

LEGISLATIVE UPDATE 2007

Overview of Significant Legislation Before Congress

Discussion of Selected Legislation

Dallas Bar Association

Employee Benefits/Executive Compensation Section

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Introduction

- A. Welcome and Happy Holidays**
- B. Number of Bills to Consider**
- C. "Shock and Awe": Political Considerations ☒ But see: BNA "Hill Watch" Article, also Hewitt Associates' summaries**
- D. There's No Substitute for Reading the Bills**
- E. Today's Discussion Not All-Encompassing – Other Legislation Out There!**

Resources For Further Research

- A.** <http://thomas.loc.gov> -- Library of Congress website
- B.** Hewitt Associates -- Legislative Updates Published Online
- C.** Archives of the BNA Pension & Benefits Daily / Reporter -- journalistic, overview-type discussion
- D.** Note the BNA “Hill Watch” Article: BNA Pension & Benefits Reporter, Vol 34, No. 48, Tuesday, December 4, 2007 at 2846 – <http://pubs.bna.com/ip/bna/pen.nsf/eh/a0b5m3m9w8>
- E.** Texas Legislature Activity:
Texas Department of Insurance Commissioner's Bulletin B-0036-07
<http://www.tdi.state.tx.us/bulletins/2007/cc36.html>
- F.** **OUTLINE + APPENDIX of Additional Bills to Consider**

Overview of Today's Discussion Topics

- A. FEE DISCLOSURE: THE "BIG KAHUNA BURGER"**
- B. EXECUTIVE COMPENSATION: VARIETY OF ITEMS**
- C. BANKRUPTCY BILL**
- D. PPA TECHNICAL CORRECTIONS BILL**
- E. APPENDIX OF ADDITIONAL PENDING BILLS**

I. Fee Disclosure

A. Relevant Bills

1. **401(k) Fair Disclosure for Retirement Security Act of 2007 (H.R. 3185)**

- House Education and Labor Committee held a hearing on Oct. 4, 2007
- Introduced by Rep. George Miller (D-CA) on July 26, 2007

2. **The Defined Contribution Plan Fee Transparency Act (H.R. 3765)**

- Introduced by Rep. Neal (D-MA) on Oct. 4, 2007
- House Ways and Means Committee held a hearing on the bill on Oct. 30

3. **Mutual Fund Fee Reform Act (H.R. 3225)**

- Introduced by Reps. Moore (D-KS) and Castle (R-DE) on Jul. 31, 2007

I. Fee Disclosure

B. Substance of Proposed Bills

1. 401(k) Fair Disclosure for Retirement Security Act of 2007 (H.R. 3185)

a. **Overview of New Provisions Added by H.R. 3185:**

- 1) **New ERISA Section 111: "SPECIAL REPORTING AND DISCLOSURE RULES FOR INDIVIDUAL ACCOUNT PLANS"**
 - Would amend ERISA, moving the existing Section 111 to Section 112, and adding a new ERISA Section 111 entitled "SPECIAL REPORTING AND DISCLOSURE RULES FOR INDIVIDUAL ACCOUNT PLANS"
- 2) **NEW ERISA 402(c): "MINIMUM INVESTMENT OPTION REQUIREMENT"**
 - Would also amend ERISA Section 402 by adding a new ERISA Section 402(c), regarding a "Minimum Investment Option Requirement", requiring certain plans to include at least one investment option that is a "nationally-recognized market-based index fund"
- 3) **NEW ERISA 502(n): Enforcement and Enforcement Coordination**
 - Would add a new ERISA Section 502(n), providing for enforcement of the new ERISA Section 111, and coordination with other government agencies in carrying out such enforcement
- 4) **NEW ERISA 519: DOL Advisory Council**
 - Would add a new ERISA Section 519, creating a new, 12-member DOL Advisory Council on Improving Employer-Employee Retirement Practices

I. Fee Disclosure

b. New ERISA Section 111: "Service Disclosure Statement"

Basic Proposition: New Section 111(a)(1) would require plan administrators of an individual account plan (including qualified cash or deferred arrangements as defined in I.R.C. Section 401(k)(2)) to obtain a written "service disclosure statement" from such service provider prior to entering into a contract, where the total costs for services under such contract equal or exceed \$1,000

Reality: Significant compliance details

I. Fee Disclosure

c. New ERISA Section 111: "Service Disclosure Statement": More Details

Details: The "**SERVICE DISCLOSURE STATEMENT**" would:

- **Identify Service Providers:** identify who will be performing services under the contract
- **Describe Services to be Provided:** describe the services to be provided,
- **Specify *and* Itemize Total Annual Cost:** specify the expected total annual cost of such services, itemized as to all relevant components of such total cost, including amounts to be paid to affiliated or other third-party service providers under the contract
- **Conflicts of Interest Involving PAYMENT:** provide details on any conflicts of interest that a service provider may have with the plan sponsor, the plan or other service provider where the disclosing service provider receives payment for services
- **Details on Share Classes:** provide details on the impact of share classes of certain mutual funds if applicable
- **Details on Free or Discounted Services:** provide details on any services that the service provider performs without charge, discounted services, or rebates

I. Fee Disclosure

d. New ERISA Section 111: Detailed "Itemization" Required for Total Costs

The "**itemization**" of the total annual costs for purposes of the Service Disclosure Statement would include:

- sales commissions
- start-up fees
- investment management and investment advice expenses
- estimated trading expenses
- administrative and record-keeping expenses
- legal fees
- trustee fees
- possible termination or surrender charges
- total asset-based fees
- 12b-1 fees (remuneration paid as described under Rule 12b-1 of the Securities and Exchange Commission under the Investment Company Act of 1940 (17 C.F.R. Section 270.12b-1))
- commissions paid as described in Section 28(e) of the Securities Exchange Act of 1934 (15 U.S.C. 78bb(e)), and
- other costs as specified by the Secretary of Labor



I. Fee Disclosure

e. **New ERISA Section 111: Detailed "Itemization" Required for Total Costs**

To the extent the actual amount for any of the costs that are required by the new ERISA Section 111 to be "itemized" costs is not available:

- the plan administrator may provide a "reasonable and representative" estimate, identified as such
- if any estimate so provided is subsequently determined to be "materially incorrect", the plan administrator must provide the correct amount in an amended report "as soon as practicable" after such correct amount is known

I. Fee Disclosure

f. **New ERISA Section 111: THREE Additional Disclosures to Accompany "Service Disclosure Statement"**

The "Service Disclosure Statement must also include written disclosure of three additional items:

- **"DISCLOSURE OF FINANCIAL RELATIONSHIPS"**
- **"DISCLOSURE OF IMPACT OF SHARE CLASSES"**
- **"DISCLOSURE OF CERTAIN ARRANGEMENTS IN CONNECTION WITH FREE OR DISCOUNTED SERVICES OR REBATES BY SERVICE PROVIDERS"**

I. Fee Disclosure

g. New ERISA Section 111: CONTENTS of the "DISCLOSURE OF CERTAIN FINANCIAL RELATIONSHIPS"

The contents of the "DISCLOSURE OF FINANCIAL RELATIONSHIPS" required to be included in the "Service Disclosure Statement" must:

- **Include Written Disclosure of Conflicts of Interest Involving Payment** -- any conflicts of interest that a service provider may have with the plan sponsor, the plan or other service provider for which the disclosing service provider receives payment for services
- **Details Regarding:** The disclosure must also detail:
 - 1) the extent to which the service provider uses its own proprietary investment products,
 - 2) the extent to which payments are received by a service provider for including certain investment options as part of a menu of investment options, and
 - 3) such other possible conflicts as may be specified by the Secretary of Labor

I. Fee Disclosure

h. New ERISA Section 111: CONTENTS of the "DISCLOSURE OF IMPACT OF SHARE CLASSES"

The contents of the "DISCLOSURE OF IMPACT OF SHARE CLASSES" required to be included in the "Service Disclosure Statement" must :

- disclose, to the extent applicable, **that the share prices of certain mutual fund investments may be different than the retail share price outside of the plan due to the existence of different share classes**

I. Fee Disclosure

i. **New ERISA Section 111: CONTENTS of the "DISCLOSURE OF CERTAIN ARRANGEMENTS IN CONNECTION WITH FREE OR DISCOUNTED SERVICES OR REBATES BY SERVICE PROVIDERS "**

The contents of the "**DISCLOSURE OF CERTAIN ARRANGEMENTS IN CONNECTION WITH FREE OR DISCOUNTED SERVICES OR REBATES BY SERVICE PROVIDERS**" required to be included in the "Service Disclosure Statement" must :

- Describe, in the case where services are provided to the plan, or to the plan sponsor in connection with the plan, by any service provider either "without charge or for fees set at a discounted rate or subject to rebate, **the extent to which, and the amount by which, consideration is otherwise obtained** by either the service provider, the plan, or the plan sponsor for such services, directly or indirectly, by means of any charges against the account of a participant or beneficiary.

I. Fee Disclosure

j. **New ERISA Section 111: Obligations to Update "Service Disclosure Statement "**

Obligations to Update:

- Service providers would be required to provide to the plan administrator an update to the "Service Disclosure Statement" at LEAST annually AND within 30 days of any material change to the statement.

I. Fee Disclosure

k. New ERISA Section 111: "Service Disclosure Statement" Publication Requirements:

The plan sponsor or plan administrator must:

- Provide a copy of any "Service Disclosure Statement" received under this new Section 111 of ERISA to participants and beneficiaries within 30 days of a written request for such statement, and
- Post a copy of any such statement on any "intranet" website maintained by the plan sponsor (or by the plan administrator on behalf of the plan sponsor) .

I. Fee Disclosure

I. **New ERISA Section 111: "Service Disclosure Statement": \$1,000 Limit**

The requirements with respect to the "Service Disclosure Statement" apply to any contract only if the total cost for services under such contract equals or exceeds \$1,000.

