cial provisions for plans maintained pursuant to collective bargaining agreements ratified before Mar. 1, 1986, and transition rules, see section 1121(d) of Pub. L. 99–514, set out as a note under section 401 of this title.

Amendment by section 1852(a)(7)(B), (C) of Pub. L. 99–514 effective, except as otherwise provided, as if included in the provisions of the Tax Reform Act of 1984, Pub. L. 98–369, div. A, to which such amendment relates, see section 1881 of Pub. L. 99–514, set out as a note under section 48 of this title.

EFFECTIVE DATE OF 1978 AMENDMENT

Pub. L. 95–600, title I, § 157(i)(2), Nov. 6, 1978, 92 Stat. 2809, provided that: ''The amendment made by paragraph (1) [amending this section] shall apply to taxable years beginning after December 31, 1975.''

EFFECTIVE DATE

Section effective Jan. 1, 1975, see section 2002(i)(2) of Pub. L. 93–406, set out as an Effective Date note under section 4973 of this title.

PLAN AMENDMENTS NOT REQUIRED UNTIL JANUARY 1, 1989

For provisions directing that if any amendments made by subtitle A or subtitle C of title XI [§§ 1101–1147 and 1171–1177] or title XVIII [§§ 1800–1899A] of Pub. L. 99–514 require an amendment to any plan, such plan amendment shall not be required to be made before the first plan year beginning on or after Jan. 1, 1989, see section 1140 of Pub. L. 99–514, as amended, set out as a note under section 401 of this title.

§ 4975. Tax on prohibited transactions

(a) Initial taxes on disqualified person

There is hereby imposed a tax on each prohibited transaction. The rate of tax shall be equal to 15 percent of the amount involved with respect to the prohibited transaction for each year (or part thereof) in the taxable period. The tax imposed by this subsection shall be paid by any disqualified person who participates in the prohibited transaction (other than a fiduciary acting only as such).

(b) Additional taxes on disqualified person

In any case in which an initial tax is imposed by subsection (a) on a prohibited transaction and the transaction is not corrected within the taxable period, there is hereby imposed a tax equal to 100 percent of the amount involved. The tax imposed by this subsection shall be paid by any disqualified person who participated in the prohibited transaction (other than a fiduciary acting only as such).

(c) Prohibited transaction

(1) General rule

For purposes of this section, the term ''prohibited transaction'' means any direct or indirect—

(A) sale or exchange, or leasing, of any property between a plan and a disqualified person;

(B) lending of money or other extension of credit between a plan and a disqualified person;

(C) furnishing of goods, services, or facilities between a plan and a disqualified person;

(D) transfer to, or use by or for the benefit of, a disqualified person of the income or assets of a plan;

(E) act by a disqualified person who is a fiduciary whereby he deals with the income or assets of a plan in his own interest or for his own account; or

(F) receipt of any consideration for his own personal account by any disqualified person who is a fiduciary from any party dealing with the plan in connection with a transaction involving the income or assets of the plan.

(2) Special exemption

The Secretary shall establish an exemption procedure for purposes of this subsection. Pursuant to such procedure, he may grant a conditional or unconditional exemption of any disqualified person or transaction, orders of disqualified persons or transactions, from all or part of the restrictions imposed by paragraph (1) of this subsection. Action under this subparagraph may be taken only after consultation and coordination with the Secretary of Labor. The Secretary may not grant an exemption under this paragraph unless he finds that such exemption is—

(A) administratively feasible,

(B) in the interests of the plan and of its participants and beneficiaries, and

(C) protective of the rights of participants and beneficiaries of the plan.

Before granting an exemption under this paragraph, the Secretary shall require adequate notice to be given to interested persons and shall publish notice in the Federal Register of the pendency of such exemption and shall afford interested persons an opportunity to present views. No exemption may be granted under this paragraph with respect to a transaction described in subparagraph (E) or (F) of paragraph (1) unless the Secretary affords an opportunity for a hearing and makes a determination on the record with respect to the findings required under subparagraphs (A), (B), and (C) of this paragraph, except that in lieu of such hearing the Secretary may accept any record made by the Secretary of Labor with respect to an application for exemption under section 408(a) of title I of the Employee Retirement Income Security Act of 1974.

(3) Special rule for individual retirement accounts

An individual for whose benefit an individual retirement account is established and his beneficiaries shall be exempt from the tax imposed by this section with respect to any transaction concerning such account (which would otherwise be taxable under this section) if, with respect to such transaction, the account ceases to be an individual retirement account by reason of the application of section 408(e)(2)(A) or if section 408(e)(4) applies to such account.

(4) Special rule for Archer MSAs

An individual for whose benefit an Archer MSA (within the meaning of section 220(d)) is established shall be exempt from the tax imposed by this section with respect to any transaction concerning such account (which would otherwise be taxable under this section) if section 220(e)(2) applies to such transaction.

(5) Special rule for Coverdell education savings accounts

An individual for whose benefit a Coverdell education savings account is established and any contributor to such account shall be exempt from the tax imposed by this section with respect to any transaction concerning such account (which would otherwise be taxable under this section) if section 530(d) applies with respect to such transaction.

(6) Special rule for health savings accounts

An individual for whose benefit a health savings account (within the meaning of section 223(d)) is established shall be exempt from the tax imposed by this section with respect to any transaction concerning such account (which would otherwise be taxable under this section) if, with respect to such transaction, the account ceases to be a health savings account by reason of the application of section 223(e)(2) to such account.

(7) Special rule for provision of pharmacy benefit services

Any party to an arrangement which satisfies the requirements of section 408(h) of the Employee Retirement Income Security Act of 1974 shall be exempt from the tax imposed by this section with respect to such arrangement.

(d) Exemptions

Except as provided in subsection (f)(6), the prohibitions provided in subsection (c) shall not apply to—

(1) any loan made by the plan to a disqualified person who is a participant or beneficiary of the plan if such loan—

(A) is available to all such participants or beneficiaries on a reasonably equivalent basis,

(B) is not made available to highly compensated employees (within the meaning of section 414(q)) in an amount greater than the amount made available to other employees,

(C) is made in accordance with specific provisions regarding such loans set forth in the plan,

(D) bears a reasonable rate of interest, and

(E) is adequately secured;

(2) any contract, or reasonable arrangement, made with a disqualified person for office space, or legal, accounting, or other services necessary for the establishment or operation of the plan, if no more than reasonable compensation is paid therefor;

(3) any loan to a leveraged employee stock ownership plan (as defined in subsection (e)(7)), if—

(A) such loan is primarily for the benefit of participants and beneficiaries of the plan, and

(B) such loan is at a reasonable rate of interest, and any collateral which is given to a disqualified person by the plan consists only of qualifying employer securities (as defined in subsection (e)(8));

(4) the investment of all or part of a plan's assets in deposits which bear a reasonable interest rate in a bank or similar financial institution supervised by the United States or a State, if such bank or other institution is a fiduciary of such plan and if—

(A) the plan covers only employees of such bank or other institution and employees of affiliates of such bank or other institution, or

(B) such investment is expressly authorized by a provision of the plan or by a fiduciary (other than such bank or institution or affiliates thereof) who is expressly empowered by the plan to so instruct the trustee with respect to such investment;

(5) any contract for life insurance, health insurance, or annuities with one or more insurers which are qualified to do business in a State if the plan pays no more than adequate consideration, and if each such insurer or insurers is—

(A) the employer maintaining the plan, or

(B) a disqualified person which is wholly owned (directly or indirectly) by the employer establishing the plan, or by any person which is a disqualified person with respect to the plan, but only if the total premiums and annuity considerations written by such insurers for life insurance, health insurance, or annuities for all plans (and their employers) with respect to which such insurers are disqualified persons (not including premiums or annuity considerations written by the employer maintaining the plan) do not exceed 5 percent of the total premiums and annuity considerations written for all lines of insurance in that year by such insurers (not including premiums or annuity considerations written by the employer maintaining the plan);

(6) the provision of any ancillary service by a bank or similar financial institution supervised by the United States or a State, if such service is provided at not more than reasonable compensation, if such bank or other institution is a fiduciary of such plan, and if—

(A) such bank or similar financial institution has adopted adequate internal safeguards which assure that the provision of such ancillary service is consistent with sound banking and financial practice, as determined by Federal or State supervisory authority, and

(B) the extent to which such ancillary service is provided is subject to specific guidelines issued by such bank or similar financial institution (as determined by the Secretary after consultation with Federal and State supervisory authority), and under such guidelines the bank or similar financial institution does not provide such ancillary service—

(i) in an excessive or unreasonable manner, and

(ii) in a manner that would be inconsistent with the best interests of participants and beneficiaries of employee benefit plans;

(7) the exercise of a privilege to convert securities, to the extent provided in regulations of the Secretary, but only if the plan receives no less than adequate consideration pursuant to such conversion;

(8) any transaction between a plan and a common or collective trust fund or pooled investment fund maintained by a disqualified person which is a bank or trust company supervised by a State or Federal agency or between a plan and a pooled investment fund of an insurance company qualified to do business in a State if—

(A) the transaction is a sale or purchase of an interest in the fund,

(B) the bank, trust company, or insurance company receives not more than a reasonable compensation, and

(C) such transaction is expressly permitted by the instrument under which the plan is maintained, or by a fiduciary (other than the bank, trust company, or insurance company, or an affiliate thereof) who has authority to manage and control the assets of the plan;

(9) receipt by a disqualified person of any benefit to which he may be entitled as a participant or beneficiary in the plan, so long as the benefit is computed and paid on a basis which is consistent with the terms of the plan as applied to all other participants and beneficiaries;

(10) receipt by a disqualified person of any reasonable compensation for services rendered, or for the reimbursement of expenses properly and actually incurred, in the performance of his duties with the plan, but no person so serving who already receives full-time pay from an employer or an association of employers, whose employees are participants in the plan or from an employee organization whose members are participants in such plan shall receive compensation from such fund, except for reimbursement of expenses properly and actually incurred;

(11) service by a disqualified person as a fiduciary in addition to being an officer, employee, agent, or other representative of a disqualified person;

(12) the making by a fiduciary of a distribution of the assets of the trust in accordance with the terms of the plan if such assets are distributed in the same manner as provided under section 4044 of title IV of the Employee Retirement Income Security Act of 1974 (relating to allocation of assets);

(13) any transaction which is exempt from section 406 of such Act by reason of section 408(e) of such Act (or which would be so exempt if such section 406 applied to such transaction) or which is exempt from section 406 of such Act by reason of section 408(b)(12) of such Act;

(14) any transaction required or permitted under part 1 of subtitle E of title IV or section 4223 of the Employee Retirement Income Security Act of 1974, but this paragraph shall not apply with respect to the application of subsection (c)(1) (E) or (F);

(15) a merger of multiemployer plans, or the transfer of assets or liabilities between multiemployer plans, determined by the Pension Benefit Guaranty Corporation to meet the requirements of section 4231 of such Act, but this paragraph shall not apply with respect to the application of subsection (c)(1)(E) or (F);

(16) a sale of stock held by a trust which constitutes an individual retirement account under section 408(a) to the individual for whose benefit such account is established if—

(A) such stock is in a bank (as defined in section 581) or a depository institution holding company (as defined in section 3(w)(1) of the Federal Deposit Insurance Act (12 U.S.C. 1813(w)(1))),

(B) such stock is held by such trust as of the date of the enactment of this paragraph,

(C) such sale is pursuant to an election under section 1362(a) by such bank or company,

(D) such sale is for fair market value at the time of sale (as established by an independent appraiser) and the terms of the sale are otherwise at least as favorable to such trust as the terms that would apply on a sale to an unrelated party,

(E) such trust does not pay any commissions, costs, or other expenses in connection with the sale, and

(F) the stock is sold in a single transaction for cash not later than 120 days after the S corporation election is made;

(17) any transaction in connection with the provision of investment advice described in subsection (e)(3)(B) to a participant or beneficiary in a plan that permits such participant or beneficiary to direct the investment of plan assets in an individual account, if—

(A) the transaction is—

(i) the provision of the investment advice to the participant or beneficiary of the plan with respect to a security or other property available as an investment under the plan,

(ii) the acquisition, holding, or sale of a security or other property available as an investment under the plan pursuant to the investment advice, or

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

(B) the requirements of subsection (f)(8) are met,[1]

(18) any transaction involving the purchase or sale of securities, or other property (as determined by the Secretary of Labor), between a plan and a disqualified person (other than a fiduciary described in subsection (e)(3)) with respect to a plan if—

(A) the transaction involves a block trade,

(B) at the time of the transaction, the interest of the plan (together with the interests of any other plans maintained by the same plan sponsor), does not exceed 10 percent of the aggregate size of the block trade,

[1] So in original. The comma probably should be a semicolon.

