees’ elective contributions to be invested in company stock, or (2) make the employer’s contribution in company stock, but not both. This restriction applies to all defined contribution plans except: (1) traditional Employee Stock Ownership Plans (ESOPs) that do not hold employee elective contributions or employer matching contributions; and (2) defined contribution plans of an employer that also sponsors a defined benefit plan covering substantially the same participants and providing a benefit accrual equal to 1.5 percent of final pay over at least 20 years of service.

Section 103. Fiduciary rules for plan sponsors designation independent investment advisers

Section 103 incorporates the Bingaman-Collins Independent Investment Advice Act (S. 1677), which provides workers with access to unbiased investment advice. Section 103 requires that any advice formally offered to workers come from investment advisors who are independent of the employer. Employers who prudently select and monitor independent, non-conflicted investment advisors will be free of liability.

TITLE II—IMPROVEMENTS IN DISCLOSURE

Section 201. Pension benefit information

Section 201 requires certain defined contribution plans to provide quarterly statements to participants, and requires defined benefit plans to provide statements to participants at least every three years. Section 201 also requires that defined contribution plan statements include the amount of employer securities, any restrictions on the sale of employer securities, and a notice of importance of diversification. The statement must also include a special notice

directed to participants with more than 20 percent of plan assets invested in employer securities.

Section 202. Provision to participants and beneficiaries of material investment information in accurate form

Section 202 requires the plan sponsor to provide participants with the same investment information it would be required to disclose to investors under applicable securities laws.

Section 203. Electronic disclosure of insider trading

Section 203 requires that any disclosure by insider of companies with 401(k) plans that hold employer securities required by the SEC regarding insider trades must be provided in electronic form to participants on the corporate website. If there are participants who do not have access to the corporate website, the information must be provided in written, electronic, or other appropriate form.

TITLE III—IMPROVEMENTS IN ACCESS AND ACCOUNTABILITY

Section 301. Additional fiduciary protections relating to lockdown

Section 301 requires plans to give participants written notice 30 days before a lockdown begins, and prohibits lockdowns from continuing for an unreasonable period.

Section 302. Limitation on fiduciary exception during lockdown period

Section 302 amends ERISA § 404(c)(1) so that it does not provide relief from fiduciary liability during any period when the ability of a participant to direct plan investments is suspended by the plan sponsor or other fiduciary.

Section 303. Insurance adequate to protect interest of participants and beneficiaries

Section 303 requires each fiduciary of a defined contribution plan with 100 or more participants to be insured for failures to meet the requirements of ERISA.

Section 304. Liability for breach of fiduciary duty

Section 304 amends ERISA section 409 to extend liability for breach of fiduciary duty to any insider of a 401(k) plan that holds publicly traded company stock and who knowingly participates in or conceals a breach. Section 304 defines an insider as an officer or director of the plan sponsor, the independent accountant for the plan, and the independent accountant for the plan sponsor. Section 304 also adds new ERISA section 409A to allow 401(k) plan participants, as well as the plan itself, to sue ERISA fiduciaries for fiduciary breach.

Section 305. Participation of participants in trusteeship of individual account plans

Section 305 requires that the assets of defined contribution plans with 100 or more participants be held in a joint trust with equal representation of the interests of the plan sponsor participants.

Section 306. Preservation of pension rights or claims

Section 306 provides that the right to civil action for pension claims under ERISA may not be waived, deferred, or lost pursuant to any agreement the participant and the plan sponsor, but the bill allows arbitration agreements if the agreements are entered into knowingly and voluntarily after a dispute arises.

Section 306. Office of Pension Participant Advocacy

Section 307 establishes an Office of Pension Participant Advocacy within the Department of Labor to help resolve participant problems.

Section 308. Study regarding insurance system for individual account plans

Section 308 directs the Pension Benefit Guaranty Corporation to study the feasibility of a system of insurance for defined contribution plans.

Section 309. Study regarding fees charged by individual account plans

Section 309 directs the Secretary of Labor to conduct a study of the fees levied by 401(k) plans on participants.

Section 310. Provisions relating to whistle blower actions involving pension plans

Section 310 amends ERISA section 502(a) to expand whistle blower protections under ERISA section 510. Section 310 broadens protected activities beyond the formal giving of information or testifying to cover any person who has opposed any unlawful pension plan practice. It also gives any person who is protected against retaliation the right to legal recourse under ERISA Section 502, a right that is currently granted only to plan participants and beneficiaries.

Section 311. Plans required to provide adequate information to individuals offered choice of lump sum distribution

Section 311 amends ERISA 205 to improve disclosure to participants on the relative value of lump sum and other optional benefit payments versus annuity payments. The comparison must disclose whether participants who are eligible for subsidized early retirement benefits will lose the subsidy if they choose to take their benefits as a lump sum rather than as an annuity.

TITLE IV—GENERAL PROVISIONS

Section 401. General effective date

Section 401 provides that S. 1992 applies generally to plan years beginning on or after January 1, 2003. The effective date for collectively bargained plans is the later of January 1, 2004, or the date that the collective bargaining agreement terminated.

Section 402. Plan amendments

Section 402 requires plans to be amended to comply with the provisions of S. 1992 before the first plan year beginning on or after January 1, 2005.

VI. COST ESTIMATE

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, May 7, 2002.

Hon. EDWARD M. KENNEDY,
*Chairman, Committee on Health, Education, Labor, and Pensions,
U.S. Senate, Washington, DC.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed estimate for S. 1992, the protecting America's Pensions Act of 2002.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contacts are Christina Hawley Sadoti (For federal costs), Leo Lex (for the state and local impact), and Bruce Vavrichek (for the private-sector impact).

Sincerely,

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

Enclosure.

S. 1992—Protecting America's Pensions Act of 2002

Summary: S. 1992 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 diversification requirements, new reporting requirements, limitations on certain investments, and other changes.

CBO estimates that implementing the bill would cost \$121 million over the 2003–2007 period, assuming appropriation of the necessary amounts. CBO also estimates that the bill would have a negligible effect on revenues. Since this bill would affect revenues, pay-as-you-go procedures would apply.

State, local, and tribal governments are exempt from the requirements of ERISA that S. 1992 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 S. 1992 is shown in the following table. The costs of this legislation fall within budget function 600 (income security).

	By fiscal year, in millions of dollars—				
	2003	2004	2005	2006	2007
CHANGES IN SPENDING SUBJECT TO APPROPRIATION					
Office of Pension Participant Advocacy:					
Estimated authorization level	25	26	26	27	28
Estimated outlays	15	25	26	27	27
Studies by the Department of Labor:					
Estimated authorization level	1	0	0	0	0
Estimated outlays	*	*	*	0	0

	By fiscal year, in millions of dollars—				
	2003	2004	2005	2006	2007
Total changes:					
Estimated authorization level	26	26	26	27	28
Estimated outlays	15	26	26	27	27

Note.—* = Less than \$500,000.

Basis of estimate

For this estimate, CBO assumes that the bill will be enacted in fiscal year 2002 and that the necessary amounts will be appropriated for each year.

Spending subject to appropriation

Office of Pension Participant Advocacy.—The bill would establish an office of pension participant advocacy within the Department of Labor (DOL). This new office would evaluate efforts aimed at protecting pension plan participants, promote the expansion of pension coverage, and, if appropriate, pursue claims on behalf of participants and beneficiaries. Based on a review of other federal programs that provide legal assistance, consumer advocacy, and technical information to the public, CBO estimates that providing this support would require appropriations of \$132 million over the 2003–2007 period, including annual adjustments for anticipated inflation.

Studies by the Department of Labor.—S. 1992 would direct DOL to undertake two studies: one regarding the feasibility of individual account plans and the other relating to fees charged by individual account plans. Based on the costs of studies with comparable requirements, CBO estimates these studies would cost \$1 million over the 2003–2005 period.

Revenues

Title II would require administrators of individual account plans and pension to provide certain information to plan participants at various intervals. The title would authorize DOL to assess civil penalties of up to \$1,000 a day for failure to comply with these requirements. Based on information from the Department of Labor, CBO expects that additional civil penalties resulting from title II would be less than \$500,000 annually.

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. CBO estimates that the bill would have a negligible effect on governmental receipts.

Estimated impact on state, local, and tribal governments: State, local, and tribal governments are exempt from the requirements of ERISA that S. 1992 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 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. S. 1992 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 the bill 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. This section describes several of the mandates in the bill; CBO estimates that the direct cost of other mandates, if any, would be small.

Investment in employers' securities

Section 101 of S. 1992 would impose a number of restrictions on individual-account (defined contribution) pension plans regarding assets held in the plans in the form of securities issued by the plan's sponsor. The bill would require affected plans to allow participants to immediately sell those securities that have been acquired through the participants' own contributions, and to allow participants to sell certain securities acquired through the sponsor's contributions after three years of service with the firm. The bill also would require plans to offer at least three investment options in addition to securities issued by the sponsor, and to notify participants of their diversification rights and the importance of diversifying assets.

The main direct cost of these provisions would be the one-time cost of notifying participants of their new rights. CBO estimates that this cost would total about \$5 million in 2003, the result of sending out approximately 10 million such notices to affected participants. While the requirement that plans allow participants to diversify their pension investments would be a mandate on affected plans, it would have only a minimal direct cost. An indirect cost could be imposed on company stockholders, however, if participants sold a sufficient number of shares of company stock so as to reduce its market price. Requiring plans to offer a range of investment options would probably add little to the plans' costs because many plans now abide by a safe harbor provision in ERISA that has similar requirements.

Benefit statements

Section 201 would require administrators of individual-account plans to provide quarterly statements to participants. 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 plan's sponsor, and an explanation of any limitations or restrictions on the right of the participant to direct an investment. In addition, if the percentage of assets held in the form of securities of the plan's sponsor exceeded 20 percent, the statement would have to include a warning that the account may be over-invested in those securities. 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. 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 of the estimated 70 million participants in individual account plans in 2003 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.

Section 201 also would require administrators of defined-benefit pension plans to provide participants with benefit statements at least once every three years. In addition, they would have to notify participants who are eligible to receive a distribution of their right to receive information describing how the amount of that distribution was calculated (and to provide that information on request). CBO estimates that the average annual cost of providing benefit statements would be about \$10 million. Providing information on how distributions were calculated would add another \$10 million in costs annually.

Provision of material investment information

Currently, companies are required to disclose to the Securities and Exchange Commission (SEC) information on the sale or purchase of company stock by officers, directors, and certain other persons affiliated with the company. Section 203 would require the sponsors of individual-account plans that allow participants' contributions to be invested in company stock to also make such disclosures to participants in the plan. The information would have to be provided electronically within two business days to participants with access to the Internet, and in writing or another form to participants without such access.

According to the SEC, between 200,000 and 300,000 notices of changes in stock holdings are filed annually by officers, directors, and other persons affiliated with the publicly traded companies it oversees—an average of about 15 to 20 notices per company each year. While some of the pension participants who would have to be notified of such transactions under the bill could be contacted electronically, based on information from the Census Bureau, CBO estimates that the majority of them would not be reachable through the Internet and would have to be contacted in writing. Even at a low average cost per transaction, contacting the estimated 25 million pension participants that would have to receive each of the 15 to 20 notices annually could cost in excess of \$150 million annually.

Notice of restriction periods

Currently, participants in individual-account plans occasionally experience time periods, called "lockdown" or "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 301 of S. 1992 generally would require plan administrators to provide affected participants with 30 days notice before an anticipated suspension, restriction, or similar limitation on the ability of participants to di-

rect investments in their accounts. Notice could be in written, electronic, or other appropriate form.

CBO estimates that the direct cost to private plans of providing advance notice of lockdown periods would be about \$5 million annually. According to a survey conducted by the American Society for Pension Actuaries, lockdown periods typically occur for a plan about once every three to four years. Data from 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, are affected by those periods. (CBO estimated the direct costs of a similar provision in H.R. 3762 to be about \$15 million. The \$5 million estimate presented here—which would apply to both S. 1992 and H.R. 3762—is based on new information indicating that providing 30-day advance notice of lockdown periods is the current practice of many pension plans. For those plans, this provision would not add to their costs.)

Liability of fiduciaries

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 lockdown periods. Section 302 would suspend fiduciaries' relief from liability during lockdown periods, with the Secretary of Labor designated to issue guidance on how such relief could be preserved. Depending on the action of the Secretary, this provision could impose a direct cost on the affected entities by increasing their financial exposure during lockdowns. However, CBO does not have sufficient information to estimate the added cost.