I. Fee Disclosure

m. **New ERISA Section 111: INVESTMENT ELECTION INFORMATION -- Annual Notice of Available Investment Options**

- Under the new ERISA Section 111(b), the plan administrator of an individual account plan that allows a participant or beneficiary to exercise control over the assets in his or her account will be required to provide such participant or beneficiary, for each plan year, notice of the investment options available for election under the plan at least 15 days before:
 - 1) the beginning of the plan year, and
 - 2) the effective date of any material change in investment options,
 - 3) or, if later, on the date on which the participant commences participation in the plan

I. Fee Disclosure

n. New ERISA Section 111: Contents of the "Advance Notice of Available Investment Options":

The "Advance Notice of Available Investment Options" must include:

- **Name:** The name of each available investment option,
- **Investment Objective:** The investment objectives of such option,
- **Risk Level:** The level of risk associated with such option,
- **Whether Option Is A "Comprehensive Investment":** whether the option is a "comprehensive investment" designed to achieve long-term retirement security, or should be combined with other options in order to achieve such security
- **Historical Returns and Percentage Fee Amounts Assessed:** The historical returns of the option, and the percentage fee amounts assessed against amounts invested under the option
- **Difference Between "Asset-Based Fees" and Annual Fees:** An explanation of the differences between any asset-based fees and any annual fees in connection with the option
- **"Benchmark" Comparison:** A comparison to a nationally-recognized market-based index or other investment option that is recommended in the retirement industry as a benchmark retirement investment option
- **How to Get More information:** Where, and the manner in which, additional, plan-specific, and generally available investment information regarding the option may be obtained
- **Statement on Selecting Investment Options, plus an Election Form:** a statement, together with any form necessary for making the election of investment options, that investment options should be selected not only on the basis of the level of fees charged by such option but also on the basis of careful consideration of other key factors, including the level of risk of the option and historical returns by the option, and
- **A "fee menu"** a fee menu relating to all investment options available under the plan, as set forth below

I. Fee Disclosure

o. New ERISA Section 111: CONTENTS of the "FEE MENU" in the "Advance Notice of Available Investment Options"

The "fee menu" in the "Advance Notice of Available Investment Options" must:

- **Include a Menu of Potential Service Fees:** it must include a menu of any potential service fees that could be assessed against a participant or beneficiary
- **Detail 3 Categories of fees:** the fee menu must provide details with respect to three categories of fees:
 - 1) **Fees that vary by investment options:** fees that vary depending on the investment options selected by the participant or beneficiary, including:
 - expense ratios,
 - investment-specific asset-based fees,
 - possible redemption fees
 - possible surrender charges
 - 2) **Fees assessed as a percentage of total assets:** fees assessed as a percentage of total assets in the account of the participant or beneficiary, regardless of the investment option selected,
 - 3) **Administration and transaction-based fees automatically deducted or imposed for certain transactions by participant or beneficiary:** administration and transaction-based fees, including plan loan origination fees, that are either automatically deducted each year or result from certain transactions engaged in by the participant or beneficiary

I. Fee Disclosure

p. New ERISA Section 111: CONTENTS of the "FEE MENU" in the "Advance Notice of Available Investment Options" -- CONTINUED

The "fee menu" in the "Advance Notice of Available Investment Options" must ALSO include :

- **General Description of Purpose for Fees:** the fee menu must include a general description of the purposes for each fee, including whether such fee is for investment management, commissions, administration, and recordkeeping
- **Details of Conflicts of Interest, as Prescribed by the Secretary:** the fee menu must also include information as determined by the Secretary to be appropriate to describe potential conflicts of interest that may exist with respect to any service providers or other parties-in-interest receiving fees that are disclosed in the menu
- **Easy to Understand:** the menu must be presented in a manner which is easily understood by the "average participant"
- **Additional Information the Secretary Determines Necessary to Assess Potential Services and Fees:** the menu must include any information the Secretary of Labor determines necessary to permit participants and beneficiaries to assess the potential services that could be provided in connection with the investment options and potential fees that could be assessed against their accounts for such services

I. Fee Disclosure

q. New ERISA Section 111: Individual Account Plans: "Annual Benefit Statement" Provided to Participants

- The bill would require the plan administrator of an individual account plan which permits a participant or beneficiary to exercise control over the assets in the account of such participant or beneficiary to provide each such participant and beneficiary with an "**annual benefit statement**" with respect to the assets in such account that are subject to such control, **no later than 90 days after the close of each plan year.**

I. Fee Disclosure

r. New ERISA Section 111: CONTENTS of the "Annual Benefit Statement"

- The "annual benefit statement" would disclose plan information from the preceding year, including:
 - **Starting and Ending Account Balance:** Starting and ending account balance of the participants account
 - **Vesting Status:** Participant's vesting status
 - **Contributions:** Employer and employee contributions
 - **Earnings:** Earnings on the account balance during the plan year
 - **Fees Assessed During Year:** Fees assessed from the account during the plan year
 - **Asset Allocation:** Asset allocation, categorized by investment option, including:
 - 1) the current asset value,
 - 2) the changes in the asset value during the year,
 - 3) the net return for the year, expressed as an amount and as a percentage

I. Fee Disclosure

s. New ERISA Section 111: CONTENTS of the "Annual Benefit Statement" -- CONTINUED:

- **Details on Service Fees Charged for Investment Option:** The "annual benefit statement" service fees charged for each investment option, indicating separately:
 - 1) Underlying investment fees, including expense ratios and trading costs
 - 2) Load fees
 - 3) Total asset-based fees, including variable annuity charges
 - 4) Mortality and expense charges
 - 5) Guaranteed investment contract fees
 - 6) Employer stock fees
 - 7) Directed brokerage charges
 - 8) Plan administration fees
 - 9) Participation transaction fees
 - 10) Total fees, and
 - 11) Total fees as a percentage of current assets

I. Fee Disclosure

t. **New ERISA Section 111: CONTENTS of the "Annual Benefit Statement"**

- **Comparison to Nationally-Recognized Market-Based Index:**
The "annual benefit statement" must also include a comparison of the performance of options to a nationally-recognized market-based index
- **And the statement may also include:**
 - **Historical return and risk level:** Information on the historical return and risk level for each investment option and
 - **Estimated projection of amount needed for retirement at 65:** An estimated projection of amount a participant needs to save monthly to retire at age 65

I. Fee Disclosure

u. **New ERISA Section 111: Annual Benefit Statement: "Reasonable and representative estimates"**

- Like with respect to data required to be included in the "Service Disclosure Statement", the plan administrator may provide a "reasonable and representative" estimate with respect to any information required to be included in the "Annual Benefit Statement" to the extent the actual amount with respect to any information required to be provided is not known
- If such information is subsequently determined to be materially incorrect, the plan administrator shall provide the correct amount in an amended statement as soon as practicable after such correct amount is known

I. Fee Disclosure

v. **New ERISA Section 111: DOL: Model Notices/Statements, Compliance Assistance**

- The bill would require the DOL to provide model notices/statements for:
 - the Service Disclosure Statement
 - the Investment Election Notice (including a model "Fee Menu")
 - the Annual Participant Benefit statement
- The bill would require the Secretary to assist small employers with educational and compliance materials for selecting and monitoring service providers, and with services to assist small employers in finding and understanding affordable investment options for such plans
- The bill would also require the Secretary to assist plan sponsors, participants and beneficiaries with any questions or problems regarding compliance with the requirements of the new ERISA section 111

I. Fee Disclosure

w. **New ERISA Section 111: PENALTIES: \$100/day under ERISA 502(c)(7)**

- The bill would amend ERISA Section 502(c)(7), which provides civil penalties against a plan administrator of up to \$100 a day for the plan administrator's failure or refusal to provide notice to participants and beneficiaries required under ERISA Section 101, to also impose such penalties for the failure or refusal of a plan administrator to provide the notice required to participants and beneficiaries under the new ERISA Section 111.

I. Fee Disclosure

x. New ERISA Section 111: Not to be construed to interfere with fiduciary duties under 404(a)(1)(A)(ii)

The new ERISA Section 111, as proposed in H.R. 3185, includes a new provision, entitled "construction", indicating that the new Section 111 shall not be construed to limit, or serve as the basis for any interference regarding the duties of a fiduciary under Section 401(a)(1)(A)(ii)

I. Fee Disclosure

- y. New ERISA Section 402(c): new investment option requirement for 401(k) plans: "nationally-recognized, market-based index fund"**
 - H.R. 3185 would, in addition to adding a new ERISA Section 111, add a new ERISA section 402(c)
 - New ERISA 402(c) would require individual account plans which permit a participant or beneficiary to exercise control over the assets in his or her account require 401(k) plans to include at least one investment option that is a "nationally-recognized, market-based index fund" which offers a combination of historical returns, risk and fees likely to meet retirement income needs at "adequate levels of contribution"
 - The Secretary is to promulgate regulations regarding such index fund

I. Fee Disclosure

z. New ERISA Section 502(n) – Enforcement Coordination

- **Enforcement Coordination:** H.R. 3185 also adds a new ERISA Section 502(n) which would require the Secretary to notify the "applicable regulatory authority", such as the SEC or the Comptroller of the Currency, where the Secretary determines that a service provider is "engaged in a pattern or practice that precludes compliance" by plan administrators with the new ERISA Section 111
 - Such provision also requires the Secretary to take enforcement action, in consultation with any such "applicable authority" to ensure that such pattern or practice "ceases or desists" and to assess any appropriate penalties
- **Annual Audit:** The bill would also require the DOL to conduct an annual audit of a representative sampling of plans to determine compliance with these disclosure requirements, and report upon such to the House Committee on Education and Labor, and the Senate Committee on Health, Education, Labor and Pensions

I. Fee Disclosure

aa. **New ERISA Section 519: DOL Advisory Council**

- The bill would establish a 12-member Department of Labor Advisory Council on Improving Employer-Employee Retirement Practices, dealing with issues with respect to the operation of employee pension benefit plans
- The bill details that Council can hold hearings, issue advisories, to present "peer-reviewed" research to plans, service providers and to the public on "best practices" for employee pension benefit plan design and operation, and to issue an Annual Report on Retirement Trends and Issues to each House of Congress

I. Fee Disclosure

bb. New ERISA Section 519: DOL Advisory Council

- The bill also directs the Secretary to report to review the reporting and disclosure requirements of Part 1 of Subtitle B of Title I of ERISA, and the related provisions of the Pension Protection Act of 2006, and to, 18 months after enactment of the Bill, report to Congress with recommendations the Secretary considers appropriate to "consolidate, simplify, standardize, and improve" the applicable reporting and disclosure requirements so as to simplify reporting for employee pension benefit plans and ensure that "needed understandable information" is provided to participants and beneficiaries of such plans.