(C) the terms of the transaction, including the price, are at least as favorable to the plan as an arm's length[2] transaction, and

(D) the compensation associated with the purchase and sale is not greater than the compensation associated with an arm's length[2] transaction with an unrelated party,[1]

(19) any transaction involving the purchase or sale of securities, or other property (as determined by the Secretary of Labor), between a plan and a disqualified person if—

(A) the transaction is executed through an electronic communication network, alternative trading system, or similar execution system or trading venue subject to regulation and oversight by—

(i) the applicable Federal regulating entity, or

(ii) such foreign regulatory entity as the Secretary of Labor may determine by regulation,

(B) either—

(i) the transaction is effected pursuant to rules designed to match purchases and sales at the best price available through the execution system in accordance with applicable rules of the Securities and Exchange Commission or other relevant governmental authority, or

(ii) neither the execution system nor the parties to the transaction take into account the identity of the parties in the execution of trades,

(C) the price and compensation associated with the purchase and sale are not greater than the price and compensation associated with an arm's length[2] transaction with an unrelated party,

(D) if[3] the disqualified person has an ownership interest in the system or venue described in subparagraph (A), the system or venue has been authorized by the plan sponsor or other independent fiduciary for transactions described in this paragraph, and

(E) not less than 30 days prior to the initial transaction described in this paragraph executed through any system or venue described in subparagraph (A), a plan fiduciary is provided written or electronic notice of the execution of such transaction through such system or venue,[1]

(20) transactions described in subparagraphs (A), (B), and (D) of subsection (c)(1) between a plan and a person that is a disqualified person other than a fiduciary (or an affiliate) who has or exercises any discretionary authority or control with respect to the investment of the plan assets involved in the transaction or renders investment advice (within the meaning of subsection (e)(3)(B)) with respect to those assets, solely by reason of providing services to the plan or solely by reason of a relationship to such a service provider described in subparagraph (F), (G), (H), or (I) of subsection (e)(2), or both, but only if in connection with such transaction the plan receives no less, nor pays no more, than adequate consideration,[1]

(21) any foreign exchange transactions, between a bank or broker-dealer (or any affiliate of either) and a plan (as defined in this section) with respect to which such bank or broker-dealer (or affiliate) is a trustee, custodian, fiduciary, or other disqualified person, if—

(A) the transaction is in connection with the purchase, holding, or sale of securities or other investment assets (other than a foreign exchange transaction unrelated to any other investment in securities or other investment assets),

(B) at the time the foreign exchange transaction is entered into, the terms of the transaction are not less favorable to the plan than the terms generally available in comparable arm's length[2] foreign exchange transactions between unrelated parties, or the terms afforded by the bank or broker-dealer (or any affiliate of either) in comparable arm's-length foreign exchange transactions involving unrelated parties,

(C) the exchange rate used by such bank or broker-dealer (or affiliate) for a particular foreign exchange transaction does not deviate by more than 3 percent from the interbank bid and asked rates for transactions of comparable size and maturity at the time of the transaction as displayed on an independent service that reports rates of exchange in the foreign currency market for such currency, and

(D) the bank or broker-dealer (or any affiliate of either) does not have investment discretion, or provide investment advice, with respect to the transaction,[1]

(22) any transaction described in subsection (c)(1)(A) involving the purchase and sale of a security between a plan and any other account managed by the same investment manager, if—

(A) the transaction is a purchase or sale, for no consideration other than cash payment against prompt delivery of a security for which market quotations are readily available,

(B) the transaction is effected at the independent current market price of the security (within the meaning of section 270.17a–7(b) of title 17, Code of Federal Regulations),

(C) no brokerage commission, fee (except for customary transfer fees, the fact of which is disclosed pursuant to subparagraph (D)), or other remuneration is paid in connection with the transaction,

(D) a fiduciary (other than the investment manager engaging in the cross-trades or any affiliate) for each plan participating in the transaction authorizes in advance of any cross-trades (in a document that is separate from any other written agreement of the parties) the investment manager to engage in cross trades at the investment manager's discretion, after such fiduciary has received disclosure regarding the conditions under which cross trades may take place (but only if such disclosure is separate from any other agreement or disclosure involving the asset

[2] So in original. Probably should be ''arm's-length''.

[3] So in original. The word ''if'' probably should not appear.

management relationship), including the written policies and procedures of the investment manager described in subparagraph (H),

(E) each plan participating in the transaction has assets of at least $100,000,000, except that if the assets of a plan are invested in a master trust containing the assets of plans maintained by employers in the same controlled group (as defined in section 407(d)(7) of the Employee Retirement Income Security Act of 1974), the master trust has assets of at least $100,000,000,

(F) the investment manager provides to the plan fiduciary who authorized cross trading under subparagraph (D) a quarterly report detailing all cross trades executed by the investment manager in which the plan participated during such quarter, including the following information, as applicable: (i) the identity of each security bought or sold; (ii) the number of shares or units traded; (iii) the parties involved in the cross-trade; and (iv) trade price and the method used to establish the trade price,

(G) the investment manager does not base its fee schedule on the plan's consent to cross trading, and no other service (other than the investment opportunities and cost savings available through a cross trade) is conditioned on the plan's consent to cross trading,

(H) the investment manager has adopted, and cross-trades are effected in accordance with, written cross-trading policies and procedures that are fair and equitable to all accounts participating in the cross-trading program, and that include a description of the manager's pricing policies and procedures, and the manager's policies and procedures for allocating cross trades in an objective manner among accounts participating in the cross-trading program, and

(I) the investment manager has designated an individual responsible for periodically reviewing such purchases and sales to ensure compliance with the written policies and procedures described in subparagraph (H), and following such review, the individual shall issue an annual written report no later than 90 days following the period to which it relates signed under penalty of perjury to the plan fiduciary who authorized cross trading under subparagraph (D) describing the steps performed during the course of the review, the level of compliance, and any specific instances of non-compliance.

The written report shall also notify the plan fiduciary of the plan's right to terminate participation in the investment manager's cross-trading program at any time,[1]

(23) except as provided in subsection (f)(11), a transaction described in subparagraph (A), (B), (C), or (D) of subsection (c)(1) in connection with the acquisition, holding, or disposition of any security or commodity, if the transaction is corrected before the end of the correction period,[1]

(24) the provision of a de minimis financial incentive described in section 401(k)(4)(A),[1] or

(25) the receipt of fees and compensation by the automatic portability provider for services provided in connection with an automatic portability transaction.

(e) Definitions

(1) Plan

For purposes of this section, the term ''plan'' means—

(A) a trust described in section 401(a) which forms a part of a plan, or a plan described in section 403(a), which trust or plan is exempt from tax under section 501(a),

(B) an individual retirement account described in section 408(a),

(C) an individual retirement annuity described in section 408(b),

(D) an Archer MSA described in section 220(d),

(E) a health savings account described in section 223(d),

(F) a Coverdell education savings account described in section 530, or

(G) a trust, plan, account, or annuity which, at any time, has been determined by the Secretary to be described in any preceding subparagraph of this paragraph.

(2) Disqualified person

For purposes of this section, the term ''disqualified person'' means a person who is—

(A) a fiduciary;

(B) a person providing services to the plan;

(C) an employer any of whose employees are covered by the plan;

(D) an employee organization any of whose members are covered by the plan;

(E) an owner, direct or indirect, of 50 percent or more of—

(i) the combined voting power of all classes of stock entitled to vote or the total value of shares of all classes of stock of a corporation,

(ii) the capital interest or the profits interest of a partnership, or

(iii) the beneficial interest of a trust or unincorporated enterprise,

which is an employer or an employee organization described in subparagraph (C) or (D);

(F) a member of the family (as defined in paragraph (6)) of any individual described in subparagraph (A), (B), (C), or (E);

(G) a corporation, partnership, or trust or estate of which (or in which) 50 percent or more of—

(i) the combined voting power of all classes of stock entitled to vote or the total value of shares of all classes of stock of such corporation,

(ii) the capital interest or profits interest of such partnership, or

(iii) the beneficial interest of such trust or estate,

is owned directly or indirectly, or held by persons described in subparagraph (A), (B), (C), (D), or (E);

(H) an officer, director (or an individual having powers or responsibilities similar to those of officers or directors), a 10 percent or more shareholder, or a highly compensated employee (earning 10 percent or more of the yearly wages of an employer) of a person de-

scribed in subparagraph (C), (D), (E), or (G); or

(I) a 10 percent or more (in capital or profits) partner or joint venturer of a person described in subparagraph (C), (D), (E), or (G).

The Secretary, after consultation and coordination with the Secretary of Labor or his delegate, may by regulation prescribe a percentage lower than 50 percent for subparagraphs (E) and (G) and lower than 10 percent for subparagraphs (H) and (I).

(3) Fiduciary

For purposes of this section, the term ''fiduciary'' means any person who—

(A) exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets,

(B) renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or

(C) has any discretionary authority or discretionary responsibility in the administration of such plan.

Such term includes any person designated under section 405(c)(1)(B) of the Employee Retirement Income Security Act of 1974.

(4) Stockholdings

For purposes of paragraphs (2)(E)(i) and (G)(i) there shall be taken into account indirect stockholdings which would be taken into account under section 267(c), except that, for purposes of this paragraph, section 267(c)(4) shall be treated as providing that the members of the family of an individual are the members within the meaning of paragraph (6).

(5) Partnerships; trusts

For purposes of paragraphs (2)(E)(ii) and (iii), (G)(ii) and (iii), and (I) the ownership of profits or beneficial interests shall be determined in accordance with the rules for constructive ownership of stock provided in section 267(c) (other than paragraph (3) thereof), except that section 267(c)(4) shall be treated as providing that the members of the family of an individual are the members within the meaning of paragraph (6).

(6) Member of family

For purposes of paragraph (2)(F), the family of any individual shall include his spouse, ancestor, lineal descendant, and any spouse of a lineal descendant.

(7) Employee stock ownership plan

The term ''employee stock ownership plan'' means a defined contribution plan—

(A) which is a stock bonus plan which is qualified, or a stock bonus and a money purchase plan both of which are qualified under section 401(a), and which are designed to invest primarily in qualifying employer securities; and

(B) which is otherwise defined in regulations prescribed by the Secretary.

A plan shall not be treated as an employee stock ownership plan unless it meets the requirements of section 409(h), section 409(*o*), and, if applicable, section 409(n), section 409(p), and section 664(g) and, if the employer has a registration-type class of securities (as defined in section 409(e)(4)), it meets the requirements of section 409(e).

(8) Qualifying employer security

The term ''qualifying employer security'' means any employer security within the meaning of section 409(*l*). If any moneys or other property of a plan are invested in shares of an investment company registered under the Investment Company Act of 1940, the investment shall not cause that investment company or that investment company's investment adviser or principal underwriter to be treated as a fiduciary or a disqualified person for purposes of this section, except when an investment company or its investment adviser or principal underwriter acts in connection with a plan covering employees of the investment company, its investment adviser, or its principal underwriter.

(9) Section made applicable to withdrawal liability payment funds

For purposes of this section—

(A) In general

The term ''plan'' includes a trust described in section 501(c)(22).

(B) Disqualified person

In the case of any trust to which this section applies by reason of subparagraph (A), the term ''disqualified person'' includes any person who is a disqualified person with respect to any plan to which such trust is permitted to make payments under section 4223 of the Employee Retirement Income Security Act of 1974.

