GROOM LAW GROUP, CHARTERED

2006 Employee Benefits Seminar

Pension Protection Act of 2006 – Highlights

TAB 1

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SUMMARY COMPARISON OF CURRENT LAW AND THE PRINCIPAL PROVISIONS OF THE PENSION PROTECTION ACT OF 2006:[1] CHANGES PRIMARILY AFFECTING DEFINED CONTRIBUTION PLANS, IRAS, GOVERNMENTAL AND TAX-EXEMPT EMPLOYER PLANS, AND INSURANCE PROGRAMS

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[1] This chart generally summarizes the changes affecting defined contribution plans, IRAs, governmental and tax-exempt employer plans, and other miscellaneous provisions included in the Pension Protection Act of 2006 (Pub. Law No. 109-280, 120 Stat. 780); H.R. 4. The single-employer pension funding and cash balance provisions, fiduciary and prohibited transaction provisions, and the multiemployer funding reforms contained in the Act are included in separate charts.

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	Current Law	The Pension Protection Act of 2006 (the "Act")
Diversification Requirements	Defined contribution plans may require plan assets to be invested in employer securities and there is no general requirement that participants be given the ability to diversify these amounts. Participants in an employee stock ownership plan ("ESOP") who have reached age 55 and have participated in the plan for at least 10 years must be permitted to diversify part of their accounts in assets other than employer stock (IRC § 401(a)(28)).	Section 901 of the Act adds new ERISA § 204(j) and IRC § 401(a)(35) providing that, beginning in 2007, amounts attributable to elective deferrals and after-tax employee contributions that are invested in publicly traded employer securities could be diversified at all times, and amounts attributable to employer matching and employer nonelective contributions that are invested in such employer securities could be diversified after a participant completes 3 years of service. A 3-year transition rule would apply to amounts invested in employer securities acquired before the first year in which the new rules apply. In addition, plans would be required to provide at least 3 diversified investment options other than employer securities or employer real property. Other investment options generally offered under the plan must be available, and plans must allow diversification elections at least quarterly, on the same basis as the opportunity to make other investment changes, except as provided in regulations or by reason of securities laws. Section 507 of the Act amends ERISA § 101, effective in 2007, requiring a plan administrator to provide notice at least 30 days before the participant becomes eligible to diversify his or her investments, setting forth such right and describing the importance of diversifying investments. Failure to provide notice may result in penalties of up to $100 per day per participant (see amended ERISA § 502(c)(7)). Treasury is directed to issue a model notice within 180 days of the date of enactment (by February 17, 2007).
Benefit Statements	ERISA requires plan administrators to provide benefit statements to participants upon request, but not more than once per year. A benefit statement must include the participant's total accrued benefits and vested accrued pension benefits (or earliest	Section 508 of the Act amends ERISA § 105(a) requiring defined contribution plans (other than one-participant plans) and tax-deferred annuities to provide (i) quarterly benefit statements to participants with the right to direct investments, (ii) annual

	Current Law	The Pension Protection Act of 2006 (the "Act")
	date on which benefits will be vested) (ERISA § 105)).	statements to participants who do not self-direct investments, and (iii) benefit statements upon written request (limited to one request per year). In addition, defined benefit plans would be required to furnish benefit statements every three years (or alternatively, annually furnish a notice of the availability of statements) to vested participants, or provide benefit statements upon written request (limited to one request per year). Such benefit statements must include, among other things, information regarding accrued or vested benefits to date, the value of the participant's investments (as of the most recent valuation date), an explanation of the importance of diversification, and a direction to the DOL's web site for investment and diversification information. Such statements may be delivered in written or electronic form. Failure to furnish benefit statements may result in penalties up to $100 per day per participant (see amendment to ERISA § 502(c)(1)). The DOL is directed to issue model benefit statements within 1 year of the date of enactment (by August 17, 2007). These new requirements are effective beginning in 2007, with special rules for collectively bargained plans.
Faster Vesting	Employer contributions made to a defined contribution plan (other than matching contributions) must vest under either a 5-year cliff or 7-year graded vesting schedule. Matching contributions must vest under a 3-year cliff or 6-year graded vesting schedule (ERISA § 203(a)(2), (a)(4) and IRC § 411(a)(2), (a)(12)).	Section 904 of the Act eliminates ERISA § 203(a)(4) and IRC § 411(a)(12) and amends ERISA § 203(a)(2) and IRC § 411(a)(2) providing that all employer contributions (not just matching contributions) made to a defined contribution plan must vest under either a 3-year cliff or 6-year graded vesting schedule. The change is effective beginning in 2007 (with special rules for collectively bargained plans).

	Current Law	The Pension Protection Act of 2006 (the "Act")
Joint and Survivor Distribut-ions	In general, defined benefit and money purchase plans must provide benefits in the form of a qualified joint and survivor annuity, which generally is an annuity for the life of the participant, and upon the participant's death, an annuity payable to the surviving spouse in an amount that is not less than 50 percent of the lifetime annuity (ERISA § 205(c) and IRC §§ 401(a)(11) and 417(a)).	Section 1004 of the Act amends ERISA §§ 205(c) and (d) and IRC § 417(a) and adds new IRC § 417(g) providing that, beginning in 2008, if a plan's mandatory joint and survivor annuity is less than 75 percent, the plan must offer as an option a survivor annuity that equals 75 percent of the annuity payable during the joint lives of the participant and spouse. If the plan's joint and survivor annuity is equal to or exceeds 75 percent, the plan must offer a 50 percent survivor annuity.
Blackout Notices	Under changes made by the Sarbanes-Oxley Act of 2002, ERISA requires plan administrators to send notice of a "blackout period" to participants at least 30 days before the beginning of the period. A blackout period is generally any period during which a participant's ability to direct assets (or obtain loans or distributions) is temporarily suspended for a period of more than 3 consecutive business days (ERISA § 101(i)).	Section 509 of the Act amends ERISA § 101(i)(8)(B) clarifying that blackout notices are not required to be sent to single-participant or partner-only plans, retroactive to the effective date under the Sarbanes Oxley Act of 2002.

EGTRRA AND SAVER'S CREDIT PERMANENCE

	Current Law	The Pension Protection Act of 2006 (the "Act")
EGTRRA Permanence	The Economic Growth Tax Relief Reconciliation Act of 2001 ("EGTRRA") made a number of changes relating to retirement plans (e.g., 401(a) tax-favored, 403(b), and 457 plans and IRAs). The provisions of EGTRRA, however, are scheduled to sunset on December 31, 2010.	The changes made by EGTRRA to tax-favored retirement plans are made permanent under § 811 of the Act.
Saver's Credit Permanence	A non-refundable credit (at a rate of up to 50 percent) is provided on contributions (up to $2,000) made by certain eligible individuals below certain AGI limits to a tax-favored retirement plan. The credit is phased out based on AGI and would sunset on December 31, 2006 (IRC § 25B).	The Saver's Credit is made permanent under § 812 of the Act. Section 833(a) of the Act amends IRC § 25B indexing the AGI limits for inflation (rounded to the nearest $500) beginning in 2007.

CHANGES AFFECTING PLAN DISTRIBUTIONS

	Current Law	The Pension Protection Act of 2006 (the "Act")
Direct Rollovers to Roth IRAs	Generally, distributions from qualified plans, tax-deferred annuities, and governmental 457 plans cannot be rolled directly over to a Roth IRA. Instead, the initial rollover must be made to a traditional IRA (as a conduit) (see generally IRC § 402(c)).	Section 824 of the Act amends IRC § 408A providing that, beginning in 2008, distributions from qualified plans, tax-deferred annuities, and governmental 457 plans (but not IRAs) may be rolled over directly to a Roth IRA, but only if the current law Roth IRA conversion rules are satisfied.
In-Service Distributions	Generally, pension payments may not be made until the earlier of termination of employment or the attainment or Normal Retirement Age ("NRA") (typically age 65). Thus, pension payments may be made to participants who (i) have reached NRA and (ii) continue in employment, if the plan permits them (see Rev. Rul. 74-254).	Section 905 of the Act amends ERISA § 3(2) and adds new IRC § 401(a)(36) permitting, beginning in 2007, pension payments to be made to a participant who (i) attains age 62 and (ii) continues in employment.
Rollover of After-Tax Amounts	Generally, after-tax contributions may be rolled directly over from a qualified plan to a defined contribution plan, and from one tax-deferred annuity to another, so long as the receiving plan or tax-deferred annuity separately accounts for such rollover amounts (IRC § 402(c)(2)).	Section 822 of the Act amends IRC § 402(c)(2) permitting, beginning in 2007, direct rollovers of after-tax amounts from qualified retirement plans into a defined contribution plan, defined benefit plan, and tax-deferred annuity, but only if the plan or annuity separately accounts for such contributions and earnings thereon.
Rollovers by Non-spouse Benefic-iaries	The spouse of a deceased participant in a qualified plan, tax-deferred annuity, or governmental § 457 plan may generally rollover the participant's benefit to an IRA (see IRC § 402(c)). Non-spouse beneficiaries may not make such rollovers. IRA beneficiaries may maintain and receive distributions from an inherited IRA subject to certain minimum distribution rules (see generally IRC § 401(a)(9)). If a nonspouse beneficiary inherits an IRA, contributions may generally not be made nor may amounts from the inherited IRA be rolled over to another IRA or employer-provided plan (IRC § 408(d)(3)(C)).	Section 829 of the Act adds new IRC § 402(c)(11) permitting, beginning in 2007, nonspouse beneficiaries to transfer amounts from a qualified plan, tax-deferred annuity, or governmental 457 plan directly to an IRA. The IRA is treated as an inherited IRA for purposes of the minimum distribution rules.

	Current Law	The Pension Protection Act of 2006 (the "Act")
Expansion of the Hardship Rules	An IRC § 401(k), 403(b), or 457 plan participant may receive a hardship distribution if certain requirements are met (see generally IRC §§ 401(k)(2)(B)(i)(IV), 403(b)(11), and 457(d)(1)(A)(iii)). Similarly, nonqualified deferred compensation plan participants may receive a distribution for an unforeseeable emergency as that term is defined under IRC § 409A (IRC § 409A(a)(2)(A)(vi), (a)(2)(B)(ii)). Generally, a hardship distribution may only be made on account of a financial emergency or unforeseeable emergency of the participant.	Section 826 of the Act directs Treasury, within 180 days of enactment (by February 17, 2007), to modify the rules relating to a distribution on account of a "hardship" or "unforeseeable emergency" under IRC §§ 401(k), 403(b), 457, and 409A to permit such a distribution upon a hardship or unforeseeable emergency of a participant's designated beneficiary, regardless of whether the beneficiary is a spouse or dependent. For example, it appears that a distribution may be made on account of a hardship or unforeseeable emergency of a grandchild, parent, or domestic partner.
Distribut-ions to Active Duty Reservists	In general, a 10-percent early withdrawal penalty tax is applied to amounts distributed from a qualified retirement plan or traditional IRA prior to the attainment of age 59-1/2, death, or disability (IRC § 72(t)).	Section 827 of the Act amends IRC § 72(t) providing that a distribution made from an IRA or elective deferrals from a 401(k) or 403(b) plan to a military reservist called to active duty on or after September 11, 2001 and before December 31, 2007 for more than 179 days will not be subject to the 10 percent early withdrawal penalty tax if such distribution is made during the period of active duty. Such distributions do not violate the distribution restrictions applicable to such plans. Generally, a military reservist receiving an early distribution may re-contribute the amounts received to an IRA on an after-tax basis over the two-year period after the reservist's active duty ends and such re-contributed amounts will not affect the annual contribution limit.
Notice and Consent Period Regarding Distribut-ions	In general, participants must receive written notice prior to amounts being distributed under the plan. In addition, if the plan is subject to the qualified joint and survivor annuity ("QJSA") requirements, special notice and consent rules apply. Generally, notice to participants must be made no less than 30 and no more than 90 days before the date of distribution (see ERISA § 205(c) and IRC § 417(a)).	Section 1102 amends ERISA § 205(c)(7)(A) and IRC § 417(a)(6)(A) requiring, beginning in 2007, distribution notices to be furnished no less than 30 days and no more than 180 days before the date of distribution.