Insurance for fiduciaries

Section 303 would require each fiduciary of an individual account plan with 100 or more participants to be insured to provide reasonable coverage for failure to meet the requirements of ERISA. The Secretary of Labor would be designated to prescribe regulations to carry out this provision.

CBO estimates that the net cost of this provision to affected entities would be about \$15 million annually. According to industry sources, fiduciaries in plans with 500 or more participants already generally have similar insurance coverage, limiting the effect of this provision primarily to fiduciaries in the approximately 40,000 plans with between 100 and 500 participants. While the annual cost of this insurance would be a direct cost for those affected entities, they would also receive direct savings from the insurance protection afforded by the policies, thus offsetting much of the direct cost.

Previous CBO estimate: On April 4, 2002, CBO transmitted a cost estimate for H.R. 3762, the Pension Security Act of 2002, as ordered reported by the House Committee on Education and the Workforce on March 20, 2002. Unlike S. 1992, H.R. 3762 would make several changes to ERISA affecting premium collections of the Pension Benefit Guaranty Corporation, resulting in an increase in direct spending of \$185 million over the 2003–2012 period. H.R. 3762 also would require DOL to provide information and educational resources to pension plan fiduciaries. That bill did not

include the authorization of a program like the Office of Pension Participation Advocacy contained in S. 1992.

CBO estimated that H.R. 3762 also would have imposed a mandate on sponsors of private pensions, but as in this estimate for S. 1992, CBO could not make precise estimates of the costs. As in the estimate for H.R. 3762, CBO has determined that the provisions of S. 1992 contain no intergovernmental mandates and would impose no other costs on state, local, or tribal governments.

Estimate prepared by: Federal costs: Christina Hawley Sadoti; impact on state, local, and tribal governments: Leo Lex; impact on the private sector: Bruce Vavrichek.

Estimate approved by: Peter H. Fontaine, Deputy Assistant Director for Budget Analysis.

VII. REGULATORY IMPACT STATEMENT

Title I of the bill imposes two new diversification mandates on private employers that provide defined contribution plans that hold company stock designed to end the captive investor issue and to counter the problem of employer pressure to buy company stock. The committee believes that it is appropriate to demand that 401(k) plans follow principles of sound investment practice in exchange for the approximately \$60 billion in revenue foregone annually by the Federal Government to support these tax deferred retirement savings plans.

Title II of the bill imposes three new disclosure requirements on private employers that maintain pension plans. The requirement to provide pension benefit statements to plan participants applies to both defined benefit and certain defined contribution plans. The other two disclosure requirements apply only to private employers that provide defined contribution plans that hold company stock. These employers will be required to provide plan participants with material investment information and disclosure of insider trading with respect to company stock. The committee believes that it is appropriate that plan sponsors give plan participants this information so that participants can make informed investment decisions.

Title III of the bill imposes several new mandates on private employers that sponsor employee retirement plans, including additional fiduciary protections during plan lockdowns, plan fiduciary insurance, and joint participant/plan sponsor trusteeship. Through voluntary measures, many private-sector retirement plans have already adopted fiduciary protections during plan lockdowns and already obtain insurance for plan fiduciaries. Similarly, worker representation on pension boards is also a common practice. Today, 65 percent of plan assets are managed with some form of worker representation on pension plan boards.

Title III also directs the Department of Labor to establish an Office on Pension Participant Advocacy to assist participants in resolving pension problems. The cost of this office will be discretionary, subject to appropriation.

The committee believes that the policy improvements that will result from Title III of this bill—improvements in pension plan access and accountability, worker representation on pension boards, and a government office to resolve participant problems—far outweigh the regulatory impact of these provisions.

VIII. APPLICATION OF LAW TO THE LEGISLATIVE BRANCH

Section 102(b)(3) of Public Law 104–1, the Congressional Accountability Act, requires a description of the application of the bill to the legislative branch. S. 1992 applies to private employer-provided defined benefit and defined contribution pension plans. As such, the committee finds that the legislation has no application to the legislative branch.

IX. MINORITY VIEWS

OVERVIEW

The collapse of Enron and other companies have directed needed attention to the adequacy of the current retirement savings system. All of us watched the tragic events at Enron, Global Crossings, and other companies unfold in which thousands of workers and retirees lost their retirement savings. We agree with the majority that reforms are needed; we disagree with their approach.

Over a dozen bills have been introduced in this Congress offering multiple solutions and complex schemes designed mostly in good faith to protect individuals, sanction wrong doers, and reform the retirement saving system, hopefully for the better. Regrettably, the Health, Education, Labor, and Pensions Committee conducted only one hearing on this issue which falls primarily within its jurisdiction, and proceeded to markup a bill without the benefit of expert advice and public input. The result is a package of reforms that suffers from flawed principles and unnecessary provisions that ensure only partisan support.

In contrast, the House Committee on Education and the Workforce conducted four days of hearings before reporting out a bill. The House approved the Pension Security Act by a vote of 255–163, including 46 Democrats, that reflected many of the proposals offered by President Bush and by Democrats as well. Had we on this Committee been able to acquire more information, we may have been able to come up with a bi-partisan bill that reflects a more balanced approach.

We approach the issue of pension reform with three critical goals in mind.

First, in enacting pension reform legislation in the aftermath of Enron, we should be expanding availability of coverage and preserving worker choice. One of the fundamental principles of investment is allowing investors to make their own decisions. We do not want to set up a system that stifles employee participation in reaching their retirement goals. We certainly do not want to do something that will ruin one of the most successful, market-based programs ever to evolve. Employees becoming owners and gaining wealth from their labors are the opportunities we should promote.

Second, we should also be protecting people from abuse, but without chilling their opportunity to participate in retirement savings plan. For every Enron, there is a Microsoft, Wal-Mart or Procter & Gamble where clerks and rank-and-file workers retire with a million dollars or more in their retirement account. Every worker that we “protect” out of a retirement savings opportunity is a worker who may never experience the great potential of capitalism.

And third, in the aftermath of Enron, we should be attuned to the impact of our actions on small businesses and their workers.

The unnecessary rush to judgment

This bill was introduced and has been brought before the committee for markup without the benefit of public hearings. Solving the problems exposed during the Enron collapse and restoring confidence in the voluntary retirement savings system should take a clear and sober understanding of the law and of the impact of proposed changes on the financial and behavioral conduct of participants. We as committee members would have preferred an opportunity to address the following questions:

- Plan participants at Motorola and SuperValu Stores successfully lobbied to eliminate company-set limits on how much company stock could be purchased in employee 401(k) plans. The workers there objected to the arbitrary limits as paternalistic and unfair. Has anyone asked them or other workers what they think about Congress mandating, directly or indirectly, what they clearly and knowingly opposed?

- Would workers on the shop floor object just as vociferously to indirect caps mandated by Congress that force their employer to choose between making matching contributions in company stock OR permitting employees to elect company stock as one of their investment options. Are we as a committee truly opposed to employees believing in the companies for which they work and in the value of what they do for a living?

- If we destroy the incentives for companies to match employee contributions with company stock, will we see a reversal in the positive, pro-employee trend, exemplified by Raytheon of Lexington, Massachusetts? There, employees received a 33 percent increase in what the employer was able to contribute because of a switch from matches in cash to matches in stock. What will the good employers do?

- If we give employees greater, swifter rights to diversify out of their company stock, will that affect the financial markets? Certainly, we do not want to destabilize solid companies because a solution is easy to enact and explain in a thirty-second sound-bite. Are there transition or other rules that would help prevent unintended and irrational rushes to sell company stock based on effective dates, or mere rumors of trouble? The committee with the expertise to ask and answer these questions has not been given the opportunity to do so.

We do not know the answers to these questions because they have not been raised publicly. But we do know there will be consequences, because there always are.

It is well documented that the increasing regulation of defined benefit plans during the 1980s had devastating effects on the willingness of employers to maintain those plans. In 1983, there were more than 175,000 traditional defined benefit pension plans in the United States. This number has declined ever since and now stands at fewer than 50,000. This decline is largely attributable to the costs and complexities that have resulted from over-regulation by Congress in wave after wave of legislation designed to “protect” workers. The issues concerning defined contribution plans would be

far different today, had the federal government treated traditional pension plans differently.

We run the very real risk of addressing one problem by creating other, more dangerous problems: that millions of employees will be unable to share in their employers' success and that employers will curtail their commitment to their plans and reduce employees' savings.

Assumptions underlying PAPA

To understand fully the policies incorporated in the Protecting America's Pensions Act, it is important to review some of the assumptions that went into it.

Assumption No. 1: Concerns about administrative costs and practicality are "red herrings"

A key assumption that went into the drafting of this bill is the belief that administrative costs and practicality are irrelevant to this debate. The charge has been made that concerns over increased administrative costs and the practicality of new burdens are "red herrings." Were these same arguments "red herrings" when Defined Benefit plan sponsors said that the burdens enacted by Congress would reduce the number of such pension plans?

There are many issues that have not been adequately considered and the consequences are not fully known. For example, the quarterly statement requirement mandate will increase costs and will certainly discourage some smaller companies from offering this retirement savings benefit. Although the Congressional Budget Office estimates that the "average cost of providing each statement would be small," the overall price tag of \$100 million annually is a considerable added burden on a segment of employers—small businesses—that are only now considering extending this benefit to workers. Small business owners are likely to look at the new IRA contribution limits and urge employees to set up their own individual accounts that are not connected to their place of work. In IRAs, however, the employees lose out on an employer match.

The hardships that government regulations impose on small businesses are a legitimate concern in this debate. If the consequence of increased administrative costs and burdens are to discourage the creation of new retirement savings plans, then the impact of this legislation will run counter to the greater policy goals of Federal pension policy. That will not only be unfortunate for small businesses, but also unfair to their employees who are working hard to build the business.

Assumption No. 2: Tax subsidy mentality

The next assumption that cripples this bill is the tax subsidy mentality. The argument is made that Congress has every right to override employee wishes because of the tax subsidy that Congress has granted to 401(k) plans. Those who make this argument forget the substantial tax penalty for early withdrawal that individuals suffer. Current tax policy is balanced and reasonable: workers have an incentive (deferred tax) to participate and a disincentive (tax penalty) to withdraw.

The subsidy mentality, and its harmful manifestation in this bill, starts from the position that the government owns all of our money. Whatever the government decides not to confiscate is a “subsidy.” In the 401(k) debate, the thinking is that money in individual accounts is not really the employee’s but the government’s so the majority party has a right to say how it is invested. The approach is unfortunate and counterproductive because it only generates big government solutions to what is essentially a market-based system. The tax subsidy mentality is a means to the ends of paternalistic government solutions. We reject that approach.

SECTIONS OF GREATEST CONCERN

We will not attempt to critique every section of the bill. Numerous noncontroversial provisions have been incorporated in most of the post-Enron reform bills. The sections identified below are those which raise the greatest concerns and pose the greatest threat to the continued viability of the voluntary retirement system.

Section 101. Elimination of employer requirements that assets be invested in employer securities

We agree with the importance of giving workers greater freedom to diversify publicly-traded employer securities in their individual account plans. Such freedom is a cornerstone of improving both the flexibility and security of workers’ retirement assets 401(k) plans. It is also important to recognize the practical implications of this diversification right. A transition rule with respect to the diversification of securities held in individual account plans as of the effective date of this newly created right would do so. Such a transition rule would provide a schedule for the removal of trading restrictions on stock held as of the effective date on an increasing percentage basis. Providing for this transition would be less disruptive to the stock of the individual company, as well as the market as a whole. We note that Senator Dodd filed, but did not offer, an amendment that provided for a 5-year transition rule.

Section 102. Rules relating to plan investments in employer stock

Nowhere is the bill’s assault on employee freedom to make investment decisions more pronounced than in the rules imposed on plan investment in company stock. Section 102 prohibits employers from offering company stock as an investment option for employees if the employer also makes 401(k) matching contributions in employer stock. Employers must choose between matching contributions with stock or allowing employees to have company stock as a 401(k) investment option. Therefore, employees would be denied the choice to invest any of their own 401(k) savings in company stock if the company elected to match in stock. This either/or restriction amounts to a “back-door-cap” on investments in company stock.