(f) Other definitions and special rules

For purposes of this section—

(1) Joint and several liability

If more than one person is liable under subsection (a) or (b) with respect to any one prohibited transaction, all such persons shall be jointly and severally liable under such subsection with respect to such transaction.

(2) Taxable period

The term ''taxable period'' means, with respect to any prohibited transaction, the period beginning with the date on which the prohibited transaction occurs and ending on the earliest of—

(A) the date of mailing a notice of deficiency with respect to the tax imposed by subsection (a) under section 6212,

(B) the date on which the tax imposed by subsection (a) is assessed, or

(C) the date on which correction of the prohibited transaction is completed.

(3) Sale or exchange; encumbered property

A transfer or real or personal property by a disqualified person to a plan shall be treated as a sale or exchange if the property is subject to a mortgage or similar lien which the plan assumes or if it is subject to a mortgage or similar lien which a disqualified person placed

on the property within the 10-year period ending on the date of the transfer.

(4) Amount involved

The term ''amount involved'' means, with respect to a prohibited transaction, the greater of the amount of money and the fair market value of the other property given or the amount of money and the fair market value of the other property received; except that, in the case of services described in paragraphs (2) and (10) of subsection (d) the amount involved shall be only the excess compensation. For purposes of the preceding sentence, the fair market value—

(A) in the case of the tax imposed by subsection (a), shall be determined as of the date on which the prohibited transaction occurs; and

(B) in the case of the tax imposed by subsection (b), shall be the highest fair market value during the taxable period.

(5) Correction

The terms ''correction'' and ''correct'' mean, with respect to a prohibited transaction, undoing the transaction to the extent possible, but in any case placing the plan in a financial position not worse than that in which it would be if the disqualified person were acting under the highest fiduciary standards.

(6) Exemptions not to apply to certain transactions

(A) In general

In the case of a trust described in section 401(a) which is part of a plan providing contributions or benefits for employees some or all of whom are owner-employees (as defined in section 401(c)(3)), the exemptions provided by subsection (d) (other than paragraphs (9) and (12)) shall not apply to a transaction in which the plan directly or indirectly—

(i) lends any part of the corpus or income of the plan to,

(ii) pays any compensation for personal services rendered to the plan to, or

(iii) acquires for the plan any property from, or sells any property to,

any such owner-employee, a member of the family (as defined in section 267(c)(4)) of any such owner-employee, or any corporation in which any such owner-employee owns, directly or indirectly, 50 percent or more of the total combined voting power of all classes of stock entitled to vote or 50 percent or more of the total value of shares of all classes of stock of the corporation.

(B) Special rules for shareholder-employees, etc.

(i) In general

For purposes of subparagraph (A), the following shall be treated as owner-employees:

(I) A shareholder-employee.

(II) A participant or beneficiary of an individual retirement plan (as defined in section 7701(a)(37)).

(III) An employer or association of employees which establishes such an individual retirement plan under section 408(c).

(ii) Exception for certain transactions involving shareholder-employees

Subparagraph (A)(iii) shall not apply to a transaction which consists of a sale of employer securities to an employee stock ownership plan (as defined in subsection (e)(7)) by a shareholder-employee, a member of the family (as defined in section 267(c)(4)) of such shareholder-employee, or a corporation in which such a shareholder-employee owns stock representing a 50 percent or greater interest described in subparagraph (A).

(iii) Loan exception

For purposes of subparagraph (A)(i), the term ''owner-employee'' shall only include a person described in subclause (II) or (III) of clause (i).

(C) Shareholder-employee

For purposes of subparagraph (B), the term ''shareholder-employee'' means an employee or officer of an S corporation who owns (or is considered as owning within the meaning of section 318(a)(1)) more than 5 percent of the outstanding stock of the corporation on any day during the taxable year of such corporation.

(7) S corporation repayment of loans for qualifying employer securities

A plan shall not be treated as violating the requirements of section 401 or 409 or subsection (e)(7), or as engaging in a prohibited transaction for purposes of subsection (d)(3), merely by reason of any distribution (as described in section 1368(a)) with respect to S corporation stock that constitutes qualifying employer securities, which in accordance with the plan provisions is used to make payments on a loan described in subsection (d)(3) the proceeds of which were used to acquire such qualifying employer securities (whether or not allocated to participants). The preceding sentence shall not apply in the case of a distribution which is paid with respect to any employer security which is allocated to a participant unless the plan provides that employer securities with a fair market value of not less than the amount of such distribution are allocated to such participant for the year which (but for the preceding sentence) such distribution would have been allocated to such participant.

(8) Provision of investment advice to participant and beneficiaries

(A) In general

The prohibitions provided in subsection (c) shall not apply to transactions described in subsection (d)(17) if the investment advice provided by a fiduciary adviser is provided under an eligible investment advice arrangement.

(B) Eligible investment advice arrangement

For purposes of this paragraph, the term ''eligible investment advice arrangement'' means an arrangement—

(i) which either—

(I) provides that any fees (including any commission or other compensation) received by the fiduciary adviser for investment advice or with respect to the sale, holding, or acquisition of any security or other property for purposes of investment of plan assets do not vary depending on the basis of any investment option selected, or

(II) uses a computer model under an investment advice program meeting the requirements of subparagraph (C) in connection with the provision of investment advice by a fiduciary adviser to a participant or beneficiary, and

(ii) with respect to which the requirements of subparagraphs (D), (E), (F), (G), (H), and (I) are met.

(C) Investment advice program using computer model

(i) In general

An investment advice program meets the requirements of this subparagraph if the requirements of clauses (ii), (iii), and (iv) are met.

(ii) Computer model

The requirements of this clause are met if the investment advice provided under the investment advice program is provided pursuant to a computer model that—

(I) applies generally accepted investment theories that take into account the historic returns of different asset classes over defined periods of time,

(II) utilizes relevant information about the participant, which may include age, life expectancy, retirement age, risk tolerance, other assets or sources of income, and preferences as to certain types of investments,

(III) utilizes prescribed objective criteria to provide asset allocation portfolios comprised of investment options available under the plan,

(IV) operates in a manner that is not biased in favor of investments offered by the fiduciary adviser or a person with a material affiliation or contractual relationship with the fiduciary adviser, and

(V) takes into account all investment options under the plan in specifying how a participant's account balance should be invested and is not inappropriately weighted with respect to any investment option.

(iii) Certification

(I) In general

The requirements of this clause are met with respect to any investment advice program if an eligible investment expert certifies, prior to the utilization of the computer model and in accordance with rules prescribed by the Secretary of Labor, that the computer model meets the requirements of clause (ii).

(II) Renewal of certifications

If, as determined under regulations prescribed by the Secretary of Labor, there are material modifications to a computer model, the requirements of this clause are met only if a certification described in subclause (I) is obtained with respect to the computer model as so modified.

(III) Eligible investment expert

The term ''eligible investment expert'' means any person which meets such requirements as the Secretary of Labor may provide and which does not bear any material affiliation or contractual relationship with any investment adviser or a related person thereof (or any employee, agent, or registered representative of the investment adviser or related person).

(iv) Exclusivity of recommendation

The requirements of this clause are met with respect to any investment advice program if—

(I) the only investment advice provided under the program is the advice generated by the computer model described in clause (ii), and

(II) any transaction described in subsection (d)(17)(A)(ii) occurs solely at the direction of the participant or beneficiary.

Nothing in the preceding sentence shall preclude the participant or beneficiary from requesting investment advice other than that described in clause (i), but only if such request has not been solicited by any person connected with carrying out the arrangement.

(D) Express authorization by separate fiduciary

The requirements of this subparagraph are met with respect to an arrangement if the arrangement is expressly authorized by a plan fiduciary other than the person offering the investment advice program, any person providing investment options under the plan, or any affiliate of either.

(E) Audits

(i) In general

The requirements of this subparagraph are met if an independent auditor, who has appropriate technical training or experience and proficiency and so represents in writing—

(I) conducts an annual audit of the arrangement for compliance with the requirements of this paragraph, and

(II) following completion of the annual audit, issues a written report to the fiduciary who authorized use of the arrangement which presents its specific findings regarding compliance of the arrangement with the requirements of this paragraph.

(ii) Special rule for individual retirement and similar plans

In the case of a plan described in subparagraphs (B) through (F) (and so much of subparagraph (G) as relates to such sub-

paragraphs) of subsection (e)(1), in lieu of the requirements of clause (i), audits of the arrangement shall be conducted at such times and in such manner as the Secretary of Labor may prescribe.

(iii) Independent auditor

For purposes of this subparagraph, an auditor is considered independent if it is not related to the person offering the arrangement to the plan and is not related to any person providing investment options under the plan.

(F) Disclosure

The requirements of this subparagraph are met if—

(i) the fiduciary adviser provides to a participant or a beneficiary before the initial provision of the investment advice with regard to any security or other property offered as an investment option, a written notification (which may consist of notification by means of electronic communication)—

(I) of the role of any party that has a material affiliation or contractual relationship with the fiduciary adviser in the development of the investment advice program and in the selection of investment options available under the plan,

(II) of the past performance and historical rates of return of the investment options available under the plan,

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

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

(V) of the manner, and under what circumstances, any participant or beneficiary information provided under the arrangement will be used or disclosed,

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

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

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

(ii) at all times during the provision of advisory services to the participant or beneficiary, the fiduciary adviser—

(I) maintains the information described in clause (i) in accurate form and in the manner described in subparagraph (H),

(II) provides, without charge, accurate information to the recipient of the advice no less frequently than annually,

(III) provides, without charge, accurate information to the recipient of the advice upon request of the recipient, and

(IV) provides, without charge, accurate information to the recipient of the advice concerning any material change to the information required to be provided to the recipient of the advice at a time reasonably contemporaneous to the change in information.

(G) Other conditions

The requirements of this subparagraph are met if—

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

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

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

(iv) the terms of the sale, acquisition, or holding of the security or other property are at least as favorable to the plan as an arm's length [2] transaction would be.

(H) Standards for presentation of information

(i) In general

The requirements of this subparagraph are met if the notification required to be provided to participants and beneficiaries under subparagraph (F)(i) is written in a clear and conspicuous manner and in a manner calculated to be understood by the average plan participant and is sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of the information required to be provided in the notification.

(ii) Model form for disclosure of fees and other compensation

The Secretary of Labor shall issue a model form for the disclosure of fees and other compensation required in subparagraph (F)(i)(III) which meets the requirements of clause (i).

(I) Maintenance for 6 years of evidence of compliance

The requirements of this subparagraph are met if a fiduciary adviser who has provided advice referred to in subparagraph (A) maintains, for a period of not less than 6 years after the provision of the advice, any records necessary for determining whether the requirements of the preceding provisions of this paragraph and of subsection (d)(17) have been met. A transaction prohibited under subsection (c) shall not be considered to have occurred solely because the records are lost or destroyed prior to the end of the 6-

year period due to circumstances beyond the control of the fiduciary adviser.

(J) Definitions

For purposes of this paragraph and subsection (d)(17)—

(i) Fiduciary adviser

The term ''fiduciary adviser'' means, with respect to a plan, a person who is a fiduciary of the plan by reason of the provision of investment advice referred to in subsection (e)(3)(B) by the person to a participant or beneficiary of the plan and who is—

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

(II) a bank or similar financial institution referred to in subsection (d)(4) or a savings association (as defined in section 3(b)(1) of the Federal Deposit Insurance Act (12 U.S.C. 1813(b)(1)), but only if the advice is provided through a trust department of the bank or similar financial institution or savings association which is subject to periodic examination and review by Federal or State banking authorities,

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

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

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

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

For purposes of this title, a person who develops the computer model described in subparagraph (C)(ii) or markets the investment advice program or computer model shall be treated as a person who is a fiduciary of the plan by reason of the provision of investment advice referred to in subsection (e)(3)(B) to a participant or beneficiary and shall be treated as a fiduciary adviser for purposes of this paragraph and subsection (d)(17), except that the Secretary of Labor may prescribe rules under which only 1 fiduciary adviser may elect to be treated as a fiduciary with respect to the plan.