I. Fee Disclosure

2. The Defined Contribution Plan Fee Transparency Act (H.R. 3765)
 - a. The Bill amends the Internal Revenue Code of 1986 by adding two new provisions:
 - 1) **a new Section 4980H** -- Imposing a tax on the "Failure to Provide Notice to Participants of Plan Fee Information"
 - 2) **a new Section 4980I** -- Imposing a tax on the "Failure to Provide Notice of Plan Fee Information to Plan Administrators"

I. Fee Disclosure

b. H.R. 3765 Has Two Levels: Plan Administrators (4980H) and Service Providers (4980I)

The bills are aimed at two levels -- imposing requirements on **plan administrators** AND on **service providers** to provide certain disclosures:

- on **plan administrators**: under 4980H, to provide notice to participants and beneficiaries in an "applicable defined contribution plan"
- on **service providers**: under 4980I, to provide notice to plan administrators of an "applicable defined contribution plan"

I. Fee Disclosure

c. New 4980H and 4980I: "Applicable Defined Contribution Plan" -- Plans subject to the new rules

- Both the new 4980H(f)(1)(B), and the new 4980I(e)(1) define "applicable defined contribution plan" as those plans described in I.R.C. 402(c)(8)(B)(iii) - (vi)
- Bill thus would apply to certain participant-directed defined contribution plans, including:
 - 1) 401(k) plans
 - 2) 403(b) plans
 - 3) 457(b) plans

I. Fee Disclosure

d. New 4980H: "Plan Administrator" = I.R.C. 414(g) Definition

- The new 4980H, at section (f)(2) defines "**plan administrator**" for purposes of the provision as such term is defined in I.R.C. 414(g)
- **I.R.C. 414(g) defines "plan administrator" to mean either :**
 - 1) the person designated as such by the plan instrument, or
 - 2) in the absence of such designation, either the employer, or in the case of a multiemployer plan, the association, committee, joint board of trustee or other similar group of representatives of the parties who maintained the plan, or
 - 3) if none of the above applies, such other person as the Secretary may prescribe by regulation

I. Fee Disclosure

e. New 4980H: Several types of notice Required under the new 4980H:

- "Enrollment Notice"
- "Annual Notice"
- **Statement to Participants and Beneficiaries in conjunction with "Enrollment Notice"**
- **Statement to Participants and Beneficiaries in conjunction with the "Annual Notice"**
- **Service Provider Disclosure under 4980I**
- **Notice in conjunction with Investment Menu Change**

I. Fee Disclosure

f. New 4980H: "Enrollment Notice" Under New 4980H(e)(2)

- The bill would require plan administrators to provide employees with an "Enrollment Notice", containing disclosures regarding plan investments, fees, and expenses, both before the initial investment of any contribution made on behalf of such employee is made, and annually thereafter
- The "Enrollment Notice" is described in general terms as a "**safe harbor**", for which a plan administrator must give a written explanation of:
 - the plan's **fees and expenses**
 - the **key characteristics** of the plan's investment alternatives
 - **explanation of the manner for making elections** among investment alternatives

I. Fee Disclosure

g. New 4980H: CONTENTS of the "Enrollment Notice" for purposes of plan administrator obtaining "Safe Harbor" from the excise taxes in new 4980H :

It must provide an explanation in writing which describes, for each investment alternative under the plan:

- **Description of the Investment Objectives:** A general description of the alternative's investment objectives,
- **Risk and Return Characteristics:** Risk and return characteristics of each investment option
- **Historic Rates of Return:** Historic rates of return for the investment option
- **Name of Manager:** The name of the alternative investment's manager
- **Whether Alternative = "Comprehensive":** Whether the alternative is designed to be a comprehensive, investment for retirement with varying degrees of long-term appreciation and capital preservation through a mix of equity and fixed income exposures
- **Annual Asset-Based Fees Which Reduced Rate of Return:** Annual asset-based fees which reduced the investment alternative's rate of return
- **Annual Fees for Administration/Recordkeeping Which are Deducted or Reduce Income of P/B Accounts:** Annual fees for administration and recordkeeping as deducted from (or reduce the income of participants' and beneficiaries' accounts)
- **Fees and Expenses for Purchases and Sales of Interests:** Fees and expenses in connection with purchases or sales of interests in investment alternatives
- **Fees and Expenses Associated with Participant-Initiated Transactions or Services:** Any fees and expenses associated with participant-initiated transactions or services

I. Fee Disclosure

h. New 4980H: Statement to Participants in Conjunction with the "Enrollment Notice"

To obtain the "safe harbor" described in 4980H with respect to the "Enrollment Notice", a plan administrator must also provide a statement to participants explaining that investment alternatives should be selected not only on the basis of fees, but also consideration of other factors, including :

- 1) the alternative investment's objective,**
- 2) the level of risk,**
- 3) the historic rates of return for the alternative investment,
and**
- 4) the participant's personal investment objective**

I. Fee Disclosure

i. New 4980H: "Annual Notice"

The bill would require, under 4980H, the provision of an "annual notice" to each participant and beneficiary:

- **Within 90 days following the end of each plan year**
- **In writing**
- **Detailing the investment alternatives that a participant or beneficiary had selected** as of the last day of the plan year, and
- **The key characteristics** of such investment alternatives

I. Fee Disclosure

j. **New 4980H: Additional Contents of "Annual Notice"**

Additional contents that must be detailed in the "Annual Notice" include information on:

- **The different asset classes** that participant's or beneficiary's account is invested in,
- **The total fees and expenses** deducted from the participant's or beneficiary's account, including:
 - 1) **administration and recordkeeping fees**, and
 - 2) **fees in connection with purchases or sales of interests** in investment alternative
- **The percentage of participant's or beneficiary's account invested** in each investment alternative,
- **Whether the alternative is actively or passively managed**
- **A general statement of the investment alternative's risk and return characteristics**
- **The historic rates of return for the investment alternative over the immediately preceding 1, 5 and 10-year periods** (in calendar or plan years)

I. Fee Disclosure

k. New 4980H Statement to Participants in Conjunction with the "Annual Notice"

- A plan administrator must include a copy of the statement required to be given in conjunction with the Enrollment Notice, as described above, as well as a statement regarding how a participant or beneficiary can access all of the information required to be provided under the Enrollment Notice.

I. Fee Disclosure

I. **New 4980H: Plan Administrators Must Also Disclose the "Service Provider Disclosure" Required Under 4980I**

To comply with the 4980H, the plan administrator must also :

- **Provide a Copy of "Service Provider Disclosure":** Provide a participant with a copy of the Service Provider Disclosure required under the new Section 4980I within 30 days after receipt of a written request for such statement, and
- **Post On Company "Intranet":** Post a copy of the Service Provider Disclosure on any "intranet" or internet website maintained to provide participants and beneficiaries with access to plan information

I. Fee Disclosure

m. New 4980H -- "Notice of Investment Menu Changes"

The requirements of 4980H are met if, in advance of any change in the "menu" of investment alternatives under the plan, the plan administrator provides the relevant "Enrollment Notice" described above, with respect to the change in investment alternatives, to participants and beneficiaries

I. Fee Disclosure

n. New 4980H -- Combination with Other Notices, or in Multiple Plan Communications at Once: OK

The proposed provision indicates that a plan shall not be treated as failing to satisfy the requirements with respect to the "Enrollment Notice", the "Annual Notice", and the "Notice of Investment Menu Changes" solely because the information is provided in combination with other plan communications, or in more than one plan communication provided contemporaneously

I. Fee Disclosure

o. **New 4980H -- Treasury: Model Statements and Regulations**

- The provision indicates that the Secretary of the Treasury shall provide "model" statements for providing the "Enrollment Notice", the "Annual Notice" and the "Notice of Investment Menu Changes", and
- The Secretary shall issue regulations for purposes of Section 4980H

I. Fee Disclosure

p. New 4980H -- Penalties

- **\$100/day Tax:** Failure by a plan administrator to comply with the requirements of 4980H results in a tax of \$100 for each day of "noncompliance" for each such failure
- **Maximum Annual Exposure: \$500,000/Plan Year:** Exposure is capped at \$500,000 with respect to any plan administrator for any plan year
- **90-Day Correction Period:** Tax can be avoided if, within 90 days of when plan administrator knew or should have known of such failure, the plan administrator provides the notices required under 4980H(e) (as detailed above)
- **Waiver Possible:** The Secretary of the Treasury can waive the tax in the case of a failure due to "a reasonable cause and not to willful neglect" to extent such would be "excessive" or "inequitable" relative to the failure involved
- **Liability for the Tax:** For plans other than multiemployer plans, the employer maintaining the plan is liable for the tax, and for multiemployer plans, the plan itself is liable for the tax.

I. Fee Disclosure

q. **New 4980I -- Service Provider Disclosure: Notice of Fees and Expenses:**

- The bill adds a new Section 4980I to the Internal Revenue Code of 1986, which would require "service providers" to provide disclosures regarding fee information to plan administrators with respect to a contract with a plan to provide services to such plan, including:
- An "Initial Disclosure"
- A "Periodic Disclosure"

I. Fee Disclosure

r. **New 4980I -- Definition of "Service Provider"**

- The new provision would define a "service provider" for purposes of the provision as any person providing services to a plan under a contract
- For this purpose, the provision generally indicates that, all corporations that provide services to a plan and are members of a "controlled group" under I.R.C. 1563(a) are treated as a single service provider

I. Fee Disclosure

s. New 4980I – Timing of disclosures:

- An "**Initial Disclosure**" must be made in advance of a contract for plan services
- A "**Periodic Disclosure**" must be made within 90 days of the end of each plan year contract is in place, and
ALSO following any "material modification" of the contract

I. Fee Disclosure

t. New 4980I – CONTENTS of "Initial Disclosure":

- **Estimate of Total Fees and Expenses:** Estimate of total fees and expenses expected to be paid by the plan under the contract
- **Itemized Fees Where Contract Provides for Both Investment Management and Administration & Recordkeeping**

For a contract providing for both investment management and administration and recordkeeping, an itemization of the following:

- a) annual fees and expenses for investment management
 - b) annual fees and expenses for administration and recordkeeping
- **Itemized List of Services to be Provided:** A detailed and itemized list of all the services to be provided under the contract
- **Whether Service Provider "Reasonably Expects" to Remit Fees and Expenses to a 3d Party Service Provider, Plus Amount:** A statement of whether service provider "reasonably expects" to remit fees and expenses expected to be paid by the plan under the contract to one or more third-party service providers or intermediaries and, if so, a statement of the amount expected to be paid to each such third-party and the identity of each such third-party
- **Whether Service Provider Expects to Receive Compensation from Another Source:** A statement of whether the service provider expects to receive compensation from a source other than the plan or plan sponsor in connection with the services provided to the plan, and if so, a statement of the amount expected to be received from each such source and the identity of each such source

I. Fee Disclosure

u. New 4980I – CONTENTS of "Periodic Disclosure":

The "Periodic Disclosure" must consist of a written statement of:

- **Fees and expenses** paid by the plan to the service provider under the arrangement during the plan year, including:
 - a) **An estimate of total fees and expenses** expected to be paid by the plan under the contract
 - b) **Itemized Fees Where Contract Provides for Both Investment Management and Administration & Recordkeeping:**

For a contract providing for both investment management and administration and recordkeeping, an itemization of the following:

 - i. annual fees and expenses for investment management
 - ii. annual fees and expenses for administration and recordkeeping
 - c) **Whether Service Provider "Reasonably Expect" to Remit Fees and Expenses to a 3d Party:** A statement of whether service provider "reasonably expects" to remit fees and expenses expected to be paid by the plan under the contract to one or more third-party service providers or intermediaries and, if so, a statement of the amount expected to be paid to each such third-party and the identity of each such third-party

I. Fee Disclosure

v. New 4980I -- "Reasonable Estimates" Permitted

- **"Reasonable Estimates" of Expenses, Fees & Compensation if Basis Disclosed:** The service provider is allowed to use reasonable estimates of expenses, fees and compensation if it discloses the basis for such estimates,
- **Reasonable Allocation Among Components Where Investment Management and Administration & Recordkeeping Fees Not Broken Out:** The service provider that does not separately price services for investment management and for administration and recordkeeping may reasonably allocate fees and expenses among such components

I. Fee Disclosure

w. New 4980I – 3d-Party payments Only to Extent > \$5,000

- The service provider is allowed to disclose "revenue-sharing" payments detailed in the "Initial Disclosure" and the "Periodic Disclosure" only to the extent such amounts are expected to exceed \$5,000

I. Fee Disclosure

x. New 4980I -- Penalties

- **\$1000/day Tax:** Failure by a service provider to comply with the requirements of 4980I results in a tax of \$1000 for each day the service provider fails to meet the requirements of the new 4980I
- **Maximum Annual Exposure: \$1,000,000/Calendar Year:** Exposure is capped at \$1,000,000 with respect to any service provider for any calendar year
- **90-Day Correction Period:** The tax can be avoided if, within 90 days of the date the service provider knew -- or on the exercise of reasonable diligence should have known -- of a failure to comply with the notice provisions of 4980I, such service provider provides the notice required by the 4980I.
- **Waiver Possible:** The Secretary of the Treasury can waive the tax in the case of a failure due to "a reasonable cause and not to willful neglect" to extent such would be "excessive" or "inequitable" relative to the failure involved

I. Fee Disclosure

3. Mutual Fund Fee Reform Act (H.R. 3225)

- Would require the SEC to improve the disclosure of 12b-1 fees and expenses charged to mutual fund investors
- More specifically, the Bill requires the SEC to initiate, within 30 days of enactment of the Bill, rulemaking proceedings to revise the requirements of regulations applicable to open-end investment companies under the Investment Company Act of 1940 relating to the disclosure of 12b-1 fees to investors in such investment companies
- Requires the SEC to complete the rulemaking required by the Bill not later than 180 days after enactment of the Bill, with such changes effective one year after the date the SEC prescribes the changes
- "12b-1 fees" means fees permitted under Rule 12b-1 (17 C.F.R. 270.12b-1) of the Securities and Exchange Commission's rules pursuant to the Investment Company Act of 1940.

I. Fee Disclosure

C. Effective Dates

- 1. 401(k) Fair Disclosure for Retirement Security Act of 2007 (H.R. 3185):** Plan years beginning after the date of enactment
- 2. The Defined Contribution Plan Fee Transparency Act (H.R. 3765):**
Requirements with respect to disclosure to participants would be effective for plan years beginning on or after Jan. 1, 2009.

Requirements with respect to disclosures between service providers and plans would apply to arrangements entered into or materially modified on or after the 90th day after enactment
- 3. Mutual Fund Fee Reform Act (H.R. 3225):** Would become effective one year after the SEC issues regulations (within 180 days after enactment)

II. Executive Compensation/ Nonqualified Deferred Compensation

A. Relevant Bills

1. **Shareholder Vote on Executive Compensation Act (H.R. 1257/ S. 1181)**
 - a. H.R. 1257 was approved by the House on April 20, 2007 (269 for, 134 against)
 - b. S. 1181 was introduced by Sen. Obama (D-IL) on April 20, 2007
2. **Protecting Employees and Retirees in Business Bankruptcies Act (S. 2092 / H.R. 3652)**
 - a. S. 2092 and H.R. 3652 were introduced by Sen. Durbin (D-IL) and Rep. Conyers (D-MI) on September 25, 2007
3. **Ending Corporate Tax Favors for Stock Options Act (S. 2116)**
 - a. S. 2116 was introduced by Sen. Levin (D-MI) on September 28, 2007
4. **Tax Reduction and Reform Act of 2007 (H.R. 3970)**
 - a. H.R. 3970 was introduced by Rep. Rangel (D-NY) on October 25, 2007
5. **Temporary Tax Relief Act of 2007 (H.R. 3996)**
 - a. H.R. 3996 was approved by the House Ways and Means Committee on November 1, 2007.
6. **Small Business and Work Opportunity Act of 2007**
 - a. Introduced by Sen. Baucus (D-MT) on January 22, 2007

II. Executive Compensation/ Nonqualified Deferred Compensation

B. Substance of Proposed Bills

1. **Shareholder Vote on Executive Compensation Act (H.R. 1257/ S. 1181)**

a. **Overview -- new Section 14(i) of Securities Exchange Act of 1934 with Annual Shareholder Vote on Executive Compensation.**

- The Bill, which purports to add a new subsection (i) to Section 14 of the Securities Exchange Act of 1934 (15 U.S.C. 78n) -- the Senate version proposes to put the same language in a new subsection (h) of Section 16 -- would require public companies to include in their annual proxies a non-binding advisory shareholder vote on their executive compensation, for any proxy, consent, or authorization for annual meeting of the shareholders occurring on or after January 1, 2009
- Although the new provision would not set any limits on executive pay, it would provide shareholders an opportunity to approve or disapprove a company's executive pay practices

II. Executive Compensation/ Nonqualified Deferred Compensation

b. Limits on Import of Annual Shareholder Vote

- The new provision, as proposed by the Bill, sets forth in the new Section 14(i)(1) that such annual shareholder votes would:
 - not be binding on the corporation or the board of directors
 - not be construed as overruling a decision by such board
 - not create or imply any additional fiduciary duty by such board
 - not be construed to restrict or limit the ability of shareholders to make proposals for inclusion in proxy materials

II. Executive Compensation/ Nonqualified Deferred Compensation

c. Disclosure and Shareholder Approval of "Golden Parachute"-Type Compensation -- DISCLOSURE

The new provision would also require disclosure and a separate advisory vote if a company gave a new, not yet disclosed "golden parachute" while simultaneously negotiating to buy or sell a company, in the new Section 14(i)(2)

- More specifically, the new provision would require that for any proxy solicitation material for an annual meeting (or special meeting in lieu of the annual meeting), where such occurs on or after January 1, 2009, and where such concerns an acquisition, merger, consolidation or proposed sale or other disposition of substantially all of the assets of an issuer, the person making such solicitation shall DISCLOSE:
 - 1) in the proxy solicitation materials, in a clear and simple form in accordance with regulations of the Commission
 - 2) any agreements or understanding such person has with any principal executive officers of such issuer
 - 3) concerning any type of compensation (present, deferred or contingent)
 - 4) where such is based on or otherwise relates to the acquisition, merger, consolidation, sale or other disposition,
 - 5) and where such has not already been subject to the non-binding advisory shareholder vote imposed by the new Section 14(i)(1)

II. Executive Compensation/ Nonqualified Deferred Compensation

d. Disclosure and Shareholder Approval of "Golden Parachute"-Type Compensation – SHAREHOLDER VOTE

The proxy solicitation containing the aforementioned disclosure must also provide for a separate SHAREHOLDER VOTE to approve such agreements or understandings

Limits on the shareholder vote on "golden parachute"-type compensation. Such vote:

- 1) will not be binding on the corporation or board of directors
- 2) will not be construed as overruling a decision by the board of directors
- 3) will not create or imply any additional fiduciary duty by such board
- 4) not restrict or limit the ability of shareholders to make proposals for inclusion in such proxy materials related to executive compensation.

II. Executive Compensation/ Nonqualified Deferred Compensation

- 2. Protecting Employees and Retirees in Business Bankruptcies Act (S. 2092 / H.R. 3652)**
 - a. Would require court approval of executive compensation on exit from bankruptcy -- Section 6: Amends 11 USC 1129(a)(5)**

Section 6 of the Bill Amends 11 USC 1129(a)(5), so as to limit executive compensation upon exit from bankruptcy by requiring it be approved by the court as "reasonable" when benchmarked against persons holding comparable positions at comparable companies in the same industry, and not "disproportionate" given the "economic concessions" made by the debtor's nonmanagement workforce during the bankruptcy case.

II. Executive Compensation/ Nonqualified Deferred Compensation

b. Deferred executive compensation would be prohibited if employee compensation plans were terminated in bankruptcy -- Section 15: Amends Section 11 USC 365

Section 15 amends Section 11 USC 365 -- relating to the process for the assumption of executive retirement plans, and sets forth that no deferred compensation arrangement for the benefit of insiders or senior management of the debtor will be assumed if a defined benefit plan for employees of the debtor has been terminated under ERISA Sections 4041 or 4042, either on or after the date the bankruptcy case was begun, or within 180 days before the case was begun.

II. Executive Compensation/ Nonqualified Deferred Compensation

- c. **Would allow workers to make a claim for earned defined contribution plans, but "insiders" could not -- Section 4(a), (b): Amends 11 USC 101(5), 507(a)**

Section 4(a): Amends 11 USC 101(5)

Allows a claim for stock value losses for employer stock held in a defined contribution plan, as long as the claimant is not an insider or 1 of the 10 most highly compensated employees of the debtor, where such stock is from employer contributions or from elective deferrals.

Section 4(b): Amends 11 USC 507(a)

Appears to allow a claim for stock value losses for employer stock held in a defined contribution plan without regard to when services resulting in the contribution of stock to the plan were rendered, with such losses measured by the market value of the stock at time of contribution to or purchase by the plan, and the value at time of commencement of the bankruptcy case where an employer or plan sponsor has committed fraud or otherwise breached a duty to the participant that has "proximately caused the loss of value".

II. Executive Compensation/ Nonqualified Deferred Compensation

d. **Would limit executive compensation "enhancements" during bankruptcy -- Section 7: Amends 11 USC 503(c)**

Section 7. Amends 11 USC 503(c) to limit "enhancements" to executive compensation before the bankruptcy case, including:

- **performance or incentive compensation,**
- **bonuses,**
- **other financial returns** designed to replace incentive, stock or other compensation in effect prior to the date of commencement of the case
- **other transfers or obligations to or for the benefit of officers, of managers, or of consultants,** in the absence of a finding by the court based on evidence in the record that such transfers or obligations are "essential" to the survival of the debtor's business OR essential to the orderly liquidation and maximization of value of the assets of the debtor, and then ONLY to the extent "reasonable", as benchmarked against comparable persons in comparable positions at comparable companies in the same industry, and not "disproportionate" in light of economic concessions by debtor's nonmanagement workforce during the case.