Our approach to the issue of plan investment in company stock would be to protect pensions by giving employees the right to diversify and the information and advice necessary to make sound choices. In essence, we tell them they should be diversified, and we stop there out of principle. S. 1992 takes the approach that individual employees cannot or should not be trusted to make decisions

in their own best interest. S. 1992 forces employees to diversify, whether they want to or not.

The restriction on employer stock in 401(k) plans that Section 102 imposes threatens to take 401(k) plans down the same road as defined benefit plans. The result of this legislation designed to protect workers from “over-investment” in company stock, will only serve to limit employee investment choice and opportunity.

Employer-sponsored 401(k) plans have served as an engine of economic growth by providing one of our most significant sources of investment capital. The “back-door cap” on company stock in 401(k) plans would not only harm workers. By making 401(k) plans less attractive to employees and the employers that sponsor them, the “back-door cap” also threatens to harm our capital markets and the economy.

Employee choice

Section 102 of the “Protecting America’s Pension Act” ignores the reality that the retirement plan needs of employees are diverse. The bill undermines employees’ choice and flexibility regarding their 401(k) investment decisions. In the name of protecting workers interests, the bill would, instead, deprive workers of the basic tools required to build retirement assets.

More than 42 million Americans currently participate in 401(k) retirement savings plans. These 42 million participants do not have the same needs or interests in a retirement plan. The retirement strategy for an employee just entering the workforce might be very different than the strategy for a worker nearing retirement. The cornerstone of the 401(k) system has been the employee’s freedom and flexibility to make retirement investment decisions best-suited to his or her needs.

In a recent survey conducted by the Employee Benefit Research Institute, 48% of respondent employers reported a company stock investment option in their 401(k) plan. If the mandate imposed by Section 102 is enacted, nearly half of the companies in the survey would no longer be able to provide company stock as an investment option if they also provided a company stock match.

The following is only a partial listing of the numerous flaws with the backdoor caps approach:

1. Even if the individual employee knew what he or she was doing, the backdoor caps provision would preempt informed personal choice. For example, a savvy investor and employee at an investment firm would be prohibited from electing company stock as a 401(k) investment option if the company matched his contribution with company stock.

2. The backdoor caps provision takes too narrow a view of a person’s retirement planning portfolio. For instance, the restriction on employee choice would apply to a worker who has a fully vested defined benefit plan from his previous employer. Even though his retirement planning portfolio would be diversified, the provision denies the employee his own educated choice of investments.

3. The defined benefit carve out in Section 102 acknowledges that some employees have other retirement savings options in addition to a 401(k) plan. Where an employer provides a generous profit sharing plan, in addition to a 401(k) plan with an employer match

in company stock, the employee would still be denied the opportunity to elect company stock as an option. This is true even though the profit sharing plan averages retirement account balances of 15 times annual earnings, as is the case at Procter & Gamble.

4. The provision makes no allowance for the employee who goes out of her way to obtain qualified investment advice from an independent expert. This bill says that congress knows more about that worker's personal retirement planning needs than an expert who has studied her portfolio.

Perhaps the clearest indication of anti-employer sentiment in the bill is the proscription on accessing company stock through open brokerage accounts. The back-door cap extends not only to a company stock purchase option, but also to the individual stock picks made by the worker through his personal account. By its own terms, the bill anticipates a level of investment sophistication by workers—the ability to figure out how to circumvent the paternalistic dictates of the back-door cap. Rather than showing respect for the ingenuity of the investor, however, the provisions ensures strict enforcement of the principle that Congress, rather than the ingenious investor, knows best.

We recognize that it is hard to legislate a one-size-fits-all solution to the diverse retirement savings options available to individuals, but that is the point. S. 1992 says that employees never know what is best for them. The majority on the Committee does not let workers choose company stock as an option, they don't let them circumvent our paternalistic will by using open brokerage accounts, and they don't let them reach agreements with their employers except in limited circumstances.

Employee ownership

Not only does this "back-door cap" on company stock restrict employee choice in making retirement investment decisions, it also deprives employees of an ownership stake in their company. Acquisition of company stock through 401(k) retirement plans has extended corporate ownership into rank-and-file workers. Employees are thereby able to participate in and benefit from the growth of their companies that they helped to generate.

The government-imposed restriction on ownership of company stock in Section 102 will be very unpopular with—and contrary to the best interests of—many employees who benefit from having an ownership interest in their companies. For example, Loretta Hartgrave started working at Wal-Mart 22 years ago as a checkout clerk in Rogers, Arkansas. She's been buying Wal-Mart stock in her retirement account ever since. Now, at the age of 44, she has over \$1 million of Wal-Mart stock in her retirement account. Committee Republicans do not think we should be telling Loretta Hartgrave that she cannot buy more Wal-Mart stock. Nor should we be telling other workers around the country that they can't share in the growth of their companies.

Impact on small businesses

Another major problem with the bill's restriction on plan investment in company stock is that it treats all companies the same. No

distinction is made between publicly held and privately held companies—or between large or small companies. Just as the needs of all employees are not the same with respect to retirement plans, neither are the needs of all companies.

We must be especially sensitive to the impact of new 401(k) legislation on small businesses and their workers. Legislation that increases the cost and burden of 401(k) plans will have a chilling effect on the sponsorship of such plans by small businesses. According to the 2001 Small Employer Retirement Survey, 46 percent of companies with 100 or fewer workers cited the fact that required contributions are too expensive as a major reason for not sponsoring a retirement plan. Twenty-two percent cited too many government regulations as a major reason for not offering retirement plans.

Many small and start-up businesses may only be able to afford to provide 401(k) matching contributions in the form of company stock, not cash. Yet, Section 102 of S. 1992 would force those companies to choose between matching contributions with stock or giving employees a company stock investment option. If the company chose to match in company stock, the employees would lose the opportunity to participate in the ownership and growth of the company. If the employer chose to give employees a company stock investment option, the employees would probably lose a company contribution to their 401(k). Either way, the employees lose.

We believe that by giving employees information, advice, and diversification rights, individual workers are in the best position to make investment choices. S. 1992 takes this choice away from employees. For these reasons, we cannot support the provision.

Section 103. Fiduciary rules for plan sponsors designating independent investment advisers

Committee Republicans are united in the belief that access to quality investment advice is one of the most important reforms that Congress must enact in response to the collapse of Enron. If ordinary workers at Enron had access to advice about the need to diversify their retirement savings, there is no doubt that hundreds of families across the country would be spared the hardships and losses resulting from this corporate tragedy.

Senators Hutchinson and Collins have each offered bills to expand access to investment advice and contribute ably to the debate on this important issue through their additional views accompanying this report.

Section 202. Provision to participants and beneficiaries of material investment information in accurate form

In its effort to get at Ken Lay and Arthur Anderson, the drafters of this bill have taken all of the investor disclosure requirements of the Securities and Exchange Commission and subjected them to the much broader ERISA enforcement scheme.

Disclosures required by ERISA are not limited to employer securities. On the contrary, ERISA protections are only available if the fiduciaries provide participants with adequate investment information. Regulations require extensive disclosure of investment information concerning the plan, investment funds, investment man-

agers, investment procedures, investment fees and unit valuation procedures. The regulations require additional distribution of summary plan documents, prospectuses, asset lists, financial statements, reports and various other categories of communications, including notifications regarding the operation of Section 404(c). See 29 CFR Part 2520.

It is not clear under this bill how extensive this disclosure obligation is intended to be since, with only a few exceptions (e.g., the initial prospectus, annual report and proxy), most securities law disclosures are accomplished by public filing with the SEC, not direct distribution to shareholders.

If this is intended to require the same distribution to participants that is required to other shareholders, this may merely be a codification of the DOL regulations. If, however, it is intended as a requirement that anything filed for public release with the SEC must be distributed to plan participants, then it is an unwarranted and burdensome expansion of the current ERISA § 404(c) requirements.

There is concern, also, that a purpose of this provision is to circumvent the security litigation abuse protections enacted by Congress in 1995. Congress responded to abusive securities litigation by enacting the Public Securities Litigation Reform Act of 1995, Public Law 104-67. That law imposes reasonable and needed safeguards. It would be regrettable if the Enron crisis were to be exploited to ease the burden on wrongdoers.

Section 203. Electronic disclosure of insider trading

Section 203 requires that any company sponsoring an individual account plan and permitting elective deferrals of its securities must inform participants and beneficiaries within two days after an insider makes a purchase or sale of company securities. In essence, anytime an insider transaction reporting notice is filed with the Securities and Exchange Commission pursuant to SEC Rule 16(a), the insider's company must notify plan participants and beneficiaries.

Under the section, notice must be provided either through the plan intranet website or through letter, fax or e-mail. Regardless of the policy and practical implications of the proposal, the new notice obligation will be expensive. The Congressional Budget Office estimates that the majority of the people entitled to notice under the section would not be reachable through electronic means and would have to be contacted in writing. This cost is estimated to exceed \$150 million annually.

This new burden, added to the additional costs, liabilities and disincentives of S. 1992, is not appropriate in the current voluntary retirement system and should be deleted.

Section 303. Insurance adequate to protect interest of participants and beneficiaries

The issue of insurance is one that clearly would have benefited from hearings and public debate. The Congressional Budget Office estimates that the cost of the insurance mandate under Sec. 303 would amount to only \$15 million annually. Discussions with plan sponsors and insurers, however, indicate greater problems.

By one estimate, a plan with 100 participants and \$5 million in assets would bear an annual premium of over \$8,000, or more than \$80.00 per participant. This premium, which would likely be passed on to the participants, would be particularly burdensome in lower-wage industries where a weekly contribution of only \$10.00 is common. We are also concerned that adequate insurance does not currently exist in the marketplace, raising questions about the feasibility of the provision.

Section 304. Liability for breach of fiduciary duty

Section 304 of the bill expands the ERISA liability provisions against fiduciaries and against insiders and outside accountants who participate or know of a fiduciary breach. Recovery under the newly created causes of action would be credited to the individual accounts of affected participants and beneficiaries.

Congress specifically designed ERISA remedies to ensure that retirement plans were made whole for losses suffered by reason of a fiduciary's failure to act prudently and exclusively in the interest of plan participants. Current law contains a comprehensive penalty and enforcement scheme that ensures that employees can recover losses to their 401(k) plan that result from imprudent action or misconduct. The numerous nationwide class action lawsuits arising out of the collapse of Enron indicate that a system is in place to bring wrongdoers to justice and provide remedies to their victims.

Section 304 expands the right of participants and beneficiaries to sue on their own behalf, and not just on behalf of the plan, as under current law. By permitting remedial and equitable relief to individuals for their losses, the bill broadly expands the types of remedies that may be recovered under ERISA lawsuits. Compensatory damages, such as mental anguish and pain and suffering, could be available under the provisions of the bill.

ERISA subjects fiduciaries to the highest obligations known to the law. The Supreme Court has made clear that the duty of loyalty forbids making intentional misrepresentations about the plan to plan participants and beneficiaries.

ERISA Section 409(a) provides that fiduciaries who breach their duties "shall be *personally* liable to make good to such plan any losses to the plan resulting from each such breach * * *" (Emphasis added). Fiduciaries are also liable for any profits they make from their breaches. Criminal penalties may also be assessed against any person who willfully violates any provision of ERISA relating to reporting and disclosing.

The bill's expansion of liability to "insiders" also duplicates existing enforcement and remedial programs under other laws. In particular, there are Securities and Exchange Commission rules on what senior managers of publicly traded corporations can tell any potential investors in their stock, including plan participants. The Commission often seeks civil money penalties and the disgorgement of illegal profits. The courts may also bar or suspend individuals from acting as corporate officers or directors.

Expanding ERISA liability and remedies will strongly discourage employers from adopting retirement plans for their employees. Even the risk of expanded remedies will cause some employers to

shut down their employee retirement savings programs. This will harm the employees that this bill is supposedly designed to help.

Finally, the allocation of remedies under this section accomplishes a long-sought remedial expansion that the courts have refused to recognize and that is inappropriate in this context. Section 304 would overturn the seminal Supreme Court case, *Massachusetts Mutual Life Insurance v. Russell*, 473 U.S. 134 (1985), with respect to 401(k) plans. MassMutual held that ERISA provides relief only for a plan and not for an individual participant or beneficiary. Although a participant may seek appropriate equitable relief under Section 502(a)(3) under current law, such equitable relief does not normally include monetary damages.