(ii) Affiliate

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

(iii) Registered representative

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

(9) Block trade

The term ''block trade'' means any trade of at least 10,000 shares or with a market value of at least $200,000 which will be allocated across two or more unrelated client accounts of a fiduciary.

(10) Adequate consideration

The term ''adequate consideration'' means—

(A) in the case of a security for which there is a generally recognized market—

(i) the price of the security prevailing on a national securities exchange which is registered under section 6 of the Securities Exchange Act of 1934, taking into account factors such as the size of the transaction and marketability of the security, or

(ii) if the security is not traded on such a national securities exchange, a price not less favorable to the plan than the offering price for the security as established by the current bid and asked prices quoted by persons independent of the issuer and of the party in interest, taking into account factors such as the size of the transaction and marketability of the security, and

(B) in the case of an asset other than a security for which there is a generally recognized market, the fair market value of the asset as determined in good faith by a fiduciary or fiduciaries in accordance with regulations prescribed by the Secretary of Labor.

(11) Correction period

(A) In general

For purposes of subsection (d)(23), the term ''correction period'' means the 14-day period beginning on the date on which the disqualified person discovers, or reasonably should have discovered, that the transaction would (without regard to this paragraph and subsection (d)(23)) constitute a prohibited transaction.

(B) Exceptions

(i) Employer securities

Subsection (d)(23) does not apply to any transaction between a plan and a plan sponsor or its affiliates that involves the acquisition or sale of an employer security (as defined in section 407(d)(1) of the Employee Retirement Income Security Act of 1974) or the acquisition, sale, or lease of employer real property (as defined in section 407(d)(2) of such Act).

(ii) Knowing prohibited transaction

In the case of any disqualified person, subsection (d)(23) does not apply to a transaction if, at the time the transaction is entered into, the disqualified person knew (or reasonably should have known) that the transaction would (without re-

gard to this paragraph) constitute a prohibited transaction.

(C) Abatement of tax where there is a correction

If a transaction is not treated as a prohibited transaction by reason of subsection (d)(23), then no tax under subsections (a) and (b) shall be assessed with respect to such transaction, and if assessed the assessment shall be abated, and if collected shall be credited or refunded as an overpayment.

(D) Definitions

For purposes of this paragraph and subsection (d)(23)—

(i) Security

The term ''security'' has the meaning given such term by section 475(c)(2) (without regard to subparagraph (F)(iii) and the last sentence thereof).

(ii) Commodity

The term ''commodity'' has the meaning given such term by section 475(e)(2) (without regard to subparagraph (D)(iii) thereof).

(iii) Correct

The term ''correct'' means, with respect to a transaction—

(I) to undo the transaction to the extent possible and in any case to make good to the plan or affected account any losses resulting from the transaction, and

(II) to restore to the plan or affected account any profits made through the use of assets of the plan.

(12) Rules relating to automatic portability transactions

(A) In general

For purposes of subsection (d)(25)—

(i) Automatic portability transaction

An automatic portability transaction is a transfer of assets made—

(I) from an individual retirement plan which is established on behalf of an individual and to which amounts were transferred under section 401(a)(31)(B)(i),

(II) to an employer-sponsored retirement plan described in clause (iii), (iv), (v), or (vi) of section 402(c)(8)(B) (other than a defined benefit plan) in which such individual is an active participant, and

(III) after such individual has been given advance notice of the transfer and has not affirmatively opted out of such transfer.

(ii) Automatic portability provider

An automatic portability provider is a person, other than an individual, who executes transfers described in clause (i).

(B) Conditions for automatic portability transactions

Subsection (d)(25) shall not apply to an automatic portability transaction unless the following requirements are satisfied:

(i) Acknowledgment of fiduciary status

An automatic portability provider shall acknowledge in writing, at such time and format as specified by the Secretary of Labor, that the provider is a fiduciary with respect to the individual retirement plan described in subparagraph (A)(i)(I).

(ii) Fees

The fees and compensation received, directly or indirectly, by the automatic portability provider for services provided in connection with the automatic portability transaction (including any increase in such fees or compensation and any fees or compensation in connection with, but received before, the transaction)—

(I) shall not exceed reasonable compensation, and

(II) shall be fully disclosed to and approved in writing in advance of the transaction by a plan fiduciary of the plan described in subparagraph (A)(i)(II) which is independent of the automatic portability provider.

An automatic portability provider shall not receive any fees or compensation in connection with an automatic portability transaction involving a plan which is sponsored or maintained by the automatic portability provider.

(iii) Data usage

The automatic portability provider shall not market or sell data relating to the individual retirement plan described in subparagraph (A)(i)(I) or to the participants of the plan described in subparagraph (A)(i)(II).

(iv) Open participation

The automatic portability provider shall offer automatic portability transactions on the same terms to any plan described in subparagraph (A)(i)(II).

(v) Pre-transaction notice

At least 60 days in advance of an automatic portability transaction, the automatic portability provider shall provide notice to the individual on whose behalf the individual retirement plan described in subparagraph (A)(i)(I) is established which includes—

(I) a description of the automatic portability transaction and a complete and accurate statement of all fees which will be charged and all compensation which will be received in connection with the transaction,

(II) a clear and prominent description of the individual's right to affirmatively elect not to participate in the transaction as well as the other available distribution options, the deadline by which the individual must make an election, the procedures for such an election, and a telephone number for the automatic portability provider that the individual may call to make such election,

(III) a description of the individual's right to designate a beneficiary and the procedures to do so, and

(IV) such other disclosures as the Secretary of Labor may require by regulation.

(vi) Post-transaction notice

Not later than 3 business days after an automatic portability transaction, the automatic portability provider shall provide notice to the individual on whose behalf the individual retirement plan described in subparagraph (A)(i)(I) is established of—

(I) the actions taken by the automatic portability provider with respect to the individual's account,

(II) all relevant information regarding the location and amount of any transferred assets,

(III) a statement of fees charged against the account by the automatic portability provider or its affiliates in connection with the transfer,

(IV) a telephone number at which the individual can contact the automatic portability provider, and

(V) such other disclosures as the Secretary of Labor may require by regulation.

(vii) Notice requirements

The notices required under clauses (v) and (vi) shall be written in a manner calculated to be understood by the average person and shall not include inaccurate or misleading statements.

(viii) Frequency of searches

The automatic portability provider shall query on at least a monthly basis whether any individual with an individual retirement plan described in subparagraph (A)(i)(I) has an account in a plan described in subparagraph (A)(i)(II).

(ix) Timeliness of execution

After liquidating the assets of an individual retirement plan described in subparagraph (A)(i)(I) to cash, an automatic portability provider shall transfer the account balance of such plan as soon as practicable to the plan described in subparagraph (A)(i)(II).

(x) Limitation on exercise of discretion

The automatic portability provider shall neither have nor exercise discretion to affect the timing or amount of the transfer pursuant to an automatic portability transaction other than to deduct the appropriate fees as described in clause (ii).

(xi) Record retention and audits

(I) In general

An automatic portability provider shall, for not less than 6 years after the automatic portability transaction has occurred, maintain the records sufficient to demonstrate the terms of this subparagraph have been met. The automatic portability provider shall make such records available to any authorized employee of the Department of the Treasury or the Department of Labor within 30 calendar days of the date of a written request for such records.

(II) Audits

An automatic portability provider shall conduct an annual audit, in accordance with regulations promulgated by the Secretary of Labor, of automatic portability transactions occurring during the calendar year to demonstrate compliance with this paragraph and any regulations thereunder and identify any instances of noncompliance therewith, and shall submit such audit annually to the Secretary of Labor, in such form and manner as specified by such Secretary.

(xii) Website

The automatic portability provider shall maintain a website which contains—

(I) a list of recordkeepers for each plan described in subparagraph (A)(i)(II) with respect to which the provider carries out automatic portability transactions, and

(II) a list of all fees described in clause (ii)(II) paid to the provider.

(g) Application of section

This section shall not apply—

(1) in the case of a plan to which a guaranteed benefit policy (as defined in section 401(b)(2)(B) of the Employee Retirement Income Security Act of 1974) is issued, to any assets of the insurance company, insurance service, or insurance organization merely because of its issuance of such policy;

(2) to a governmental plan (within the meaning of section 414(d)); or

(3) to a church plan (within the meaning of section 414(e)) with respect to which the election provided by section 410(d) has not been made.

In the case of a plan which invests in any security issued by an investment company registered under the Investment Company Act of 1940, the assets of such plan shall be deemed to include such security but shall not, by reason of such investment, be deemed to include any assets of such company.

(h) Notification of Secretary of Labor

Before sending a notice of deficiency with respect to the tax imposed by subsection (a) or (b), the Secretary shall notify the Secretary of Labor and provide him a reasonable opportunity to obtain a correction of the prohibited transaction or to comment on the imposition of such tax.

(i) Cross reference

For provisions concerning coordination procedures between Secretary of Labor and Secretary of the Treasury with respect to application of tax imposed by this section and for authority to waive imposition of the tax imposed by subsection (b), see section 3003 of the Employee Retirement Income Security Act of 1974.

(Added Pub. L. 93–406, title II, §2003(a), Sept. 2, 1974, 88 Stat. 971; amended Pub. L. 94–455, title XIX, §1906(b)(13)(A), Oct. 4, 1976, 90 Stat. 1834; Pub. L. 95–600, title I, §141(f)(5), (6), Nov. 6, 1978, 92 Stat. 2795; Pub. L. 96–222, title I, §101(a)(7)(C),

(K), (L)(iv)(III), (v)(XI), Apr. 1, 1980, 94 Stat. 198–201; Pub. L. 96–364, title II, §§208(b), 209(b), Sept. 26, 1980, 94 Stat. 1289, 1290; Pub. L. 96–596, §2(a)(1)(K),(L), (2)(I), (3)(F), Dec. 24, 1980, 94 Stat. 3469, 3471; Pub. L. 97–448, title III, §305(d)(5), Jan. 12, 1983, 96 Stat. 2400; Pub. L. 98–369, div. A, title IV, §491(d)(45), (46), (e)(7), (8), July 18, 1984, 98 Stat. 851–853; Pub. L. 99–514, title XI, §1114(b)(15)(A), title XVIII, §§1854(f)(3)(A), 1899A(51), Oct. 22, 1986, 100 Stat. 2452, 2882, 2961; Pub. L. 101–508, title XI, §11701(m), Nov. 5, 1990, 104 Stat. 1388–513; Pub. L. 104–188, title I, §§1453(a), 1702(g)(3), Aug. 20, 1996, 110 Stat. 1817, 1873; Pub. L. 104–191, title III, §301(f), Aug. 21, 1996, 110 Stat. 2051; Pub. L. 105–34, title II, §213(b), title X, §1074(a), title XV, §§1506(b)(1), 1530(c)(10), title XVI, §1602(a)(5), Aug. 5, 1997, 111 Stat. 816, 949, 1065, 1079, 1094; Pub. L. 105–206, title VI, §6023(19), July 22, 1998, 112 Stat. 825; Pub. L. 106–554, §1(a)(7) [title II, §202(a)(7), (b)(7), (10)], Dec. 21, 2000, 114 Stat. 2763, 2763A–628, 2763A–629; Pub. L. 107–16, title VI, §§612(a), 656(b), June 7, 2001, 115 Stat. 100, 134; Pub. L. 107–22, §1(b)(1)(D), (3)(D), July 26, 2001, 115 Stat. 197; Pub. L. 108–173, title XII, §1201(f), Dec. 8, 2003, 117 Stat. 2479; Pub. L. 108–357, title II, §§233(c), 240(a), Oct. 22, 2004, 118 Stat. 1434, 1437; Pub. L. 109–135, title IV, §413(a)(2), Dec. 21, 2005, 119 Stat. 2641; Pub. L. 109–280, title VI, §§601(b)(1), (2), 611(a)(2), (c)(2), (d)(2), (e)(2), (g)(2), 612(b), Aug. 17, 2006, 120 Stat. 958, 959, 967, 969–971, 974, 976; Pub. L. 110–458, title I, §106(a)(2), (b)(2), (c), Dec. 23, 2008, 122 Stat. 5106; Pub. L. 115–141, div. U, title IV, §401(a)(190), (229)–(234), Mar. 23, 2018, 132 Stat. 1193, 1195; Pub. L. 116–94, div. P, title XIII, §1302(b), Dec. 20, 2019, 133 Stat. 3205; Pub. L. 117–328, div. T, title I, §§113(c), 120(a), (b), Dec. 29, 2022, 136 Stat. 5295, 5303.)

