

104TH CONGRESS  
1ST SESSION

# S. 1490

To amend title I of the Employee Retirement Income Security Act of 1974 to improve enforcement of such title and benefit security for participants by adding certain provisions with respect to the auditing of employee benefit plans, and for other purposes.

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## IN THE SENATE OF THE UNITED STATES

DECEMBER 20, 1995

Mr. SIMON (for himself, Mr. JEFFORDS, Mr. LEAHY, and Mrs. BOXER) introduced the following bill; which was read twice and referred to the Committee on Labor and Human Resources

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## A BILL

To amend title I of the Employee Retirement Income Security Act of 1974 to improve enforcement of such title and benefit security for participants by adding certain provisions with respect to the auditing of employee benefit plans, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*  
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Pension Audit Im-  
5 provement Act of 1995”.

1 **SEC. 2. REPEAL OF LIMITED SCOPE AUDIT.**

2 (a) IN GENERAL.—Section 103(a)(3) of the Em-  
 3 ployee Retirement Income Security Act of 1974 (29  
 4 U.S.C. 1023(a)(3)) is amended by striking subparagraph  
 5 (C) and by redesignating subparagraph (D) as subpara-  
 6 graph (C).

7 (b) CONFORMING AMENDMENTS.—

8 (1) Section 103(a)(3)(A) of such Act (29  
 9 U.S.C. 1023(a)(3)(A)) is amended by striking “Ex-  
 10 cept as provided in subparagraph (C), the” and in-  
 11 serting “The”.

12 (2) Section 104(a)(5)(A) of such Act (29  
 13 U.S.C. 1024(a)(5)(A)) is amended by striking “sec-  
 14 tion 103(a)(3)(D)” and inserting “section  
 15 103(a)(3)(C)”.

16 (c) EFFECTIVE DATE.—The amendments made by  
 17 this section shall apply with respect to opinions required  
 18 under section 103(a)(3)(A) of the Employee Retirement  
 19 Income Security Act of 1974 for plan years beginning on  
 20 or after January 1 of the calendar year following the date  
 21 of the enactment of this Act.

22 **SEC. 3. REPORTING AND ENFORCEMENT REQUIREMENTS**  
 23 **FOR EMPLOYEE BENEFIT PLANS.**

24 (a) IN GENERAL.—Part 1 of subtitle B of title I of  
 25 the Employee Retirement Income Security Act of 1974  
 26 (29 U.S.C. 1021 et seq.) is amended—

1 (1) by redesignating section 111 as section 112,  
2 and

3 (2) by inserting after section 110 the following  
4 new section:

5 “DIRECT REPORTING OF CERTAIN EVENTS

6 “SEC. 111. (a) REQUIRED NOTIFICATIONS.—

7 “(1) NOTIFICATIONS BY PLAN ADMINIS-  
8 TRATOR.—The administrator of an employee benefit  
9 plan shall, within 5 business days after the adminis-  
10 trator first has reason to believe (or after the admin-  
11 istrator is notified under paragraph (2)) that an ir-  
12 regularity may have occurred with respect to the  
13 plan—

14 “(A) notify the Secretary of the irregular-  
15 ity in writing; and

16 “(B) furnish a copy of such notification to  
17 the accountant who is currently engaged under  
18 section 103(a)(3)(A).

19 “(2) NOTIFICATIONS BY ACCOUNTANT.—

20 “(A) IN GENERAL.—An accountant en-  
21 gaged by the administrator of an employee ben-  
22 efit plan under section 103(a)(3)(A) shall, with-  
23 in 5 business days after the accountant first  
24 has reason to believe in connection with such  
25 engagement that an irregularity may have oc-  
26 curred with respect to the plan—

1           “(i) notify the plan administrator of  
2           the irregularity in writing, or

3           “(ii) if the accountant has reason to  
4           believe that the irregularity may have in-  
5           volved an individual who is the plan admin-  
6           istrator or who is a senior official of the  
7           plan administrator, notify the Secretary of  
8           the irregularity in writing.

9           “(B) NOTIFICATION UPON FAILURE OF  
10          PLAN ADMINISTRATOR TO NOTIFY.—If an ac-  
11          countant who has provided notification to the  
12          plan administrator pursuant to subparagraph  
13          (A)(i) does not receive a copy of the administra-  
14          tor’s notification to the Secretary required  
15          under paragraph (1)(B) within the 5-business  
16          day period specified therein, the accountant  
17          shall furnish to the Secretary a copy of the ac-  
18          countant’s notification made to the plan admin-  
19          istrator on the next business day following such  
20          period.