It has been suggested that the remedies in the bill have been narrowly tailored to apply only to officers, directors, and independent accountants of plan sponsors of 401(k) plans offering employer stock. Section 304 of the bill, however, is not so limited. For instance, financial institutions who are investment fiduciaries, or otherwise are fiduciaries under 401(k) plans could be sued under this proposal. In our view, this is unnecessary since the plan which was awarded damages under ERISA Section 409 today would normally be required to reallocate any recovery to affected plan participants.

We believe that this proposal will encourage unnecessary lawsuits where adequate remedies already exist under ERISA. Many employers will simply not bear the potentially unlimited financial risk created by this provision. The result will be to drive many employers from the system, once again harming employees who will be denied a workplace retirement plan. In the end, there will be fewer workers covered by retirement benefits.

Section 305. Participation of participants in trusteeship of individual account plans

The Joint Trusteeship proposal in Section 305 is of special concern. The provision requires equal representation of participants on boards of trustees for plans with more than 100 participants. The bill would require elections and mandates the Secretary of Labor to supply independent trustees to break ties on issues.

Recognize that the retirement system is voluntary, Congress should heed the advice of the companies that choose to establish retirement savings plans. In testimony before the Employer-Employee Relations Subcommittee of the House Education and the Workforce Committee, John Vine, counsel to the ERISA Industry Committee (ERIC), stated the concerns most clearly:

ERIC also strongly opposes proposals that have been made for the joint trusteeship of individual account plans. Joint trusteeship will be divisive, disruptive, and counter-productive. 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 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.

It is a fundamental principle of trust law that a company establishing a trust has an interest in assuring the purposes of the trust are fulfilled. The law has viewed with intense skepticism the claims of beneficiaries that they have a right, despite contrary trust provisions, to manage the trust or pick their own trustees.

Under ERISA a person or entity making such a fiduciary selection is accountable for that selection. Plan sponsors have a strong preference for a system in which they are free to select persons with the training and skill necessary to discharge complex plan administration functions and are prepared to bear the responsibility for their selections. If Board members or other executives are to be held accountable in this fashion, they should have the authority to select the persons they think best able to perform plan administration functions. Politicizing this selection process will, of necessity, dilute the disciplined approach to the selection of fiduciaries and investment professionals based solely upon appropriate investment factors.

Moreover, but perhaps most importantly, this joint trusteeship provision has nothing to do with the suffering caused by the collapse of Enron. Unlike defined benefit plans, and the management structure being imposed by this section, the hallmark of individual account plans is individual choice. A typical 401(k) plan has 14 investment options; the Enron plan had 20. It is estimated that 89 percent of the company stock in the plan was purchased at the direction of *employees*, not the trustees. The loss of hundreds of millions of dollars of employee retirement assets had little to do with the decisions of the retirement plan board of trustees.

The joint-trusteeship issue is exceedingly controversial and inappropriate in any meaningful reform package. A similar provision (the "Visclosky" amendment) was defeated by a Democratic House of Representatives in September 1989 by a vote of 250 to 173. Taft-Hartley style joint trusteeship is uniquely suited to the building trades, the construction industry and other industries where there is no single plan sponsor in a position to assume such selection and supervision liability. It is ill suited to the single-employer plan environment.

Further, there exists no evidence that this provision is needed, nor would it promote better administration of such plans. Indeed, the provision would cause mass confusion as employers and the Department of Labor try to organize thousands of workplace elections for millions of employees to pick trustees who may or may not have the necessary expertise. Employers may be required to police the campaign and election process to ensure there is no coercion, threats or promises of benefits by the candidates or their supporters. Presumably, if the employer used an improper policy or procedure, or failed to police the conduct of workers, the plan would be deemed out of compliance with ERISA and lose its tax-exempt status.

In most workplaces, there are likely to be several different groups of employees, each with their own community of interest. Numerous questions will arise with regard to which group of employees would vote for which plank of trustees. Further, it is unclear whether former employees who are still participants in the plan will have a vote or could be elected as trustees. Fairness and

disqualification criteria are also important considerations that have not been addressed in this legislation.

Enron employees needed greater protection from fraud and abuse, better information about the status of the company and its stock, and better access to information about diversification and investment advice. The establishment of a politicized board of trustees will not further any of these objective, and will likely discourage many companies from offering a plan at all. For these and many other reasons, the joint trusteeship provision should be excluded from any serious reform package.

Section 306. Preservation of pension rights or claims

This provision excludes arbitration, which is an essential tool that employers and unions use to resolve a range of issues, including benefit disputes. There is no evidence of abuse of current arbitration procedures or requirements. In fact, there is nothing unique about benefit disputes that would render them incompatible with arbitration. The concept of mandatory arbitration arose in the securities industry. The very claims of agency, fiduciary responsibility and denial of benefits are the basis of many securities industry disputes. Section 306 would ban this important practice that allows for disputes to be resolved quickly and with less expense than litigation.

The prohibition of pre-dispute arbitration agreements under ERISA is anti-worker and anti-employer. It will result in fewer people having access to investment earnings and a share of the American dream.

Under current law, the courts will enforce agreements between individual workers and their employers to arbitrate claims arising under statutes so long as the terms provide adequate due process, and the agreement is entered knowingly and its exclusivity is clear. The agreement must be clear that all disputes, involving claims under federal employment statutes, will be taken to binding arbitration and not to court. Arbitration agreements generally provide that all claims arising out of one's employment will be heard by an arbitrator or panel of arbitrators rather than by a judge or jury.

The fairness of the process is guaranteed by the Federal Arbitration Act (9 U.S.C. §§ 1–16) which outlines rights of the parties. Although the remedies are the same, the parties favor arbitration because the process is faster and cheaper than federal litigation.

Section 306 would carve out an ERISA exception in all pre-dispute arbitration agreements between individual workers and their employers. This Section represents another long-term policy objective that has no place in an Enron-related bill.

Section 307. Office of Pension Participant Advocacy

Section 307 creates a career ombudsman in the Department of Labor with power to sue on behalf of participants and beneficiaries, to investigate federal enforcement and other policies, and to report to Congress on problems that may be corrected by the Secretary.

First and foremost, the proposed functions of the Office of Pension Participant Advocacy are duplicative of the ongoing functions of Pension and Welfare Benefits Administration of the Department of Labor. Today there are more than 100 highly trained and dedi-

cated advisors working out of PWBA's national office and 15 field offices located throughout the country. In 1996 PWBA had only 12 Benefits Advisors all located in the national office. The creation of this office represents a serious commitment on the part of the Department of protecting the rights of and helping workers obtain the benefits to which they are entitled.

The Benefits Advisors handled 170,000 inquiries in 2001 and recovered over \$64 million in benefits for participants and beneficiaries through informal individual dispute resolution. Over \$250 million have been obtained through this informal process over the last five years. These dollars are separate from any amounts recovered through the formal investigative process.

Complaint referrals from PWBA's benefits advisors have become the best source of investigative case leads. If a complaint from an individual appear to indicate a fiduciary violation by the plan or a matter that impacts several participants and not just one individual, then that inquiry is referred to an investigator. According to statistics from the PWBA, last year 1263 investigations were opened as a result of referrals from the Benefits Advisors; 1238 were closed with over \$111 million in monetary results.

The proposed authority for the new Advocate includes the ability to pursue claims on behalf of participants and beneficiaries, including, upon request of any participant or beneficiary, bringing a civil action on behalf of the participant or beneficiary which the participant or beneficiary is entitled to bring under Section 502(a)(1)(B). The potential demand on resources would be enormous and the program would be extremely difficult to manage. It would overwhelm the other responsibilities of the program, including the need to provide broad-based enforcement.

Furthermore, the Advocate's right to sue would be in addition to, and perhaps in conflict with, any action filed by (a) the Secretary, (b) the Justice Department for criminal violations, (c) the Internal Revenue Service, and (d) plan participants and beneficiaries. It is very likely that plan sponsors could find themselves defending against competing agendas or conflicting theories of liability from within the Department of Labor or among the different departments. Such a situation is ill-conceived and impractical, and should be omitted from any bill seriously considered on the Senate floor.

Section 308. Study regarding insurance system for individual account plans

Under Section 308, the Pension Benefits Guaranty Corporation is instructed to study the feasibility of insuring individual account plans, and to propose options for developing such a system.

It is doubtful that any insurance system for defined contribution plans is feasible. The concept of a defined contribution plan is that it provides whatever benefits can be purchased by a participant's accounts as those accounts grow due to contributions and earnings. Any insurance program would require dependence on a legal list of cautious or nearly riskless investments that could not keep pace with inflation. This approach runs counter to the wisdom of modern portfolio theory and the general wisdom that equities should play a significant role in a long-term portfolio.

Section 310. Provisions relating to whistleblower actions involving pension plans

Section 310 of the amended bill expands an individual's right to sue under Section 510 of ERISA to protect "other persons" who "oppose" any unlawful action under ERISA. Plaintiffs would be entitled to sue for uncapped compensatory and consequential damages. For at least three major reasons, we cannot support the provision.

First, there is considerable confusion and disagreement as to who would qualify as "other persons" under the provision. No definition is provided in Section 310. It has been suggested that the term is intended to extend protections to persons who do not otherwise qualify as "participants." That term is defined in Section 2(7) of ERISA very broadly as "any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive such benefit." A participant, by contrast, is an employee who, in the past, present or future, is eligible to receive benefits under the plan.

The one example given to justify the provision was Enron plan administrator Cindy Olson, who may or may not have had injury or redress under other provisions of ERISA. During the debate over the Section, other examples of newly hired employees and outside accountants were rejected. The only persons who are left are those who are permanently ineligible to participate, and perhaps independent contractors who consult on plan or even unrelated issues. Concern over this issue is not merely academic; it directly relates to the size of the new pool of persons who will be entitled to file suit under the Section.

Second, we are concerned that the person's degree of opposition is exceedingly vague and unenforceable. A person will make a case under Section 510 of ERISA if he can demonstrate that he "opposed any practice * * * that is made unlawful by this title * * *." As currently written, Section 510 of ERISA delineates a narrow and clear set of facts under which the protections apply. Persons may sue under the whistleblower provisions of ERISA for giving information or testimony in an inquiry or proceeding. Under Section 310 of the Protecting America's Pensions Act, however, plan sponsors, employers, the Secretary of Labor and lawyers are left to speculate over what constitutes opposition to improper conduct. It is possible that such a provision would be ignored by judges as void for vagueness. It is equally likely, however, that courts will be forced to entertain testimony on "opposition" as manifested in passive conduct, body language, or hearsay. Greater specificity is required in the statute that affects the conduct of millions of individuals and trillions of dollars.

Finally, the issue of expanded remedies is exceedingly problematic. In ERISA whistleblower suits under current law, courts may grant full equitable relief including reinstatement and full back pay. This is the approach taken by many of the federal remedial statutes, including the National Labor Relations Act. Under these laws, conciliation and getting people back to work is the primary

goal. Section 310 adopts the confrontational approach to labor relations that ensures acrimony and protracted litigation.

The operative language in the provision is the inclusion of a right to sue for “appropriate equitable and legal relief * * *.” The amendment entitles plaintiffs to demand uncapped compensatory and consequential damages. This would be on top of full back pay, reinstatement and other instructions by the court to restore all benefits.

The expanded remedies under the Section are not applicable to participants and beneficiaries who sue under Section 510; only “other persons” are entitled to this special new right. Fundamental fairness demand that the remedial scheme be rational and not discriminate against or in favor of any one group of persons. As stated previously, the collapse of Enron should not be used as an opportunity to achieve long-sought changes to the ERISA remedial scheme.

Section 311. Plans required to provide adequate information to individuals offered choice of lump sum distribution

Section 311 requires special information disclosures by defined benefit pension plans that give participants an option to elect lump sum distributions in lieu of an annuity upon retirement. The disclosure must compare the relative value of each form of benefit payment and disclose the calculations and assumptions on which the plan relied.

As an initial matter, it must be recognized that the Treasury Department has stated in the official IRS/Treasury Business Plan that it will be issuing “guidance on disclosure to participants regarding their distributions from pension plans.” This statement is very similar to what the drafters on this section are seeking. The final rules may not be completed before the end of this fiscal year, but the issue remains a high priority. Regulations in this area have been delayed because of the need under last year’s pension law to issue regulations covering disclosures in cash balance plans.