II. Executive Compensation/ Nonqualified Deferred Compensation

e. **Would only allow the recovery of executive compensation relative to lost employee compensation -- Section 16:** Amends 11 USC 563

Section 16 Amends 11 USC 563:

- **Gives the bankrupt estate a claim against compensation paid to any officer of the debtor serving as a member of the debtor's board of directors** within the year in the same percentage as the percentage of relief the debtor has obtained if any, under certain provisions of either 11 USC 1113 or 1114, whereby the debtor either reduces its contractual obligations under a collective bargaining agreement or under a retiree benefit plan, or the percentage of reductions in benefits that resulted from the termination of a defined benefit plan pursuant to ERISA Sections 4041 or 4042 at any time on or after 180 days before the date of the bankruptcy case was begun. The trustee may file a claim for such amounts, or if it does not, any party in interest can file such a claim to recover such amounts for the benefit of the bankrupt estate.
- **Finally, the court is disallowed from awarding post-petition compensation under Section 503(c)** or to any person subject to such section if there is a "reasonable likelihood" that such is intended to reimburse or replace compensation recovered by the bankrupt estate under the amended Section 563.

II. Executive Compensation/ Nonqualified Deferred Compensation

f. Would void extra payments made to executives or consultants in anticipation of bankruptcy -- Section 18 Amends 11 USC 547

Section 18 amends 11 USC 547, and

- Sets forth that the trustee may avoid a transfer "to or for the benefit of" an insider (including an obligation incurred under an employment contract) made in anticipation of bankruptcy, or a transfer made in anticipation of bankruptcy to a consultant who is formerly an insider and who is retained to provide services to an entity that becomes a debtor made or incurred within 1 year before the filing of the petition.
- Bars the use of 547(c) as a defense against recovery of any such transfer.
- Authorizes the trustee to begin an action to recover such transfer, and a party-in-interest to do so if the trustee does not do so within a certain period of time, with costs of recovery to be borne by the estate.

II. Executive Compensation/ Nonqualified Deferred Compensation

3. Ending Corporate Tax Favors for Stock Options Act (S. 2116)

a. New Stock Option Deduction -- New I.R.C. Section 162(q), Amendment to I.R.C. Section 83(h)

The new Bill changes the deduction for compensation paid in the form of stock options:

- **The Bill amends Section 83(h) to eliminate the existing deduction for employers paying compensation in the form of stock options, making such deductible only as permitted in a new I.R.C. Section 162(q)**
- **The new I.R.C. Section 162(q) creates a new deduction for compensation for personal services paid in the in the form of stock options under the new IRC Section 162(q), entitled "Consistent Treatment of Stock Options by Corporations", which would:**
 - 1) require the tax deduction to be consistent with the "book" expense (i.e., "the expense used for ascertaining income, profit, or loss, and in a report or statement to shareholders, partners or other proprietors")**
 - 2) require the deduction to be taken in the same period that the accounting expense is recognized**

II. Executive Compensation/ Nonqualified Deferred Compensation

b. Timing and Transition Rule

The bill would establish a **transition rule**, such that the amendments to the Code created by the Bill take place thusly:

- The new deduction regime applies to stock options exercised after enactment
- Deductions under the old rule are allowed for options vested prior to adoption of FAS 123R on June 15, 2005, and
- A "catch-up" deduction in the first year after enactment for options that vested between adoption of FAS 123R and the date of enactment -- such that a deduction under 162(q) as enacted will be allowed for stock options granted before enactment and vested during taxable periods beginning after June 15, 2005 and ending before enactment will be allowed in the first taxable period of taxpayer ending after the date of enactment
- For public entities reporting as small business issuers and for non-public entities required to file public reports of financial conditions, the above rules apply using December 15, 2005 as the operative date instead of June 15, 2005
- No deduction is allowed under EITHER 83(h) or 162(q) for any stock option where the vesting date of such option is changed to accelerate the time at which the option may be exercised

II. Executive Compensation/ Nonqualified Deferred Compensation

c. **Stock Option Deductions Subject to \$1 million Cap on Corporate Deductions**

The Bill would also make executive stock option deductions subject to the same \$1 million cap on corporate deductions that applies to other types of compensation paid to top executives

- This is done by amending Section 162(m)(4) of the Code by adding a new (D) expanding the term "applicable employee remuneration" for purposes of 162(m)(1) to any compensation deducted under 162(q), and also excluding such compensation from qualifying as performance-based compensation under 162(m)(4)(C)

II. Executive Compensation/ Nonqualified Deferred Compensation

4. Tax Reduction and Reform Act of 2007 (H.R. 3970)

5. Temporary Tax Relief Act of 2007 (H.R. 3996)

a. Overview

- **100 plus pages each and chock full of tax provisions** -- These bills, each of which is over 100 pages long and "chock full" of Internal Revenue Code amendments, each add, significantly for our practice area, provisions that change the advantageous tax treatment for the so-called "carried interest", i.e., the share of profits earned by private investment firms (e.g., private equity funds, venture capital funds, hedge funds) from long-term investments given to them by the limited partners in their funds, and that make nonqualified deferred compensation paid by certain partnerships and foreign corporations taxable income when there is no "substantial risk of forfeiture".
- **Each adds new Sections 457A and 710 of the Internal Revenue Code**, the first rendering the "carried interest" income to be ordinary income, and the second rendering compensation income deferred in a nonqualified deferred compensation plan (as such plan is defined in I.R.C. 409A(d)) of a so-called "nonqualified entity", i.e. certain partnerships and foreign corporations, includible in income in the taxable year in which such income is no longer subject to a "substantial risk of forfeiture", as defined in the proposed statute.
- **The provisions in H.R. 3970 appear to be more developed**, with more detailed definitions, so we will focus on that Bill for purposes of our discussion today

II. Executive Compensation/ Nonqualified Deferred Compensation

- b. Proposed new I.R.C. Section 710: "carried interest" goes from "capital gains" to "ordinary income" treatment:** Currently such "carried interest" income receives capital gains treatment, and is taxed at the favorable capital gains rates; the bills would change the treatment of such income such that it would be treated as ordinary income for the performance of services, taxed at ordinary income tax rates. See, e.g, H.R. 3970 at Section 1201, adding new Section 710 to the Internal Revenue Code:
- 1) New provision Section 710 is entitled "SPECIAL RULES FOR PARTNERS PROVIDING INVESTMENT MANAGEMENT SERVICES TO PARTNERSHIP"
 - 2) Language of provision indicates that "in the case of an investment services partnership":
 - **net income** with respect to such an interest shall be treated as ordinary income for the performance of services
 - **net loss** with respect to such interest is treated as **ordinary loss**, to the extent not disallowed by a special loss-limiting subsection -- which allows the loss to only to the extent it does not exceed the excess (if any) of the aggregate net income for all prior partnerships OVER the aggregate net loss with respect to such interest not disallowed for prior partnership taxable years to which this new Section 710 applies

II. Executive Compensation/ Nonqualified Deferred Compensation

c. Proposed new I.R.C. Section 710: "Investment Services Partnership Interest"

- **"Investment Services Partnership Interest"** is defined to mean an interest in a partnership which is held by any person if such person provides (directly or indirectly) a substantial quantity of any of the following services with respect to the assets of the partnership in the conduct of a trade or business of providing such services:
 - 1) Advising as to the advisability of investing in, purchasing, or selling any specified asset (i.e. securities under 475(c)(2), real estate, commodities under 475(e)(2), or options or derivative contracts with respect to securities, real estate or commodities,
 - 2) Managing, acquiring, or disposing of any specified asset,
 - 3) Arranging financing with respect to acquiring specified assets, or
 - 4) Any activity in support of any such services

II. Executive Compensation/ Nonqualified Deferred Compensation

d. Proposed new I.R.C. Section 457A: Nonqualified Deferred Compensation for Investment Services -- OVERVIEW

Section 1202 of H.R. 3970 adds a new Section 457A to the Internal Revenue Code, providing that "compensation for investment services" deferred under the nonqualified deferred compensation plan of a "**nonqualified entity**" is to be included as gross income in the taxable income when there is "no substantial risk of forfeiture" of the rights to such compensation

- "**Nonqualified entity**" is defined under the provision to mean:
 - i. any foreign corporation which has investment-related income unless substantially all of such income is effectively connected with the conduct of a trade or business in the U.S., or is subject to a comprehensive foreign income tax, and
 - ii. any partnership which has investment-related income unless substantially all of such income is allocated to persons OTHER THAN foreign persons with respect to whom such income is not subject to a comprehensive foreign income tax AND organizations which are exempt from tax under this title

II. Executive Compensation/ Nonqualified Deferred Compensation

e. Proposed new I.R.C. Section 457A: Nonqualified Deferred Compensation for Investment Services -- "Investment Services" and "Investment-Related Income"

- **"Investment services"** is defined by reference to Section 710(c)(1) of the provision detailed above and enacted in the same act: "all services if a substantial quantity of such services are services described in section 710(c)(1)", which such services include:
 - 1) Advising as to the advisability of investing in, purchasing, or selling any specified asset
 - 2) Managing, acquiring, or disposing of any specified asset
 - 3) Arranging financing with respect acquiring specified assets, or
 - 4) Any activity in support of any such services
- **"Investment-related income"** is defined as any income attributable, directly or indirectly to investment services, or to assets with respect to which the investment services were performed, or to the investment.

II. Executive Compensation/ Nonqualified Deferred Compensation

- f. **Proposed new I.R.C. Section 457A: Nonqualified Deferred Compensation for Investment Services -- "Substantial Risk of Forfeiture"**
 - **"Substantial risk of forfeiture"** is defined in the provision thusly:
"The rights of a person to compensation shall be treated as subject to a substantial risk of forfeiture only if such person's rights to such compensation are conditioned upon the future performance of substantial services by any individual".

II. Executive Compensation/ Nonqualified Deferred Compensation

6. Small Business and Work Opportunity Act of 2007

a. First of Two Relevant Items: New Maximum Deferral Amount For Nonqualified Plans

- **Maximum deferral amount: lesser of \$1M or average of 5 previous years of compensation paid by employer:** Section 206 of the Bill amends 409A(a) by adding a new 409A(a)(5), which effectively limits the annual aggregate amount which may be deferred under a nonqualified deferred compensation plan, by limiting such effectively to the lesser of \$1,000,000 or the average annual compensation paid by the employer (or its predecessor) maintaining the plan and includible in the employee's gross income during the 5 previous taxable years.