21          “(3) IRREGULARITY DEFINED.—

22                 “(A) For purposes of this subsection, the  
23                 term ‘irregularity’ means—

24                         “(i) a theft, embezzlement, or a viola-  
25                         tion of section 664 of title 18, United

1 States Code (relating to theft or embezzle-  
2 ment from an employee benefit plan);

3 “(ii) an extortion or a violation of sec-  
4 tion 1951 of such title 18 (relating to in-  
5 terference with commerce by threats or vi-  
6 olence);

7 “(iii) a bribery, a kickback, or a viola-  
8 tion of section 1954 of such title 18 (relat-  
9 ing to offer, acceptance, or solicitation to  
10 influence operations of an employee benefit  
11 plan);

12 “(iv) a violation of section 411, 501,  
13 or 511 of this title (relating to criminal  
14 violations); or

15 “(v) any intentional misstatement or  
16 omission of an amount or disclosure in a  
17 financial statement, accounting record, or  
18 supporting document undertaken to mis-  
19 lead.

20 “(B) The term ‘irregularity’ shall not in-  
21 clude any act or omission described in this  
22 paragraph involving less than \$1,000 unless  
23 there is reason to believe that the act or omis-  
24 sion may bear on the integrity of plan manage-  
25 ment.

1       “(b) NOTIFICATION UPON TERMINATION OF EN-  
2 GAGEMENT OF ACCOUNTANT.—

3               “(1) NOTIFICATION BY PLAN ADMINIS-  
4 TRATOR.—Within 5 business days after the termi-  
5 nation of an engagement for auditing services under  
6 section 103(a)(3)(A) with respect to an employee  
7 benefit plan, the administrator of such plan shall—

8                       “(A) notify the Secretary in writing of  
9 such termination, giving the reasons for such  
10 termination, and

11                      “(B) furnish the accountant whose engage-  
12 ment was terminated with a copy of the notifi-  
13 cation sent to the Secretary.

14               “(2) NOTIFICATION BY ACCOUNTANT.—If the  
15 accountant referred to in paragraph (1)(B) has not  
16 received a copy of the administrator’s notification to  
17 the Secretary as required under paragraph (1)(B),  
18 or if the accountant disagrees with the reasons given  
19 in the notification of termination of the engagement  
20 for auditing services, the accountant shall notify the  
21 Secretary in writing of the termination, giving the  
22 reasons for the termination, within 10 business days  
23 after the termination of the engagement.

24       “(c) DETERMINATION OF PERIODS REQUIRED FOR  
25 NOTIFICATION.—In determining whether a notification re-

1 quired under this section with respect to any act or omis-  
2 sion has been made within the required number of busi-  
3 ness days—

4 “(1) the day on which such act or omission be-  
5 gins shall not be included; and

6 “(2) Saturdays, Sundays, and legal holidays  
7 shall not be included.

8 For purposes of this subsection, the term ‘legal holiday’  
9 means any Federal legal holiday and any other day ap-  
10 pointed as a holiday by the State in which the person re-  
11 sponsible for making the notification principally conducts  
12 his business.

13 “(d) IMMUNITY FOR GOOD FAITH NOTIFICATION.—  
14 Except as provided in this Act, no accountant shall be lia-  
15 ble to any person for any finding, conclusion, or statement  
16 made in any notification made pursuant to subsection  
17 (a)(2) or (b)(2), or pursuant to any regulations issued  
18 thereunder, if such finding, conclusion, or statement is  
19 made in good faith.”

20 (b) CIVIL PENALTY.—

21 (1) IN GENERAL.—Section 502(c) of such Act  
22 (29 U.S.C. 1132(c)) is amended by adding at the  
23 end the following new paragraph:

24 “(5)(A) The Secretary may assess a civil pen-  
25 alty of up to \$100,000 against any administrator

1 who fails to provide the Secretary with any notifica-  
 2 tion as required under section 111.

3 “(B) The Secretary may assess a civil penalty  
 4 of up to \$100,000 against any accountant who  
 5 knowingly and willfully fails to provide the Secretary  
 6 with any notification as required under section 111.”

7 (2) CONFORMING AMENDMENT.—Section  
 8 502(a)(6) of such Act (29 U.S.C. 1132(a)(6)) is  
 9 amended by striking “subsection (c)(2) or (i) or (l)”  
 10 and inserting “paragraph (2), (4), or (5) of sub-  
 11 section (c) or subsection (i) or (l)”.

12 (c) CLERICAL AMENDMENTS.—

13 (1) Section 514(d) of such Act (29 U.S.C.  
 14 114(d)) is amended by striking “111” and inserting  
 15 “112”.

16 (2) The table of contents in section 1 of such  
 17 Act is amended by striking the item relating to sec-  
 18 tion 111 and inserting the following new items:

“Sec. 111. Direct reporting of certain events.

“Sec. 112. Repeal and effective date.”