The issues in Section 311 involve interest rates and mortality assumptions that are highly variable, difficult to understand, and subject to broad interpretation. Indeed, an amendment similar to Section 311 was rejected in the Finance Committee 2 years ago during the cash balance plan debate because the proposal is impractical.

Section 311 would be administratively burdensome, expose employers to liability and would not give most participants a true understanding of the value of their retirement options. Employers would not want to choose assumptions on which to calculate various retirement options—they would want the government to choose the assumptions to remove them from exposure to liability. There are no “right” assumptions for the sponsor to use.

Section 311 requires the plan to inform participants what interest rate and mortality assumptions were used in determining relative values and how the plan’s assumptions compare to those interest rates and mortality tables outlined in § 205(g) of ERISA. That section of ERISA includes the 30-year Treasury interest rates and Treasury Department mortality tables specified for use by in-

insurance companies in calculating reserves. By necessity, those assumptions are very conservative.

The assumptions used by the plan sponsor will dictate which form of benefit is the most valuable. Employers will be forced to make assumptions at their own risk. This requirement to choose assumptions and make calculations is akin to mandating investment advice. Plan sponsors don't want investment advice mandated because they are worried about exposure to liability. Furthermore, what ever assumptions they choose, they can be sued under S. 1992.

In addition to the liability exposure, it would be a huge administrative burden for a plan sponsor calculate all of the permutations on various forms of benefit. The plan sponsor would not necessarily know what variables might affect an individual's case. Some of the variables that will alter the value of a benefit option are:

Life expectancy. The state of a person's health is a major factor that sponsors do not know about participants. An individual's choice between an annuity or a lump sum distribution is highly personal:

- If you have cancer, have 6 months to live, and are unmarried, you would take the lump sum!
- If you think you'll live to be 100, take the annuity.
- Is your spouse well or ill?

Interest rates.—The Internal Revenue Code mandates the use of the 30-year Treasury rates for calculating lump sum distributions under § 417(e). There is no statutory rule for what interest rate to sue a sponsor must calculate from one form of annuity to another (e.g. from an annuity payable beginning at age 55 versus one beginning at age 65). To make matters worse, the Treasury Department has abruptly discontinued the 30-year Treasury bond. While they said they would continue to calculate the rate for a couple of years, that calculation is viewed as being "soft" or "unreliable" because no more bonds are being issued.

Further compounding the problem, the 30-year Treasury rate is currently at a 40-year low. There is an inverse relationship between interest rates and calculations of lump-sum distributions, making that form of benefit very attractive, currently. However, most plan sponsors think they could easily earn 8 or 9 percent instead of the lower 30-year Treasury rate. The assumption chosen will influence the value of a lump-sum distribution or an annuity calculation. If interest rates shoot up (and the calculation of the 30-year bond rate rises as well), lump sum distributions will look less attractive.

Martial status.—Not all pre-retirees are married. Some are single but getting married. Some may be married but with a seriously ill spouse. Sponsors cannot take those variables into consideration when comparing optional forms of benefits.

Payout of the benefit.—Legislation on this category is exceedingly problematical and very many questions arise that have not been considered: How long a period of time will the benefit be paid out? Will it be a single-life annuity, 10-year pay-out, 20-year pay-out, a lump sum distribution. What other forms of distribution are required to be calculated? (E.g., 3-year or 5-year pay-outs? Is a child named as a beneficiary of any benefit or portion of a benefit?)

Each of these would have to be calculated separately, taking into consideration the individual's variables. Calculations will need to be correct—not just estimates; otherwise, the sponsor would be sued. If a company has acquired other companies and plans have been merged with others, all forms of benefit distribution must be preserved under all the plans (because a plan sponsor is forbidden from eliminating a form of distribution under a plan.)

CONCLUSION

The spectacular collapse of the Enron Corporation has ruined careers, dashed retirement expectations, and shaken the confidence in our financial markets and in several professions. All of us are deeply concerned about the lost retirement savings and security of the thousands of Enron employees who relied on a system that failed them. Each of us respects the duty to learn the lessons of Enron and to prevent another crisis of this magnitude.

Committee Republicans want a bill we can support. It must be one that protects employee choice and opportunity. It must also expand employee access to retirement savings. The legislation we can support is one that recognizes the importance of small businesses and that doesn't impose needless costs and risks. And it is one that is based on the lessons learned, not a wish list of failed ideas.

JUDD GREGG.
PAT ROBERTS.
MIKE DEWINE.
TIM HUTCHINSON.
MICHAEL B. ENZI.
JOHN WARNER.
KIT BOND.
BILL FRIST.

MINORITY VIEWS OF SENATOR HUTCHINSON AND SENATOR ROBERTS

I agree with the majority that making investment advice available to participants in 401(k) plans is important. However, I must take issue with the manner in which the majority purports to deliver such advice. Their proposal lacks substance and will have minimal, if any, affect on the expansion of investment advice to 401(k) plan participants. Should the majority's proposal be enacted, millions of 401(k) participants will continue to lack access to professional investment advice, an unfortunate outcome that can only work to the detriment of hardworking Americans.

I would urge that the majority modify the bill as noted below to provide more meaningful access to investment advice for 401(k) plan participants, and stand ready and willing to work with the Majority towards that end.

Since ERISA was adopted 25 years ago there has been a fundamental shift from traditional pension plans to defined contribution plans such as 401(k) plans, under which participants exercise investment control over their retirement savings. Today there are approximately 42 million American workers that participate in participant-directed retirement plans. Today, the average account balance exceeds \$50,000. This amount increases substantially for individuals approaching retirement, reaching nearly \$190,000. These accounts represent not only a larger share of retirement capital than tradition pension plans, but for millions of Americans—their most important financial asset. In light of the wide array of investment choices facing plan participants, the need for professional guidance in making proper and appropriate investment choices is clear.

It is common today for participants to be able to direct their own plan investment among any number of investment vehicles within their company's 401(k) plan. For some, virtually unlimited choice of investment options is available. For most plan participants, the increase in the number of investment vehicles through which they are to invest their retirement savings, coupled with their lack of investment sophistication, has caused fear, anxiety, and a call for professional assistance and guidance in making appropriate investment choices.

Participants want direction in managing their retirement savings. However, the availability of investment advice is limited in today's 401(k) marketplace. Recent surveys have shown that only between 16–20 percent of 401(k) participants have an investment survey advisory service available to them through their retirement plan. This means that over 80% of plan participants have no investment advisory services available. It is our current pension law, ERISA, which works as a deterrent towards the expansion of professional investment advice. ERISA provides, appropriately, that

persons who give “investment advice” are fiduciaries. As such, they must act prudently and solely in the interests of participants. However, ERISA goes further and includes a set of “prohibited transaction” rules modeled on IRS regulations for charitable foundations. These rules have been interpreted by the DOL to preclude fiduciaries from giving any advice if they have any financial interest in a transaction, even when their advice is otherwise in the interest of the plan participant. Applying these rules, all major financial institutions are effectively prohibited from providing advice if they or any affiliate sponsor (1) the 401(k) plan, or (2) any mutual fund, collective investment, or other investment in which the participant may invest. These prohibited transaction rules preclude participants from receiving investment advice from the financial institutions that manage the plan’s investment options—even though these firms are in many instances already providing educational services to the very same participants.

Because the logical choice in professional advisory services for 401(k) plans is essentially shut off by ERISA’s prohibited transaction rules, the marketplace for advice providers is limited to “third-party” providers, many of whom are Internet-based. While the advice marketplace has been open to these “third-party” advice providers for several years, it is clear that their method of delivery of advice—primarily through on-line products, has not sufficiently filled the “advice gap” that exists in the 401(k) marketplace today. The result of these limitations is that over 80 percent of 401(k) plan participants do not have effective access to professional investment advice.

To reverse this abysmal statistic, Congress must act to ensure that the advice marketplace includes those professional advice providers best suited to reaching the greatest number of plan participants. The Majority’s legislative proposal falls far short on this point.

Despite the inherent shortcomings in the current marketplace of advice providers for 401(k) plan participants; the Majority has included in the legislation the provisions of S. 1677, the Independent Advice Act. Although the provisions of S. 1677 have not been the subject of hearings, and have little support within the broad business community, they are nonetheless included within the legislation as reported from this Committee. I have serious reservations regarding S. 1677. I also include herein an advice proposal that I have introduced that I believe is the true answer to the advice gap that exists in the 401(k) marketplace.

There are significant other reasons for opposing the Majority’s approach to investment advice. Restricting competition in the marketplace for investment advice, and excluding the financial service industry from meaningful participation in the competition for advisory services, works to the ultimate detriment of plan participants. The majority’s proposal will essentially limit the employer provided investment industry to computer based Internet providers. Investment advice through the internet is neither feasible nor desirable for many plan participants, particularly those in rural areas and those employed by small businesses. Not only will less advice be available in the marketplace, but also the quality of the advice available will be diminished.

Beyond the obvious stifling of competition, the Majority's approach offers little to the business community—particularly small business owners. For small employers, the legislation will require them to seek and contract with an advice provider that is separate from the plan service provider with whom they have a relationship. This additional cost—both in time and money, will act as a severe detriment to the effective availability of advice in the small business community.

The Majority's approach is also deficient in its approach to providing information to plan participants about the advice they would receive under the proposal. The Majority's approach does not require disclosure to participants of any of the fees, compensation, or affiliations with respect to the advice services, provided by the "independent" advice provider. Under the bill, participants will lack even the basic information they need to make informed decisions regarding the quality of an advice provider, the quality of its product and services, the fees or compensation it receives for the advice it provides, or its relationship with the plan's service provider, the employer, or other potentially conflicting sources. Moreover, the Majority's approach does little require advice providers to document the advice that is given to participants. In essence, the Majority's approach, as a whole, leaves plan participants in the dark regarding the services they are receiving.

The provisions of S. 1677 included in this bill will preserve the status quo, leaving millions of American workers without access to high-quality professional investment advice for managing their life savings. Most participants will continue to be left without the necessary tools to make appropriate and informed investment decisions regarding their most important financial assets. In that regard, we all lose.

S. 1978, the appropriate legislative solution

Legislation I have introduced, S. 1978, The Retirement Security Advice Act of 2002, seeks to address the advice gap through enhancing competition in the advice marketplace, while ensuring that participants receive appropriate protections with regard to the advice they receive. My legislation will modernize ERISA by adding another statutory exemption to the prohibited transaction rules to allow employers to provide their workers with access to high quality, professional investment advice. It is a proposal which has passed the House of Representatives with bipartisan support on two occasions after being vetted through committee hearings, mark-ups and floor debates.

S. 1978 will open up the marketplace significantly by increasing the number of firms that would be qualified to provide professional investment advice to plan participants. Yet, this expanded market of advice providers would be limited to those institutions that meet the legislation's qualification requirements—protecting plan participants from unscrupulous actors.

Most importantly, my legislation ensures that plan participants enjoy significant protections so that they are encouraged to seek professional investment advice, knowing that they have meaningful legal resource should the advice they receive fail to meet ERISA's stringent rules.

My legislation's strong consumer protection provisions require that only specified, qualified financial institutions (as well as their employees, agents and representatives, and affiliated companies) will be authorized to provide investment advice to plan participants. These providers include: investment advisers registered under federal or state securities laws; banks regulated under federal or state law; insurance companies qualified to do business under state law; and broker dealers registered under federal law. Each of these types of institutions is subject to substantial regulation under federal and/or state laws. Because of the regulatory regime under which these entities must operate, limiting fiduciary advisors to these entities ensures that less qualified individuals will not be able to simply "hang out a shingle" and proffer advice to unsuspecting plan participants.

In addition, any advice providers will be subject to ERISA's rigorous fiduciary standards. To meet ERISA's fiduciary obligations, the advice providers must provide prudent, objective advice to plan participants. In providing advice to plan participants, ERISA requires that these advice providers act:

1. Solely in the interest of the plan's participants and beneficiaries;
2. For the exclusive purpose of providing benefits to participants and beneficiaries;
3. With the care, skill, prudence and diligence under the circumstances of a prudent person acting in a like capacity and familiar with the matters involved; and
4. In accordance with plan documents as well as ERISA.