- **Operative provisions:**

409A(a)(5)(A): LIMITATION -- Sets forth that requirements of paragraph are met if plan provides that aggregate compensation deferred for any taxable year may not exceed the "applicable dollar amount

409A(a)(5)(D)(i): APPLICABLE DOLLAR AMOUNT -- Defines this to mean the LESSER of either

- the average annual compensation paid during the "base period" to participant by the employer maintaining the nonqualified deferred compensation plan (or any predecessor) and which was includible in participant's gross income for taxable years in "base period,"
OR
- \$1,000,000

409A(a)(5)(D)(ii): BASE PERIOD -- The language hereunder defines this as the 5-taxable year period ending with the taxable year preceding the taxable for which the limitation is being computed, OR, if employee did not perform services for such employer for 5 previous taxable years, the average for that period during which participant performed such services.



II. Executive Compensation/ Nonqualified Deferred Compensation

a. **First of Two Relevant Items: Treasury to Provide Guidance on Amendment Period to Conform With 409A(a)(5)**

Note that Section 206 of the Bill sets forth that the Secretary of Treasury would be required to provide guidance no later than 60 days after enactment providing a limited period during which nonqualified deferred compensation plans adopted before December 31, 2006 could be amended:

1. To conform to the requirements of the new 409A(a)(5) for amounts deferred after December 31, 2006, AND
2. To provide that a participant may, no later than December 31, 2007, cancel or modify an outstanding deferral election with regard to all or a portion of amounts deferred after December 31, 2006 to the extent necessary for the plan to meet the requirements of the new 409A(a)(5) (but ONLY if such amounts to be cancelled/modified are, to the extent not previously included in gross income, includible in participant's income when no longer subject to substantial risk of forfeiture."

II. Executive Compensation/ Nonqualified Deferred Compensation

b. **Second of Two Relevant Items: New Definition of "Covered Employee" for Denial of Deduction for "Excessive Employee Remuneration"**

- **"Covered Employee" Definition Expanded: CEO, Top 4 Compensated Officers, or Covered Employee for Any Taxable Year Beginning After 12/31/06**

Section 214 amends I.R.C. 162(m)(3) to redefine "covered employee" for purposes of the limitation in 162(m)(1) -- the provision limiting the deduction for employee remuneration to such a covered employee to the extent such exceeds \$1,000,000 for the taxable year -- to three categories of individual:

1. the CEO of the taxpayer, or individual acting in such capacity, at any time during the taxable year,
2. any 1 of the 4 highest compensated officers of the taxpayer for the taxable year other than the CEO described above,
3. a covered employee of taxpayer (or any predecessor) for any preceding taxable year beginning after December 31, 2006 (including the beneficiary of such an employee if the remuneration was for services performed by such employee as a covered employee)

II. Executive Compensation/ Nonqualified Deferred Compensation

C. Effective Dates

1. **Shareholder Vote on Executive Compensation Act (H.R. 1257/ S. 1181)**

- a. Effectively applies January 1, 2009 and thereafter
- b. Bill would require SEC to issue final regulations within one year after the date of enactment

2. **Protecting Employees and Retirees in Business Bankruptcies Act (S. 2092 / H.R. 3652)**

- a. Would be effective on date of enactment

3. **Ending Corporate Tax Favors for Stock Options Act (S. 2116)**

- a. The new deduction rules would become effective on date of enactment
- b. The executive pay deduction limit would apply to stock options exercised or granted after the date of enactment

II. Executive Compensation/ Nonqualified Deferred Compensation

C. Effective Dates

4. **Tax Reduction and Reform Act of 2007 (H.R. 3970)**

- a. Would become effective for taxable years beginning after December 31, 2007

5. **Temporary Tax Relief Act of 2007 (H.R. 3996)**

- a. Would become effective for amounts deferred which are attributable to services performed after December 31, 2007 with a transition rule for existing deferrals

6. **Small Business and Work Opportunity Act of 2007**

- New I.R.C. 409A(a)(5) effective for amounts deferred after December 31, 2006, except for purposes of determining the "average annual compensation", taxable years beginning before December 31, 2006 may be taken into account into the "base period" computation
- New I.R.C. Section 162(m)(3) would be effective for taxable years beginning after December 31, 2006

III. Bankruptcy

A. Relevant Bills

1. **Protecting Employees and Retirees in Business Bankruptcies Act of 2007 (S. 2092 / H.R. 3652)**

- a. Introduced by Sen. Durbin (D-IL) and Rep. Conyers (D-MI) on September 25, 2007

III. Bankruptcy

B. Substance of Proposed Bills

1. **Protecting Employees and Retirees in Businesses Bankruptcies Act of 2007 (S. 2092 / H.R. 3652)**

a. Overview

- **Effort to Enact More Protection for Worker/Retiree Wages & Benefits:** The Bill sets forth that it seeks to protect worker and retiree wages and benefits when a corporation files for bankruptcy under Chapter 11.
- **Variety of Executive Comp-Related Changes to Bankruptcy Code:** The Bill makes a variety of changes to Bankruptcy Code with respect to executive compensation, as discussed at length above.
- **Variety of Additional Wage/Benefit-Related Amendments to Bankruptcy Code:** The Bill also adds a variety of provisions to the Bankruptcy Code, and amends a number of existing Bankruptcy Code provisions, including:
 - 1) **New Priority Claims:** the Bill adds some new priority claims and modification of existing priority claims,
 - 2) **Changes to CBA Modification Process in 1113:** the Bill modifies the process in Section 1113 for rejecting a collective bargaining agreements,
 - 3) **Changes to Retiree Benefit Modification Process in 1114:** The Bill modifies the process in Section 1114 for amending retiree benefits.

III. Bankruptcy

b. The Statement of Purpose of Reorganization Plans Would Include a Plan to Preserve Jobs -- New 11 USC 1100

- **New Statement of Purpose** -- Section 14 of the Bill amends Title 11 of the United States Code to add a new Section 1100, entitled "Statement of Purpose", modifying such that the purpose of a debtor commencing a case under that chapter shall have as its purpose the reorganization of its business, and "to the greatest extent possible, maintaining or enhancing the productive use of its assets, so as to preserve jobs."
- **Courts Can Now Consider, in Approving Reorg Plan, Extent of Job/Benefit Preservation:** The Bill also amends 11 USC 1129(a), so that the bankruptcy court can consider, in determining whether to confirm a plan under such provision, the extent to which each plan would maintain existing jobs, has preserved retiree health benefits, and has maintained any existing defined benefit plans.

III. Bankruptcy

c. **Wage Priority Claims for Workers: from \$10,000 to \$20,000 -- Amendments to 11 USC 507(a)**

Section 3: Amends 11 USC 507(a)

- **Wage and "Benefits Earned" Priority Claims Increase from \$10,000 to \$20,000:** The Bill would amend Bankruptcy Code Section 507(a) -- the provision setting forth "priority" claims -- to allow wage claims per worker to be increased from a \$10,000 limit to \$20,000, and would allow a second claim of up to \$20,000 for "benefits earned".
- **180-day Time Limit Eliminated:** The Bill also eliminates the 180 day time-limit for making such claims (either for wages or for "benefits earned")

III. Bankruptcy

d. **New Priority Claim for the Loss in Value of Stock in Defined Contribution Pension Plan -- Amendments to 11 USC 101(5) and 11 USC 507(a)**

Section 4(a) of the Bill: Amends 11 USC 101(5).

- This provision of the Bill amends 11 USC 101(5) to allow a claim for stock value losses for employer stock held in a defined contribution plan, as long as the claimant is not an "insider" or "1 of the 10 most highly compensated employees" of the debtor, where such stock is from employer contributions or from elective deferrals.

Section 4(b): Amends 11 USC 507(a)

- This provision amends 11 USC 507(a) to allow a claim for stock value losses for employer stock held in a defined contribution plan without regard to when services resulting in the contribution of stock to the plan were rendered, with such losses measured by the market value of the stock at time of contribution to or purchase by the plan, and the value at time of commencement of the bankruptcy case where an employer or plan sponsor has committed fraud or otherwise breached a duty to the participant that has "proximately caused the loss of value".

III. Bankruptcy

e. **New Priority Administrative Expense for Severance Pay -- Amendments to 11 USC 503(b)**

Section 5 of the Bill: Amends 11 USC 503(b)

Amendments to 503(b) would allow a priority claim for severance pay owed under a plan/policy/program OR under a collective bargaining agreement to employees of the debtor -- *other than* for such pay to insiders, senior management, or a consultant retained to provide services to a debtor. Also excluded from this is severance pay under an individual contract of employment or for layoff or termination, which will be deemed earned in full upon the layoff or termination.

III. Bankruptcy

f. **New Restrictions on Amending Collective Bargaining Agreements -- Amendments to 11 USC 1113**

Section 8 of the Bill: Amends 11 USC 1113

- Amends the process for rejecting certain collective bargaining agreements, requiring the debtor in possession or trustee to meet in good faith with an authorized representative to reach "mutually acceptable modifications" before a motion to reject such an agreement can be entertained by the court, with proposals to modify limited to modifications
 - 1) Designed to achieve a "total aggregate financial contribution" for the affected labor group for a period not to exceed two years after the effective date of the plan,
 - 2) That are no more than the "minimal savings necessary" to allow the debtor to exit bankruptcy without liquidating, and
 - 3) That will not "overly burden" the affected labor group in terms of the amount of savings and nature of modifications when compared to other groups expected to maintain an ongoing relationship with the debtor, including management personnel.

III. Bankruptcy

f. **New Restrictions on Amending Collective Bargaining Agreements -- Amendments to 11 USC 1113 - CONTINUED**

Section 8 of the Bill: Amends 11 USC 1113

- Under the Bill, if, after the negotiations described above, an impasse is reached, the court can grant a motion to reject only after considering:
 - 1) Whether the parties have negotiated in good faith,
 - 2) Alternative proposals by the authorized representative,
 - 3) Whether further negotiations are likely to produce an agreement, and
 - 4) Whether the authorized representative agreed to provide financial relief to the debtor within the 24-month period prior to commencement of the bankruptcy.
- Finally, the rejection of such a contract will constitute a breach of contract by the debtor, with the same effect as rejection of an executory contract under 11 USC 365(g), and no claim for rejection damages will be limited by 11 USC 502(b)(7)

III. Bankruptcy

g. Amendments Tightening the Procedures Through Which Retiree Benefits Can Be Modified -- Amendments to 11 USC 1114

Section 9 of the Bill, entitled "Payment of Insurance Benefits to Retired Employees":
Amends 11 USC 1114

- **Good Faith Meeting with "Authorized Representative" of Retiree Benefits Required:** The new amendments creates new limitations for a debtor who seeks to modify retiree benefits, by disallowing the filing of a motion to make such modifications unless the bankruptcy trustee has met with the authorized representative of such retirees to confer in good faith in attempting to reach mutually satisfactory modifications.
- **Modifications Limited:** Such modifications to retiree benefits are limited to those
 - 1) that achieve a "total aggregate financial contribution" for the affected retiree group for a period not to exceed 2 years after the effective date of the plan,
 - 2) are no more than the minimal savings necessary to permit the debtor to exit bankruptcy without liquidating, and
 - 3) will not "overly burden" the affected retirees either in the amount of savings and nature of modifications when compared to other groups expected to maintain an ongoing relationship with the debtor, including management personnel.