AUTOMATIC ENROLLMENT – NONDISCRIMINATION SAFE HARBOR

	Current Law	The Pension Protection Act of 2006 (the "Act")
Nondis-crimination Safe Harbor	Generally, a IRC § 401(k) plan is subject to the actual deferral percentage ("ADP") test and actual contribution percentage ("ACP") test (IRC §§ 401(k)(3) and 401(m)(2)). A safe harbor is available (allowing a plan to automatically meet these tests) if the plan sponsor makes either "safe harbor nonelective contributions" or "safe harbor matching contributions" (discussed more fully below). A notice requirement applies as well (also discussed below) (IRC §§ 401(k)(12) and 401(m)(11)). Generally, a 401(k) plan that makes safe harbor nonelective contributions and matching contributions would automatically meet the top-heavy rules (IRC § 416(g)(4)(H)).	In general, §§ 902(a), (b), and (c) of the Act add new IRC §§ 401(k)(13) and 401(m)(12) and amends IRC § 416(g)(4)(H). Generally, if the requirements described below are satisfied, a 401(k) plan with a "qualified automatic contribution arrangement" would automatically meet the: • Actual deferral percentage ("ADP") test. • Actual contribution percentage ("ACP") test. • Top-heavy rules.
Automatic Election	Generally, a 401(k) plan participant must affirmatively make an election to defer compensation under the plan. However, IRS guidance allows employers to make contributions on behalf of new employees or current non-participating employees under an "auto enrollment" program (also known as a "negative election" program) as long as they are notified of, and have, the opportunity to change or opt out at any time (see Rev. Rul. 98-30; see also, Treas. Reg. § 1.401(k)-1(a)(3)(ii)).	An election to defer compensation would be automatically made by the employer on behalf of an eligible employee, unless the employee elects otherwise. The participant must be given the opportunity to make an affirmative election (i) to not have such elective contributions made or (ii) to make elective contributions at a specified level (see new IRC § 401(k)(13)(C)(i), (ii) (as added by § 902(a) of the Act)).
Elective Contribution Amount	The IRS has informally approved of a "negative election" program that automatically increases the rate of elective deferrals for participants and IRS regulations do not restrict an advance election to increase deferrals as of a future date (see IRS General Information Letter, March 17, 2004; see also, Treas. Reg. § 1.401(k)-1(a)(3)(ii)).	The elective contribution amount must be capped at 10 percent of compensation, but may not be less than: • 3 percent of compensation for the first plan year in which the deemed contribution election applies to the participant; • 4 percent of compensation for the second plan year; • 5 percent of compensation for the third plan year; and

	Current Law	The Pension Protection Act of 2006 (the "Act")
		• 6 percent of compensation for any plan year thereafter (see new IRC § 401(k)(13)(C)(iii) (as added by § 902(a) of the Act)).
Availability of Automatic Enrollment	IRS guidance provides that a "negative election" program may be made available to new and current non-participating employees (see Rev. Rul. 2000-8).	The automatic election generally applies only to new employees, but current eligible employees who have not affirmatively declined to defer compensation under the plan may be covered. Participants already participating in the plan are not eligible (see new IRC § 401(k)(13)(C)(iv) (as added by § 902(a) of the Act)).
Contribution Requirement	Under the 401(k) safe harbor rules, a 401(k) plan will meet the ADP test if a plan sponsor makes matching contributions on behalf of all non-highly compensated employees ("NHCEs") covered under the arrangement equal to (i) 100 percent of the employee's elective deferral up to 3 percent of compensation and (ii) 50 percent of the employee's elective deferral from 3 to 5 percent of compensation (IRC § 401(k)(12)(B)). Alternatively, the plan sponsor may make a nonelective contribution of at least 3 percent of compensation on behalf of all NHCEs (IRC § 401(k)(12)(C)). A 401(k) plan will meet the ACP test if (i) the matching contributions are not provided with respect to elective deferral in excess of 6 percent of compensation, (ii) the rate of matching contribution does not increase as the rate of an employee's elective deferrals increases, and (iii) the rate of matching contribution with respect to any rate of elective deferral of a highly compensated employee ("HCE") is no greater than the rate of matching contribution with respect to the same rate of deferral of a NHCE (IRC § 401(m)(11)(B)).	The plan sponsor must generally make (i) matching contributions on behalf of all non-highly compensated employees ("NHCEs") covered under the arrangement equal to (a) 100 percent of their elective contributions up to 1 percent of compensation plus (b) 50 percent of their elective contributions from 1 to 6 percent of compensation (i.e., a match of 3-1/2 percent of compensation), *or* (ii) nonelective contributions on behalf of all NHCEs eligible to participate in the arrangement, without regard to whether a covered employee makes a contribution under the plan, of at least 3 percent of compensation. If matching contributions are made, the plan would automatically satisfy the ACP test if (i) the matching contributions do not exceed 6 percent of compensation, (ii) the rate of the match does not increase as the rate of an employee's elective deferrals increases, and (iii) the rate of the match for highly compensated employees ("HCEs") is no greater than the rate of match for NHCEs (see new IRC § 401(k)(13)(D)(i), (ii) (as added by § 902(a) of the Act)).

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Vesting Requirement	Safe harbor contributions must be 100 percent vested at all times (IRC § 401(k)(12)(E)(i)).	Participants must be 100 percent vested in employer matching or nonelective contributions after completing 2 years of service (see new IRC § 401(k)(13)(D)(iii) (as added by § 902(a) of the Act))
Notice Requirement	At least 30 days but no more than 90 days before the beginning of the plan year, employees must generally be given written notice which is (i) "sufficiently accurate and comprehensive" to inform the employee of his or her rights and obligations under the plan and (ii) written in a manner calculated to be understood by the average employee. For new employees, notice must generally be provided no more than 90 days before the employee becomes eligible, and no later than the date of eligibility (see IRC §§ 401(k)(12)(D) and 401(m)(11)(A)(i)).	Generally the same as current law, except the notice must explain (i) the participant's rights to elect not to have elective contributions made under the plan (or to elect a different percentage) and (ii) how such contributions will be invested in the absence of any investment election. The participant must be given a reasonable amount of time after receipt of the notice, and before the automatic elective contributions begin, to make an election with respect to contributions and investments (see new IRC § 401(k)(13)(E) (as added by § 902(a) of the Act)).
403(b) Annuity Contracts	In general, 403(b) annuity contracts are subject to the actual contribution percentage ("ACP") test, but not the actual deferral percentage ("ADP") test (see IRC § 403(b)(12)). The IRS allows "negative election" programs for 403(b) annuity contracts (see Rev. Rul. 2000-35).	A 403(b) annuity contract that makes an automatic election on behalf of participants would generally satisfy the ACP test with respect to matching contributions if the applicable requirements are satisfied (generally through the operation of IRC § 403(b)(12)).
Effective Date	N/A	The automatic enrollment nondiscrimination safe harbor is available for plan years beginning after December 31, 2007.

ADDITIONAL PROVISIONS AFFECTING AUTOMATIC ENROLLMENT

	Current Law	**The Pension Protection Act of 2006 (the "Act")**
Unwinding Automatic Contribut-ions	No provision.	Beginning in 2008, an IRC § 401(a) plan, a tax-deferred annuity, and a governmental 457(b) plan that generally incorporates a negative election-type feature into the plan (i.e., an "eligible automatic contribution arrangement"), and generally meets the notice requirements applicable to a qualified automatic contribution arrangement (discussed above), may return automatic contributions to participants, but only if the participant elects to receive an "erroneous automatic contribution" within 90 days of the date the first automatic contribution was made on behalf of the participant. The returned amounts are includible income in the year in which such amounts are returned, but the 10 percent early withdrawal penalty and the otherwise applicable withdrawal restrictions would not apply. If matching contributions are made, such contributions shall generally be forfeited. In general, the returned amount must not exceed the amounts that were automatically contributed prior to the effective date of the participant's election to return such amounts. Erroneous automatic contributions shall not be taken into account for purposes of applying the nondiscrimination rules or limit on elective deferrals (see § 902(d) of the Act adding new IRC § 414(w)).
Excess Contribut-ions	In general, a 10 percent excise tax is imposed on "excess contributions" or "excess aggregate contributions" made by an employer that are not returned to participants within 2-1/2 months after the close of the plan year in which the contributions were made (IRC § 4979(a)). Generally, excess contributions are elective contributions (and employer nonelective and matching contributions that are treated as elective contributions) made to	Beginning in 2008, if automatic contributions made under an eligible automatic contribution arrangement result in excess contributions or excess aggregate contributions, the 10 percent excise tax does not apply if such contributions (and earnings) are returned to participants within 6 months after the close of the plan year and such amounts are included in income (see § 902(e) of the Act amending IRC § 4979(f)).

	Current Law	The Pension Protection Act of 2006 (the "Act")
	HCEs that cause the plan to fail the ADP test (IRC § 401(k)(8)(B)). Generally, excess aggregate contributions are the aggregate amount of matching and after-tax contributions (if any) made to HCEs which cause the plan to fail the ACP test (see IRC §§ 401(m)(8)(B) and 4979(d)).	
Preemption of State Law for Auto Enrollment	ERISA § 514 broadly preempts any state law that relates to a plan. Various state laws may restrict a plan's enrollment procedures, including state requirements for affirmative or written authorization for payroll deductions, or limits on overall payroll deductions for employee benefit plan contributions relative to an employee's total wages. The DOL has issued several advisory opinions indicating that such laws, even state criminal laws, are preempted by ERISA. However, there has been no recent guidance in this area.	Section 902(f) adds new ERISA § 514(e) providing that, effective on the date of enactment (August 17, 2006), any state law restricting automatic enrollment arrangements (i.e., a "qualified" or "eligible" automatic contribution arrangement discussed above) that generally meet the notice requirements for the nondiscrimination safe harbor (also discussed above) and meet the new "default investment" requirements (discussed below) would be preempted. The DOL is given authority to prescribe minimum standards that an arrangement must meet in order to enjoy preemption under ERISA § 514.