My bill will also ensure that participants have legal recourse if they feel there has been a fiduciary breach. S. 1978 provides a number of avenues for legal recourse against a fiduciary adviser for breach of its fiduciary duties. In essence, the legal avenues available to participants in the event of a fiduciary breach for the advice they receive are designed to allow employees to be made whole for any wrongdoing, with any losses restored to the participant's account.

Under the fiduciary provisions of ERISA and as applicable to fiduciary advisors under S. 1978, a plan participant or beneficiary, another plan fiduciary, or the plan itself, could sue a fiduciary adviser for breach of fiduciary duty in providing advice to a plan participant. If found to have breached its duty, the fiduciary advisor could be held "personally liable" (1) to restore losses to the plan resulting from each such breach, (2) restore to the plan any profits of the fiduciary advisor that were made through use of plan assets, and (3) for other equitable or remedial relief as the court deems appropriate—including removal of such fiduciary advisor.

The Department of Labor could itself sue the fiduciary adviser under claims similar to those of participants and plans discussed above. In addition to the above recoveries, the Department could also assess an additional civil penalty of 20 percent of the applicable recovery amount for a breach of fiduciary duty.

A participant, beneficiary, or plan fiduciary could also sue the fiduciary advisor under ERISA: (1) for injunctive relief (e.g., to stop the fiduciary advisor from providing advice that either breaches its fiduciary duty or violates the terms of the pension plan), or (2) to

obtain other appropriate equitable relief in response to such a violation including enforcing ERISA or the terms of the plan.

In addition to the protections under ERISA, plan participants would have protections available to them under other federal laws. Protections would be available under federal securities and banking laws as well as state insurance laws. With the availability of remedies under these laws as well as ERISA—plan participants would have substantial and powerful means for enforcing their rights in the event the advice they are given regarding their 401(k) accounts is unsuitable, fraudulent, or violative of the fiduciary duty the adviser owes them.

Information that plan participants must receive to assist them in deciding on advice that is given

The legislation requires timely, clear, and conspicuous disclosures of the following to participants at the inception of the advisory relationship, any time there is a material change in the relationship, at least annually thereafter, and always upon request:

1. All fees or other compensation relating to the advice that the fiduciary adviser or any of its affiliates receive in connection with the provision of the advice or in connection with the resulting transactions;
2. Any material affiliation or contractual relationship of the fiduciary adviser or any of its affiliates with respect to the security or other property in which plan assets are invested;
3. Any limitation placed on the scope of the investment advice to be provided;
4. The types of services offered by the fiduciary adviser in connection with the provision of investment advice and all material information about the adviser, its operations, and its key personnel; and
5. All disclosures required to be made under all applicable securities laws.

To ensure that such disclosures are understandable by plan participants, S. 1978 requires the above disclosures to be written in plain English and in a manner calculated to be understood by the average plan participant.

My approach is comprehensive, allowing the highest quality advice to reach the largest number of participants with a level of protection for plan participants that ensures that their retirement savings are secure. The 80 percent of workers in the United States without access to investment advice services should be able to make informed decisions about their financial investments. The Retirement Security Advice Act is the best solution to help them maximize their retirement savings.

TIM HUTCHINSON.
PAT ROBERTS.

MINORITY VIEWS OF SENATOR BOND

On March 18, 2002, I added my name as a co-sponsor of the Retirement Security Advice Act of 2002 (S. 1978), introduced by Senator Tim Hutchinson. I did so, and submitted a statement for the record, because the bill holds important implications for small businesses in this country and the millions of Americans they employ.

In 1996, Congress created the Savings Incentive Match Plans for Employees (SIMPLE) as a pension-plan option for small firms in this country. The goal was a simple one: provide a pension plan with low administrative costs for employers so they can offer pension benefits to encourage employees to save for their retirement. I am pleased that these plans have become quite popular, and together with the other pension simplifications and improvements enacted in the last five years, they have contributed to better access to pension benefits by small businesses and their employees.

Greater retirement savings, however, have raised new and complex issues for many employees who have seen their pension accounts grow substantially. As the Ranking Member of the Committee on Small Business and Entrepreneurship, I have heard many constituents raise difficult questions in this area: What are appropriate investments for my personal circumstances and risk tolerance? Should I buy stocks, bonds, annuities, or something else? How should I diversify my investments? When should I modify my investment mix? And so on.

The importance of these questions has increased substantially in light of recent high-profile business failures and more generally because of the economic downturn. Gone are the days of the momentum market where any dollar invested seemed to grow with little effort or risk.

The return to more cautious investing has left employees who participate in employer-sponsored pension plans in a real dilemma—hire an outside investment advisor or go it alone in most cases. Why? Current pension rules effectively preclude most employers from offering investment advice to their employees. In fact, recent estimates are that only about 16 percent of participants have access to investment advice through their pension plan. In today's complex investment environment that is simply too little help for employees who are trying to manage their retirement security.

Senator Hutchinson's bill addresses this situation in a responsible way. For most businesses, and particularly small firms, the logical place to look for an investment advisor would be the company that manages the plan's investment options or an affiliated firm. Under Senator Hutchinson's bill that option would now be available, opening the door for countless businesses to offer this important benefit at a low cost to their employees who participate in the company's pension plan. In addition, by allowing more businesses to offer investment-advice benefits, the bill creates an oppor-

tunity for increased competition among investment advisors, which can lead to better advice products and lower costs overall.

Senator Hutchinson's bill, however, does not simply change the rules to help the business community. It also includes critical protections for the plan participants. Investment advisors must satisfy strict requirements concerning their qualifications, and they must disclose on a regular basis all their business relationships, fees, and potential conflicts of interest directly to the participants. In addition, and arguably most importantly, the investment advisor must assume fiduciary liability for the investment advice it renders to the employee participants in the plan. In short, if the investment advisor does not act solely in the interest of the participant, it will be liable for damages resulting from the breach of its fiduciary duty. Together, the bill's provisions provide substantive safeguards to protect the interests of the plan participants who take advantage of the new investment-advice benefit.

Some have contended that a better alternative is to force small businesses to engage an independent third party to provide investment advice. I disagree. The result would simply be the same as under current law. Cost is a real issue for small businesses seeking to offer benefits like pension plans and related investment advice—hence, the genesis of the SIMPLE pension plan. As under the current rules, if the only option is a costly outside advisor, the small firm will not offer the investment-advice benefit. As a result, we would not move the ball even a yard further—employees would still be left to their own devices to figure out the complex world of investing or they would have to seek out and hire their own advisor, which few have the wherewithal to do.

More to the point, nothing under the Hutchinson bill prevents a business from engaging an independent advisor if the employer deems that the best alternative. The standard under the Hutchinson bill for selecting the investment advisor is prudence; the same criteria that the employer must exercise under current law when selecting the company that manages the pension plan and its investment options. If a prudent person would not hire or retain the investment advisor, then under the Hutchinson bill, the employer should not do so either or face liability for breach of fiduciary duty. Again, additional protection for the plan participants.

In my assessment, investment advice is an increasingly important benefit that employees want and need. Moreover, small businesses in particular need the flexibility to offer benefits that keep them competitive with big companies as they seek to hire and retain the very best employees possible. And when we talk about small business, we are not dealing with an insignificant employer in this country. In fact, according to Small Business Administration data, small businesses represent 99% of all employers and provide about 75% of the net new jobs in this country.

The Retirement Security Advice Act provides a carefully balanced and responsible solution to this situation. Most importantly, it provides a solution that employers will actually use to offer the investment advice sought by their employees who struggle to put money aside in the hopes of having a nest egg that someday will provide them with a comfortable retirement.

KIT BOND.

X. CHANGES IN EXISTING LAW

In compliance with rule XXVI paragraph 12 of the Standing Rules of the Senate, the following provides a print of the statute or the part or section thereof to be amended or replaced (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):

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EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974

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TABLE OF CONTENTS

Sec. 1. Short title and table of contents.

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Sec. 409A. Liability for breach of fiduciary duty in 401(k) plans.

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TITLE III—JURISDICTION, ADMINISTRATION, ENFORCEMENT; JOINT PENSION, PROFIT-SHARING, AND EMPLOYEE STOCK OWNERSHIP PLAN TASK FORCE, ETC. [JURISDICTION, ADMINISTRATION, ENFORCEMENT; JOINT PENSION TASK FORCE, ETC.]

Subtitle A—Jurisdiction, Administration, and Enforcement

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Subtitle D—Office of Pension Participant Advocacy

3051. Office of Pension Participant Advocacy.

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Subtitle B—Regulatory Provisions

PART 1—REPORTING AND DISCLOSURE

DUTY OF DISCLOSURE AND REPORTING

SEC. 101. (a) * * *

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(2) the information described in sections 104(b)(3) and [105(a) and (c)] 105(a), (b), and (d).

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(h) SIMPLE RETIREMENT ACCOUNTS.—

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(i)(1) Except as specifically provided in this Act, and notwithstanding any other provision of law, if the Commission requires any

disclosure of the sale or purchase of any securities by an officer or director or other affiliated person of any issuer of the securities that—

(A) sponsors an individual account plan, and
(B) permits elective deferrals (as defined in section 402(g)(3) of the Internal Revenue Code of 1986) to be invested in employer securities and employer real property,
the issuer shall, within 2 business days after disclosure to the Commission, make such disclosure available on any individual account plan website the issuer maintains which is accessible only by plan participants and beneficiaries. If there are participants or beneficiaries of an individual account plan sponsored by an issuer who do not have access to such a website, the information required to be provided under this paragraph shall be provided to the participants and beneficiaries in written, electronic, or other appropriate form to the extent that such form is reasonably accessible to them.

(2) The Commission may provide that the requirement under this subsection of disclosure in electronic form will be in lieu of any other form of such disclosure that may be required by the Commission or under any other Federal law.

(3) In this subsection—

(A) the terms affiliated person, Commission, issuer, and securities have the same meanings as in section 3 of the Securities Exchange Act of 1934, and

(B) the terms employer securities and employer real property have the meanings given such terms by section 407(d).

[(h)] (j) CROSS REFERENCE.—

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

(i) at least once each calendar quarter to a plan participant of an individual account plan which permits a participant or beneficiary to exercise control over the assets in his or her account, and

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

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

(i) at least once every 3 years to each participant, and

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

Information furnished under subparagraph (B) to a participant (other than at the request of the participant) may be based on reasonable estimates determined under regulations prescribed by the Secretary.

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

(i) shall indicate, on the basis of the latest reasonably 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,

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

(iii) may be provided in written, electronic, or other appropriate form to the extent that such form is reasonably accessible to the participant or beneficiary.

(B) In the case of an individual account plan, the pension benefit statement under paragraph (1) shall include (together with the information required in subparagraph (A))—

(i) 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,

(ii) 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 diversified investment portfolio, including a statement of the risk of holding substantial portions of a portfolio in the securities of any 1 entity, such as employer securities, and

(iii) in the case of an individual account plan, if the percentage of assets in the individual account that consists of employer securities and employer real property (as defined in paragraphs (1) and (2), respectively, of section 407(d)), as determined as of the most recent valuation date of the plan, exceeds 20 percent of the total account, a warning that the account may be over-invested in employer securities and employer real property.

Employer securities and employer real property held by a plan by reason of a pooled investment vehicle described in section 404(e)(2)(B)(ii) shall be excluded for purposes of clause (iii) from the calculation of the assets in an account that consist of employer securities and employer real property.

(b)(1) In the case of a participant or beneficiary who is entitled to a distribution of a benefit under a defined benefit plan, the administrator of such plan shall—

(A) notify each participant or beneficiary of the availability of, and the right to request, the information described in paragraph (2), and

(B) provide to the participant or beneficiary the information described in paragraph (2) upon the request of the participant or beneficiary.

(2) The information described in this paragraph includes—

(A) a worksheet explaining how the amount of the distribution was calculated and stating the assumptions used for such calculation,

(B) upon request of the participant or beneficiary, any plan documents relating to the calculation (if available), and

(C) such other information as the Secretary may prescribe.

[(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.]

(c) In no case shall a participant or beneficiary or beneficiary of a plan be entitled to more than 1 statement described in subsection (a)(1) (A)(ii) or (B)(ii) or subsection (b), whichever is applicable, in any 12-month period.