Editorial Notes

References in Text

The Employee Retirement Income Security Act of 1974, referred to in text, is Pub. L. 93–406, Sept. 2, 1974, 88 Stat. 829. Part 1 of subtitle E of title IV of such Act is classified generally to part 1 (29 U.S.C. 1381 et seq.) of subtitle E of subchapter III of chapter 18 of Title 29, Labor. Sections 401, 405 to 408, 3003, 4044, 4223, and 4231 of such Act are classified to sections 1101, 1105 to 1108, 1203, 1344, 1403, and 1411, respectively, of Title 29. For complete classification of this Act to the Code, see Short Title note set out under section 1001 of Title 29 and Tables.

The date of the enactment of this paragraph, referred to in subsec. (d)(16)(B), is the date of enactment of Pub. L. 108–357, which was approved Oct. 22, 2004.

The Investment Company Act of 1940, referred to in subsecs. (e)(8) and (g), is title I of act Aug. 22, 1940, ch. 686, 54 Stat. 789, which is classified generally to subchapter I (§80a–1 et seq.) of chapter 2D of Title 15, Commerce and Trade. For complete classification of this Act to the Code, see section 80a–51 of Title 15 and Tables.

The Investment Advisers Act of 1940, referred to in subsec. (f)(8)(J)(i)(I), is title II of act Aug. 22, 1940, ch. 686, 54 Stat. 847, which is classified generally to subchapter II (§80b–1 et seq.) of chapter 2D of Title 15, Commerce and Trade. For complete classification of this Act to the Code, see section 80b–20 of Title 15 and Tables.

The Securities Exchange Act of 1934, referred to in subsec. (f)(8)(J)(i)(IV), (10)(A)(i), is act June 6, 1934, ch. 404, 48 Stat. 881, which is classified principally to chapter 2B (§78a et seq.) of Title 15, Commerce and Trade. Section 6 of the Act is classified to section 78f of Title 15. For complete classification of this Act to the Code, see section 78a of Title 15 and Tables.

Amendments

2022—Subsec. (d)(24). Pub. L. 117–328, §113(c), added par. (24).

Subsec. (d)(25). Pub. L. 117–328, §120(a), added par. (25).

Subsec. (f)(12). Pub. L. 117–328, §120(b), added par. (12).

2019—Subsec. (c)(7). Pub. L. 116–94 added par. (7).

2018—Subsec. (d)(3). Pub. L. 115–141, §401(a)(229), substituted ''a leveraged'' for ''an leveraged'' in introductory provisions.

Subsec. (d)(16)(A). Pub. L. 115–141, §401(a)(190), substituted ''1813(w)(1))),'' for ''1813(w)(1)),''.

Subsec. (d)(17). Pub. L. 115–141, §401(a)(230), substituted ''any transaction'' for ''Any transaction'' in introductory provisions.

Subsec. (d)(21). Pub. L. 115–141, §401(a)(231), substituted ''person'' for ''person person'' in introductory provisions.

Subsec. (f)(8)(C)(iv)(II). Pub. L. 115–141, §401(a)(232), inserted ''subsection'' before ''(d)(17)(A)(ii)''.

Subsec. (f)(8)(F)(i)(I). Pub. L. 115–141, §401(a)(233), struck out comma after ''adviser''.

Subsec. (f)(8)(F)(i)(V). Pub. L. 115–141, §401(a)(234), inserted ''of'' before ''the manner''.

2008—Subsec. (d)(17). Pub. L. 110–458, §106(a)(2)(A), substituted ''that permits'' for ''and that permits'' in introductory provisions.

Subsec. (d)(18). Pub. L. 110–458, §106(b)(2)(A), in introductory provisions, substituted ''disqualified person'' for ''party in interest'' and ''subsection (e)(3)'' for ''subsection (e)(3)(B)''.

Subsec. (d)(19) to (21). Pub. L. 110–458, §106(b)(2)(B), substituted ''disqualified person'' for ''party in interest'' wherever appearing.

Subsec. (d)(21)(C). Pub. L. 110–458, §106(b)(2)(C), struck out ''or less'' before ''than 3 percent''.

Subsec. (f)(8)(A). Pub. L. 110–458, §106(a)(2)(B)(i), substituted ''subsection (d)(17)'' for ''subsection (b)(14)''.

Subsec. (f)(8)(C)(iv)(II). Pub. L. 110–458, §106(a)(2)(B)(ii), substituted ''(d)(17)(A)(ii)'' for ''subsection (b)(14)(B)(ii)''.

Subsec. (f)(8)(F)(i)(I). Pub. L. 110–458, §106(a)(2)(B)(iii), substituted ''fiduciary adviser,'' for ''financial adviser''.

Subsec. (f)(8)(I). Pub. L. 110–458, §106(a)(2)(B)(iv), substituted ''subsection (c)'' for ''section 406''.

Subsec. (f)(8)(J)(i). Pub. L. 110–458, §106(a)(2)(B)(v), substituted ''a participant'' for ''the participant'' in introductory provisions and concluding provisions, inserted ''referred to in subsection (e)(3)(B)'' after ''investment advice'' in introductory provisions, and substituted ''subsection (d)(4)'' for ''section 408(b)(4)'' in subcl. (II).

Subsec. (f)(11)(B)(i). Pub. L. 110–458, §106(c), inserted ''of the Employee Retirement Income Security Act of 1974'' after ''section 407(d)(1)'' and ''of such Act'' after ''section 407(d)(2)''.

2006—Subsec. (d)(17). Pub. L. 109–280, §601(b)(1), added par. (17).

Subsec. (d)(18). Pub. L. 109–280, §611(a)(2)(A), added par. (18).

Subsec. (d)(19). Pub. L. 109–280, §611(c)(2), added par. (19).

Subsec. (d)(20). Pub. L. 109–280, §611(d)(2)(A), added par. (20).

Subsec. (d)(21). Pub. L. 109–280, §611(e)(2), added par. (21).

Subsec. (d)(22). Pub. L. 109–280, §611(g)(2), added par. (22).

Subsec. (d)(23). Pub. L. 109–280, §612(b)(1), added par. (23).

Subsec. (f)(8). Pub. L. 109–280, §601(b)(2), added par. (8).

Subsec. (f)(9). Pub. L. 109–280, §611(a)(2)(B), added par. (9).

Subsec. (f)(10). Pub. L. 109–280, §611(d)(2)(B), added par. (10).

Subsec. (f)(11). Pub. L. 109–280, §612(b)(2), added par. (11).

2005—Subsec. (d)(16)(A). Pub. L. 109–135, § 413(a)(2)(A), inserted ''or a depository institution holding company (as defined in section 3(w)(1) of the Federal Deposit Insurance Act (12 U.S.C. 1813(w)(1))'' after ''a bank (as defined in section 581)''.

Subsec. (d)(16)(C). Pub. L. 109–135, § 413(a)(2)(B), inserted ''or company'' after ''such bank''.

2004—Subsec. (d)(16). Pub. L. 108–357, § 233(c), added par. (16).

Subsec. (f)(7). Pub. L. 108–357, § 240(a), added par. (7).

2003—Subsec. (c)(6). Pub. L. 108–173, § 1201(f)(1), added par. (6).

Subsec. (e)(1)(E) to (G). Pub. L. 108–173, § 1201(f)(2), added subpar. (E) and redesignated former subpars. (E) and (F) as (F) and (G), respectively.

2001—Subsec. (c)(5). Pub. L. 107–22, § 1(b)(1)(D), (3)(D), in heading, substituted ''Coverdell education savings'' for ''education individual retirement'' and in text, substituted ''a Coverdell education savings'' for ''an education individual retirement''.

Subsec. (e)(1)(E). Pub. L. 107–22, § 1(b)(1)(D), substituted ''a Coverdell education savings'' for ''an education individual retirement''.

Subsec. (e)(7). Pub. L. 107–16, § 656(b), inserted '', section 409(p),'' after ''409(n)'' in concluding provisions.

Subsec. (f)(6)(B)(iii). Pub. L. 107–16, § 612(a), added cl. (iii).

2000—Subsec. (c)(4). Pub. L. 106–554, § 1(a)(7) [title II, § 202(b)(10)], substituted ''an Archer'' for ''a Archer''.

Pub. L. 106–554, § 1(a)(7) [title II, § 202(a)(7), (b)(7)], substituted ''Archer MSAs'' for ''medical savings accounts'' in heading and ''Archer MSA'' for ''medical savings account'' in text.

Subsec. (e)(1)(D). Pub. L. 106–554, § 1(a)(7) [title II, § 202(b)(10)], substituted ''an Archer'' for ''a Archer''.

Pub. L. 106–554, § 1(a)(7) [title II, § 202(a)(7)], substituted ''Archer MSA'' for ''medical savings account''.

1998—Subsec. (c)(3). Pub. L. 105–206, § 6023(19)(A), substituted ''exempt from the tax'' for ''exempt for the tax''.

Subsec. (i). Pub. L. 105–206, § 6023(19)(B), substituted ''Secretary of the Treasury'' for ''Secretary of Treasury''.

1997—Subsec. (a). Pub. L. 105–34, § 1074(a), substituted ''15 percent'' for ''10 percent''.

Subsec. (c)(4). Pub. L. 105–34, § 1602(a)(5), substituted ''if section 220(e)(2) applies to such transaction.'' for ''if, with respect to such transaction, the account ceases to be a medical savings account by reason of the application of section 220(e)(2) to such account.''

Subsec. (c)(5). Pub. L. 105–34, § 213(b)(2), added par. (5).

Subsec. (d). Pub. L. 105–34, § 1506(b)(1)(B)(ii), struck out concluding provisions which read as follows: ''The exemptions provided by this subsection (other than paragraphs (9) and (12)) shall not apply to any transaction with respect to a trust described in section 401(a) which is part of a plan providing contributions or benefits for employees some or all of whom are owner-employees (as defined in section 401(c)(3)) in which a plan directly or indirectly lends any part of the corpus or income of the plan to, pays any compensation for personal services rendered to the plan to, or acquires for the plan any property from or sells any property to, any such owner-employee, a member of the family (as defined in section 267(c)(4)) of any such owner-employee, or a corporation controlled by any such owner-employee through the ownership, directly or indirectly, of 50 percent or more of the total combined voting power of all classes of stock entitled to vote or 50 percent or more of the total value of shares of all classes of stock of the corporation. For purposes of the preceding sentence, a shareholder-employee (as defined in section 1379, as in effect on the day before the date of the enactment of the Subchapter S Revision Act of 1982), a participant or beneficiary of an individual retirement account or an individual retirement annuity (as defined in section 408), and an employer or association of employees which establishes such an account or annuity under section 408(c) shall be deemed to be an owner-employee.''

Pub. L. 105–34, § 1506(b)(1)(B)(i), substituted ''Except as provided in subsection (f)(6), the prohibitions'' for ''The prohibitions'' in introductory provisions.

Subsec. (e)(1)(D) to (F). Pub. L. 105–34, § 213(b)(1), struck out ''or'' at end of subpar. (D), added subpar. (E), and redesignated former subpar. (E) as (F).

Subsec. (e)(7). Pub. L. 105–34, § 1530(c)(10), inserted ''and section 664(g)'' after ''section 409(n)'' in concluding provisions.

Subsec. (f)(6). Pub. L. 105–34, § 1506(b)(1)(A), added par. (6).

1996—Subsec. (a). Pub. L. 104–188, § 1453(a), substituted ''10 percent'' for ''5 percent''.

Subsec. (c)(4). Pub. L. 104–191, § 301(f)(1), added par. (4).

Subsec. (d)(13). Pub. L. 104–188, § 1702(g)(3), substituted ''408(b)(12)'' for ''408(b)''.