	Current Law	The Pension Protection Act of 2006 (the "Act")
Investment Advice	The provision of investment advice for a fee to plan sponsor or to participants in a participant-directed plan is a fiduciary act (ERISA § 3(21)(A)). Generally, an investment adviser that provides advice to invest in specific securities or vehicles that pay additional fees to the adviser or the adviser's affiliate could violate ERISA's self-dealing restrictions. The DOL has issued several older class exemptions that may provide relief for such transactions (see PTEs 75-1, 77-4, 84-24, 86-128). The DOL more recently has indicated a prohibited transaction will not occur if an adviser levels or offsets all of his fees such that the adviser has no financial interest in a transaction (see DOL Adv. Ops. 97-15A (Frost Bank), 2005-10A (Country Bank)). Alternatively, the adviser must use, and not deviate from, an independently developed computer model that provides the investment recommendations (DOL Adv. Op. 2001-09 (Sun America)). Plan sponsors that hire investment advisers have a fiduciary responsibility to prudently select and monitor the adviser. In addition, under ERISA § 405, a sponsor could be liable for the fiduciary breaches of advisers they have hired under certain circumstances.	Section 601 of the Act adds a prohibited transaction exemption under ERISA § 408 and IRC § 4975, effective beginning in 2007, for the provision of advice to participants and receipt of fees from such advice by a "fiduciary advisor." The exemption does not apply to "plan level" advice (i.e., advice to plan fiduciaries who are selecting investment options, or any plans other than participant directed plans). Fiduciary adviser is defined broadly to include banks, insurance companies, broker dealers, registered investment advisers, all of their affiliates, and all of their employees, representatives and agents. The exemption includes significant conditions. Most importantly, advice must be given pursuant to an "eligible investment advice arrangement" ("Eligible Arrangement"). To be an Eligible Arrangement, either (i) any fees received by the adviser must not vary on the basis of investment options selected or (ii) the adviser must use a computer model. The computer model must be objective and must be certified by an eligible investment expert at the time it is initially used and then again if later modified. The independent expert must have no material relationship with the adviser. A myriad of additional conditions apply, including comprehensive disclosures of fees and affiliations that must be given before the time of the advice and regularly updated. Advisers must obtain an annual audit from an independent auditor regarding compliance with the exemption. Plan sponsors are given some relief from the specific advice provided by advisers, but they must prudently select and monitor advisers as they currently must do for investment managers. The exemption for IRAs includes the same conditions in ERISA § 406 and IRC § 4975. However, the exemption includes a special rule that directs the DOL to study whether computer models are

	Current Law	The Pension Protection Act of 2006 (the "Act")
		feasible for IRAs. In particular, the DOL must determine if computer models can take into account the full range of investments available in IRAs, including individual bonds and equities. The DOL must issue a report to Congress and if it determines a computer model is not feasible it must issue a class exemption for IRAs that follows the statutory exemption, but without the computer model requirement. If the DOL initially finds that computer models are not feasible for IRAs, any person may later ask the DOL to review that finding based on new information and the DOL must respond within 90 days of such request. If the DOL then makes a finding that computer models are feasible, then the exemption is revoked within 2 years.
Default Investment Options	Under ERISA, the investment of plan assets is generally a "fiduciary" act (ERISA § 3(21)(A)). Under ERISA a fiduciary must, among other things, act for the exclusive benefit of participants and act with care, skill and prudence (ERISA § 404(a)(1)). Under ERISA § 404(c), provided certain requirements are met, plan fiduciaries are relieved of liability for losses that result from a participant's exercise of control over his or her plan account balance. It is DOL's view that 404(c) relief is not available in the absence of a participant's affirmative investment direction, including where a participant's account is invested "by default" in an investment option.	Section 624 of the Act adds new ERISA § 404(c)(5), effective beginning in 2007, extending protection to fiduciaries of plans that provide for the investment of the participant account balances in the absence of an affirmative investment election in "default investments." To obtain relief, the plan must comply with new DOL regulations and provide notice to participants. The DOL must issue regulations on the appropriateness of designating certain investments as "default investments" that would permit the use of a mix of investments and asset classes consistent with long-term capital appreciation or capital preservation, or a blend of both. Annual notice must be provided to participants explaining the employee's right to designate investments under the plan and how a participant's account balance will be invested in the absence of an affirmative investment election. The participant must be given a reasonable amount of time after receipt of the notice, and before the beginning of the plan year, to affirmatively designate investments under the plan.

	Current Law	The Pension Protection Act of 2006 (the "Act")
Mapping	ERISA § 404(c) provides that if a participant is permitted to direct his own investments under the plan, plan fiduciaries will generally not be liable for losses that result from the participant's direction. Under 404(c), the plan fiduciary must provide a broad range of investment options, consisting of at least three diversified investment options. Failure to prudently choose these investment options may result in personal liability on the part of the fiduciary under ERISA § 404(a). The DOL currently takes the position that § 404(c) is not available to a fiduciary either (1) during a blackout period or (2) when participant account balances are "mapped" to new options without an affirmative participant direction. ERISA § 101(i) requires administrators to provide advance notice of a "blackout period." Generally, the notice must be provided at least 30 days in advance. A "blackout period is defined as a period of 3 or more consecutive days in which individual account participants may not direct trades, obtain loans or obtain distributions.	For plan years beginning after 2007 (later for collectively bargained plans), § 621 of the Act amends ERISA § 404(c) in two respects. First, fiduciaries are provided with 404(c) relief during a blackout period if they authorized and implemented the blackout period consistent with the "requirements of this title." In addition, ERISA § 404(c)(4) would be added to provide generally that, if certain requirements are met, § 404(c) relief would be available for mapping that constitutes a "qualified change in investment options." A "qualified change in investment options" must meet the following requirements: • The participant's account is reallocated among one or more new investment options which have characteristics relating to risk and rate of return are reasonably similar to the existing investment options immediately before the change; • Notice must be sent at least 30 days and no more than 60 days before the effective date of the change, explaining how the account will be invested in the absence of affirmative directions and including information comparing the new and existing options; • The participant must not have provided affirmative investment instructions contrary to the change before the effective date of such change; and The investments of the participant or beneficiary in effect immediately before the change must have been the product of the exercise of control by the participant or beneficiary.

	Current Law	**The Pension Protection Act of 2006 (the "Act")**
Annuities in DC Plans	The selection of an annuity provider for purposes of making a distribution is a fiduciary act subject to ERISA's prudence and loyalty standards (see ERISA § 404(a)(1)). The DOL has taken the position that, in selecting an annuity provider for a plan termination, a plan fiduciary must take steps to obtain the safest available annuity, unless it would be in the interest of participants and beneficiaries to do otherwise. The DOL has also described a number of factors that a plan fiduciary should consider in evaluating potential annuity providers in order to discharge his prudence obligations under ERISA. The DOL has taken the position that these principles are equally applicable to both defined benefit and defined contribution plans.	Section 625 of the Act directs the DOL to issue final regulations within 1 year after the date of enactment (by August 17, 2007) clarifying that the selection of an annuity contract as an optional form of distribution from an individual account plan is not subject to the "safest available annuity" standard articulated in Interpretive Bulletin 95-1, but is subject to otherwise applicable fiduciary standards (e.g., "prudence").

IRA-RELATED AMENDMENTS

	Current Law	The Pension Protection Act of 2006 (the "Act")
Indexing Income Limitations	If an individual (or his or her spouse) is an active participant in an employer-provided retirement plan, the deduction for traditional IRA contributions is phased out based on adjusted gross income ("AGI") levels (IRC § 219(g)(3)). Special AGI levels apply if the individual is not an active participant in an employer-provided plan, but his or her spouse is an active participant (IRC § 219(g)(7)). Individuals with an AGI above certain levels cannot contribute to a Roth IRA (IRC § 408A(c)(3)).	Section 833(b) of the Act amends IRC §§ 219(g) and 408A(c)(3) providing that, beginning in 2007, the AGI limits for making (i) deductible contributions to a traditional IRA, and (ii) contributions to a Roth IRA, are indexed for inflation (rounded to the nearest $1,000).
Direct Deposit of Tax Refunds	Generally, taxpayers may directly deposit their tax refund into a checking or savings account.	Section 830 of the Act directs Treasury, beginning in 2007, to make available a form through which taxpayers may directly deposit their tax refund into an IRA, subject to the current law contribution limits.
IRA Distributions for Charitable Purposes	In general, amounts distributed from a traditional IRA are taxed as ordinary income (IRC § 408(d)). Charitable contributions are generally deductible, subject to special rules relating to the type of charitable contribution.	In general, § 1201 of the Act permits IRA owners who are age 70-1/2 or over to make tax-free IRA distributions (capped at $100,000) to a tax-exempt charity. Such distributions may be made in 2006 and 2007.
Additional IRA Contribut-ions for Certain Employees	The maximum contribution limit for traditional IRAs is $4,000 for 2005 to 2007, $5,000 for 2008, and indexed for inflation in $500 increments thereafter (IRC § 219(b)(5)(A)). Individuals age 50 or older may make a catch-up contribution of up to $500 for 2005 and up to $1,000 for 2006 and thereafter. The IRA catch-up limit is not indexed for inflation (IRC § 219(b)(5)(B)).	In general, certain 401(k) participants receiving at least a 50 percent matching contribution in the form of employer stock from an employer that (i) declared bankruptcy and (ii) is subject to indictment or conviction (along with or any other person) from business transactions related to the bankruptcy may make IRA catch-up contributions of up to $3,000 per year for 2007 through 2009 (see § 831 of the Act).

