

CRS Report for Congress

Received through the CRS Web

Employer Stock in Retirement Plans: Bills in the 107th Congress

Updated March 28, 2002

Patrick J. Purcell
Specialist in Social Legislation
Domestic Social Policy Division

Employer Stock in Retirement Plans: Bills in the 107th Congress

Summary

In the wake of the bankruptcy of Enron Corporation, numerous bills have been introduced in the 107th Congress with the intent of protecting workers from the financial losses that employees risk when they invest a large proportion of their retirement savings in securities issued by their employers. Legislative proposals include some that would directly regulate the proportion of employees' retirement savings that can be comprised of employer securities, and others that would encourage education of employees on financial matters without imposing a cap on employee investment in employer securities. Some of the bills would expand employee rights to direct the investment of the assets they hold in their retirement plans and would impose new civil and/or criminal penalties on plan fiduciaries who violate the right of participants to control these assets.

By the end of March, three of these bills had been reported (with amendments) by Congressional committees. **H.R. 3669**, the "Employee Retirement Savings Bill of Rights," was ordered reported, as amended, by the House Committee on Ways and Means on March 14, 2002. **H.R. 3762**, the "Pension Security Act," was ordered reported (as amended) by the House Committee on Education and the Workforce on March 20, 2002. **S. 1992**, the "Protecting America's Pensions Act," was ordered reported (as amended) by the Senate Committee on Health, Education, Labor, and Pensions on March 21, 2002. The Senate Finance Committee expects to mark up a bill in April.

Contents

Periodic benefit statements; Notice to participants	1
Divestiture of employer securities in individual account plans	3
Suspensions of account activity ("lockdowns" or "blackout" periods)	5
Limits on employer securities or real property in I.R.C. § 401(k) plans	7
Provision of material investment information	8
Vesting periods	9
Bonding or insurance for fiduciaries	9
Plan assets held in trust	9
Liability for breach of fiduciary duty	10
Civil enforcement	10
Criminal enforcement	10
Administrative enforcement	10
Insurance for individual account plans	11
Misrepresentation of value of employer securities	11
Bankruptcy claims	11
Employer deduction for contributions of employer stock to I.R.C. § 401(k) plans	11
Investment advice and retirement planning	11
Studies and reports for Congress	12
Limitation on auditor services	12

Employer Stock in Retirement Plans: Bills in the 107th Congress

Employers sponsor retirement plans voluntarily, but any firm that does so must abide by the terms of the *Employee Retirement Income Security Act of 1974* (P.L. 93-406), popularly known as ERISA. In order for a plan to be tax-qualified – that is for contributions to the plan and investment earnings on those contributions to be eligible for deferral of federal income taxes – the plan also must comply with the relevant sections of the *Internal Revenue Code of 1986*. Consequently, retirement plans are jointly regulated by the Department of the Treasury, which oversees vesting, funding, and participation requirements, and the Department of Labor, which has jurisdiction over reporting and disclosure, fiduciary matters, and employee benefit rights. Some of the bills described in this report would amend only ERISA, some would amend only the Internal Revenue Code (I.R.C.), and some would amend both.

Most of the proposed legislation would affect only employer-sponsored defined contribution (DC) plans, such as those authorized under I.R.C. § 401(k). In a few instances, proposed amendments would affect traditional defined benefit (DB) pension plans, and those proposals are noted in the text of the report. *Individual Retirement Accounts* (IRAs) would not be affected by these proposals, except those that would require participants in a special IRA called a *Simplified Employee Pension* (a SEP-IRA) to be notified if their accounts include a high percentage of employer stock.

Protecting employees from the risk of investing a high percentage of their financial assets in employer securities can directly conflict with efforts to promote employee ownership of the firms where they work, which is the objective of *Employee Stock Ownership Plans* (ESOPs). Under current law, an ESOP is *required* to hold at least 50% of its assets in employer securities. The conflict is especially acute when an ESOP and a 401(k) plan are combined in a single plan, sometimes called a “KSOP.” These are becoming increasingly popular, in part because dividend payments to an ESOP are deductible for federal income tax purposes while other dividend payments are not tax-deductible. Because of their unique characteristics, many of the bills provide for separate treatment of ESOPs.