Subsec. (e)(1). Pub. L. 104–191, § 301(f)(2), reenacted heading without change and amended text generally. Prior to amendment, text read as follows: ''For purposes of this section, the term 'plan' means a trust described in section 401(a) which forms a part of a plan, or a plan described in section 403(a), which trust or plan is exempt from tax under section 501(a), an individual retirement account described in section 408(a) or an individual retirement annuity described in section 408(b) (or a trust, plan, account, or annuity which, at any time, has been determined by the Secretary to be such a trust, plan, or account).''

1990—Subsec. (d)(13). Pub. L. 101–508 inserted before semicolon at end ''or which is exempt from section 406 of such Act by reason of section 408(b) of such Act''.

1986—Subsec. (d). Pub. L. 99–514, § 1899A(51), inserted a closing parenthesis after ''and (12)'' in second sentence.

Subsec. (d)(1)(B). Pub. L. 99–514, § 1114(b)(15)(A), substituted ''highly compensated employees (within the meaning of section 414(q))'' for ''highly compensated employees, officers, or shareholders''.

Subsec. (e)(7). Pub. L. 99–514, § 1854(f)(3)(A), inserted '', section 409(*o*), and, if applicable, section 409(n)'' in last sentence.

1984—Subsec. (d). Pub. L. 98–369, § 491(d)(45), substituted in provision following par. (15) ''or an individual retirement annuity (as defined in section 408)'' for '', individual retirement annuity, or an individual retirement bond (as defined in section 408 or 409)''.

Subsec. (e)(1). Pub. L. 98–369, § 491(d)(46), struck out ''or 405(a)'' after ''section 403(a)'' and ''or a retirement bond described in section 409'' after ''section 408(b)'', and substituted ''or annuity'' for ''annuity, or bond'' and ''or account'' for ''account, or bond''.

Subsec. (e)(7). Pub. L. 98–369, § 491(e)(7), substituted ''section 409(h)'' for ''section 409A(h)'', ''section 409(e)(4)'' for ''section 409A(e)(4)'', and ''section 409(e)'' for ''section 409A(e)''.

Subsec. (e)(8). Pub. L. 98–369, § 491(e)(8), substituted ''section 409(*l*)'' for ''section 409A(*l*)''.

1983—Subsec. (d). Pub. L. 97–448 inserted '', as in effect on the day before the date of the enactment of the Subchapter S Revision Act of 1982'' after ''section 1379'' in last sentence.

1980—Subsec. (b). Pub. L. 96–596, § 2(a)(1)(K), substituted ''taxable period'' for ''correction period''.

Subsec. (d)(14), (15). Pub. L. 96–364, § 208(b), added pars. (14) and (15).

Subsec. (e)(7). Pub. L. 96–222, § 101(a)(7)(K), (L)(iv)(III), (v)(XI), substituted references to an employee stock ownership plan, for references to a leveraged employee stock ownership plan wherever appearing therein, and substituted provisions relating to treatment of a plan as an employee stock ownership plan, for provisions relating to treatment of a plan as a leveraged employee stock ownership plan.

Subsec. (e)(8). Pub. L. 96–222, § 101(a)(7)(C), substituted provisions defining ''qualifying employer security'' within the meaning of section 409A(*l*), for provisions defining such term as stock, or otherwise an equity security, or within the meaning of section 503(e)(1) to (3).

Subsec. (e)(9). Pub. L. 96–364, § 209(b), added par. (9).

Subsec. (f)(2)(B), (C). Pub. L. 96–596, § 2(a)(2)(I), added subpar. (B) and redesignated former subpar. (B) as (C).

Subsec. (f)(4)(B). Pub. L. 96–596, §2(a)(1)(L), substituted ''taxable period'' for ''correction period''.

Subsec. (f)(6). Pub. L. 96–596, §2(a)(3)(F), struck out par. (6), which defined correction period, with respect to a prohibited transaction, as the period beginning on the date on which the prohibited transaction occurs and ending 90 days after the date of mailing of a notice of deficiency with respect to the tax imposed by subsec. (b) of this section under section 6212 of this title, extended by any period in which a deficiency cannot be assessed under section 6213(a) of this title and any other period which the Secretary determines is reasonable and necessary to bring about the correction of the prohibited transaction.

1978—Subsec. (d)(3). Pub. L. 95–600, §141(f)(6), substituted ''leveraged employee'' for ''employee''.

Subsec. (e)(7). Pub. L. 95–600, §141(f)(5), substituted in heading ''Leveraged employee'' for ''Employee'', and in text, ''leveraged employee'' for ''employee'' and inserted provision that a plan not be treated as a leveraged employee stock ownership plan unless it meet the requirements of section 409A(e) and (h).

1976—Subsecs. (c) to (f). Pub. L. 94–455 struck out ''or his delegate'' after ''Secretary'' wherever appearing.

Statutory Notes and Related Subsidiaries

EFFECTIVE DATE OF 2022 AMENDMENT

Amendment by section 113(c) of Pub. L. 117–328 applicable with respect to plan years beginning after Dec. 29, 2022, see section 113(e) of Pub. L. 117–328, set out as a note under section 401 of this title.

Pub. L. 117–328, div. T, title I, §120(e), Dec. 29, 2022, 136 Stat. 5308, provided that: ''The amendments made by this section [amending this section] shall apply to transactions occurring on or after the date which is 12 months after the date of the enactment of this Act [Dec. 29, 2022].''

EFFECTIVE DATE OF 2008 AMENDMENT

Amendment by Pub. L. 110–458 effective as if included in the provisions of Pub. L. 109–280 to which the amendment relates, except as otherwise provided, see section 112 of Pub. L. 110–458, set out as a note under section 72 of this title.

EFFECTIVE DATE OF 2006 AMENDMENT

Pub. L. 109–280, title VI, §601(b)(4), Aug. 17, 2006, 120 Stat. 966, as amended by Pub. L. 110–458, title I, §106(a)(3), Dec. 23, 2008, 122 Stat. 5106, provided that: ''Except as provided in this subsection [amending this section and enacting provisions set out as notes under this section], the amendments made by this subsection shall apply with respect to advice referred to in section 4975(e)(3)(B) of the Internal Revenue Code of 1986 provided after December 31, 2006.''

Pub. L. 109–280, title VI, §611(h), Aug. 17, 2006, 120 Stat. 975, provided that:

''(1) IN GENERAL.—Except as provided in paragraph (2), the amendments made by this section [amending this section and sections 1002, 1108, and 1112 of Title 29, Labor] shall apply to transactions occurring after the date of the enactment of this Act [Aug. 17, 2006].

''(2) BONDING RULE.—The amendments made by subsection (b) [amending section 1112 of Title 29] shall apply to plan years beginning after such date.''

Pub. L. 109–280, title VI, §612(c), Aug. 17, 2006, 120 Stat. 977, provided that: ''The amendments made by this section [amending this section and section 1108 of Title 29, Labor] shall apply to any transaction which the fiduciary or disqualified person discovers, or reasonably should have discovered, after the date of the enactment of this Act [Aug. 17, 2006] constitutes a prohibited transaction.''

EFFECTIVE DATE OF 2005 AMENDMENT

Amendment by Pub. L. 109–135 effective as if included in the provision of the American Jobs Creation Act of 2004, Pub. L. 108–357, to which such amendment relates, see section 413(d) of Pub. L. 109–135, set out as a note under section 1361 of this title.

EFFECTIVE DATE OF 2004 AMENDMENT

Amendment by section 233(c) of Pub. L. 108–357 effective Oct. 22, 2004, see section 233(e) of Pub. L. 108–357, set out as a note under section 512 of this title.

Pub. L. 108–357, title II, §240(b), Oct. 22, 2004, 118 Stat. 1437, provided that: ''The amendment made by this section [amending this section] shall apply to distributions with respect to S corporation stock made after December 31, 1997.''

EFFECTIVE DATE OF 2003 AMENDMENT

Amendment by Pub. L. 108–173 applicable to taxable years beginning after Dec. 31, 2003, see section 1201(k) of Pub. L. 108–173, set out as a note under section 62 of this title.

EFFECTIVE DATE OF 2001 AMENDMENT

Amendment by Pub. L. 107–22 effective July 26, 2001, see section 1(c) of Pub. L. 107–22, set out as a note under section 26 of this title.

Pub. L. 107–16, title VI, §612(c), June 7, 2001, 115 Stat. 100, provided that: ''The amendment made by this section [amending this section and section 1108 of Title 29, Labor] shall apply to years beginning after December 31, 2001.''

Amendment by section 656(b) of Pub. L. 107–16 applicable to plan years beginning after Dec. 31, 2004, except that in the case of any employee stock ownership plan established after Mar. 14, 2001, or established on or before such date if employer securities held by the plan consist of stock in a corporation with respect to which an election under section 1362(a) of this title is not in effect on such date, amendment applicable to plan years ending after Mar. 14, 2001, see section 656(d) of Pub. L. 107–16, set out as a note under section 409 of this title.

EFFECTIVE DATE OF 1997 AMENDMENT

Amendment by section 213(b) of Pub. L. 105–34 applicable to taxable years beginning after Dec. 31, 1997, see section 213(f) of Pub. L. 105–34, set out as a note under section 26 of this title.

Pub. L. 105–34, title X, §1074(b), Aug. 5, 1997, 111 Stat. 949, provided that: ''The amendment made by this section [amending this section] shall apply to prohibited transactions occurring after the date of the enactment of this Act [Aug. 5, 1997].''

Amendment by section 1506(b)(1) of Pub. L. 105–34 applicable to taxable years beginning after Dec. 31, 1997, see section 1506(c) of Pub. L. 105–34, set out as a note under section 409 of this title.

Amendment by section 1530(c)(10) of Pub. L. 105–34 applicable to transfers made by trusts to, or for the use of, an employee stock ownership plan after Aug. 5, 1997, see section 1530(d) of Pub. L. 105–34, set out as a note under section 401 of this title.

Amendment by section 1602(a)(5) of Pub. L. 105–34 effective as if included in the provisions of the Health Insurance Portability and Accountability Act of 1996, Pub. L. 104–191, to which such amendment relates, see section 1602(i) of Pub. L. 105–34, set out as a note under section 26 of this title.

EFFECTIVE DATE OF 1996 AMENDMENTS

Amendment by Pub. L. 104–191 applicable to taxable years beginning after Dec. 31, 1996, see section 301(j) of Pub. L. 104–191, set out as a note under section 62 of this title.

Pub. L. 104–188, title I, §1453(b), Aug. 20, 1996, 110 Stat. 1817, provided that: ''The amendment made by this section [amending this section] shall apply to prohibited transactions occurring after the date of the enactment of this Act [Aug. 20, 1996].''

Amendment by section 1702(g)(3) of Pub. L. 104–188 effective, except as otherwise expressly provided, as if included in the provision of the Revenue Reconciliation

Act of 1990, Pub. L. 101–508, title XI, to which such amendment relates, see section 1702(i) of Pub. L. 104–188, set out as a note under section 38 of this title.

EFFECTIVE DATE OF 1990 AMENDMENT

Amendment by Pub. L. 101–508 effective, except as otherwise provided, as if included in the provision of the Revenue Reconciliation Act of 1989, Pub. L. 101–239, title VII, to which such amendment relates, see section 11701(n) of Pub. L. 101–508, set out as a note under section 42 of this title.

EFFECTIVE DATE OF 1986 AMENDMENT

Amendment by section 1114(b)(15)(A) of Pub. L. 99–514 applicable to years beginning after Dec. 31, 1988, see section 1114(c)(3) of Pub. L. 99–514, set out as a note under section 414 of this title.

Amendment by section 1854(f)(3)(A) of Pub. L. 99–514 effective Oct. 22, 1986, see section 1854(f)(4)(A) of Pub. L. 99–514, set out as a note under section 409 of this title.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by section 491(d)(45), (46) of Pub. L. 98–369 applicable to obligations issued after Dec. 31, 1983, see section 491(f)(1) of Pub. L. 98–369, set out as a note under section 62 of this title.