	Current Law	The Pension Protection Act of 2006 (the "Act")
Tax-Free Pension Distributions to Pay Premiums for Health and LTC Insurance for Public Safety Officers	Distributions from a governmental qualified retirement plan, 403(b) annuity or 457(b) plan are generally includible in income when paid (IRC § 403(b)(1) and 457(a)). Premium payments for coverage under an accident or health insurance plan or qualified long-term care insurance contract are generally made on an after-tax basis, but may be deductible on an individual's return if certain requirements are met (see IRC § 213(a)).	Section 845 of the Act adds new IRC § 402(l) permitting, beginning in 2007, retired or disabled public safety officers (i.e., law enforcement officers, firefighters, or rescue squad or ambulance crew) to exclude up to $3,000 of distributions from a governmental qualified retirement plan, 403(b) annuity, or 457(b) plan for the direct payment of premiums for coverage for the public safety officer, his or her spouse, and his or her dependents under an accident or health insurance plan or qualified long-term care insurance contract.
Purchase of Permissive Service Credit	Generally, participants of state and local government defined benefit plans may be credited with "permissive service credit" (i.e., service not otherwise credited under the plan) if the participant voluntarily contributes an amount necessary to fund the benefit attributable to the credited service. Special rules apply under § 415 to the contributions or benefits associated with such service credit (IRC § 415(n)). Amounts from a 403(b) or 457 plan may generally be used to purchase permissive service credit if certain requirements are met (IRC §§ 403(b)(13) and 457(e)(17)).	Section 821 of the Act retroactively amends the purchase of service credit and transfer rules enacted in 1997 and 2001 (under IRC § 415(n)) to clarify that state and local governmental employees may purchase enhanced benefits and benefits for which there is no performance of actual service, including through amounts transferred from 403(b) or governmental 457(b) plans. With respect to distributions of amounts attributable to transfers of 403(b) and 457(b) plan assets, the distribution rules applicable to defined benefit plans apply.
Waiver of the 10 Percent Penalty on Certain Distribut-ions	In general, a 10-percent early withdrawal penalty tax is applied to amounts distributed from a qualified retirement plan prior to separation from service after age 55, the attainment of age 59-1/2, death, or disability (IRC § 72(t)).	Effective upon the date of enactment (August 17, 2006), § 828 of the Act amends IRC § 72(t) providing that the 10-percent early withdrawal penalty tax does not apply to distributions from a governmental defined benefit pension plan made to a public safety employee (i.e., a police officer, fire fighter, or emergency medical services employee) after separation from service after the attainment of age 50.

	Current Law	The Pension Protection Act of 2006 (the "Act")
Incentive and Retention Plans for Educational Institutions	Generally, any amounts deferred under a governmental 457(b) plan (and any income attributable to such amounts) are not taxed until such amounts are actually "paid to" the participant or beneficiary (IRC § 457(a)(1)). In general, welfare benefit plans escape many of ERISA's regulatory requirements. Generally, voluntary early retirement incentive plans are permitted under ADEA so long as the plan prohibits arbitrary age discrimination in employment (see ADEA 4(f)(2)(B)(ii), (l)(1)).	Section 1104 of the Act amends ERISA § 3(2)(B), IRC § 457, and ADEA § 4 providing that certain voluntary early retirement incentive plans of local educational agencies (e.g., a public board of education) or § 501(c)(5) or (6) education associations (e.g., teachers' unions) will be treated as bona fide severance plans for purposes of (i) IRC § 457 (and therefore not subject to the § 457 limits), (ii) welfare benefit plans under ERISA (and therefore exempt from some of ERISA's requirements), and (iii) defined benefit plans exempt from ADEA (and therefore not limited by ADEA). In addition, certain payments not in excess of 2 times the § 457(b) deferral limit under an employment retention plan of a local educational agency or § 501(c)(5) or (6) education association are not includible in income until paid. Such employment retention plans are also treated as welfare benefit plans under ERISA. These provisions are generally effective upon enactment (August 17, 2006).
Clarification-ion of the Minimum Distribution Rules	A participant in a qualified plan (including governmental plans) must begin receiving distributions by the April 1 of the calendar year following the calendar year in which the individual attains age 70-1/2 or the calendar year in which he or she retires. IRS rules limit permissible distribution options (e.g., to satisfy the general rule that minimum distributions be "nonincreasing") (IRC § 401(a)(9)).	Section 823 of the Act directs Treasury to issue regulations providing that a governmental plan is treated as complying with the minimum distribution rules (retroactive to effective date of the requirements) if it complies with a reasonable, good faith interpretation of those requirements.
Nondiscrim-ination Rules	In general, only state and local government plans are exempt from the nondiscrimination rules under the Code (see IRC §§ 401(a)(5)(G), 401(a)(26)(G), and 401(k)(3)(G)).	Section 861 of the Act amends IRC §§ 401(a)(5)(G), 401(a)(26)(G), and 401(k)(3)(G) providing that, beginning after the date of enactment (August 17, 2006), all governmental plans (not just state and local plans) would be exempt from the nondiscrimination and minimum participation rules.

	Current Law	**The Pension Protection Act of 2006 (the "Act")**
Indian Tribal Government Plans	In general, a governmental plan is a plan established and maintained for its employees by (i) the Federal government, (ii) state and local governments, and (iii) any agency or instrumentality of such governments (ERSIA § 3(32) and IRC § 414(d)).	Section 906 of the Act amends ERISA § 3(32) and IRC § 414(d) providing that, beginning after the date of enactment (August 17, 2006), the term "governmental plan" includes a defined benefit plan established or maintained by an Indian tribal government for its employees performing governmental functions and not commercial activities.

CHURCH PLANS

	Current Law	The Pension Protection Act of 2006 (the "Act")
Self-Annuitizing Church Plan	Under current regulations, if certain requirements are satisfied, annuity payments from a "retirement income account" maintained by a church will generally meet the minimum required distribution rules, even though such payments are not made by an insurance company (i.e., the church self-annuitizes) (see IRC §§ 403(b)(9) and 401(a)(9)).	Section 865 of the Act provides that in the case of a money purchase plan maintained by a church as of April 17, 2002, annuity payments made by the church plan will not fail to meet the required minimum distribution rules so long as the requirements applicable to annuity payments from a retirement income account are satisfied.
Debt-Financed Property Exception	In general, a IRC § 401(a) qualified retirement plan is not subject to unrelated business income tax ("UBIT") if the plan realizes income from debt-financed real property if certain requirements are met (IRC § 514(c)(9)).	Section 866 of the Act amends IRC § 514(c)(9)(C) providing that, beginning after the date of enactment (August 17, 2006), this exemption is extended to a "retirement income account" maintained by a church.
Distribution Limits for Church Plans	Generally, accrued benefits under a defined benefit plan are limited to the lesser of (i) $175,000 for 2006 (indexed for inflation) or (ii) 100 percent of the participant's compensation for the highest 3 years (IRC § 415(b)).	In general, beginning in 2007, the 100 percent of compensation limitation would no longer apply to benefits of non-highly compensated employees ("NHCEs") covered under a church plan. For this purpose, benefits include, in the case of a highly compensated employee ("HCE"), all benefits accrued prior to becoming an HCE (see § 867 of the Act).

Corporate Owned Life Insurance and Other Insurance Programs

	Current Law	The Pension Protection Act of 2006 (the "Act")
Taxation of Corporate Owned Life Insurance	In general, corporate owned life insurance ("COLI") is a life insurance policy purchased by the employer on the lives of its employees. The employer is the policy's owner and beneficiary. All policy proceeds paid upon the death of the employee are intended to be received by the company tax-free (see IRC § 101(a)).	Section 863(a) of the Act adds new IRC § 101(j). Under this new IRC section, proceeds paid under a COLI policy are generally not taxable if certain notice and consent requirements are satisfied and if (i) the insured was an employee within 12 months of death, (ii) the insured is a "highly compensated employee" under IRC § 414(q) (without regard to the top-paid group rules) or a "highly compensated individual" under IRC § 105(h)(5) with a salary in the top 35 percent of employees, including any director, or (iii) the benefits are payable to the individual's family, designated beneficiary (other than the employer), a trust for the benefit of such persons, or the individual's estate, or are used to purchase an equity interest in the employer from any of such persons. Under the notice and consent requirements, the employee, prior to the issuance of the contract, must (i) be notified in writing of the coverage and the maximum face amount for which the employee could be insured at issuance, (ii) be informed in writing that the employer will be the beneficiary of any death benefits under the policy, and (iii) provide written consent to being insured and to the coverage continuing after the employee's termination of employment. In addition, § 863(b) of the Act adds new IRC § 6039I subjecting employers maintaining COLI programs to annual reporting and recordkeeping requirements. These provisions would apply to contracts issued after the date of enactment (August 17, 2006), excluding contracts issued pursuant to a IRC § 1035 exchange. Material increases in the death benefit or other material changes in a grandfathered contract may be treated as a new contract.

	Current Law	**The Pension Protection Act of 2006 (the "Act")**
Combined Annuity and Life Insurance Contracts with Long-Term Care Insurance	The treatment of long-term care riders under life insurance and annuity contracts is unclear in a number of areas, some of which may affect the tax status of the underlying contract and exchanges of contracts.	Section 844 of the Act amends IRC §§ 72(e), 848(e), 1035, and 7702B and adds new IRC § 6050U, generally effective in 2010. Generally, any charge against the cash value of an annuity contract or the cash surrender value of a life insurance contract which is used to pay for qualified long-term care insurance is excludible from income so long as the long-term care insurance coverage is part of or a rider on the annuity or life insurance contract. Any person (or entity) making such charge is required to report (i) the amount of such charges against each contract for the year, (ii) the amount of the reduction in the investment in the contract, and (iii) information relating to the holder of the contract. Those individuals identified in the report must generally receive information in the report. Penalties apply for failure to report such information and to furnish such information to the identified parties. Qualified long-term care insurance would be treated as a separate contract for income tax purposes. Premium payments made with such charges are not eligible for the itemized medical expense deduction. No gain or loss is recognized on the exchange of a life insurance contract, an endowment contract, an annuity, or a qualified long-term care insurance contract for a qualified long-term care insurance contract (i.e., the tax-free exchanges of such contracts are permitted). For purposes of tax-free exchanges, a contract will continue to be considered an annuity or life insurance contract even though a qualified long-term care insurance contract is part of or a rider on such contract. Beginning in 2010, the guideline premium limitation is not increased by charges against the contract's cash surrender value for coverage under the qualified long-term care insurance contract. Instead, for purposes of the limitation, the charges reduce premiums

	Current Law	**The Pension Protection Act of 2006 (the "Act")**
		paid under the contract. The specified policy acquisition expenses that must be capitalized is determined using 7.7 percent of the net premiums for the taxable year on the annuity or life insurance contracts with a long-term care insurance rider.

MISCELLANEOUS

	Current Law	The Pension Protection Act of 2006 (the "Act")
DB/K Plan	Under current law, a defined contribution and defined benefit plan must be separate. Separate rules unique to a defined benefit and defined contribution must be satisfied by each respective type of plan.	Section 903 of the Act adds new ERISA § 210(e) and IRC § 414(x) which provide for a new type of hybrid plan (generally effective in 2010), which is the combination of a defined benefit plan and a 401(k) plan (the "DB/K Plan"). The defined benefit portion of the plan must provide a minimum benefit of 1 percent of final average compensation per year of service up to 20 years, without regard to whether the participant makes a contribution under the 401(k) portion of the plan. Benefits under the defined benefit portion of the plan must be fully vested within 3 years. The defined benefit portion of the plan is not subject to the top heavy rules. The 401(k) portion of the plan must provide for automatic enrollment at a rate of at least 4 percent of compensation and a matching fully-vested contribution equal to at least 50 percent of the employee's contribution up to 4 percent of compensation. The nondiscrimination rules for 401(k) plans will be deemed to be satisfied for these amounts. Contributions to the 401(k) plan (either higher matching contributions or after-tax contributions) and defined benefit accruals higher than the minimum benefit are permitted, subject to the applicable nondiscrimination rules.
EPCRS	The IRS Employee Plans Correction Resolution System ("EPCRS") allows the sponsor of a qualified plan, a 403(a) or 403(b) plan, or a SEP or a SIMPLE IRA (and on a provisional basis, 457(b) governmental plans) to voluntarily correct failures that may result in adverse tax consequences through various correction programs, including the Self-Correction Program ("SCP") or the Voluntary Correction Program ("VCP") (see Rev. Proc. 2006-27).	Section 1101 of the Act clarifies that the IRS has the authority to (i) continuously update and improve EPCRS, giving special consideration to issues relating to small employers and significant and insignificant failures under the SCP, and (ii) to waive income, excise, or other taxes to ensure that such penalties bear a reasonable relationship to the failure.