Periodic benefit statements; Notice to participants. ERISA requires plan sponsors to provide, at least annually, at the request of any participant, a statement of benefits accrued under the plan (29 U.S.C. § 1025).

H.R. 3669 (Portman/Cardin) would require administrators of participant-directed individual account plans, at the time of enrollment and each quarter thereafter, to provide each participant with an investment education notice that includes generally accepted investment principles, including risk management and diversification, and a statement of the risk of concentrating holdings in a single investment security. The notice requirement would apply to participant-directed plans

under I.R.C. §401(a) (except government plans), and to plans under I.R.C. §403, and §457. The Secretary of Treasury, in consultation with the Secretary of Labor would issue a model notice. The notice requirement would not apply to plans with only one participant. The bill would impose an excise tax of \$100 per participant on plans that fail to provide required notices. The total tax would be limited to \$500,000 per year.

The Secretary of the Treasury would have authority to waive the tax when in his or her judgment imposing the tax would be excessive or inequitable.

H.R. 3762 (Boehner) would require administrators of participant-directed individual account plans to provide each participant with a quarterly statement that includes the individual's account balance (including amounts held as employer securities), an explanation of any limits or restrictions on the individual's right to direct the investment of plan assets, and a statement that advises the participant of the importance of diversifying investments and of the risk of concentrating holdings in a single investment security. The notice requirement would apply to individual account plans except for ESOPs that do not hold either employee elective deferrals or employer matching contributions. The Secretary of Labor would be required to issue guidance and develop a model benefit statement. The administrator of a defined benefit plan would be required to provide each participant with a statement of the total benefit accrued and the total vested benefit in the plan at least once every 3 years. The bill provides Secretary of Labor with authority to levy a civil penalty of \$1,000 per day on employers that fail to comply.

S. 1992 (Kennedy) would require administrators of participant-directed individual account plans to provide quarterly statements to participants. It would require administrators of defined benefit plans to provide statements to participants at least every 3 years. Statements for all plans must include total accrued benefits and total vested benefits (or the earliest date at which vesting will occur). Statements for individual account plans must include the value of employer securities, an explanation of any restrictions the participant's right to diversify out of employer securities, a statement of the importance of diversifying assets, and notification of the risk inherent in concentrating investment in a single security. It must include a special notice directed at participants with more than 20% of plan assets invested in employer securities. The Secretary of Labor is to develop a model statement. In the case of a defined benefit plan, the administrator would be required to notify participants who are eligible to receive a distribution of their right to receive information describing the manner in which the amount of the distribution was calculated. Plans with more than 100 participants that offer lump-sum distributions or other optional forms of benefit would be required to provide, prior to such distribution, a statement describing the relative values of the alternative forms of distribution, including the interest rate and mortality assumptions used to derive the estimates, as well as other information prescribed by the Secretary of Labor.

S. 1971 (Grassley) would require plan administrators to provide quarterly statements to participants and annual statements to beneficiaries, including the total benefit accrued under the plan, the total benefit in which the participant is fully vested (or the earliest date on which vesting will occur), the value of any employer securities held in the plan, an explanation of any restrictions on the participant's right to diversify out of employer securities, a statement on the importance of diversifying assets, and notification of the risk inherent in concentrating investment in a single

security. The requirement would apply to all participant-directed plans that are tax-qualified plans under I.R.C. §401(a), annuity plans under I.R.C. §403, and individual retirement accounts under I.R.C. §408. Would impose a tax of \$100 per participant per day on employer that fails to comply.

H.R. 3657 (Miller, CA), **S. 1919** (Wellstone), and **S. 2032** (Durbin) would require defined benefit plans to provide a statement of accrued benefits at least once every 3 years to participants age 35 and older. The bills would require defined contribution plans to provide statements annually to each plan participant. They also would require such statements to be provided at any time at the request of a participant.