Amendment by section 491(e)(7), (8) of Pub. L. 98–369 effective Jan. 1, 1984, see section 491(f)(3) of Pub. L. 98–369, set out as a note under section 401 of this title.

EFFECTIVE DATE OF 1983 AMENDMENT

Amendment by Pub. L. 97–448 effective on date of enactment of Subchapter S Revision Act of 1982 [Oct. 19, 1982], see section 311(c)(4) of Pub. L. 97–448, set out as a note under section 1368 of this title.

EFFECTIVE DATE OF 1980 AMENDMENTS

For effective date of amendment by Pub. L. 96–596 with respect to any first tier tax and to any second tier tax, see section 2(d) of Pub. L. 96–596, set out as an Effective Date note under section 4961 of this title.

Amendment by section 208(b) of Pub. L. 96–364 effective Sept. 26, 1980, see section 210(a) of Pub. L. 96–364, set out as an Effective Date note under section 194A of this title.

Amendment by section 209(b) of Pub. L. 96–364 applicable to taxable years ending after Sept. 26, 1980, see section 210(c) of Pub. L. 96–364, set out as an Effective Date note under section 194A of this title.

Pub. L. 96–222, title I, §101(b)(1)(C), Apr. 1, 1980, 94 Stat. 205, provided that: ''The amendment made by subparagraph (C) of subsection (a)(6) [probably should be '(a)(7)', which amended this section] shall apply to stock acquired after December 31, 1979.''

Amendment by section 101(a)(7)(K), (L)(iv)(III), (v)(XI) of Pub. L. 96–222 effective, except as otherwise provided, as if it had been included in the provision of the Revenue Act of 1978, Pub. L. 95–600, to which such amendment relates, see section 201 of Pub. L. 96–222, set out as a note under section 32 of this title.

EFFECTIVE DATE OF 1978 AMENDMENT

Pub. L. 95–600, title I, §141(h), as added by Pub. L. 96–222, title I, §101(a)(7)(B), Apr. 1, 1980, 94 Stat. 197; Pub. L. 99–514, §2, Oct. 22, 1986, 100 Stat. 2095, provided that: ''Paragraphs (5) and (6) of subsection (f) [section 141(f)(5), (6) of Pub. L. 95–600] shall apply—

''(1) insofar as they make the requirements of subsections (e) and (h)(1)(B) of section 409A [now section 409] of the Internal Revenue Code of 1986 [formerly I.R.C. 1954] applicable to section 4975 of such Code, to stock acquired after December 31, 1979, and

''(2) insofar as they make paragraphs (1)(A) and (2) of section 409A(h) [now section 409(h)] of such Code applicable to such section 4975, to distributions after December 31, 1978.''

EFFECTIVE DATE; SAVINGS PROVISION

Pub. L. 93–406, title II, §2003(c), Sept. 2, 1974, 88 Stat. 978, as amended by Pub. L. 99–514, §2, Oct. 22, 1986, 100 Stat. 2095, provided that:

''(1)(A) The amendments made by this section [enacting this section and amending section 503 of this title] shall take effect on January 1, 1975.

''(B) If, before the amendments made by this section [enacting this section and amending section 503 of this title] take effect, an organization described in section 401(a) of the Internal Revenue Code of 1986 [formerly I.R.C. 1954] is denied exemption under section 501(a) of such Code by reason of section 503 of such Code, the denial of such exemption shall not apply if the disqualified person elects (in such manner and at such time as the Secretary or his delegate shall by regulations prescribe) to pay, with respect to the prohibited transaction (within the meaning of section 503(b) or (g)) which resulted in such denial of exemption, a tax in the amount and in the manner provided with respect to the tax imposed under section 4975 of such Code. An election made under this subparagraph, once made, shall be irrevocable. The Secretary of the Treasury or his delegate shall prescribe such regulations as may be necessary to carry out the purposes of this subparagraph.

''(2) Section 4975 of the Internal Revenue Code of 1986 (relating to tax on prohibited transactions) shall not apply to—

''(A) a loan of money or other extension of credit between a plan and a disqualified person under a binding contract in effect on July 1, 1974 (or pursuant to renewals of such a contract), until June 30, 1984, if such loan or other extension of credit remains at least as favorable to the plan as an arm's-length transaction with an unrelated party would be, and if the execution of the contract, the making of the loan, or the extension of credit was not, at the time of such execution, making, or extension, a prohibited transaction (within the meaning of section 503(b) of such Code) or the corresponding provisions of prior law);

''(B) a lease of joint use of property involving the plan and a disqualified person pursuant to a binding contract in effect on July 1, 1974 (or pursuant to renewals of such a contract), until June 30, 1984, if such lease or joint use remains at least as favorable to the plan as an arm's-length transaction with an unrelated party would be and if the execution of the contract was not, at the time of such execution, a prohibited transaction (within the meaning of section 503(b) of such Code) or the corresponding provisions of prior law;

''(C) the sale, exchange, or other disposition of property described in subparagraph (B) between a plan and a disqualified person before June 30, 1984, if—

''(i) in the case of a sale, exchange, or other disposition of the property by the plan to the disqualified person, the plan receives an amount which is not less than the fair market value of the property at the time of such disposition; and

''(ii) in the case of the acquisition of the property by the plan, the plan pays an amount which is not in excess of the fair market value of the property at the time of such acquisition:

''(D) Until June 30, 1977, the provision of services to which subparagraphs (A), (B), and (C) do not apply between a plan and a disqualified person (i) under a binding contract in effect on July 1, 1974 (or pursuant to renewals of such contract), or (ii) if the disqualified person ordinarily and customarily furnished such services on June 30, 1974, if such provision of services remains at least as favorable to the plan as an arm's-length transaction with an unrelated party would be and if the provision of services was not, at the time of such provision, a prohibited transaction (within the meaning of section 503(b) of such Code) or the corresponding provisions of prior law; or

''(E) the sale, exchange, or other disposition of property which is owned by a plan on June 30, 1974, and all times thereafter, to a disqualified person, if such plan is required to dispose of such property in order to comply with the provisions of section 407(a)(2)(A) (relating to the prohibition against holding excess employer securities and employer real

property) of the Employee Retirement Income Security Act of 1974 [29 U.S.C. 1107(a)(2)] and if the plan receives not less than adequate consideration.

For the purposes of this paragraph, the term 'disqualified person' has the meaning provided by section 4975(e)(2) of the Internal Revenue Code of 1986.''

REGULATORY AUTHORITY

Pub. L. 117–328, div. T, title I, § 120(c), Dec. 29, 2022, 136 Stat. 5306, provided that: ''Not later than 12 months after the date of the enactment of this Act [Dec. 29, 2022], the Secretary of Labor shall issue such guidance as may be necessary to carry out the purposes of the amendments made by this section [amending this section], including regulations or other guidance which—

''(1) require an automatic portability provider to provide a notice to individuals on whose behalf the individual retirement plan described in paragraph (12)(A)(i)(I) of section 4975(f) of the Internal Revenue Code of 1986, as added by this section, is established in advance of the notices specified in paragraph (12)(B)(v) of such section, as so added,

''(2) require an automatic portability provider to disclose to plans described in paragraph (12)(A)(i)(II) of section 4975(f) of the Internal Revenue Code of 1986, as added by this section, information required to be provided by a covered service provider pursuant to section 2550.408b–2(c) of title 29, Code of Federal Regulations,

''(3) require a plan described in such paragraph (12)(A)(i)(II), as so added, to fully disclose fees related to an automatic portability transaction in its summary plan description or summary of material modifications, as relevant,

''(4) require a plan described in such paragraph, as so added, to invest amounts received on behalf of a participant pursuant to an automatic portability transaction in the participant's current investment election under the plan or, if no election is made or permitted, in the plan's qualified default investment alternative (within the meaning of section 2550.404c–5 of title 29, Code of Federal Regulations) or another investment selected by a fiduciary with respect to such plan,

''(5) prohibit or restrict the receipt or payment of third party compensation (other than a direct fee paid by a plan sponsor which is in lieu of a fee imposed on an individual retirement plan owner) by an automatic portability provider in connection with an automatic portability transaction,

''(6) prohibit exculpatory provisions in an automatic portability provider's contracts or communications with individuals disclaiming or limiting its liability in the event that an automatic portability transaction results in an improper transfer,

''(7) require an automatic portability provider to take actions necessary to reasonably ensure that participant and beneficiary data is current and accurate,

''(8) limit the use of data related to automatic portability transactions for any purpose other than the execution of such transactions or locating missing participants, except as permitted by the Secretary of Labor,

''(9) provide for corrections procedures in the event an auditor determines the automatic portability provider was not in compliance with this provision and related regulations as specified in paragraph (12)(B)(ix)(II) [probably should be ''(12)(B)(xi)(II)''] of section 4975(f) of such Code, as so added, including deadlines, supplemental audits, and corrective actions which may include a temporary prohibition from relying on the exemption provided by paragraph (25) of section 4975(d) of such Code, as added by this section,

''(10) ensure that the appropriate participants and beneficiaries, in fact, receive all the required notices and disclosures, and

''(11) make clear that the exemption provided by paragraph (25) of section 4975(d) of such Code, as added by this section, applies solely to the automatic portability transactions described therein, and, to the extent the Secretary deems necessary or advisable, specify how the application of the exemption relates to or coordinates with the application of other statutory provisions, regulations, administrative guidance, or exemptions.

Any term used in this subsection which is used in paragraph (12) of section 4975(f) of such Code, as added by this section, has the same meaning as when used in such paragraph.''

REGULATIONS

Secretary of the Treasury or his delegate to issue before Feb. 1, 1988, final regulations to carry out amendments made by section 1114 of Pub. L. 99–514, see section 1141 of Pub. L. 99–514, set out as a note under section 401 of this title.

APPLICABILITY OF AMENDMENTS BY PUB. L. 116–94

Pub. L. 116–94, div. P, title XIII, § 1302(c), Dec. 20, 2019, 133 Stat. 3205, provided that: ''With respect to a group health plan subject to subsection (h) of section 408 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1108) (as amended by subsection (a)) and subsection (c) of section 4975 of the Internal Revenue Code of 1986 (as amended by subsection (b)), beginning at the end of the fifth plan year of such group health plan that begins after the date of enactment of this Act [Dec. 20, 2019], such subsection (h) of such section 408 and such subsection (c) of such [sic] shall have no force or effect.''

REPORT TO CONGRESS

Pub. L. 117–328, div. T, title I, § 120(d), Dec. 29, 2022, 136 Stat. 5307, provided that:

''(1) IN GENERAL.—Not later than 2 years after the date of the first audit report received by the Secretary of Labor from any automatic portability provider, and every 3 years thereafter, the Secretary of Labor shall report to the Committees on Health, Education, Labor and Pensions and Finance of the Senate and the Committees on Education and Labor [now Committee on Education and the Workforce] and Ways and Means of the House of Representatives on—

''(A) the effectiveness of automatic portability transactions under the exemption provided by paragraph (25) of section 4975(d) of the Internal Revenue Code of 1986, as added by this section, detailing—

''(i) the number of automatic cash outs from qualified plans to individual retirement plans described in section 4975(f)(12)(A)(i)(I) of such Code,

''(ii) the number of completed automatic portability transactions to employer-sponsored retirement plans described in section 4975(f)(12)(A)(i)(II) of such Code,

''(iii) the number of individual retirement plans described in section 4975(f)(12)(A)(i)(I) of such Code which have been transferred to designated beneficiaries,

''(iv) the number of individual retirement plans described in section 4975(f)(12)(A)(i)(I) of such Code for which the automatic portability provider is searching for next of kin due to a deceased account holder without a designated beneficiary, and

''(v) the number of accounts that were reduced to a zero balance while in the automatic portability provider's custody;

''(B) a summary of any consumer complaints submitted to the Employee Benefits Security Administration regarding automatic portability transactions;

''(C) a summary of compliance issues found in the annual audit described in section 4975(f)(12)(B)(xiii)(II) [probably should be ''4975(f)(12)(B)(xi)(II)''] of such Code, if any, and their corrections;

''(D) a summary of the fees individuals are charged in connection with automatic portability transactions, including whether those fees have increased since the last report;

''(E) recommendations of any necessary statutory changes to this exemption to improve the effectiveness of automatic portability transactions, including repeal of this provision in the event of a pattern of noncompliance; and

''(F) any other information the Secretary of Labor deems important.