	Current Law	The Pension Protection Act of 2006 (the "Act")
Clarification of the QDRO Rules	Generally, benefits provided under a qualified retirement plan may not be assigned or alienated. However, benefits may be assigned to a former spouse (or other alternate payee) pursuant to a qualified domestic relations order ("QDRO"). Special rules govern whether a domestic relations order is qualified (ERISA § 206(d)(3) and IRC § 414(p)).	Section 1001 of the Act directs the DOL to issue, within 1 year after the date of enactment (by August 17, 2007), regulations clarifying the status of certain domestic relations orders, including that a domestic relations order will not fail to be a QDRO solely because it is issued after or modifies a previous domestic relations order or QDRO, or because of the time at which it is issued.
Reporting Simplificat-ion	Plan administrators are required to annually file a Form 5500 with the DOL providing plan-specific information. In general, one-participant plans with plan assets of $100,000 are exempt from filing and plans with 100 or fewer participants are subject to simplified reporting (see ERISA § 103)).	Under § 1103 of the Act, Treasury and the DOL are directed to (i) simplify the Form 5500 annual reporting rules for plans with fewer than 25 employees and (ii) exempt one-participant plans with less than $250,000 in assets from filing a Form 5500 (generally effective beginning on or after January 1, 2007).
Plan Amendments	In general, unless IRS prescribes otherwise, discretionary plan amendments must be made by the end of the plan year, and required amendments by the end of the tax filing deadline for the plan year for which they are first effective (see IRC § 401(b)).	In general, plans must be amended on or before the last day of the first plan year beginning on or after January 1, 2009 to effectuate the changes made by the Act (or as required to implement applicable IRS regulations). Governmental plans have until 2011 (see § 1107 of the Act).

TAB 2

August 17, 2006

SUMMARY COMPARISON AND ANALYSIS OF CURRENT LAW WITH THE FIDUCIARY AND PROHIBITED TRANSACTION PROVISIONS OF THE PENSION PROTECTION ACT OF 2006[1]

Contents

1 This chart generally summarizes changes to ERISA Title I and the prohibited transaction amendments included in the Pension Protection Act of 2006 (Pub. Law No. 109-280, 120 Stat. 780); H.R. 4.

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Current Law	Pension Protection Act of 2006	Analysis	Effective Date
Prohibited Transaction Exemptions			
Block Trading: ERISA section 406(a) currently prohibits purchase and sale transactions between a plan and a party in interest (e.g. service provider or fiduciary and certain affiliates) absent an exemption. Section 4975 of the Code imposes excise tax liability in the case of prohibited transactions involving qualified pension plans, IRAs, and certain other accounts. Where a manager wishes to aggregate the trades of multiple clients in a single "block" with a single counterparty, one or more plans may not be able to participate if the counterparty is a party in interest with respect to the plan(s).	**Block Trading (Act § 611(a))**: The PPA adds **ERISA § 408(b)(15)** which provides an exemption from the prohibitions of section 406 for the purchase or sale of securities between a plan and a party in interest (other than a fiduciary) in a block trade (i.e., a trade that will be allocated among 2 or more client accounts of a fiduciary) provided – 1. the trade involves at least 10,000 shares or a market value of $200,000, 2. the terms of the transaction, including the price, are at least as favorable to the plan as an arm's length transaction, 3. the plan's interest (together with other plans maintained by the same sponsor) in the block trade accounts for no more than 10% of the block trade, 4. the compensation associated with the trade is no greater than in an arms' length transaction with an unrelated party. A parallel exemption is provided under new Code § 4975(d)(18).	The new exemption may not be available where the counterparty in the block trade is a plan fiduciary. It is possible that a technical correction or DOL guidance will confirm that the exemption would be available for transactions with a fiduciary so long as the fiduciary does not have discretion over the assets involved in the transaction. It had been hoped that the exemption would provide relief in certain situations not covered by the QPAM exemption (PTE 84-14), such as where an affiliate of the counterparty has the ability to appoint the investment manager on behalf of the plan. However, given the fact that the exemption does not cover transactions with parties-in-interest that are fiduciaries, it is unlikely to extend to these transactions, unless DOL interprets the exemption to apply to transactions with parties in interest who do not act as fiduciaries in the transactions at issue. The new exemption provides to individual separate accounts the same type of access to block trades that is currently enjoyed by bank commingled funds and pooled separate accounts under PTEs 90-1 and 91-38.	Applies to transactions occurring after August 17, 2006 (date of enactment).
Electronic or Alternative Trading Systems: ERISA section 406(a) prohibits, in the absence of an exemption (e.g. QPAM), a purchase or sales of securities between a plan and a party in	**Electronic or Alternative Trading Systems (Act § 611(c))**: The PPA adds new **ERISA § 408(b)(16)** which provides an exemption from the prohibitions of section 406 for the purchase or sale of securities or other property (as determined by DOL)	The exemption provides relief from the prohibitions of section 406(a) for "non-blind" party-in-interest transactions effected through the trading system.	Applies to transactions occurring after August 17, 2006

CURRENT LAW	PENSION PROTECTION ACT OF 2006	ANALYSIS	EFFECTIVE DATE
	PROHIBITED TRANSACTION EXEMPTIONS		
interest through an alternative trading network under circumstances where the transaction is not deemed a "blind transaction." (See Adv. Op. 2004-05A indicating that certain trading systems are "blind transactions" and not prohibited transactions.) ERISA section 406(b) prohibits a fiduciary manager from exercising his authority to utilize a trading network or system in which it has an ownership interest or from which it receives a fee for plan transactions.	between a plan and a party in interest via an exchange, electronic communication network, alternative trading system, or similar regulated trading venue ("trading system") if -- 1. the transaction is effected under rules designed to match purchases and sales at the best price available through the trading system in accordance with applicable governmental rules <u>OR</u> the identity of the parties is not taken into account in the trade execution, 2. the price and compensation are not greater than that associated with an arm's-length transaction, 3. the transaction through the trading system is effected at the best price available, 4. if the party in interest is an owner of the trading system, an independent fiduciary authorizes the use of the trading system (Note that at one point in the legislative process, DOL proposed this condition relating to the ownership of the trading system, but its language stated "if the fiduciary or the party in interest" is an owner of the trading system.), and 5. the plan fiduciary is provided at least 30 days before the initial transaction executed through the system, the plan fiduciary is provided notice of the execution of such transaction. A parallel exemption is provided under new Code § 4975(d)(19).	Unless DOL interprets the exemption to apply only to the prohibitions of section 406(a) and not potential 406(b) violations, this exemption may also provide relief for - • principal transactions between a plan and the plan fiduciary causing the transaction through the trading system, and • transactions through a trading system in which the manager has an interest or through which the manager receives a fee. This exemption may not cover inadvertent cross trades through a trading system (i.e., a trade between two of the manager's clients) because the client plans will not likely be parties in interest with respect to each other. DOL is to issue regulations applying the exemption to transactions involving "property" other than securities. According to the Joint Committee on Taxation Technical Explanation, the exemption should also be available for futures contracts and currency trades.	(date of enactment).
<u>Foreign Exchange Transactions</u>: ERISA section 406(a)(1)(A) and (D) prohibit foreign exchange ("FX") transactions between a plan and a party in interest. Existing class	**<u>Foreign Exchange Transactions (Act § 611(e))</u>:** The PPA adds new **ERISA § 408(b)(18)** which provides an exemption from the prohibitions of section 406 for FX transactions between a plan and a party in interest bank, broker-dealer or affiliate (including a	Many FX transactions are principal transactions with the plan's trustee or custodian (or an affiliate). The procedures under the current class exemptions requiring direction of an investment manager	Applies to transactions occurring after August 17, 2006

CURRENT LAW	PENSION PROTECTION ACT OF 2006	ANALYSIS	EFFECTIVE DATE
PROHIBITED TRANSACTION EXEMPTIONS			
exemptions, PTEs 94-20 and 98-54, permit plans to engage in FX transactions with parties in interest (other than the fiduciary with discretion over the securities or FX transaction), if a direction (individual or standing) from a fiduciary independent of the counterparty is obtained. ERISA section 406(b) prohibits a plan fiduciary from causing a plan to engage in an FX transaction with a counterparty affiliated with the fiduciary. There is no current relief for these transactions.	fiduciary) if – 1. the transaction is in connection with the purchase, sale or holding of securities or other investment asset (other than an FX transaction unrelated to investment of securities or other assets), 2. at the time of the transaction, the terms of the transaction are not less favorable to the plan than the terms generally available in comparable arms'-length transactions between unrelated parties, or the terms afforded by the bank or broker in comparable arm's length FX transactions involving unrelated parties, 3. the exchange rate may not deviate by more or less than 3% from the interbank bid/asked rate displayed by an independent service at the time of the transaction for comparable transactions, and 4. the bank or broker-dealer (or any affiliate) does not have investment discretion or provide advice with respect to the transaction. A parallel exemption is provided under new Code § 4975(d)(21).	unaffiliated with the plan are unwieldy. The new exemption will eliminate the need for individualized or standing directions, provided the trustee/custodian is able to implement and finds acceptable the interbank rate standard. The exemption does not provide relief for FX transactions between the plan and the fiduciary who has discretion over the assets in the transaction. Thus, managers of bank collective funds and transition mangers will still be unable to effect FX through the bank. Some have questioned whether a transaction of less than $1 million could be deemed "comparable" under condition #2 because intrabank transactions are usually not less than $1 million.	(date of enactment).
Transactions with Service Providers: ERISA prohibits most transactions between a plan and a party in interest. A "party in interest" includes a plan fiduciary, service provider, employer,	**Exemption for Transactions with Party-in-Interest Service Providers (Act § 611(d))**: The PPA adds **ERISA § 408(b)(17)** which provides an exemption from the prohibitions of section 406 for transactions described in sections 406(a)(1)(A), (B) and (D)	This is a broad exemption covering 406(a) transactions that meet a single condition -- that the plan receive no less, or pay no more, than "adequate consideration."	Applies to transactions occurring after August 17, 2006