H.R. 3642 (Bonior) would require the sponsor of a 401(k) plan to provide semiannually a written notice to each participant or beneficiary disclosing the financial health of the plan sponsor and advising them of the importance of diversifying their investment assets.

S. 1969 (Hutchinson) would require the sponsor of an individual account plan other than an ESOP to provide quarterly statements to each participant or beneficiary that include the individual's account balance (including amounts held as employer securities), an explanation of any limits on their right to direct their investments, and advising them of the importance of diversifying their investments.

S. 1921 (Hutchison) would require defined contribution plans other than ESOPs to provide a benefit statement to each participant, at least quarterly, that includes the total account balance, the percentage of assets in each investment option, disclosure of any fees incurred, and such other information as may be prescribed by the Secretary of Labor. If employer securities comprise 25% or more of the account balance, the statement must include a separate notice of that fact, inform the participant of his or her right to diversify, and recommend that the participant seek professional investment advice. The Secretary of Labor could exempt plans with under 100 participants, except with respect to the required notice to participants with employer stock in excess of 25% of their total account balances.

Divestiture of employer securities in individual account plans. ERISA mandates that if an employer requires salary deferrals equal to more than 1% of employee pay to be used to purchase employer securities in a 401(k) plan, then no more than 10% the assets in the plan that are attributable to employee salary deferrals can be invested in employer stock (29 U.S.C. § 1107(b)(2)). Employers generally are not prohibited from requiring participants to hold employer securities that are contributed to the plan by the employer. The Internal Revenue Code allows employees participating in Employee Stock Ownership Plans (ESOPs) to begin diversifying their holdings of employer stock when they have attained age 55 and completed at least 10 years of participation in the plan (26 U.S.C. § 401(a)(28)).

The diversification requirements of **H.R. 3669** would apply to individual account plans that hold employer securities that are readily tradable on an established market, except for employee stock ownership plans that hold no employer stock that is attributable to employee elective deferrals, employer matching contributions, or employer contributions made to satisfy the I.R.C. §401(m) safe harbor option.

Participants in plans that require elective deferrals equal to more than 1% of salary to be used to purchase employer stock (plans covered under ERISA §407(b)(2)) could, as of 01/01/03, sell all employer stock attributable to *employee salary deferrals*. Phased in over a 5-year period beginning in 2003: (1) participants in plans that do not require employee salary deferrals to be used to purchase employer stock could sell all employer stock attributable to *employee salary deferrals* as soon as it is received; (2) participants with 3 or more years of service could sell all employer stock received as *matching contributions* or as employer contributions under I.R.C. §401(m)(4)(A) or §401(k)(12)(C); and (3) participants with 5 or more years of service could sell employer stock received *other than as matching contributions*. Plans must offer at least 3 investment options other than employer stock. Elections to diversify would have to be available to participants at least quarterly.

The diversification requirements of **H.R. 3762** would apply to individual account plans that hold employer securities that are readily tradable on an established market, except for employee stock ownership plans that hold no employer stock attributable to employee elective deferrals or employer matching contributions. Participants in individual account plans could sell employer stock acquired through elective deferrals after 3 years of participation in the plan, (or if the plan so provides, after 3 years of service). Participants in individual account plans could sell employer stock allocated to their accounts by the employer 3 years after the quarter during which the stock is allocated to them. Plans must offer a broad range of investment alternatives (to be defined by the Secretary of Labor). Opportunity to direct investments must be provided at least quarterly. The bill would apply to assets acquired on or after the effective date. Plans would be required to provide participants with the opportunity to divest assets acquired prior to the effective date in 20 percent increments over a 5-year schedule beginning in 2003, with 100% of such assets eligible for divestiture beginning in 2007.