III. Bankruptcy

g. Amendments Tightening the Procedures Through Which Retiree Benefits Can Be Modified -- Amendments to 11 USC 1114 – CONTINUED

- **Court Considerations Before It Can Grant a Motion to Modify:** If, after such negotiations, the court can grant such a motion to modify the payment of retiree benefits only after considering :
 - 1) Whether the parties have negotiated in good faith,
 - 2) Alternative proposals by the authorized representative,
 - 3) Whether further negotiations are likely to produce an agreement,
 - 4) the effect of the proposed modifications on the affected retirees, and
 - 5) where the representative is a labor union, the effect of a strike.
- **No Provision of Retiree Benefits to Senior Management or Insiders if Modifications Made Under 1113 or 1114:** Finally, the Bill adds language preventing any plan, fund, program or contract to provide retiree benefits for insiders or senior management for debtor if debtor has obtained relief under the foregoing provisions to modify retiree benefits, or under certain provision of Section 1113 dealing with modification of a collective bargaining agreement.

III. Bankruptcy

h. Recovery of Executive Compensation In Proportion to Relief Granted Under 1113 and 1114 -- Amendments to 11 USC 563

Section 16 of the Bill amends 11 USC 563 to give the bankrupt estate a claim against compensation paid to any officer of the debtor serving as a member of the debtor's board of directors within the year in the same percentage as the percentage of relief the debtor has obtained if any, under certain provisions of either 11 USC 1113 or 1114, whereby the debtor either reduces its contractual obligations under a collective bargaining agreement or under a retiree benefit plan, or the percentage of reductions in benefits that resulted from the termination of a defined benefit plan pursuant to ERISA Sections 4041 or 4042 at any time on or after 180 days before the date of the bankruptcy case was begun. The trustee may file a claim for such amounts, or if it does not, any party in interest can file such a claim to recover such amounts for the benefit of the bankrupt estate.

Finally, the court is disallowed from awarding post-petition compensation under Section 503(c) or to any person subject to such section if there is a "reasonable likelihood" that such is intended to reimburse or replace compensation recovered by the bankrupt estate under the section as amended.

III. Bankruptcy

i. Bids for Sales of Assets Also Evaluated for Offers to Maintain Jobs/Preserve Retiree Benefits/Assume Pension Obligations -- Amendments to 11 USC 363

Section 10 of the Bill Amends 11 USC 363.

- **Court Must Consider Job and Benefits Aspects of Bids for Assets:** The Bill amends 11 USC 363 to require a court to consider, in determining whether to approve a sale of assets under the provision whether the bidder has:
 - 1) Offered to maintain existing jobs,
 - 2) Preserved retiree health benefits,
 - 3) Assumed the obligations of any defined benefit plan.
- **If Retiree Benefits Modified Under 1114, Charges Against Sale Price for Retiree Benefits:** Secondly, the amended provision sets forth that if retiree benefits are modified or eliminated under certain provisions of Section 1114, then except as otherwise provided in an agreement with the authorized representative of the retirees, a charge of \$20,000 per retiree shall be made against the proceeds of the sale to fund 12 months of replacement health coverage or to provide the affected retirees with the means by to obtain replacement coverage on their own, with this choice left to the authorized representative.
- **Amounts So Paid Under This Section Offset Any Claims 1114:** Finally, amounts paid under this foregoing provision would offset any claim for modification or elimination of retiree benefits under certain provisions of 1114.

III. Bankruptcy

j. Reasonable and Necessary Expenses in Disposing of /Preserving Property Securing an Allowed Secured Claim to Include Unpaid Wages and Other Accrued Benefits -- Amendments to 11 USC 506(c)

Section 13 amends 11 USC 506(c), relating to payments by a secured lender.

The new, amended provision indicates that where employees have not received wages and/or benefits under a collective bargaining agreement for services rendered on and after the date of the commencement of the bankruptcy case, such unpaid obligations will be deemed to be necessary costs and expenses of preserving, or disposing of property securing an allowed secured claim, and such shall be recovered even if the trustee has otherwise waived this provision under an agreement with the holder of the allowed secured claim or successor/predecessor in interest.

k. Claim in Bankruptcy Would Be Allowed for Loss of Pension Benefits in Terminated Defined Benefit Plan -- Amendments to 11 USC 502

Section 12 amends 11 USC 502 to allow a claim in bankruptcy for a loss of pension benefits, by an active or retired participant in a defined benefit plan terminated under ERISA sections 4041 or 4042, for any shortfall in pension benefits accrued as a result of the termination (as of the effective date of the termination) of the plan and limitations on payment of benefits imposed by ERISA 4022, notwithstanding any claim asserted and collected by the PBGC with respect to such termination.

III. Bankruptcy

I. **Exception from the Automatic Stay for Grievance/ Arbitration/ Dispute Resolution Under CBA -- Amendments to 11 USC 362(b)**

Section 17 amends 11 USC 362(b).

Creates an exception from the automatic stay for the commencement or continuation of a grievance, arbitration or other similar dispute resolution proceeding established by a collective bargaining agreement either that was, or could have been begun against the debtor before filing of the bankruptcy case, or for the payment or enforcement of an award or settlement under such a proceeding.

III. Bankruptcy

m. Labor Union Would Be Allowed to Make Proof of Claim -- Amendments to 501(a)

Section 11 of the Bill amends 11 USC 501(a) to allow a union (labor organization) to make a proof of claim under 501(a).

III. Bankruptcy

n. Damages for Rejection of a CBA Under 1113; Reorg Plan Must Account for Retiree Benefits

Section 19 of the Bill amends 11 USC 1129(a) by adding new sections 13 and 18.

- First, it adds a new subsection (18) adding to the list of items included in 1129(a) the case where a debtor initiated proceedings under Section 1113, the plan provides for recovery of rejection damages.
- Second, the Bill strikes existing subsection (13) and adds a new subsection (13), which sets forth the reorganization plan must provide for the continuation of retiree benefits at the level established pursuant to certain subsections of Section 1114 for the duration of the period for which the debtor has obligated itself to provide such benefits, or if no modifications are made prior to confirmation of the plan, the reorganization plan provides for the continuation of all such retiree benefits maintained or established in whole or part by the debtor before the filing of the bankruptcy petition -- and also such reorg plan must provide for allowed claims for modification of retiree benefits or for other financial returns, as negotiated by the debtor and the authorized representative, to extent such returns are paid under, rather than outside of a plan.

III. Bankruptcy

C. Effective Dates

1. **Protecting Employees and Retirees in Businesses Bankruptcies Act of 2007 (S. 2092 / H.R. 3652)**

- Would be effective on date of enactment

IV. Technical Corrections to the Pension Protection Act

A. Relevant Bills

1. **Pension Protection Technical Correction Act of 2007 (S. 1974/ H.R. 3361)**

- The Senate and House Bills were introduced on Aug. 2, 2007
- Hearing held before House Ways and Means Committee held by Chairman Rangel (D-NY) on Nov. 1

2. **Bill To Provide an Orderly Transition to New Requirements (H.R. 3868) H.R. 3868**

- Introduced Oct. 17, 2007
- Introduced by Reps. Pomeroy (D-ND) and Cantor (R-VA)

IV. Technical Corrections to the Pension Protection Act

B. Substance of Proposed Bills

1. **Pension Protection Technical Correction Act of 2007 (S. 1974/H.R. 3361)**

- a. Summaries of the Act Available on the Web:** Several summaries of this legislation are available, and I encourage you to retrieve them from the World Wide Web, and peruse them for information on and development of the provisions of this Act, including:
- i. Joint Committee on Taxation, "Description of the Pension Protection Technical Corrections Act of 2007" (JCX-60-07), August 3, 2007 --** Most comprehensive and authoritative, and it gives a summary of the effect of each of the provisions of the Act
 - ii. Watson Wyatt INSIDER - September 2007: "PPA Remains On Legislative Agenda" --** Brief but informative
 - iii. Hewitt Associates' Legislative Update: November 7, 2007 --** Skeletal information
 - iv. BNA Pension & Benefits Reporter: "Hill Watch", December 4, 2007 --** Also skeletal information

IV. Technical Corrections to the Pension Protection Act

b. Topics Addressed by the Act

Some of the areas of the Pension Protection Act of 2006 addressed by the Act include:

1. TITLE I -- Reform of Funding Rules for Single-Employer Defined Benefit Plans

Minimum funding standards -- PPA 101 and 111

ERISA 302(c)(7)(A), 302(d)(1);
IRC 412(c)(7)(A), IRC 412(d)(1))

Funding rules -- PPA 102 and 112

ERISA 303(i)(4)(B), 303(j)(3);
IRC 430(i)(4)(B), 430(j)(3), and

Benefit limitations -- PPA 103 and 113

ERISA 206(g)(3)(E), 206(g)(10), 101(j);
IRC 436(d)(5), 436(k), 436(l)

Restrictions on funding of nonqualified deferred compensation plans by employers maintaining underfunded or terminated single-employer defined benefit plans -- PPA 116

IRC 409A(b)(3)(A)(ii)

Technical Corrections -- PPA 107 and 114

IV. Technical Corrections to the Pension Protection Act

b. Topics Addressed by the Act -- CONTINUED

2. TITLE II -- Funding rules for multiemployer defined benefit plans

Shortfall funding method -- PPA 201 and 211

Funding rules for multiemployer plans in endangered or critical status -- PPA 202 and 212

- **Notice requirements:** ERISA 305(b)(3)(D), 305(e)(8)(C), IRC 432(b)(3)(D)
- **Implementation/enforcement of default schedule:** ERISA 305(c)(7), 305(e)(3)(C)
IRC 432(c)(7), 432(e)(3)(C)
- **Restriction on payment of lump sums while plan in critical status:**
ERISA 305(f)(2)(A)
IRC 432(f)(2)(A)
- **Definition of plan sponsor:** IRC 432(i)(9)
- **Excise tax on trustees for failure to adopt a timely rehabilitation plan:** IRC 4971(g)(4) TITLE I -- Reform of Funding Rules for Single-Employer Defined Benefit Plans