CURRENT LAW	PENSION PROTECTION ACT OF 2006	ANALYSIS	EFFECTIVE DATE
PROHIBITED TRANSACTION EXEMPTIONS			
union and certain affiliates of these entities. ERISA § 3(14). Although section 408(b) contains an exemption for the provision of services to a plan by a party in interest, current law prohibits other transactions between a plan and its party in interest service providers (including purchases, sales, leases, loans and exchanges) unless another exemption applies.	(sales, exchanges, leases, loans, uses and transfers between a plan and those entities that are parties in interest solely by reason of providing services to a plan (or because of a relationship to a service provider) if the plan pays no more (or receives no less) than "adequate consideration". The exemption does not apply to transactions between a plan and a fiduciary with respect to the assets involved in the transaction (or an affiliate of such a fiduciary). "Adequate consideration" is defined as follows – 1. For securities traded on such an exchange: the prevailing price on a national securities exchange, 2. For other securities for which there is a generally recognized market: the current bid and asked prices quoted by persons independent of the issuer and the party in interest, or 3. For all other assets: the fair market value of the asset as determined in good faith by a fiduciary. A parallel exemption is provided under new Code § 4975(d)(20).	One issued raised by the language of the amendment is whether the exemption available for a transaction with an appointing fiduciary? The exemption does not provide any relief from the prohibitions of ERISA section 406(b), so will not cover a transaction if the plan's fiduciary has an interest in the service provider that could affect the fiduciary's exercise of its best judgment (such as an ownership interest or profits interest). The exemption's "adequate consideration" condition may be challenging to apply with respect to non-sale transactions, such as loans.	(date of enactment).
Cross Trading: ERISA § 406(b)(2) currently prohibits an investment manager or other fiduciary from causing a client plan to engage in a direct purchase or sale of securities with another client of the manager, even though such a "cross trade" may result in cost savings for both clients. DOL has issued class exemptions to permit under certain conditions "agency"	**Cross Trading (Act § 611(g)):** The PPA adds **ERISA § 408(b)(19)** which provides an exemption from the prohibitions of section 406 for any transaction described in sections 406(a)(1)(A) and 406(b)(2) involving the purchase and sale of a security between a plan and any account managed by the same investment manager, if — 1. the transaction is a cash-only purchase or sale of a	The new exemption will have utility primarily for large separately-managed accounts. Unlike the new service provider exemption, the conditions of the cross-trade exemption may be burdensome. The new exemption's restriction on conditioning fees or services on the ability to engage in cross trading (#7) arguably eliminates the ability to offer fee incentives	Effective for transactions occurring after August 17, 2006 (date of enactment). DOL is required

CURRENT LAW	PENSION PROTECTION ACT OF 2006	ANALYSIS	EFFECTIVE DATE
PROHIBITED TRANSACTION EXEMPTIONS			
cross trades (where the manager has discretion only on one side of the transaction) and "passive" cross trades (where the portfolio composition is determined by an external index or fixed computer model). <u>See</u> PTEs 86-128 and 2002-12.	security for which market quotations are readily available; 2. the transaction is effected at the market price as determined under SEC Rule 17a-7(b) applicable to mutual funds; 3. no brokerage commission or other fee (except customary and disclosed transfer fees) is paid in connection with the transaction; 4. for each plan engaged in the transaction, a fiduciary independent of the manager receives written disclosures of the conditions under which cross trades may occur, and provides advance written approval (both the disclosures and approval must be in a document separate from any management agreement); 5. each affected plan or master trust must have assets in excess of $100 million; 6. the manager must provide detailed quarterly reports of all cross trades to the plan fiduciary; 7. the manager's fee schedule or other services must not be contingent on the ability to cross trade; 8. the manager must adopt written cross-trading policies and procedures; and 9. the manager must designate an individual responsible for compliance reviews and who will prepare an annual compliance report for clients signed under penalties of perjury (the report must also remind clients of their right to terminate participation). A parallel exemption is provided under new Code § 4975(d)(22). (The Code does not contain a 406(b)(2)-type prohibition.)	(other than the direct cost savings of avoiding commissions or market impact). The exemption's prohibition on commissions may rule out the common use of "brokered" cross trades at discounted commission rates. It is not clear whether the restriction is intended to prohibit all commissions or merely those paid to the manager or its affiliates. The exemption's "penalties of perjury" compliance audit (condition #9) is a condition not found in most prohibited transaction exemptions and may present compliance challenges. Given these additional burdens and uncertainties, the exemption is not likely to alter reliance on existing class exemptions for passive or agency cross trades, but will add an additional tool for discretionary managers, particularly those who also manage mutual fund assets.	to issue regulations within 180 days regarding the content of managers' written cross-trading policies and procedures. A manager that engages in cross trading in the interim presumably will do so at risk that its policies and procedures will later be determined insufficient.

CURRENT LAW	PENSION PROTECTION ACT OF 2006	ANALYSIS	EFFECTIVE DATE
	BONDING RELIEF		
Bonding: ERISA section 412 requires plan fiduciaries and other persons who "handle" assets of employee benefit plans to be bonded against losses to the plan from acts of fraud or dishonesty. Each plan must be covered for 10% of the amount of plan assets handled, up to $500,000. Banks and insurance companies supervised or examined by Federal or State authorities generally are exempt. Current law does not exempt registered broker-dealers or registered investment advisers from the bonding requirement.	**Persons Required to Be Bonded (Act § 611(b)):** The PPA adds **ERISA § 412(a)(2)** which extends the bonding exemption to registered broker-dealers subject to fidelity bond requirements of a self-regulatory organization. Banks and insurance companies remain exempted from the bonding requirement. **Bond Amount (Act § 622)**: The PPA amends **ERISA § 412(a)** to increase the maximum required bond amount from $500,000 to $1,000,000 for plans that hold employer securities.	H.R. 2830 would have included a bonding exemption for registered investment advisers and affiliates of broker-dealers under certain conditions. However, the final PPA only provides relief to registered broker-dealers. Even at the current maximum bond amount of $500,000, large investment managers find it difficult to get the required bonds. Doubling the maximum bonding requirement to $1 million will exacerbate this significant problem.	The broker-dealer exemption applies to plan years beginning after August 17, 2006 (date of enactment). The increase in the bond amount will apply to plan years beginning after December 31, 2007.

	DEFINITION OF "PLAN ASSETS"		
Significant Participation Test: The "significant participation test" under DOL's plan asset regulation provides that a non-publicly traded investment entity (e.g., a limited partnership, LLC or trust) is treated as holding "plan assets" if participation by "benefit plan investors" is significant — that is, benefit plan investors own 25 or more of any	**Plan Assets Definition (Act § 611(f)):** The PPA adds **ERISA § 3(42)** which provides that the term "plan assets" will mean, generally, plan assets as defined by regulations issued by the Secretary of Labor, but specifies that such regulations shall provide that an entity shall not be treated as holding plan assets if less than 25% of the total value of each equity class is held by benefit plan investors. The amendment narrows the definition of "benefit plan investor" to include only:	The new "benefit plan investor" definition means that governmental and foreign plans will no longer be counted in determining whether benefit plan investor participation in a private investment fund is "significant." This should expand ERISA plan investment opportunities in non-plan asset vehicles. The "to the extent" change will facilitate ERISA plan	Applies to transactions occurring after August 17, 2006 (date of enactment).

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Definition of "Plan Assets"			
class of the fund's equity interests. 29 C.F.R. § 2510.3-101. If a fund holds plan assets, the fund must be managed to comply with ERISA's prohibited transaction rules and other fiduciary requirements. The plan asset regulation currently defines a "benefit plan investor" as any employee benefit plan, including an ERISA plan, a non-ERISA governmental or foreign plan, an individual retirement account (IRA) or other arrangement subject to Code section 4975, and an entity that holds plan assets by reason of a plan's investment. 29 C.F.R. § 2510.3-101(f). DOL's current position is that, if any fund holds plan assets (because benefit plan investors hold 25% or more of its equity interests), that entity's entire investment in another entity must be treated as the investment by a "benefit plan investor." For example, if Fund A holds plan assets and invests in Fund B, Fund B must treat Fund A's entire investment as an investment by a benefit plan investor, even if only 50% of A's equity interests are owned by benefit plan investors. In calculating the percentage of equity interests owned by benefit plan investors, any equity interest "held" by a person who has	1. Plans covered by ERISA, 2. IRAs or other arrangements subject to Code section 4975, and 3. Those entities whose assets include plan assets by reason of a plan's investment in the entity. Non-ERISA plans such as governmental, church and foreign benefit plans are effectively excluded from the definition of "benefit plan investor." In another change, the PPA provides that an investment entity is deemed to hold plan assets only to the extent of the percentage of the entity owned by benefit plan investors. For example, if 50% of Fund A's equity interests are held by benefit plan investors, only 50% of Fund A's investment in Fund B must be counted as an investment by a benefit plan investor in Fund B's calculations under the significant participation test. The 25% threshold under the significant participation test was not changed by the Act.	investments through "funds of funds," which may offer more diverse investments in alternative asset classes. Investment managers sought a change to the Manager Disregard Rule that would clarify that only those interests <u>owned</u> by the manager must be disregarded. HR 2830 contained this language but it did not make it into the final PPA, leaving the issue as to whether interests <u>controlled</u> but not owned by the manager must be disregarded. Some suggest that, notwithstanding new section 3(42), DOL should retain discretion to issue regulations that increase the 25% threshold (but could not decrease the threshold). The amendment made by the PPA gives DOL legislative authority to issue regulations defining when an entity holds "plan assets" – authority which DOL did not have under prior law. Current DOL "plan asset" regulations are interpretative rules only. It may be possible to argue, based on the language of the new section 3(42), that DOL regulations may not impose "plan assets" status on any entity in which benefit plan investors hold less than 25% of the interests, including, for example, pooled separate accounts and collective investment funds.	

Current Law	Pension Protection Act of 2006	Analysis	Effective Date
Definition of "Plan Assets"			
discretionary authority with respect to the assets of the entity (or who provides investment advice with respect to such assets) must be disregarded (e.g., subtracted from the denominator) (the "Manager Disregard Rule").			
Correction of Prohibited Transaction			
Excise Taxes on Prohibited Transactions: ERISA currently prohibits purchases and sales between a plan a party in interest. ERISA § 406(a)(1)(A). In the case of a securities transaction, a prohibited transaction is deemed to occur once the transaction has settled. Currently, there is no relief from ERISA's prohibited transaction provisions, or from the imposition of excise taxes under the Code, even if an inadvertent prohibited transaction is ultimately corrected.	**Exemption for Corrected Party-in-Interest Transactions (Act § 612)):** The PPA adds **ERISA § 408(b)(20)** which provides an exemption from the prohibitions of section 406(a) in connection with the acquisition, holding, or disposition of any security or commodity, if the transaction is corrected within 14 days of the date that the fiduciary discovers (or reasonably should have discovered) the fact that the transaction was prohibited. The exemption would not apply to: 1. a transaction between the plan and plan sponsor involving employer securities or real property, or 2. a transaction that the fiduciary or party in interest knew or reasonably should have known was prohibited at the time it occurred. To "correct" means: 1. to undo the transaction to the extent possible and in any case to make good to the plan any losses resulting from the transaction, and	Significantly, the exemption permits correction within a 14-day window from *the date the transaction is discovered (or reasonably should have been discovered).* The Senate version of the exemption would have required correction within 14 days of the transaction itself. Undoubtedly, the issue will arise as to when and whether a prohibited transaction "reasonably should have been discovered."	Applies to any transaction fiduciary discover (or should have discovered) is a prohibited transaction after August 17, 2006 (date of enactment).