S. 1992 would require participant-directed individual account plans that hold employer securities that are readily tradable on an established market to offer at least 3 other investment options in addition to employer securities. The bill provides that participants may diversify all elective deferrals out of employer stock immediately, and that participants may diversify all employer contributions of employer stock after 3 years of service. It would require plans to pass through voting rights on employer stock to plan participants. The diversification requirements would not apply to ESOPs that hold neither employee elective deferrals made under I.R.C. §401(k) nor employer matching contributions made under I.R.C. §401(m). It would require plan administrators to notify participants of their diversification rights and inform them of the importance of diversifying assets. The Secretary of Labor would issue model notices. The Labor Department would be required to study options for applying the diversification requirements to employer stock that is not publicly traded.

Effective January 1, 2003, **S. 1971** would allow participants to diversify out of employer securities purchased through employee elective deferrals, and would allow participants with 3 or more years of service to diversify out of all other employer securities. It would prohibit any plan from imposing restrictions and conditions (such as holding periods) on investments in employer securities that it does not impose on other investment options in the plan. It would require plans to offer at least 3 investment options. The diversification requirements of the bill would apply to all

defined contribution plans that hold employer securities that are readily tradable on an established market except for ESOPs that hold no employer securities that were either purchased as employee elective deferrals or contributed as matching contributions for employee elective deferrals. Plans would have to meet the divestiture requirements in order to qualify under I.R.C. §401(a).

H.R. 3657 would permit vested 401(k) participants to sell employer stock 30 days after it is credited to their accounts. This provision would apply only to employer securities that are readily tradable in established markets. **H.R. 3657** would allow participants in ESOPs to begin diversifying after 10 years of participation in the plan. This would apply only to employer securities that are readily tradable in established markets.

S. 1838 (Boxer) and **H.R. 3640** (Pascrell) would permit vested 401(k) participants to sell employer stock 90 days after it is credited to their accounts. **S. 1838**, **H.R. 3640** and **H.R. 3692** would allow participants in ESOPs to begin diversifying their holdings when they have attained age 35 and completed at least 5 years of participation in the plan.

H.R. 3463 (Deutsch) would allow participants in 401(k) plans to sell employer stock 3 years after the stock is contributed to their accounts.

S. 1969 would permit participants in individual account plans other than ESOPs to sell employer stock after they have participated in the plan for 3 years.

S. 1919 would require plans to permit participants with at least one year of service to sell employer stock no more than 30 days after it is credited to their accounts. This would apply only to employer securities that are readily tradable in established markets. The Secretary of Labor would be required to recommend legislative changes to apply these diversification rules to employer stock not readily tradable in established markets. **S. 1919** would require plans to permit participants with at least 10 years of service to sell employer stock in an ESOP no more than 30 days after it is credited to their accounts. This would apply only to employer securities that are readily tradable in established markets.

S. 1921 would require defined contribution plans (other than ESOPs) to include at least 4 investment options, 3 of which may not be employer securities or real property. It would prohibit employers from requiring any employee contribution or salary deferral to be invested in employer securities, and it would permit vested plan participants to sell employer stock 90 days after it is credited to their accounts.

Suspensions of account activity (“lockdowns” or “blackout” periods). Companies sometimes suspend transactions in their 401(k) accounts, most commonly when they are changing plan administrators, installing new software, or performing other routine administrative tasks that require a temporary suspension of account activity. Currently, there is no statutory or regulatory limit on the length of time during which participants can be blocked from re-allocating assets or conducting other transactions in a 401(k) plan.

H.R. 3669 would require the administrator of an individual account plan to provide written notice to participants at least 30 days before any period during which their ability to direct investments in the plan or to obtain loans or distributions from the plan would be substantially reduced for at least 3 consecutive business days. Restrictions on any normally available rights to diversify investments out of employer stock would constitute a substantial reduction in the right to direct investments. The Secretary of Treasury, in consultation with the Secretary of Labor, would issue regulations providing guidance on the issuance of the required notice. The notice requirement would not apply to plans with one participant. The bill would impose an excise tax of \$100 per participant on plans that fails to provide required notice. The Secretary of the Treasury would have authority to waive the tax when in his or her judgment imposing the tax would be excessive or inequitable.