[(c)] (d) Each administrator required to register under section 6057 of the Internal Revenue Code of 1986 shall, before the expiration of the time prescribed for such registration, furnish to each participant described in subsection (a)(2)(C) of such section, an individual statement setting forth the information with respect to such participant required to be contained in the registration statement required by section 6057(a)(2) of such Code. Such statement shall also include a notice to the participant of any benefits which are forfeitable if the participant dies before a certain date.

[(d)] (e) 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.

(f) The Secretary of Labor shall develop model language which may be used by plan administrators in complying with the requirements of subsection (a). Such language shall be in a form calculated to be understood by the average plan participant.

REPORTS MADE PUBLIC INFORMATION

SEC. 106. (a) * * *

(b) Information described in [sections 105(a) and 105(c)] *subsections (a), (b), and (d) of section 105* with respect to a participant may be disclosed only to the extent that information respecting that participant's benefits under title II of the Social Security Act [(42 U.S.C. 401 et seq.)] may be disclosed under such Act.

REQUIREMENT OF JOINT AND SURVIVOR ANNUITY AND PRERETIREMENT SURVIVOR ANNUITY

SEC. 205. (a) * * *

* * * * *

(1)(1) if a pension plan with more than 100 participants provides a participant, spouse, or surviving spouse with the option to elect to have any nonforfeitable benefit paid in the form of a lump sum distribution, or provides for other optional forms of benefits, the plan administrator shall provide, within a reasonable period of time before the individual is required to make the election, a statement comparing the relative values of each form of benefit payment.

(2) The statement under paragraph (1) shall include such information as the Secretary of the Treasury determines appropriate to enable a participant, spouse, or surviving spouse to make an informed decision as to what form of benefit to elect. Such information shall be provided in a form calculated to be understood by the average plan participant and shall include—

(A) the interest rate and mortality assumptions used in determining the relative values, an explanation of how such assump-

tions compare to the assumptions used under subsection (g) or to any other assumptions specified by the Secretary, and one or more illustrations using dollar amounts to show the relative values of the benefits on a comparable basis, and

(B) any factors (including early retirement subsidies) which are taken into account in determining the value of one form of payment but not taken into account in determining the other form of payment.

[(1)] (m) In prescribing regulations under this section, the Secretary of the Treasury shall consult with the Secretary of Labor.

ESTABLISHMENT OF TRUST

SEC. 403. (a)(1) Except as provided in subsection (b), all assets of an employee benefit plan shall be held in trust by one or more trustees. Such trustee or trustees shall be either named in the trust instrument or in the plan instrument described in section 402(a) or appointed by a person who is a named fiduciary, and upon acceptance of being named or appointed, the trustee or trustees shall have exclusive authority and discretion to manage and control the assets of the plan, except to the extent that—

[(1)] (A) the plan expressly provides that the trustee or trustees are subject to the direction of a named fiduciary who is not a trustee, in which case the trustees shall be subject to proper directions of such fiduciary which are made in accordance with the terms of the plan and which are not contrary to this Act, or

[(2)] (B) authority to manage, acquire, or dispose of assets of the plan is delegated to one or more investment managers pursuant to section 402(c)(3).

(2)(A) *The assets of a single-employer plan which is an individual account plan which covers more than 100 participants shall be held in trust by a joint board of trustees, which shall consist of two or more trustees representing on an equal basis the interests of the employer or employers maintaining the plan and the interests of the participants and their beneficiaries.*

(B)(i) *Except as provided in clause (ii), in any case in which the plan is maintained pursuant to one or more collective bargaining agreements between one or more employee organizations and one or more employers, the trustees representing the interests of the participants and their beneficiaries shall be designated by such employee organizations.*

(ii) *Clause (i) shall not apply with respect to a plan described in such clause if the employee organization (or all employee organizations, if more than one) referred to in such clause file with the Secretary, in such form and manner as shall be prescribed in regulations of the Secretary, a written waiver of their rights under clause (i).*

(iii) *In any case in which clause (i) does not apply with respect to a single-employer plan because the plan is not described in clause (i) or because of a waiver filed pursuant to clause (ii), the trustee or trustees representing the interests of the participants and their beneficiaries shall be elected by the participants in accordance with regulations of the Secretary. An individual shall not be treated as ineligible for selection as trustee solely because such individual is*

an employee of the plan sponsor, except that the employee so selected may not be a highly compensated employee (as defined in section 414(q) of the Internal Revenue Code of 1986).

(iv) The Secretary shall provide by regulation for the appointment of a neutral, in accordance with the procedures under section 203(f) of the Labor Management Relations Act, 1947 (29 U.S.C. 173(f)), to cast votes as necessary to resolve tie votes by the trustee.

SEC. 404 (a)(1) * * *

* * * * *

(c)(1) 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 assets in his account (as determined under regulations of the Secretary)—

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

(B) no person who is otherwise a fiduciary (*other than a qualified investment adviser*) 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 subparagraph shall not apply with respect to any participant or beneficiary for any period during which the ability of the participant or beneficiary to direct the investment of assets in his or her individual account is suspended by a plan sponsor or fiduciary and shall not be construed to exempt any fiduciary from liability for any violation of subsection (e) or (f).*

* * * * *

(4) *The plan sponsor and plan administrator of a pension plan described in paragraph (1) shall, in addition to any other fiduciary duty or responsibility under this part, have a fiduciary duty to ensure that each participant and beneficiary under the plan, in connection with the investment of assets in his or her account in employer securities, is provided with all material investment information regarding investment of such assets in employer securities to the extent that such information is generally required to be provided by the plan sponsor to investors in connection with such an investment under applicable securities laws. The provision by the plan sponsor or plan administrator of any materially misleading investment information shall be treated as a violation of this paragraph. 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 (B) to the extent such limitation or restriction is disclosed to participants or beneficiaries through the summary plan description or materials describing specific investment alternative under the plan.*

(d)(1) * * *

(e)(1)(A) *An individual account plan to which this paragraph applies shall—*

(i) *offer at least 3 investment options (not inconsistent with regulations prescribed by the Secretary) in addition to any option to invest in employer securities or employer real property,*

(ii) *provide that a participant or beneficiary has the immediate right to reinvest any employee contributions and elective*

deferrals invested in employer securities or employer real property (and earnings thereon) in any other investment option provided by the plan,

(iii) provide that a participant or beneficiary has the right after no more than 3 years of service to reinvest any employer contributions (other than elective deferrals) of employer securities or employer real property (and earnings thereon) in any other investment option provided by the plan, and

(iv) meet the requirements of section 409(e)(2) of the Internal Revenue Code of 1986 with respect to employer securities held by the plan which are readily tradable on an established securities market.

(B)(i) Except as provided in clause (ii), this paragraph shall apply to any individual account plan which holds employer securities which are readily tradable on an established securities market.

(ii) This paragraph shall not apply to an employee stock ownership plan if the plan has no contributions (or earnings thereon) which are subject to section 401(k)(3) or (m) of such Code.

(C)(i) Except as provided in clause (ii), within 30 days after the date of any election by a participant or beneficiary under this paragraph to reinvest (or as otherwise provided in regulations), the plan administrator shall take such actions as are necessary to effectuate such reinvestment.

(ii) In any case in which the plan provides for elections to reinvest periodically during prescribed time periods, the 30-day period described in clause (i) shall commence at the end of each such prescribed period.

(D) Not later than 30 days before the first date on which a participant is eligible to exercise the right to reinvest employer securities and employer real property under this paragraph, the plan administrator shall provide to such participant and his or her beneficiaries a notice—

(i) setting forth such right under this paragraph, and

(ii) describing the importance of diversifying the investment of retirement account assets.

The Secretary shall prescribe a model notice for purposes of satisfying the requirements of this subparagraph which shall be in a form calculated to be understood by the average plan participant. The notice required by this subparagraph may be provided in written, electronic, or other appropriate form to the extent that such form is reasonably accessible to the participant or beneficiary.

(2)(A)(i) Except as provided in this paragraph, an individual account plan under which a participant or beneficiary is permitted to exercise control over assets in his or her account shall provide that if the plan (or any other plan maintained by the employer which covers the participant or beneficiary) requires employer contributions other than elective deferrals to be invested in employer securities or employer real property, the plan may not permit elective deferrals to be invested in employer securities or employer real property.

(ii) This paragraph shall not apply to an individual account plan maintained by an employer for any plan year if the employer maintains a qualified defined benefit plan (as defined in subparagraph (C)) for the plan year.

(B)(i) A plan which offers as an investment option the purchase of stock through an open brokerage account or similar investment vehicle shall not be treated as meeting the requirements of subparagraph (A) unless the plan provides that such option may not be used to purchase employer securities or employer real property which are to be held by the plan.

(ii) A plan shall not be treated as failing to meet the requirements of subparagraph (A) merely because elective deferrals are invested in employer securities or employer real property by reason of an investment in a pooled investment vehicle. For purposes of this clause, a pooled investment vehicle is an investment option of the plan which is comprised of plan assets and which is not designed to invest primarily in employer securities or employer real property.

(C)(i) For purposes of subparagraph (A)(ii), the term “qualified defined benefit plan” means, with respect to any individual account plan, a defined benefit plan—

(I) which covers at least 90 percent of the employees as are covered by the individual account plan, and

(II) with respect to which the accrued benefit of each participant, payable at normal retirement age under the plan, is not less than a benefit which is actuarially equivalent to a percentage of the participant’s final average pay equal to 1.5 percent multiplied by the number of years of service (not greater than 20) of the participant.

If a plan provides for benefits payable prior to normal retirement age, the requirements of subclause (II) shall not be treated as met unless such benefits are at least equal to the actuarial equivalent of the normal retirement benefit under the plan.

(ii) In applying subclause (II) of clause (i) to a defined benefit plan with respect to which a participant’s accrued benefit is equal to a fixed dollar amount multiplied by the number of years of service—

(I) the participant’s pay during the plan year preceding the plan year of the determination shall be used in lieu of final average pay, and

(II) the plan shall be treated as satisfying the requirement of such subclause if the average accrued benefit under the plan of all the participants who are also covered by the individual account plan meets such requirement.

(3) For purposes of this subsection—

(A) the term “elective deferral” has the meaning given such term by section 402(g)(3) of the Internal Revenue Code of 1986,

(B) the term “employee stock ownership plan” has the meaning given such term by section 4975(e)(7) of such Code,

(C) the terms “employer securities” and “employer real property” have the meanings given such terms by section 407(d), and

(D) the term “year of service” has the meaning given such term by section 203(b)(2).

(f)(1) In the case of an individual account plan which permits a plan participant or beneficiary to exercise control over the assets in his or her account, if a plan sponsor or other person who is a fiduciary designates and monitors a qualified investment adviser pursuant to the requirements of paragraph (3), such fiduciary—

(A) shall be deemed to have satisfied the requirements under this section for the prudent designation and periodic review of an investment adviser with whom the plan sponsor or other person who is a fiduciary enters into an arrangement for the provision of advice referred to in section 3(21)(A)(ii),

(B) shall not be liable under this section for any loss, or by reason of any breach, with respect to the provision of investment advice given by such adviser to any plan participant or beneficiary, and

(C) shall not be liable for any co-fiduciary liability under subsections (a)(2) and (b) of section 405 with respect to the provision of investment advice given by such adviser to any plan participant or beneficiary.

(2)(A) For purposes of this section, the term ‘qualified investment adviser’ means, with respect to a plan, a person—

(i) who is a fiduciary of the plan by reason of the provision of investment advice by such person to a plan participant or beneficiary;

(ii) who—

(I) is registered as an investment adviser under the Investment Advisers Act of 1940 (15 U.S.C. 80b–1 et seq.),

(II) is registered as an investment adviser under the laws of the State in which such adviser maintains the principal office and place of business of such adviser, but only if such State has an examination requirement to qualify for such registration,

(III) is a bank or similar financial institution referred to in section 408(b)(4),

(IV) is an insurance company qualified to do business under the laws of a State, or

(V) is any other comparably qualified entity which satisfies such criteria as the Secretary determines appropriate, consistent with the purposes of this subsection, and

(iii) who meets the requirements of subparagraph (B).

(B) The requirements of this subparagraph are met if every individual employed (or otherwise compensated) by a person described in subparagraph (A)(ii) who provides investment advice on behalf of such person to any plan participant or beneficiary is—

(i) an individual described in subclause (I) or (II) of subparagraph (A)(ii),

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

(iii) a registered representative as described in section 3(a)(18) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(18)) or section 202(a)(17) of the Investment Advisers Act of 1940 (15 U.S.C. 80b–2(a)(17)), or

(iv) any other comparably qualified individual who satisfies such criteria as the Secretary determines appropriate, consistent with the purposes of this subsection.