19 (d) EFFECTIVE DATE.—The amendments made by  
 20 this section shall apply with respect to any irregularity or  
 21 termination of engagement described in such amendments  
 22 only if the 5-day period described in such amendments in  
 23 connection with such irregularity or termination com-  
 24 mences on or after the date of the enactment of this Act.

1 **SEC. 4. ADDITIONAL REQUIREMENTS FOR QUALIFIED PUB-**  
 2 **LIC ACCOUNTANTS.**

3 (a) IN GENERAL.—Section 103(a)(3)(C) of the Em-  
 4 ployee Retirement Income Security Act of 1974 (29  
 5 U.S.C. 1023(a)(3)(C)), as redesignated by section 2, is  
 6 amended—

7 (1) by inserting “(i)” after “(C)”;

8 (2) by inserting “, with respect to any engage-  
 9 ment of an accountant under subparagraph (A)”  
 10 after “means”;

11 (3) by redesignating clauses (i), (ii), and (iii) as  
 12 subclauses (I), (II), and (III), respectively;

13 (4) by striking the period at the end of  
 14 subclause (III) (as so redesignated) and inserting a  
 15 comma;

16 (5) by adding after subclause (III) (as so redesi-  
 17 gnated), and flush with clause (i), the following:

18 “but only if such person meets the require-  
 19 ments of clauses (ii) and (iii) with respect  
 20 to such engagement.”; and

21 (6) by adding at the end the following new  
 22 clauses:

23 “(ii) A person meets the requirements  
 24 of this clause with respect to an engage-  
 25 ment of such person as an accountant  
 26 under subparagraph (A) if such person—

1           “(I) has in operation an appro-  
2           priate internal quality control system;

3           “(II) has undergone a qualified  
4           external quality control review of the  
5           person’s accounting and auditing  
6           practices, including such practices rel-  
7           evant to employee benefit plans (if  
8           any), during the 3-year period imme-  
9           diately preceding such engagement;  
10          and

11          “(III) has completed, within the  
12          2-year period immediately preceding  
13          such engagement, at least 80 hours of  
14          continuing education or training  
15          which contributes to the accountant’s  
16          professional proficiency, at least 20  
17          hours of which have been completed  
18          during the 1-year period immediately  
19          preceding the engagement, and at  
20          least 16 hours of which relate to em-  
21          ployee benefit plan matters.

22          “(iii) A person meets the require-  
23          ments of this clause with respect to an en-  
24          gagement of such person as an accountant  
25          under subparagraph (A) if such person

1 meets such additional requirements and  
2 qualifications of regulations which the Sec-  
3 retary deems necessary to ensure the qual-  
4 ity of plan audits.

5 “(iv) For purposes of clause (ii)(II),  
6 an external quality control review shall be  
7 treated as qualified with respect to a per-  
8 son referred to in clause (ii) if—

9 “(I) such review is performed in  
10 accordance with the requirements of  
11 external quality control review pro-  
12 grams of recognized auditing stand-  
13 ard-setting bodies, as determined  
14 under regulations of the Secretary,  
15 and

16 “(II) in the case of any such per-  
17 son who has, during the peer review  
18 period, conducted one or more pre-  
19 vious audits of employee benefit plans,  
20 such review includes the review of an  
21 appropriate number (determined as  
22 provided in such regulations, but in  
23 no case less than one) of plan audits  
24 in relation to the scale of such per-  
25 son’s auditing practice.

1           The Secretary shall issue the regulations  
2           under subclause (I) no later than Decem-  
3           ber 31, 1997.”

4           (b) EFFECTIVE DATES.—

5           (1) IN GENERAL.—Except as provided in para-  
6           graph (2), the amendments made by this section  
7           shall apply with respect to plan years beginning on  
8           or after the date which is 3 years after the date of  
9           the enactment of this Act.

10          (2) RESTRICTIONS ON CONDUCTING EXAMINA-  
11          TIONS.—Clause (iii) of section 103(a)(3)(C) of the  
12          Employee Retirement Income Security Act of 1974  
13          (as added by subsection (a)(6)) shall take effect on  
14          the date of enactment of this Act.

15   **SEC. 5. CLARIFICATION OF FIDUCIARY PENALTIES.**

16          (a) MODIFICATION OF PROHIBITION OF ASSIGNMENT  
17          OR ALIENATION.—

18          (1) AMENDMENT TO ERISA.—Section 206(d) of  
19          the Employee Retirement Income Security Act of  
20          1974 (29 U.S.C. 1056(d)) is amended by adding the  
21          following new paragraph:

22                 “(4) Paragraph (1) shall not apply to any offset  
23          of a participant’s accrued benefit in an employee  
24          pension benefit plan against an amount that the

1 participant is ordered or required to pay to the  
2 plan—

3 “(A) under a judgment of conviction for a  
4 crime involving such plan, or

5 “(B) under a civil judgment (including a  
6 consent order or decree) entered—

7 “(i) by a court in an action brought  
8 under section 502(a) of this title, or

9 “(ii) pursuant to a settlement agree-  
10 ment between the Secretary and the partic-  
11 ipant in connection with a violation (or al-  
12 leged violation) of part 4 of this title by a  
13 fiduciary or any other person,

14 if the judgment, order, decree, or settlement  
15 agreement expressly provides for the offset of  
16 all or part of the amount ordered or required  
17 to be paid to the plan against the participant’s  
18 accrued benefit in the plan.”