H.R. 3762 would require the administrator of an individual account plan to provide written notice to participants at least 30 days before any action that would suspend, limit, or restrict their ability to direct their investments under the plan for last for at least 3 consecutive calendar days. The notice must state the reason for the restriction of account activity and its expected length, identify the affected investments, and advise the participants to evaluate their investment decisions accordingly. The Secretary of Labor would be required to issue model notices and would be authorized to issue regulations identifying exceptions to the notice requirement. Participants must be notified of changes in the expected length of the suspension period as soon as possible. It provides Secretary of Labor with authority to levy a civil penalty of \$100 per participant per day on employers that fail to comply. Specifies that ERISA 404(c) relief from fiduciary liability would not apply during a lockdown that is unreasonable in length or is not preceded by required notice to plan participants. It would prohibit company owners, officers and directors from trading any employer securities or derivatives during a period when retirement plan participants are restricted in their ability to direct investments under the plan.

S. 1992 would require plan administrators to give participants written notice 30 days before the start of any period during which the participants' ability to direct the investment of assets under the plan would be suspended, restricted, or otherwise limited. It would prohibit such periods from continuing for an "unreasonable" length of time, as determined by regulations to be issued by the Secretary of Labor. It would amend ERISA section 404(c)(1) to suspend fiduciaries' relief from fiduciary liability during a transaction suspension period. The Secretary of Labor would issue guidance on how plan sponsors could preserve relief from fiduciary liability during transaction suspension periods.

S. 1971 would require plans to give participants 30-day advance written notice of a transaction suspension period lasting for 2 or more consecutive business days during which participants' ability to direct the investment of assets held in the plan is substantially reduced. Certain exceptions would be specified in regulations issued by the Secretary of the Treasury. The notice requirement would apply to all participant-directed plans that are tax-qualified plans under I.R.C. §401(a), annuity plans under I.R.C. §403, and individual retirement accounts under I.R.C. §408. The bill would impose an excise tax on employer of \$100 per participant per day for failure to comply. It would amend ERISA section 404(c)(1) to suspend fiduciaries' relief from fiduciary liability during a transaction suspension period. The Secretary

of the Treasury would issue guidance on how plan sponsors could preserve relief from fiduciary liability during transaction suspension periods. The bill would impose an excise tax of 20% on any gain realized by company officers or other insiders on transactions involving employer securities that occur when the company's retirement plan is in a transaction suspension period.

H.R. 3677 would prohibit lockdowns that affect vested benefits. This would in effect prohibit lockdowns in any plan in which any participant has a vested benefit.

S. 1969 would require plans to give participants written notice 30 days before a lockdown begins and would prohibit officers and owners from trading employer securities during a lockdown. They also would suspend fiduciaries' relief from fiduciary liability during a lockdown.

S. 1919 and **S. 1921** would require plans to give participants 30-day advance written notice of a lockdown. Both bills would hold a fiduciary liable for losses during a lockdown from participants' investment in employer securities if the fiduciary violates his or her duty with respect to the imposition of a lockdown or the ability of participants to control their assets. The bills also would prohibit officers and owners from trading employer securities during a lockdown.

S. 2032 would require plans to give participants 60-day advance written notice of a transaction suspension period and prohibit such periods from exceeding 10 consecutive business days. The bill would make employers liable for excessive losses in the value of employer securities that occur during a transaction suspension period.

H.R. 3657 and **S. 1919** would require plans to give participants written notice 30 days before a lockdown begins and limit lockdowns to 10 consecutive business days.

H.R. 3509 would require 401(k) plan sponsors to secure permission from the Department of Labor before suspending transactions in the plan and to provide 90 days notice of any suspension.

H.R. 3622 (Rangel) would impose tax penalties on the sale of company stock by executives or board members when 401(k) transactions are suspended.