IV. Technical Corrections to the Pension Protection Act

b. Topics Addressed by the Act -- CONTINUED

3. TITLE III -- Interest-Rate Provisions

- **Extension of replacement 30-Year Treasury Rates --**
PPA 301

4. TITLE IV -- PBGC Guarantee and RE

- **Plans covered by the missing participant program --**
PPA 410

ERISA 4050(d)

IV. Technical Corrections to the Pension Protection Act

b. Topics Addressed by the Act -- CONTINUED

5. TITLE V -- Disclosure

- **DB plan funding notice and disclosure of withdrawal liability -- PPA 501**
ERISA 101(f)
- **Access to multiemployer pension plan information -- PPA 502**
ERISA 101(k), 101(l), 4221(e)
- **Disclosure of termination information to plan participants -- PPA 506**
ERISA 4041, 4042
- **Periodic pension benefit statements -- PPA 508**
ERISA 209(a)
- **Notice to participants or beneficiaries of blackout periods -- PPA 509**
ERISA 101(i)(8)(B)

IV. Technical Corrections to the Pension Protection Act

b. Topics Addressed by the Act -- CONTINUED

6. TITLE VI -- Investment Advice, Prohibited Transactions, and Fiduciary Rules

- **Prohibited Transaction Rules Relating to Financial Investments -- PPA 611**

ERISA 408(b)(18)(C); IRC 4975(d)(21)(C)

- **Inapplicability of Relief from Fiduciary Liability During Suspension of Ability of Participant or Beneficiary to Direct Investments -- PPA 621**

ERISA 404(c)

IV. Technical Corrections to the Pension Protection Act

b. Topics Addressed by the Act -- CONTINUED

7. TITLE VII -- Benefit Accrual Standards

- **Preservation of capital**

ERISA 204(b)(5)(B)(i)(II); IRC 411(b)(5)(B)(i)(II)

- **Application of present-value rules**

ERISA 203(f)(1)(B)

IRC 411(a)(13)(A)(ii)

- **Effective date -- PPA 701(e)**

IV. Technical Corrections to the Pension Protection Act

b. Topics Addressed by the Act -- CONTINUED

8. TITLE VIII -- Pension-Related Revenue Provisions

- **Increase in deduction limit for single-employer plans -- PPA 801**
IRC 404
- **Updating deduction rules for combination of plans -- PPA 803**
IRC 404(a)(7)
- **Allow rollovers by nonspouse beneficiaries of certain retirement plan distributions -- PPA 829**
IRC 402(c)(11), 401(a)(31)(D)
- **Use of excess pension assets for future retiree health benefits and collectively bargained retiree health benefits -- PPA 841**
IRC 420

IV. Technical Corrections to the Pension Protection Act

b. Topics Addressed by the Act -- CONTINUED

8. TITLE VIII -- Pension-Related Revenue Provisions -- CONTINUED

- **Distributions from governmental retirement plans for health and long-term care insurance for public safety officers -- PPA 845**
IRC 402(l)
- **Annuities to surviving spouses and dependent children of special trial judges -- PPA 854**
IRC 3121(b)(5)(E)
Social Security Act 210(a)(5)(E)
- **Provisions for recall -- PPA 856**
IRC 7443B

IV. Technical Corrections to the Pension Protection Act

b. Topics Addressed by the Act -- CONTINUED

9. TITLE IX -- Increase in Pension Plan Diversification and Participation and Other Pension Provisions

- **Defined contribution plans required to provide employees with freedom to invest their assets -- PPA 901**

IRC 401(a)(35)(E)

- **Increasing participation through automatic contribution arrangements -- PPA 902**

IRC 414(w)

- **Treatment of eligible combined DB plans and qualified CODAs -- PPA 903**

IRC 414(x)(1)

ERISA 210(e)

IV. Technical Corrections to the Pension Protection Act

b. Topics Addressed by the Act -- CONTINUED

10. TITLE X -- Spousal Pension Protection Provisions

- **Extension of Tier II Railroad Retirement Act benefits to surviving former spouses -- PPA 1003**

IV. Technical Corrections to the Pension Protection Act

b. Topics Addressed by the Act -- CONTINUED

11. TITLE XI -- Administrative Provisions

- **No reduction in unemployment compensation as a result of pension rollovers -- 1105**

IV. Technical Corrections to the Pension Protection Act

b. Topics Addressed by the Act -- CONTINUED

12. TITLE XII -- Provisions Relating to Exempt Organizations

- **Tax-free distributions from individual retirement plans for charitable purposes -- PPA 1201**

IRC 408(d)(8)(D)

IV. Technical Corrections to the Pension Protection Act

C. Effective Date

1. **Pension Protection Technical Correction Act of 2007 (S. 1974/ H.R. 3361)** would be effective as if included in the PPA
2. **H.R. 3868**: would be effective as if included in the PPA.

V. APPENDIX: Partial List of Additional, Relevant Bills Under Consideration by Congress

A. TAX LEGISLATION

1. **Small Business and Work Opportunity Act of 2007**

- Introduced on January 22, 2007 by Sen. Baucus (D-MT)
- Purports to amend 409A(a) to limit the maximum amount of income that may be deferred under a nonqualified deferred compensation plan to \$1,000,000; also purports to redefine "covered employee" for purposes of the limitation on the deduction of excessive employee remuneration

V. APPENDIX: Partial List of Additional, Relevant Bills Under Consideration by Congress

B. IRAs

- 1. Public Good Rollover Act of 2007 (S. 819/ H.R. 1419)**
 - Introduced by Sen. Dorgan (D-ND) and Rep. Pomeroy (D-ND) on March 8, 2007
- 2. Automatic IRA Act of 2007 (S. 1141 / H.R. 2167)**
 - Introduced by Sens. Bingham (D-NM) and Smith (R-OR) on April 18, 2007
 - Introduced by Reps. Neal (D-MA) and English (R-PA) on May 3, 2007
- 3. Women's Retirement Security Act (S. 1288)**
 - Introduced by Sens. Smith (R-OR) and Conrad (D-ND) on May 3, 2007
- 4. Temporary Tax Relief Act of 2007 (H.R. 3996)**
 - Approved by the House Ways and Means Committee on November 1, 2007

V. APPENDIX: Partial List of Additional, Relevant Bills Under Consideration by Congress

C. CONTINGENT WORKERS

1. **Independent Contractor Proper Classification Act of 2007 (S. 2044)**

- Introduced by Sen. Obama (D-IL) on September 12, 2007

D. DISCRIMINATION IN RETIREMENT PLAN BENEFITS

1. **Lilly Ledbetter Fair Pay Act of 2007 (H.R. 2831)**

- Approved by the House in vote of 225 to 199 on July 31, 2007
- Bill reportedly seeks to overturn the recent Supreme Court decision in Ledbetter v. Goodyear Tire & Rubber Co., relating to the limitations period for filing a claim beginning when the discriminatory act occurs and is communicated to the individual, as opposed to re-start with each paycheck

2. **The Fair Pay Restoration Act (S. 1843)**

- Introduced by Sen. Kennedy (D-MA) on July 20, 2007

V. APPENDIX: Partial List of Additional, Relevant Bills Under Consideration by Congress

E. EXPATRIATE TAX

1. **Tax Collection Responsibility Act of 2007 (H.R. 3056)**

- Passed the House 232-173 on October 10, 2007

2. **Temporary Tax Relief Act of 2007 (H.R. 3996)**

- Approved by the House Ways and Means Committee on November 1, 2007

V. APPENDIX: Partial List of Additional, Relevant Bills Under Consideration by Congress

F. RETIREMENT PLAN DISTRIBUTIONS FOR ACTIVE MILITARY/ MILITARY SERVICE DIFFERENTIAL PAY/ TAX RELIEF

1. **Heroes Earnings Assistance and Relief Tax Act of 2007 (H.R. 3997)**

- Approved by the House Ways and Means Committee on November 1, 2007

2. **Temporary Tax Relief Act of 2007 (H.R. 3996)**

- Approved by the House Ways and Means Committee on November 1, 2007

3. **Help Our Patriotic Employers at Helping Our Military Employees (HOPE at HOME) Act (S. 384)**

- Introduced by Sen. Landrieu (D-LA) on January 24, 2007

4. **Defenders of Freedom Tax Relief Act (S. 1593)**

- Introduced by Senators Baucus (D-MT) and Grassley (R-IA) on June 12, 2007

V. APPENDIX: Partial List of Additional, Relevant Bills Under Consideration by Congress

G. GENETIC NONDISCRIMINATION

1. **Genetic Information Nondiscrimination Act of 2007 (H.R. 493/S. 358)**

- H.R. 493 passed by the House by a vote of 420 to 3 on April 25, 2007
- S. 358 approved by Senate Health, Education, Labor and Pensions Committee by a vote of 19 to 2 on January 31, 2007

H. WARN ACT REVISIONS

1. **Trade and Globalization Assistance Act of 2007 (H.R. 3920)**

- Approved by the House by a vote of 264-157 on October 31, 2007

V. APPENDIX: Partial List of Additional, Relevant Bills Under Consideration by Congress

I. EMPLOYEE HEALTH BENEFITS OF DEFENSE CONTRACTOR EMPLOYERS

1. **Department of Defense Appropriations Act for FY 2008 (H.R. 3222)**
2. **National Defense Authorization Act for FY 2008 (H.R. 1585)**

J. EXPANDED FAMILY AND SICK LEAVE

1. **Children's Health Insurance Program Reauthorization Act (H.R. 3963)**
 - Approved by the House on October 25 by a vote of 265 to 142, and in the Senate on November 1 by a vote of 64-30, but President Bush's Statement of Administration Policy on October 25 indicated the president would veto the Bill
2. **Healthy Families Act (S. 910/ H.R. 1542)**

V. APPENDIX: Partial List of Additional, Relevant Bills Under Consideration by Congress

K. REVISIONS TO AMERICANS WITH DISABILITIES ACT

1. **ADA Restoration Act of 2007 (H.R. 3195/ S. 1881)**

- Introduced by Senators Harkin (D-IA) and Specter (R-PA) on July 26, 2007

L. REVISIONS TO NATIONAL LABOR RELATIONS ACT

1. **Re-Empowerment of Skilled and Professional Employees and Construction Tradesworkers (RESPECT) Act (H.R. 1644/ S. 969)**

- Approved by the House Committee on Education and Labor on September 19, 2007.