19 (2) AMENDMENT TO 1986 CODE.—Section  
20 401(a)(13) of the Internal Revenue Code of 1986 is  
21 made by adding at the end the following new sub-  
22 paragraph:

23 “(C) SPECIAL RULE FOR CERTAIN JUDG-  
24 MENTS AND SETTLEMENTS.—Subparagraph (A)  
25 shall not apply to any offset of a participant’s

1 accrued benefit in an employee pension benefit  
2 plan against an amount that the participant is  
3 ordered or required to pay to the plan—

4 “(i) under a judgment of conviction  
5 for a crime involving such plan, or

6 “(ii) under a civil judgment (including  
7 a consent order or decree) entered—

8 “(I) by a court in an action  
9 brought under section 502(a) of the  
10 Employee Retirement Income Security  
11 Act of 1974, or

12 “(II) pursuant to a settlement  
13 agreement between the Secretary of  
14 Labor and the participant in connec-  
15 tion with a violation (or alleged viola-  
16 tion) of part 4 of title I of such Act  
17 by a fiduciary or any other person,

18 if the judgment, order, decree or settlement  
19 agreement expressly provides for the offset of  
20 all or part of the amount ordered or required  
21 to be paid to the plan against the participant’s  
22 accrued benefit in the plan.”

23 (3) EFFECTIVE DATE.—The amendments made  
24 by this subsection shall take effect on the date of en-  
25 actment of this Act.

1 (b) CIVIL PENALTIES FOR BREACH OF FIDUCIARY  
2 RESPONSIBILITY.—

3 (1) IMPOSITION AND AMOUNT OF PENALTY  
4 MADE DISCRETIONARY.—Section 502(l)(1) of the  
5 Employee Retirement Income Security Act of 1974  
6 (29 U.S.C. 1132(l)(1)) is amended—

7 (A) by striking “shall” and inserting  
8 “may”, and

9 (B) by striking “equal to” and inserting  
10 “not greater than”.

11 (2) APPLICABLE RECOVERY AMOUNT.—Section  
12 502(l)(2) of such Act (29 U.S.C. 1132(l)(2)) is  
13 amended to read as follows:

14 “(2) For purposes of paragraph (1), the term  
15 ‘applicable recovery amount’ means any amount  
16 which is recovered from (or on behalf of) any fidu-  
17 ciary or other person with respect to a breach or vio-  
18 lation described in paragraph (1) on or after the  
19 30th day following receipt by such fiduciary or other  
20 person of written notice from the Secretary of the  
21 violation, whether paid voluntarily or by order of a  
22 court in a judicial proceeding instituted by the Sec-  
23 retary under subsection (a)(2) or (a)(5). The Sec-  
24 retary may, in the Secretary’s sole discretion, extend

1 the 30-day period described in the preceding sen-  
2 tence.”

3 (3) OTHER RULES.—Section 502(1) of such Act  
4 (29 U.S.C. 1132(1)) is amended by adding at the  
5 end the following new paragraphs:

6 “(5) A person shall be jointly and severally lia-  
7 ble for the penalty described in paragraph (1) to the  
8 same extent that such person is jointly and severally  
9 liable for the applicable recovery amount on which  
10 the penalty is based.

11 “(6) No penalty shall be assessed under this  
12 subsection unless the person against whom the pen-  
13 alty is assessed is given notice and opportunity for  
14 a hearing with respect to the violation and applicable  
15 recovery amount.”

16 (4) EFFECTIVE DATES.—

17 (A) IN GENERAL.—The amendments made  
18 by this subsection shall apply to any breach of  
19 fiduciary responsibility or other violation of part  
20 4 of title I of the Employment Retirement In-  
21 come Security Act of 1974 occurring on or after  
22 the date of enactment of this Act.

23 (B) TRANSITION RULE.—In applying the  
24 amendment made by paragraph (2) (relating to  
25 applicable recovery amount), a breach or other

1 violation occurring before the date of the enact-  
2 ment of this Act which continues after the  
3 180th day after such date (and which may have  
4 been discontinued at any time during its exist-  
5 ence) shall be treated as having occurred after  
6 such date of enactment.

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