Limits on employer securities or real property in I.R.C. § 401(k) plans. ERISA limits the amount of employer stock that can be held in a *defined benefit* plan to 10% of plan assets (29 U.S.C. §1107(a)). *Defined contribution* plans are generally exempted from limits on investing in employer stock (29 U.S.C. § 1104(a)(2) and § 1107(b)), except for certain plans that require elective deferrals equal to more than 1% of employee salary to be used for purchasing employer stock (29 U.S.C. § 1107(b)(2)).¹

¹ A defined benefit plan pays retired workers a pension benefit based on a pre-determined formula, usually related to the employee's length of service and average salary in the years immediately preceding retirement. A defined contribution plan is much like a savings account
(continued...)

Under **S. 1992**, a participant-directed individual account plan that holds employer securities that are readily tradable on an established market could either (1) permit employees' elective deferrals to be invested in employer securities or (2) make matching or other employer contributions in the form of employer securities, but not both. The restriction includes (but is not limited to) plans that allow for employee investment in employer securities via a brokerage window. These restrictions would apply to all defined contribution plans except: (1) Employee Stock Ownership Plans (ESOPs) that do not hold either any employee elective deferrals or employer matching contributions and (2) defined contribution (DC) plans of an employer that also sponsors a defined benefit (DB) plan covering at least 90% of the DC plan participants and providing for a benefit that is at least the actuarial equivalent of the benefit that would result from an accrual rate of 1.5% of final average pay times years of service. This accrual rate need not apply beyond 20 years of service.

H.R. 3463 would limit employer stock to 10% of the total assets in a 401(k) plan that are attributable to *employee* contributions. Employer contributions would not be subject to the limit.

S. 1838, H.R. 3640 and **H.R. 3692** (Jackson-Lee) would limit employer stock to 20% of the assets held by any individual in a 401(k) plan.

H.R. 3677 would require that for a 401(k) plan participant with fewer than 3 years in the plan, no more than 20% of assets attributable to employee elective deferrals could be invested in employer securities. For a participant with more than 3 years in the plan, no more than 20% of the entire vested account balance could be invested in employer securities.

Under **S. 1919**, accounts in defined contribution plans other than ESOPs of closely held companies and ESOPs that hold more than 50% of voting rights or 50% of market capitalization would be prohibited from holding employer stock in excess of 20% of the sum of assets in the account plus the present value of benefits accrued by the participant under a defined benefit plan with the same employer. Accounts with more than 20% employer stock as of December 31, 2003 would have until December 31, 2007 to reach this percentage. The limit would not apply if employer stock in all the employer's defined contribution is less than 15% of the combined assets held in all of the employer's DC and DB plans.

Provision of material investment information. ERISA requires the sponsors of individual account plans to provide sufficient information about investment options under the plan for participants to be able to make informed decisions, including a description of each investment option, its investment goals, and its risk and return characteristics (29 U.S.C. § 1104(c)).

H.R. 3657, S. 1919, S. 1992, and S. 2032 would require the plan sponsor to provide plan participants with the same investment information it would be required to disclose to investors under applicable securities laws. **S. 1992** also would

¹(...continued)

fro retirement maintained by the employer on behalf of each participating employee.

mandate, in the case of any company that sponsors an individual account plan and allows employee elective deferrals to be used to purchase employer securities, that any disclosure required by the S.E.C. regarding insider trades must be provided by the company to its employees in electronic form within 2 days of disclosure to the S.E.C. The information must be provided in written form to employees who do not have access to the electronic means of disclosure.

Vesting periods. Plan participants are always fully vested in their own contributions and earnings attributable to those contributions. Section 633 of P.L. 107-16 amended the Internal Revenue Code at 26 U.S.C. § 411(a) such that employees are fully vested in employer matching contributions after no more than 3 years under “cliff” vesting and after no more than 6 years under “graded” vesting.²

H.R. 3657 would fully vest participants in defined contribution plans in the accrued benefit derived from employer contributions after they have completed one year of service.

Under **H.R. 3677**, 401(k) participants would not be fully vested in their contributions until they have completed 3 years of participation in the plan.

Bonding or insurance for fiduciaries. ERISA requires every fiduciary of an employee benefit plan and every person who handles funds or other property of such a plan to be bonded (29 U.S.C. § 1112).