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	CORRECTION OF PROHIBITED TRANSACTION		
	2. to restore to the plan any profits made through the use of the plan assets. A parallel exemption is provided under new section 4975(d)(23). If a transaction is covered by the new exemption, no excise tax shall be assessed, and if assessed, the tax shall be abated.		
	INVESTMENT ADVICE (ACT §601)		
Investment Advice Issues: The provision of investment advice for a fee to plan sponsor or to participants in a participant-directed plan is a fiduciary act. ERISA § 3(21)(A). Generally, an investment adviser that provides advice to invest in specific securities or vehicles that pay additional fees to the adviser or the adviser's affiliate could violate ERISA's self-dealing restrictions. DOL has issued several older class exemptions that may provide relief for such transactions. See PTEs 75-1, 77-4, 84-24, 86-128. DOL more recently has indicated a prohibited transaction will not occur if an adviser levels or offsets all of his fees such that the adviser has no financial interest in a transaction. See DOL Adv. Ops. 97-15A (Frost Bank), 2005-10A (Country Bank). Alternatively, the adviser must use, and not deviate from, an independently developed computer model that provides the investment recommendations. DOL Adv. Op. 2001-09 (Sun America).	**Exemption for Fiduciary Advisers (Act § 601)**: In General: The Amendment provides an exemption for the provision of advice to participants and receipt of fees from such advice by a "fiduciary advisor." The exemption does not apply to "plan level" advice – i.e., advice to plan fiduciaries who are selecting investment options, or any plans other than participant directed plans. Fiduciary adviser is defined broadly to include banks, insurance companies, broker dealers, registered investment advisers, all of their affiliates, and all of their employees, representatives and agents. The exemption includes significant conditions. Most importantly, advice must be given pursuant to an "eligible investment advice arrangement" ("Eligible Arrangement"). To be an Eligible Arrangement, either: 1. any fees received by the adviser must not vary on the basis of investment options selected or 2. the adviser must use a computer model. The computer model must be objective and must be certified by	General The final agreement significantly reduces the usefulness of the broad exemption originally passed by the House. If narrowly interpreted, the exemption may not provide much more flexibility than the fee leveling and independent computer modeling options available under current law and, in fact, the adviser would be required to comply with significant new audit and disclosure conditions. There are two issues which DOL could interpret favorably that would enhance the utility of the exemption: Fee leveling: It may be possible to read the fee leveling condition as only requiring fee neutrality for the individual adviser providing the advice, as opposed to requiring comprehensive fee neutrality for the adviser's employer and affiliates. If DOL (or Congress) provided such a clarification, this condition would make more sense because an exemption would still be needed because an employer's financial interests are usually imputed to an individual acting on the	Applies to advice provided after December 31, 2006.

CURRENT LAW	PENSION PROTECTION ACT OF 2006	ANALYSIS	EFFECTIVE DATE
INVESTMENT ADVICE (ACT §601)			
Plan sponsors that hire investment advisers have a fiduciary responsibility to prudently select and monitor the adviser. In addition, under ERISA section 405, a sponsor could be liable for the fiduciary breaches of advisers they have hired under certain circumstances.	an eligible investment expert at the time it is initially used and then again if later modified. The independent expert must have no material relationship with the adviser. A myriad of additional conditions apply, including comprehensive disclosures of fees and affiliations that must be given before the time of the advice and regularly updated. Advisers must obtain an annual audit from an independent auditor regarding compliance with the exemption. Plan sponsors are given some relief from the specific advice provided by advisers, but they must prudently select and monitor advisers as they currently must do for investment managers. <u>IRAs</u> The exemption includes the same conditions in ERISA section 406 and Code section 4975. However, the exemption includes a special rule that directs the DOL to study whether computer models are feasible for IRAs. In particular, DOL must determine if computer models can take into account the full range of investments available in IRAs, including individual bonds and equities. DOL must issue a report to Congress and if it determines a computer model is not feasible it must issue a class exemption for IRAs that follows the statutory exemption, but without the computer model requirement. If DOL initially finds that computer models are not feasible for IRAs, any person may later ask DOL to review that finding based on new information and DOL must respond within 90 days of	employer's behalf. <u>Computer Model</u>: The exemption includes a provision requiring that advice be given at the direction of the participant. However, it further indicates that nothing precludes individuals from requesting advice other than that provided under the computer model provided that the request is not "solicited." It is not clear whether this provision (1) requires "rerunning" and following the model in order for the adviser to respond to the participant's request, or, (2) provides exemptive relief for deviating from the model in response to such a request. It is also unclear if advisory materials could in any way publicize this option without running afoul of the "no solicitation" rule. <u>IRAs</u>: It is possible that DOL could issue a very helpful exemption for IRAs under this provision. However, there is no set time frame for the issuance of the DOL exemption and there could be a strong effort by opponents to an IRA exemption to prove that computer models can cover all individual securities. Moreover, DOL is required to continuously review future requests and subsequently revoke the exemption if it revises its initial finding, which creates uncertainty for those seeking to rely on a DOL exemption.	The provision relating to the DOL study is effective on August 17, 2006 (date of enactment).

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Investment Advice (Act §601)			
	such request. If DOL then makes a finding that computer models are feasible, then the exemption is revoked within 2 years.		
Default Investments & Auto Enrollment			
ERISA § 404(c) – Default Investment Options: Under ERISA, the investment of plan assets is generally a "fiduciary" act. ERISA § 3(21)(A). Under ERISA a fiduciary must, among other things, act for the exclusive benefit of participants and act with care, skill and prudence. ERISA § 404(a). Under ERISA section 404(c), provided certain requirements are met, plan fiduciaries are relieved of liability for losses that result from a participant's exercise of control over his or her plan account balance. It is DOL's view that 404(c) relief is not available in the absence of a participant's affirmative investment direction, including where a participant's account is invested "by default" in an investment option.	**Default Investment (Act § 624)**: A new **ERISA § 404(c)(5)** is added to extend protection to fiduciaries of plans that provide for the investment of the participant account balances in the absence of an affirmative investment election in "default investments." To obtain relief, the plan must comply with new DOL regulations and provide notice to participants. DOL must issue regulations on the appropriateness of designating certain investments as "default investments" that would permit the use of a mix of investments and asset classes consistent with long-term capital appreciation or capital preservation, or a blend of both. Annual notice must be provided to participants explaining the employee's right to designate investments under the plan and how a participant's account balance will be invested in the absence of an affirmative investment election. The participant must be given a reasonable amount of time after receipt of the notice, and before the beginning of the plan year, to affirmatively designate investments under the plan.	This section 404(c) amendment will encourage employers to offer automatic enrollment programs since they will be able to obtain liability relief. Providing relief for both capital preservation and accumulation vehicles will provide needed flexibility. As with any relief under section 404(c), plan fiduciaries will still be liable for prudently selecting and monitoring the default vehicles. One limit is that the amendment only applies to section 404(c) plans, and many individual account plans may not qualify as section 404(c) plans. DOL proposed regulations for default investment programs in September, 2006. The regulation is broader in scope in that it addresses non-404(c) plans.	Effective for years beginning after December 31, 2006.
Preemption of State Law for Auto Enrollment: ERISA section 514 broadly preempts any state law that relates to a plan.	**Preemption (Act § 902(f))**: ERISA's preemption provision is amended to provide that any state law restricting the inclusion of an "automatic contribution arrangement" would be preempted.	This provision will provide some new certainty regarding automatic enrollment arrangements. Several aspects of the preemption relief that are noteworthy.	Effective on August 17, 2006 (date of

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DEFAULT INVESTMENTS & AUTO ENROLLMENT			
Various state laws may restrict a plan's enrollment procedures, including state requirements for affirmative or written authorization for payroll deductions, or limits on overall payroll deductions for employee benefit plan contributions relative to an employee's total wages. DOL has issued several advisory opinions indicating that such laws, even state criminal laws, are preempted by ERISA. <u>See</u> DOL Adv. Ops. 96-01A; 94-27A.	An automatic contribution arrangement is limited to arrangements under which contributions are made in accordance with the default investment arrangements that are added to section 404(c)(5). As a condition of obtaining preemption, the administrator must provide an annual notice to participants describing the arrangement.	The provision might be interpreted to <u>narrow</u> current law since DOL has issued numerous favorable opinions of the subject under the more general preemption rules of section 514(a). Moreover, the relief is available only for section 404(c) plans. There may be a <u>negative</u> inference created for non-section 404(c) plans, including many health and welfare plans that have automatic enrollment features, since those plans have previously relied on the general preemption rules under section 514(a). Notices required under this provision must be coordinated with the notice required under the new default investment rules in section 404(c)(5).	enactment).
MAPPING (ACT § 621(a)(2))			
<u>Mapping:</u> ERISA section 404(c) provides that if a participant is permitted to direct his own investments under the plan, plan fiduciaries will generally not be liable for losses that result from the participant's direction. Under 404(c), the plan fiduciary must provide a broad range of investment options, consisting of at least three diversified investment options. Failure to prudently choose these investment options may result in personal liability on the part of the fiduciary under 404(a).	**<u>Mapping (Act § 621(a)(2))</u>:** ERISA section 404(c) is amended in two respects. First, fiduciaries are provided with 404(c) relief during a blackout period if they authorized and implemented the blackout period consistent with the "requirements of this title." In addition, ERISA section 404(c)(4) would be added to provide generally that, if certain requirements are met, section 404(c) relief would be available for mapping that constitutes a "qualified change in investment options." A "qualified change in investment options" must meet the following requirements: 1. The participant's account is reallocated among one or more new investment options which have characteristics	Providing "mapping" relief is also a favorable change. Important changes were made in conference that allow administrators to "synch" the existing blackout notice with this mapping notice and provide relief for any mapping circumstances whether or not a blackout period is entered into. However, requiring mapping to similar risk and return vehicles may be challenging in some cases. In many circumstances there may be no similar fund or there will be uncertainty as to whether funds are similar enough (e.g., a GIC vs. a money market fund).	Applies for plan year beginning after 12/31/07. <u>Special CBA rule</u>: Plan Years beginning on the earlier of (A) the later of 12/31/08 or the termination of