The report required by this subsection shall be made publicly available.

''(2) REPORT ON NOTICES RELATING TO AUTOMATIC TRANSFERS.—Not later than 2 years after the date of the enactment of this Act [Dec. 29, 2022], the Secretary of Treasury shall report to the Committee on Finance of the Senate and the Committee on Ways and Means on the adequacy of the notices relating to transfers under section 401(a)(31)(B)(i) of the Internal Revenue Code of 1986.''

DETERMINATION OF FEASIBILITY OF APPLICATION OF COMPUTER MODEL INVESTMENT ADVICE PROGRAMS FOR INDIVIDUAL RETIREMENT AND SIMILAR PLANS

Pub. L. 109–280, title VI, §601(b)(3), Aug. 17, 2006, 120 Stat. 964, provided that:

''(A) SOLICITATION OF INFORMATION.—As soon as practicable after the date of the enactment of this Act [Aug. 17, 2006], the Secretary of Labor, in consultation with the Secretary of the Treasury, shall—

''(i) solicit information as to the feasibility of the application of computer model investment advice programs for plans described in subparagraphs (B) through (F) (and so much of subparagraph (G) as relates to such subparagraphs) of section 4975(e)(1) of the Internal Revenue Code of 1986, including soliciting information from—

''(I) at least the top 50 trustees of such plans, determined on the basis of assets held by such trustees, and

''(II) other persons offering computer model investment advice programs based on nonproprietary products, and

''(ii) shall on the basis of such information make the determination under subparagraph (B).

The information solicited by the Secretary of Labor under clause (i) from persons described in subclauses (I) and (II) of clause (i) shall include information on computer modeling capabilities of such persons with respect to the current year and preceding year, including such capabilities for investment accounts maintained by such persons.

''(B) DETERMINATION OF FEASIBILITY.—The Secretary of Labor, in consultation with the Secretary of the Treasury, shall, on the basis of information received under subparagraph (A), determine whether there is any computer model investment advice program which may be utilized by a plan described in subparagraph (A)(i) to provide investment advice to the account beneficiary of the plan which—

''(i) utilizes relevant information about the account beneficiary, which may include age, life expectancy, retirement age, risk tolerance, other assets or sources of income, and preferences as to certain types of investments,

''(ii) takes into account the full range of investments, including equities and bonds, in determining the options for the investment portfolio of the account beneficiary, and

''(iii) allows the account beneficiary, in directing the investment of assets, sufficient flexibility in obtaining advice to evaluate and select investment options.

The Secretary of Labor shall report the results of such determination to the committees of Congress referred to in subparagraph (D)(ii) not later than December 31, 2007.

''(C) APPLICATION OF COMPUTER MODEL INVESTMENT ADVICE PROGRAM.—

''(i) CERTIFICATION REQUIRED FOR USE OF COMPUTER MODEL.—

''(I) RESTRICTION ON USE.—Subclause (II) of section 4975(f)(8)(B)(i) of the Internal Revenue Code of 1986 shall not apply to a plan described in subparagraph (A)(i).

''(II) RESTRICTION LIFTED IF MODEL CERTIFIED.—If the Secretary of Labor determines under subparagraph (B) or (D) that there is a computer model investment advice program described in subparagraph (B), subclause (I) shall cease to apply as of the date of such determination.

''(ii) CLASS EXEMPTION IF NO INITIAL CERTIFICATION BY SECRETARY.—If the Secretary of Labor determines under subparagraph (B) that there is no computer model investment advice program described in subparagraph (B), the Secretary of Labor shall grant a class exemption from treatment as a prohibited transaction under section 4975(c) of the Internal Revenue Code of 1986 to any transaction described in section 4975(d)(17)(A) of such Code with respect to plans described in subparagraph (A)(i), subject to such conditions as set forth in such exemption as are in the interests of the plan and its account beneficiary and protective of the rights of the account beneficiary and as are necessary to—

''(I) ensure the requirements of sections 4975(d)(17) and 4975(f)(8) (other than subparagraph (C) thereof) of the Internal Revenue Code of 1986 are met, and

''(II) ensure the investment advice provided under the investment advice program utilizes prescribed objective criteria to provide asset allocation portfolios comprised of securities or other property available as investments under the plan.

If the Secretary of Labor solicits any information under subparagraph (A) from a person and such person does not provide such information within 60 days after the solicitation, then, unless such failure was due to reasonable cause and not wilful neglect, such person shall not be entitled to utilize the class exemption under this clause.

''(D) SUBSEQUENT DETERMINATION.—

''(i) IN GENERAL.—If the Secretary of Labor initially makes a determination described in subparagraph (C)(ii), the Secretary may subsequently determine that there is a computer model investment advice program described in subparagraph (B). If the Secretary makes such subsequent determination, then the class exemption described in subparagraph (C)(ii) shall cease to apply after the later of—

''(I) the date which is 2 years after such subsequent determination, or

''(II) the date which is 3 years after the first date on which such exemption took effect.

''(ii) REQUESTS FOR DETERMINATION.—Any person may request the Secretary of Labor to make a determination under this subparagraph with respect to any computer model investment advice program, and the Secretary of Labor shall make a determination with respect to such request within 90 days. If the Secretary of Labor makes a determination that such program is not described in subparagraph (B), the Secretary shall, within 10 days of such determination, notify the Committee on Ways and Means and the Committee on Education and the Workforce of the House of Representatives and the Committee on Finance and the Committee on Health, Education, Labor, and Pensions of the Senate of such determination and the reasons for such determination.

''(E) EFFECTIVE DATE.—The provisions of this paragraph shall take effect on the date of the enactment of this Act [Aug. 17, 2006].''

COORDINATION OF 2006 AMENDMENT WITH EXISTING EXEMPTIONS

Pub. L. 109–280, title VI, §601(c), Aug. 17, 2006, 120 Stat. 966, provided that: ''Any exemption under section 408(b) of the Employee Retirement Income Security Act of 1974 [29 U.S.C. 1108(b)] and section 4975(d) of the Internal Revenue Code of 1986 provided by the amendments made by this section [amending this section and section 1108 of Title 29, Labor] shall not in any manner alter existing individual or class exemptions, provided by statute or administrative action.''

PLAN AMENDMENTS NOT REQUIRED UNTIL JANUARY 1, 1998

For provisions directing that if any amendments made by subtitle D [§§1401–1465] of title I of Pub. L. 104–188 require an amendment to any plan or annuity contract, such amendment shall not be required to be made before the first day of the first plan year beginning on or after Jan. 1, 1998, see section 1465 of Pub. L. 104–188, set out as a note under section 401 of this title.

PLAN AMENDMENTS NOT REQUIRED UNTIL JANUARY 1, 1989

For provisions directing that if any amendments made by subtitle A or subtitle C of title XI [§§1101–1147 and 1171–1177] or title XVIII [§§1800–1899A] of Pub. L. 99–514 require an amendment to any plan, such plan amendment shall not be required to be made before the first plan year beginning on or after Jan. 1, 1989, see section 1140 of Pub. L. 99–514, as amended, set out as a note under section 401 of this title.

INTENT OF CONGRESS CONCERNING EMPLOYEE STOCK OWNERSHIP PLANS

Pub. L. 94–455, title VIII, §803(h), Oct. 4, 1976, 90 Stat. 1590, provided that: ''The Congress, in a series of laws (the Regional Rail Reorganization Act of 1973, the Employee Retirement Income Security Act of 1974, the Trade Act of 1974, and the Tax Reduction Act of 1975) and this Act has made clear its interest in encouraging employee stock ownership plans as a bold and innovative method of strengthening the free private enterprise system which will solve the dual problems of securing capital funds for necessary capital growth and of bringing about stock ownership by all corporate employees. The Congress is deeply concerned that the objectives sought by this series of laws will be made unattainable by regulations and rulings which treat employee stock ownership plans as conventional retirement plans, which reduce the freedom of the employee trusts and employers to take the necessary steps to implement the plans, and which otherwise block the establishment and success of these plans. Because of the special purposes for which employee stock ownership plans are established, it is consistent with the intent of Congress to permit these plans (whether structured as pension, stock bonus, or profit-sharing plans) to distribute income on employer securities currently.''

§ 4976. Taxes with respect to funded welfare benefit plans

(a) General rule

If—

(1) an employer maintains a welfare benefit fund, and

(2) there is a disqualified benefit provided during any taxable year,

there is hereby imposed on such employer a tax equal to 100 percent of such disqualified benefit.

(b) Disqualified benefit

For purposes of subsection (a)—

(1) In general

The term ''disqualified benefit'' means—

(A) any post-retirement medical benefit or life insurance benefit provided with respect to a key employee if a separate account is required to be established for such employee under section 419A(d) and such payment is not from such account,

(B) any post-retirement medical benefit or life insurance benefit provided with respect to an individual in whose favor discrimination is prohibited unless the plan meets the requirements of section 505(b) with respect to such benefit (whether or not such requirements apply to such plan), and

(C) any portion of a welfare benefit fund reverting to the benefit of the employer.

(2) Exception for collective bargaining plans

Paragraph (1)(B) shall not apply to any plan maintained pursuant to an agreement between employee representatives and 1 or more employers if the Secretary finds that such agreement is a collective bargaining agreement and that the benefits referred to in paragraph (1)(B) were the subject of good faith bargaining between such employee representatives and such employer or employers.

(3) Exception for nondeductible contributions

Paragraph (1)(C) shall not apply to any amount attributable to a contribution to the fund which is not allowable as a deduction under section 419 for the taxable year or any prior taxable year (and such contribution shall not be included in any carryover under section 419(d)).

(4) Exception for certain amounts charged against existing reserve

Subparagraphs (A) and (B) of paragraph (1) shall not apply to post-retirement benefits charged against an existing reserve for post-retirement medical or life insurance benefits (as defined in section 512(a)(3)(E)) or charged against the income on such reserve.

(c) Definitions

For purposes of this section, the terms used in this section shall have the same respective meanings as when used in subpart D of part I of subchapter D of chapter 1.

(Added Pub. L. 98–369, div. A, title V, §511(c)(1), July 18, 1984, 98 Stat. 861; amended Pub. L. 99–514, title XVIII, §1851(a)(11), Oct. 22, 1986, 100 Stat. 2861; Pub. L. 100–647, title I, §1011B(a)(27)(A), (B), title III, §3021(a)(1)(C), Nov. 10, 1988, 102 Stat. 3487, 3626; Pub. L. 101–140, title II, §203(a)(2), Nov. 8, 1989, 103 Stat. 830.)

Editorial Notes

CODIFICATION

Pub. L. 101–140 amended this section to read as if the amendments made by section 1011B(a)(27) of Pub. L. 100–647 (enacting subsec. (c)) had not been enacted. Subsequent to enactment by Pub. L. 100–647, subsec. (c) was amended by Pub. L. 100–647, §3021(a)(1)(C). See 1988 Amendment note below.

AMENDMENTS

1989—Subsec. (b)(5). Pub. L. 101–140 amended subsec. (b) to read as if amendments by Pub. L. 100–647, §1011B(a)(27)(B), had not been enacted, see 1988 Amendment note below.

Subsecs. (c), (d). Pub. L. 101–140 amended this section to read as if amendments by Pub. L. 100–647, §1011B(a)(27)(A), had not been enacted, see 1988 Amendment note below.

1988—Subsec. (b)(5). Pub. L. 100–647, §1011B(a)(27)(B), added par. (5) relating to limitation in case of benefits to which section 89 applies.

Subsec. (c). Pub. L. 100–647, §1011B(a)(27)(A), added subsec. (c) relating to tax on funded welfare benefit funds which include discriminatory employee benefit plan. Former subsec. (c) redesignated (d).

Subsec. (c)(1)(B). Pub. L. 100–647, §3021(a)(1)(C)(i), substituted ''any testing year (as defined in section