H.R. 3657 and **S. 1919** would require each fiduciary to be bonded or insured in an amount sufficient to ensure coverage of financial losses due to any failure by the fiduciary to perform his or her duties responsibly.

S. 1992 and **S. 2032** would require each fiduciary of a defined contribution plan with 100 or more participants to be insured for failures to meet ERISA requirements.

Plan assets held in trust. ERISA requires all assets of a retirement plan to be held in trust for the exclusive purpose of providing benefits to participants and defraying reasonable administrative expenses (29 U.S.C. § 1103).

H.R. 3657, **S. 1919**, and **S. 2032** would provide, in the case of a single-employer, individual account plan under which some or all of the assets are derived from employee contributions, for a joint board of trustees, consisting of two or more trustees representing on an equal basis the interests of the employer maintaining the plan and the interests of the participants and their beneficiaries.

S. 1992 would require assets of DC plans with 100 or more participants to be held in a joint trust with equal representation of the interests of plan sponsors and participants.

² “Vesting” is the process by which a participant becomes legally entitled to a retirement benefit. Under “cliff” vesting, a participant becomes 100% vested at a particular point in time. Under “graded” vesting, the participant becomes vested in a percentage of his or her accrued benefit after each year of service, and must be fully vested after no more than 6 years.

Liability for breach of fiduciary duty. ERISA states that a fiduciary who breaches his or her duties or obligations shall be personally liable to make good any losses resulting from each such breach and shall be subject to such other equitable or remedial relief as a court may deem appropriate, including removal of such fiduciary (29 U.S.C. § 1109).

H.R. 3657, S. 1919, and S. 2032 would amend ERISA to extend liability for breach of fiduciary duty to any person who, with notice of the facts constituting the breach, participates in or undertakes to conceal such breach.

S. 1992 would amend ERISA to require persons who breach their fiduciary duty to participants of a 401(k) plan to make good the losses suffered by plan participants and beneficiaries resulting from their breach of fiduciary duty. Participants and beneficiaries would have the right to sue fiduciaries for losses resulting from breach of duty. Any insider who participates in a breach of fiduciary duty or who knowingly conceals such a breach would be held personally liable for losses resulting from the breach of duty. Provides that ERISA 404(c) is not a valid defense for such breach.

Civil enforcement. ERISA provides participants, beneficiaries, and the Secretary of Labor with a right of civil action under ERISA (29 U.S.C. § 1132).

H.R. 3657, S. 1919, S. 1992, and S. 2032 would provide generally that a person's right to civil action under ERISA may not be waived, deferred, or lost pursuant to any agreement between the participant or beneficiary and the plan sponsor. **S. 1992** would amend ERISA §502 to extend to persons who do not participate in the plan the opportunity to bring a civil action seeking equitable or remedial relief in the event of that employer or other person violates the individual's rights under ERISA §510.

Criminal enforcement. ERISA provides for criminal penalties of a fine and/or imprisonment for certain violations or employee rights (29 U.S.C. § 1131).

H.R. 3677 would extend criminal penalties to include violations of employer requirements with respect to the caps on employer stock, diversification of investments and the prohibition on lockdowns mandated by the bill.

Administrative enforcement. ERISA is jointly administered by the Department of the Treasury (vesting, funding, and participation) and the Department of Labor (reporting and disclosure, fiduciary matters, employee benefit rights). Within the Department of Labor, ERISA is administered by the Pension and Welfare Benefits Administration (PWBA) under the Assistant Secretary for Pension and Welfare Benefits.

H.R. 3657, S. 1919, S. 1992, and S. 2032 would establish an Office of Pension Participant Advocacy within the Department of Labor.

Insurance for individual account plans. There is no provision in current law.

H.R. 3657, S. 1919, S. 1992, and S. 2032 would direct the Pension Benefit Guaranty Corporation to study the feasibility of a system of insurance for defined contribution retirement plans.

Misrepresentation of value of employer securities. ERISA requires plan fiduciaries to act solely in the interest of plan participants and to discharge their duties with care, skill, prudence, and diligence (29 U.S.C. § 404).