CURRENT LAW	PENSION PROTECTION ACT OF 2006	ANALYSIS	EFFECTIVE DATE
MAPPING (ACT § 621(a)(2))			
DOL currently takes the position that section 404(c) is not available to a fiduciary either (1) during a blackout period or (2) when participant account balances are "mapped" to new options without an affirmative participant direction. Section 101(i) of ERISA requires administrators to provide advance notice of a "blackout period." Generally, the notice must be provided at least 30 days in advance. A "blackout period is defined as a period of 3 or more consecutive days in which individual account participants may not direct trades, obtain loans or obtain distributions.	relating to risk and rate of return are reasonably similar to the existing investment options immediately before the change; 2. Notice must be sent at least 30 days and no more than 60 days before the effective date of the change, explaining how the account will be invested in the absence of affirmative directions and including information comparing the new and existing options; 3. The participant must not have provided affirmative investment instructions contrary to the change before the effective date of such change; and 4. The investments of the participant or beneficiary in effect immediately before the change must have been the product of the exercise of control by the participant or beneficiary.		the CBA, or (B) 12/31/09.
EMPLOYER STOCK			
Divestment of Employer Securities: Under the Code, an employee stock ownership plan ("ESOP"), which is designed to invest primarily in employer securities, must permit a participant who has attained age 55 with at least 10 years of participation to diversify his or her account into assets other than employer securities. Eligible individual account plans generally are not subject to restrictions on the amount that may be invested in employer securities, and fiduciaries generally will not be deemed to violate ERISA's diversification requirements	**Divestment of Employer Securities (Act § 901)**: The PPA amends ERISA and the Code are amended to add new **ERISA § 204(j)** and **Code § 401(a)(35)**, which generally provide that defined contribution plans are required to permit participants to diversify amounts invested in employer securities. The time at which the new diversification rights are triggered depends upon the type of contribution invested in employer securities: 1. In the case of elective deferrals under a qualified cash or deferred arrangement and employee after-tax contributions that are invested in employer securities, each "applicable individual" (i.e., a plan participant, and any beneficiary who has an account under the plan with	Currently, ERISA section 407, dealing with limitations on acquisition and holding of employer securities, allows a plan to require that employees invest up to 1% of their elective deferrals in employer securities. This seems at odds with the diversification requirements added to ERISA section 204(j) under the PPA. Current regulations under ERISA section 404(c) include a "general volatility rule" applicable to all plan investment options, including employer stock alternatives, which provides that a plan will not meet the requirements of ERISA section 404(c) if it does not allow participants to give investment instructions "with	Generally: Applies to plan years beginning after 12/31/2006. Special CBA Rule: Applies on the earlier of: (1) 12/31/07, or the date on which the last CBA terminates

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EMPLOYER STOCK			
with respect to qualifying employer securities held by such plans.	respect to which the beneficiary is entitled to exercise the rights of the participant) must be permitted to direct that such amounts be transferred into alternative investments. 2. With respect to nonelective employer contributions and employer matching contributions that are invested in employer securities, a participant with at least three years of vesting service, a beneficiary of such participant, or the beneficiary of a deceased participant, must be permitted to direct that such amounts be transferred into alternative investments. A transition rule would apply to employer securities held in accounts of participants acquired in a plan year beginning before January 1, 2006. Under the transition rule, the divestment opportunities would apply to 33% of each class of employer securities held in a participant's account during the first year of the transition, 66% during the second year of the transition, and 100% during the final year of the transition. No transition period would apply for participants aged 55 and over who completed three years of services before the first plan year beginning after December 31, 2005. Plans subject to the diversification rules are required to give applicable individuals a choice of at least three investment options—other than employer securities—each of which is diversified and has materially different risk and return characteristics. Plans must offer applicable individuals the opportunity to request diversification from employer securities with the same frequency	a frequency which is appropriate in light of the market volatility to which the investment alternative may reasonably be expected to be subject." Thus, even though the PPA allows for quarterly trading out of an employer stock alternative, a plan may not meet the requirements of ERISA section 404(c) if it only allows for quarterly trading out of the employer stock alternative.	(without regard to extensions), or (2) 12/31/2008. Special ESOP Rule: the earlier of: (1) 12/31/07, or (2) the first date on which the fair market value of employer securities exceeds the guaranteed minimum value specified by the plan. 3-Year Transition Rule: Special transition rule applies to nonelective employer contributions and employer matching contributions invested in employer

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Employer Stock			
	as the opportunity to make other investment changes, and such opportunity must be offered at least quarterly. Plans may not impose restrictions or conditions with respect to investment of employer securities that are not imposed on the investment of other assets (other than as required by securities laws). For example, a plan may not provide lower rates of employer matching contributions with respect to participants who divest their accounts of employer securities. Plan administrators must provide participants with written notice of diversification rights at least 30-days prior to such rights being triggered (the disclosure obligations is discussed below).		securities in plan years beginning before January 1, 2007.
	Notice to Participants Regarding the Right to Divest Employer Securities (Act § 507): The PPA adds a new **ERISA § 101(m)**, which requires a plan administrator to notify each individual account plan participant of his or her right to sell employer securities at least 30 days before the participant is eligible to sell such securities. The notice must also describe the importance of diversifying retirement account assets. The notice must be written in a manner calculated to be understood by the average participant, and may be delivered in written, electronic, or other appropriate form to the extent such form is reasonably accessible to the applicable individual. Also amended is **ERISA §502(a)(7)**, to allow the Secretary of Labor to assess a civil penalty upon the plan administrator of up	If a participant's ability to divest from employer securities is triggered at different times due to the manner in which employer securities were acquired, e.g., elective deferrals versus non-elective employer contributions or employer matching contributions, separate notices must be provided. The Treasury Department is required to issue a model notice within 180 days of the enactment of the legislation.	Notice: Applies to plan years beginning after December 31, 2006.

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EMPLOYER STOCK			
	to $110 per day, for failure to provide the required notice in a timely manner.		
Benefit Statements: ERISA currently requires pension plans to provide certain benefits statements to participants "upon request." Specifically, section 105(a) of ERISA requires pension plans to provide a statement of a participant or beneficiary's accrued and vested benefits (or the date benefits will become vested) upon written request. Plans are not required to provide this statement more frequently than once per year. Plans to which more than one unaffiliated employer contributes (e.g., multiemployer plans) are not currently subject to this requirement under section 105(d). Plans wishing to qualify for the fiduciary relief provided by ERISA section 404(c) are required to provide, upon request, information concerning the value of shares or units in the investment options held in a participant or beneficiary's account under the plan.	**Periodic Benefit Statements (Act § 508):** The PPA amends **ERISA § 105(a)** to require periodic benefit statements to individual account plan and defined benefit plan participants, including a notice regarding account diversification. Certain pension plans must provide benefit statements automatically, rather than solely upon request. Individual account plans must furnish quarterly statements to participants and beneficiaries who have the right to direct the investment of their accounts, annual statements to participants and beneficiaries who have plan accounts that they do not have the right to direct, and upon request to other beneficiaries. Defined benefit plans would be required to provide benefit statements every three years to vested participants who are current employees, or an annual explanation of how to obtain a benefit statement. Other participants and beneficiaries could obtain statements from a defined benefit plan upon request. Benefit statements could be provided in written or electronic form, and would be required to provide a statement of both accrued and vested benefits (or the date on which benefits become vested) and an explanation of the impact of any permitted disparity or floor-offset arrangements. For individual account plans, statements would generally be required to include the value of each investment option to which the participant's account has been allocated, and if a participant has the right to direct the investment of his account, an explanation of any limitations on		Applies to plan years beginning after December 31, 2006. For collectively bargained plans, the amendments apply to plan years beginning after December 31, 2007 or December 31, 2008, depending on the expiration date of the latest collective bargaining agreement under which the plan is maintained.

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Employer Stock			
	the right to direct account balances, the importance of a diversified portfolio, and notice that the DOL website contains information on investing and diversification. Participants and beneficiaries would not be entitled to more than one benefit statement in any 12-month period. The PPA removes section 105(d) from ERISA. Accordingly, plans maintained by multiple employers are now subject to benefit statement requirements to the same extent as their single employer counterparts. The PPA directs the DOL to develop a model benefit statement within one year of enactment and permits interim final rules.		
Miscellaneous			
Missing Participants: Under current ERISA § 4050 and PBGC regulations, when a plan participant in a terminating single-employer DB plan cannot be located, the plan administrator may purchase an annuity for the missing participant or pay the funds to the PBGC. Before turning assets over to the PBGC, the plan administrator must conduct a diligent search for missing plan participants. DOL takes the position that plan fiduciaries have a duty to attempt to locate missing participants. DOL Info. Ltr. to W. Strauss (Aug. 25, 1986), DOL also views the choice of a distribution option for missing participants in	**Missing Participants (Act § 410):** The PPA amends **ERISA § 4050** to direct the PBGC to issue regulations including multi-employer plans in the PBGC's missing participant program. Thus, like terminating single employer DB plan, terminating multi-employer plans must either purchase an annuity for the missing participant or pay the funds to the PBGC. The PPA also amends ERISA § 4050 to provide that certain other terminating plans may, in accordance with PBGC regulations, transfer missing participants' benefits to the PBGC. Plans included in the permissive PBGC missing participant program include: 1. defined contribution plans 2. defined benefit pension plans with no more than 25 active employees maintained by a professional service	Without further guidance from the DOL, it may be difficult for plan fiduciaries of terminating defined contribution plans to utilize the PBGC missing participant program. The PPA does not provide any relief from ERISA's fiduciary liability provisions for the transfer of assets to the PBGC. ERISA section 404(c)(3) provides that a fiduciary shall not be liable for losses suffered by a participant account transferred to an IRA in accordance with DOL regulations. DOL regulations shield plan fiduciaries from ERISA liability for the selection of an IRA provider and the investment of IRA funds in the case of IRA rollovers. Without similar liability protections, plan fiduciaries may not be as willing to	Effective for distributions made after final regulations implementing the provisions are issued.

CURRENT LAW	PENSION PROTECTION ACT OF 2006	ANALYSIS	EFFECTIVE DATE
a terminating defined contribution plan as a fiduciary decision and has identified establishing an IRA as the preferred distribution option. DOL FAB 2004-02 (Sept. 30, 2004).	corporation, and 3. the portion of defined benefit pension plans that provide benefits based upon the separate accounts of participants. Once assets are transferred to the PBGC, the PBGC becomes responsible for paying each located plan participant either a single lump-sum (plus interest) or a payment in another form specified by the PBGC's regulations. The regulations may also require plan administrators transferring missing participant assets to provide the PBGC with information about the benefits due to the plan's missing participants.	turn missing participant assets over to the PBGC. Depending on the regulations adopted by the PBGC, this informational requirement could apply even where the plan administrator does not elect to transfer participant assets to the PBGC. For instance, where a plan administrator opens a bank account for a missing participant, the plan administrator may still have to provide the PBGC with information	
Coercive Interference with Participant Rights under ERISA Section 511: Section 511 provides that it is unlawful to coerce or intimidate any participant through the use of fraud, force, violence or the threat thereof for the purpose of interfering with or preventing the exercise of the participant's right under the plan, Title I, section 3001 or the WPPDA. A violation of Section 511 results in a fine of $10,000 and or imprisonment of up to one year.	**Increased Interference Penalties (§ 623)**: The penalty for violation of section 511 was increased to $100,000 and imprisonment of no more than 10 years.		Applies to violations occurring on or after August 17, 2006 (date of enactment).