(3) The requirements of this paragraph are met if—

(A) the plan sponsor or other person who is a fiduciary in designating a qualified investment adviser receives at the time of the designation, and annually thereafter, a written

verification from the qualified investment adviser that the investment adviser—

(i) is and remains a qualified investment adviser,

(ii) acknowledges that the investment adviser is a fiduciary with respect to the plan and is solely responsible for its investment advice,

(iii) has reviewed the plan documents (including investment options) and has determined that its relationship with the plan and the investment advice provided to any plan participant or beneficiary, including any fees or other compensation it will receive, will not constitute a violation of section 406,

(iv) will, in providing investment advice to any participant or beneficiary, consider any employer securities or employer real property allocated to his or her account, and

(v) has the necessary insurance coverage (as determined by the Secretary) for any claim by any plan participant or beneficiary,

(B) the plan sponsor or other person who is a fiduciary in designating a qualified investment adviser reviews the documents described in paragraph (4) provided by such adviser and determines that there is no material reason not to enter into an arrangement for the provision of advice by such qualified investment adviser, and

(C) the plan sponsor or other person who is a fiduciary in designating a qualified investment adviser determines whether or not to continue the designation of the investment adviser as a qualified investment adviser within 30 days of having information brought to its attention that the investment adviser is no longer qualified or that a substantial number of plan participants or beneficiaries have raised concerns about the services being provided by the investment adviser.

(4) A qualified investment adviser shall provide the following documents to the plan sponsor or other person who is a fiduciary in designating the adviser:

(A) The contract with the plan sponsor or other person who is a fiduciary for the services to be provided by the investment adviser to the plan participants and beneficiaries.

(B) A disclosure as to any fees or other compensation that will be received by the investment adviser for the provision of such investment advice.

(C) The Uniform Application for Investment Adviser Registration as filed with the Securities and Exchange Commission or a substantially similar disclosure application as determined by and filed with the Secretary.

(5) Any qualified investment adviser that acknowledges it is a fiduciary pursuant to paragraph (3)(A)(ii) shall be deemed a fiduciary under this part with respect to the provision of investment advice to a plan participant or beneficiary.

(g)(1) In the case of any eligible individual account plan (as defined in section 407(d)(3))—

(A) no lockdown may take effect until at least 30 days after notice of such lockdown is provided by the plan administrator to such participant or beneficiary, and

(B) any lockdown may not continue for an unreasonable period.

(2) The notice required by this subsection may be provided in written, electronic, or other appropriate form to the extent that such form is reasonably accessible to the participant or beneficiary.

(3) For purposes of this subsection, the term lockdown means any suspension, restriction, or similar limitation which is imposed on the ability of a participant or beneficiary to exercise control over the assets in his or her account as otherwise generally provided under the terms of the plan (as determined under regulations of the Secretary). Any limitation or restriction that may govern the frequency of transfers between investment vehicles shall not be treated as a suspension referred to in the preceding sentence 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. 409. LIABILITY FOR BREACH OF FIDUCIARY DUTY.

(a) * * *

(b)(1)(A) If an insider with respect to the plan sponsor of an employer individual account plan that holds employer securities that are readily tradable on an established securities market—

(i) knowingly participates in a breach of fiduciary responsibility to which subsection (a) applies, or

(ii) knowingly undertakes to conceal such a breach, such insider shall be personally liable under this subsection for such breach in the same manner as the fiduciary who commits such breach.

(B) For purposes of subparagraph (A), the term insider means, with respect to any plan sponsor of a plan to which subparagraph (A) applies—

(i) any officer or director with respect to the plan sponsor, or

(ii) any independent qualified public accountant of the plan or of the plan sponsor.

(3) Any relief provided under this subsection or section 409A—

(A) to an individual account plan shall inure to the individual accounts of the affected participants or beneficiaries, and

(B) to a participant or beneficiary shall be payable to the individual account plan on behalf of such participant or beneficiary unless such plan has been terminated.

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

SEC. 409A. LIABILITY FOR BREACH OF FIDUCIARY DUTY IN 401(k) PLANS.

(a) Any person who is a fiduciary with respect to an individual account plan that includes a qualified cash or deferred arrangement under section 401(k) of the Internal Revenue Code of 1986 who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this title shall be personally liable to make good to each participant and beneficiary of the plan any losses to such participant or beneficiary resulting from each such breach, and to restore to such participant or beneficiary and profits of such fidu-

ciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 411 of this Act.

(b) The right of participants and beneficiaries under subsection (a) to sue for breach of fiduciary duty with respect to an individual account plan that includes qualified cash or deferred arrangement under section 401(k) of such Code shall be in addition to all existing rights that participants and beneficiaries have under section 409, section 502, and any other provision of this title, and shall not be construed to give rise to any inference that such rights do not already exist under section 409, section 502, or any other provision of this title.

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

BONDING

SEC. 412. (a) * * *

* * * * *

(f) Notwithstanding the preceding provisions of this section, each fiduciary of an individual account plan which covers more than 100 participants shall be insured, in accordance with regulations prescribed by the Secretary, to provide reasonable coverage for failures to meet the requirements of this part.

CIVIL ENFORCEMENT

SEC. 502. [1132] (a) A civil action may be brought—

(1) by a participant or beneficiary—

* * * * *

(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);

* * * * *

(8) by the Secretary, or by an employer or other person referred to in section 101(f)(1), (A) to enjoin any act or practice which violates subsection (f) of section 101, or (B) to obtain appropriate equitable relief (i) to redress such violation or (ii) to enforce such subsection; [or]

(9) in the event that the purchase of an insurance contract or insurance annuity in connection with termination of an individual's status as a participant covered under a pension plan with respect to all or any portion of the participant's pension benefit under such plan constitutes a violation of part 4 of this title or the terms of the plan, by the Secretary, by an individual who was a participant or beneficiary at the time of the alleged violation, or by a fiduciary, to obtain appropriate relief, including the posting of security if necessary, to assure receipt by the participant or beneficiary of the amounts provided or to be provided by such insurance contract or annuity, plus reasonable prejudgment interest on such amounts[.]; and

(10) by the Secretary, or other person referred to in section 510—

(A) to enjoin any act or practice which violates section 510 in connection with a pension plan, or

(B) to obtain appropriate equitable or legal relief to redress such violation or to enforce section 510 in connection with a pension plan.

* * * * *

(c)(1) * * *

* * * * *

(7) The Secretary may assess a civil penalty against any plan administrator of an individual account plan 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)(i).

(8) The Secretary may assess a civil penalty against any person of up to \$1,000 a day from the date of the person's failure or refusal to comply with the requirements of section 404(c)(4) until such failure or refusal is corrected.

[(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.

* * * * *

(n)(1) The pension rights under this title (including the right to maintain a civil action) may not be waived, deferred, or lost pursuant to any agreement not authorized under this title with specific reference to this subsection.

(2) Paragraph (1) shall not apply to an agreement providing for arbitration or participation in any other nonjudicial procedure to resolve a dispute relating to a pension plan under this title if the agreement is entered into knowingly and voluntarily by the parties involved after the dispute has arisen or is pursuant to the terms of a collective bargaining agreement.

SEC. 510. [1140] It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, this title, section 3001, or the Welfare and Pension Plans Disclosure Act [(29 U.S.C. 301 et seq.)] or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, this title, or the Welfare and Pension Plans Disclosure Act. It shall be unlawful for any person to discharge, fine, suspend, expel, or discriminate against any [person because he] other person because such other person has opposed any practice in connection with a pension plan that is made unlawful by this title or has given information or has testified or is about to testify in any inquiry or proceeding relating to this Act or the Welfare and Pension Plans Disclosure Act. The provisions of section 502 shall be applicable in the enforcement of this section.

* * * * *

Subtitle D—Office of Pension Participant Advocacy

SEC. 3051. OFFICE OF PENSION PARTICIPANT ADVOCACY.

(a) ESTABLISHMENT.—

(1) IN GENERAL.—There is established in the Department of Labor an office to be known as the “Office of Pension Participant Advocacy”.

(2) PENSION PARTICIPANT ADVOCATE.—The Office of Pension Participant advocacy shall be under the supervision and direction of an official to be known as the “Pension Participant Advocate” who shall—

(A) have demonstrated experience in the area of pension participant assistance, and

(B) be selected by the Secretary after consultation with pension participant advocacy organizations.

The Pension Participant Advocate shall report directly to the Secretary and shall be entitled to compensation at the same rate as the highest rate of basic pay established for the Senior Executive Service under section 5382 of title 5, United States Code.

(b) FUNCTIONS OF OFFICE.—It shall be the function of the Office of Pension Participant Advocacy to—

(1) evaluate the efforts of the Federal Government, business, and financial, professional, retiree, labor, women’s, and other appropriate organizations in assisting and protecting pension plan participants, including—

(A) serving as a focal point for, and actively seeking out, the receipt of information with respect to the policies and activities of the Federal Government, business, and such organizations which affect such participants,

(B) identifying significant problems for pension plan participants and the capabilities of the Federal Government, business, and such organizations to address such problems, and

(C) developing proposals for changes in such policies and activities to correct such problems, and communicating such changes to the appropriate officials,

(2) promote the expansion of pension plan coverage and the receipt of promised benefits by increasing the awareness of the general public of the value of pension plans and by protecting the rights of pension plan participants, including—

(A) enlisting the cooperation of the public and private sectors in disseminating information, and

(B) forming private-public partnerships and other efforts to assist pension plan participants in receiving their benefits,

(3) advocate for the full attainment of the rights of pension plan participants, including by making pension plan sponsors and fiduciaries aware of their responsibilities,

(4) give priority to the special needs of low- and moderate-income participants,

(5) develop needed information with respect to pension plans, including information on the types of existing pension plans,

levels of employer and employee contributions, vesting status, accumulated benefits, benefits received, and forms of benefits, and

(6) if the Advocate determines appropriate, pursue claims on behalf of participants and beneficiaries (including, upon request of any participant or beneficiary, bringing any civil action on behalf of the participant or beneficiary which the participant or beneficiary is entitled to bring under section 502(a)(1)(B) and provide appropriate assistance in the resolution of disputes between participants and beneficiaries and pension plans, including assistance in obtaining settlement agreements.

(c) **REPORTS.**—

(1) **ANNUAL REPORT.**—Not later than December 31 of each calendar year, the Pension Participant Advocate shall 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 on its activities during the fiscal year ending in the calendar year. Such report shall—

(A) identify significant problems the Advocate has identified,

(B) include specific legislative and regulatory changes to address the problems, and

(C) identify any actions taken to correct problems identified in any previous report.

The Advocate shall submit a copy of such report to the Secretary and any other appropriate official at the same time it is submitted to the committees of Congress.

(2) **SPECIFIC REPORTS.**—The Pension Participant Advocate shall report to the Secretary or any other appropriate official any time the Advocate identifies a problem which may be corrected by the Secretary or such official.

(3) **REPORTS TO BE SUBMITTED DIRECTLY.**—The report required under paragraph (1) shall be provided directly to the committees of Congress without any prior review or comment by the Secretary or any other Federal officer or employee.

(d) **SPECIFIC POWERS.**—

(1) **RECEIPT OF INFORMATION.**—Subject to such confidentiality requirements as may be appropriate, the Secretary and other Federal officials shall, upon request, provide such information (including plan documents) as may be necessary to enable the Pension Participant Advocate to carry out the Advocate's responsibilities under this section.

(2) **APPEARANCES.**—The Pension Participant Advocate may—

(A) represent the views and interests of pension plan participants before any Federal agency, including, upon request of a participant, in any proceeding involving the participant, and

(B) upon request of a participant or beneficiary, represent the participant or beneficiary in any civil action which the participant or beneficiary is entitled to bring under section 502(a)(1)(B).

(3) **CONTRACTING AUTHORITY.**—In carrying out responsibilities under subsection (b)(5), the Pension Participant Advocate may, in addition to any other authority provided by law—

- (A) contract with any person to acquire statistical information with respect to pension plan participants, and
 (B) conduct direct surveys of pension plan participants.

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