H.R. 3623 (Bentsen) would treat as a breach of fiduciary duty any knowing misrepresentation of the present or expected valuation of employer securities.

Bankruptcy claims. Participants in defined contribution plans whose accounts hold employer securities have generally the same claims on employer assets in the case of the employer's bankruptcy as other shareholders have.

H.R. 3623 would amend 11 U.S.C. § 507(a) to include claims by participants in defined contribution plans that arise from a fiduciary's breach of duty.

Employer deduction for contributions of employer stock to I.R.C. § 401(k) plans. Under current law contributions of employer stock are deductible by the employer for tax purposes at the market price of the stock.

S. 1828, H.R. 3640 and H.R. 3692 would reduce by 50% the tax deduction available to employers that contribute employer stock rather than cash to a 401(k) plan.

Investment advice and retirement planning. ERISA provides that a person is a fiduciary with respect to a plan to the extent that he or she "renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so (29 U.S.C. § 1002(21)(A)(ii)).

H.R. 3669 would amend I.R.C. § 132(m) to exclude from income the value of qualifying employer-provided retirement planning services. Would amend the I.R.C. to permit employers to offer employees a choice of taxable cash compensation or tax-free qualified retirement planning services. Qualified advisors would have to be certified or regulated and may include advisors from a financial institution's trust or custody department. Exclusion would apply to highly-compensated employees only if such services are also available to non-highly-compensated employees.

H.R. 3762 incorporates **H.R. 2269**, the "Retirement Security Advice Act of 2001," as amended by the Committee. (H.R. 2269 was passed by the House of Representatives on November 15, 2001.) As amended, the bill requires fiduciary advisors to disclose to participants the availability of advice from independent third parties and requires the Secretary of Labor to develop model disclosure forms that will allow fiduciary advisors to meet the disclosure requirements. The amended bill also requires investment advisors affiliated with banks to work in a trust department that is regularly examined by state or federal regulators.

S. 1969 would allow qualified financial advisors to provide investment advice to plan participants provided that they agree to act solely in the interest of the persons they advise. The bills would grant an exemption from the “prohibited transaction” provisions of ERISA for plan sponsors that provide investment advice to plan participants.

S. 1921 incorporates the language of **H.R. 2269** (Boehner), the “Retirement Security Advice Act.”

S. 1992 incorporates **S. 1677** (Bingaman), the “Independent Investment Advice Act.”

Studies and reports for Congress. **H.R. 3509** (Bentsen) would direct the Departments of Labor and Treasury, in consultation with the Securities and Exchange Commission, to study the feasibility of statutory limits on employer securities in defined contribution plans. **S. 2032** would require the Secretary of Labor, in consultation with the Secretary of the Treasury and the Securities and Exchange Commission to undertake a study of the feasibility of statutory limits on employer securities in defined contribution plans.

H.R. 3669 and **H.R. 3762** would require the Secretary of Labor, in consultation with the Treasury Department, to study ways in which retirement plans can be made more widely available to employees of small employers. Would require the Secretary of Labor to study the effects of the *Economic Growth and Tax Relief Reconciliation Act of 2001* (P.L. 107-16) on pension coverage among workers.

S. 1921 would direct the Secretary, in consultation with the Secretary of the Treasury and the Securities and Exchange Commission, to study the feasibility of requiring defined contribution plans to permit participants to trade securities daily and to sell securities during a lockdown, the feasibility of insuring plan participants against fraud involving employer stock, and other matters that the Secretary may deem appropriate for study.

S. 1919 would require the Secretary of Labor in consultation with the Secretary of the Treasury, to study the feasibility of applying a 20% cap on employer stock in ESOPs that provide only for employer contributions.

S. 1992 would direct the Secretary of Labor to conduct a study of the fees levied by defined contribution plans.

Limitation on auditor services. **S. 1919** and **S. 1921** would prohibit auditors from providing other services (e.g., consulting services) to firms that they audit.