

AMENDMENT**OFFERED BY MR. KUHL OF NEW YORK AND MR.
ANDREWS OF NEW JERSEY**

At the end of title III of the bill (relating to other provisions), add the following new sections (and conform the table of contents accordingly):

1 **SEC. 304. OTHER AMENDMENTS RELATING TO PROHIBITED**
2 **TRANSACTIONS.**

3 (a) DEFINITION OF AMOUNT INVOLVED.—Section
4 502(i) of the Employee Retirement Income Security Act
5 of 1974 (29 U.S.C. 1132(i)) is amended to read as follows:

6 “(i)(1) In the case of a transaction prohibited by sec-
7 tion 406 by a party in interest with respect to a plan to
8 which this part applies, the Secretary may assess a civil
9 penalty against such party in interest. The amount of such
10 penalty may not exceed 5 percent of the amount involved
11 in each such transaction for each year or part thereof dur-
12 ing which the prohibited transaction continues, except
13 that, if the transaction is not corrected (in such manner
14 as the Secretary shall prescribe in regulations) within 90
15 days after notice from the Secretary (or such longer period
16 as the Secretary may permit), such penalty may be in an

1 amount not more than 100 percent of the amount in-
2 volved.

3 “(2) For purposes of paragraph (1)—

4 “(A) Except as provided in subparagraphs (C)
5 and (D), the term ‘amount involved’ means, with re-
6 spect to a prohibited transaction, the greater of—

7 “(i) the amount of money and the fair
8 market value of the other property given, or

9 “(ii) the amount of money and the fair
10 market value of the other property received.

11 “(B) For purposes of subparagraph (A), fair
12 market value—

13 “(i) shall be determined as of the date on
14 which the prohibited transaction occurs; and

15 “(ii) shall be the highest fair market value
16 during the period between the date of the trans-
17 action and the date of correction.

18 “(C) In the case of services described in sub-
19 section (b)(2) or (c)(2) of section 408, the term
20 ‘amount involved’ means only the amount of excess
21 compensation.

22 “(D) In the case of principal transactions in-
23 volving securities or commodities, the term ‘amount
24 involved’ means only the amount received by the dis-
25 qualified person in excess of the amount such person

1 would have received in an arm's length transaction
2 with an unrelated party as of the same date.

3 “(E) For the purposes of this paragraph—

4 “(i) the term ‘security’ has the meaning
5 given such term by section 475(c)(2) of the In-
6 ternal Revenue Code of 1986 (without regard to
7 subparagraph (F)(iii) and the last sentence
8 thereof) , and

9 “(ii) the term ‘commodity’ has the mean-
10 ing given such term by section 475(e)(2) of
11 such Code (without regard to subparagraph
12 (D)(iii) thereof).”.

13 (b) EXEMPTION FOR BLOCK TRADING.—Section
14 408(b) of such Act (29 U.S.C. 1108(b)), as amended by
15 section 601, is further amended by adding at the end the
16 following new paragraph:

17 “(15)(A) Any transaction involving the pur-
18 chase or sale of securities between a plan and a
19 party in interest (other than a fiduciary) with re-
20 spect to a plan if—

21 “(i) the transaction involves a block trade,

22 “(ii) at the time of the transaction, the in-
23 terest of the plan (together with the interests of
24 any other plans maintained by the same plan

1 sponsor), does not exceed 10 percent of the ag-
2 gregate size of the block trade, and

3 “(iii) the terms of the transaction, includ-
4 ing the price, are at least as favorable to the
5 plan as an arm’s length transaction.

6 “(B) For purposes of this paragraph, the term
7 ‘block trade’ includes any trade which will be allo-
8 cated across two or more client accounts of a fidu-
9 ciary.”.

10 (c) BONDING RELIEF.— Section 412(a) of such Act
11 (29 U.S.C. 1112(a)) is amended—

12 (1) by redesignating paragraph (2) as para-
13 graph (3);

14 (2) by striking “and” at the end of paragraph
15 (1); and

16 (3) by inserting after paragraph (1) the fol-
17 lowing new paragraph:

18 “(2) no bond shall be required of an entity
19 which is subject to regulation as a broker or a dealer
20 under section 15 of the Securities Exchange Act of
21 1934 (15 U.S.C. 78a et seq.) or an entity registered
22 under the Investment Advisers Act of 1940 (15
23 U.S.C. 80b-1 et seq.), including requirements im-
24 posed by a self-regulatory organization (within the
25 meaning of section 3(a)(26) of such Act (15 U.S.C.

1 78c(a)(26)), or any affiliate with respect to which
2 the broker or dealer agrees to be liable to the same
3 extent as if they held the assets directly.”.

4 (d) EXEMPTION FOR ELECTRONIC COMMUNICATION
5 NETWORK.—Section 408(b) of such Act (as amended by
6 subsection (b)) is further amended by adding at the end
7 the following:

8 “(16) Any transaction involving the purchase
9 and sale of securities or other property between a
10 plan and a fiduciary or a party in interest if—

11 “(A) the transaction is executed through
12 an exchange, electronic communication network,
13 alternative trading system, or similar execution
14 system or trading venue subject to regulation
15 and oversight by the applicable governmental
16 regulating entity,

17 “(B) neither the execution system nor the
18 parties to the transaction take into account the
19 identity of the parties in the execution of
20 trades,

21 “(C) the transaction is effected pursuant
22 to rules designed to match purchases and sales
23 at the best price available through the execution
24 system, and

1 “(D) the price and compensation associ-
2 ated with the purchase and sale are not greater
3 than an arm’s length transaction with an unre-
4 lated party.”.

5 (e) CONFORMING ERISA’S PROHIBITED TRANS-
6 ACTION PROVISION TO FERSA.—Section 408(b) of such
7 Act (29 U.S.C. 1106), as amended by subsection (d), is
8 further amended by adding at the end the following new
9 paragraph:

10 “(17)(A) transactions described in subpara-
11 graphs (A), (B), and (D) of section 406(a)(1) be-
12 tween a plan and a party that is a party in interest
13 (under section 3(14)) solely by reason of providing
14 services, but only if in connection with such trans-
15 action the plan receives no less, nor pays no more,
16 than adequate consideration.

17 “(B) For purposes of this paragraph, the term
18 ‘adequate consideration’ means—

19 “(i) in the case of a security for which
20 there is a generally recognized market—

21 “(I) the price of the security pre-
22 vailing on a national securities exchange
23 which is registered under section 6 of the
24 Securities Exchange Act of 1934, taking
25 into account factors such as the size of the

1 transaction and marketability of the secu-
2 rity, or

3 “(II) if the security is not traded on
4 such a national securities exchange, a price
5 not less favorable to the plan than the of-
6 fering price for the security as established
7 by the current bid and asked prices quoted
8 by persons independent of the issuer and
9 of the party in interest, taking into ac-
10 count factors such as the size of the trans-
11 action and marketability of the security,
12 and

13 “(ii) in the case of an asset other than a
14 security for which there is a generally recog-
15 nized market, the fair market value of the asset
16 as determined in good faith by a fiduciary or fi-
17 duciaries in accordance with regulations pre-
18 scribed by the Secretary.”.

19 (f) RELIEF FOR FOREIGN EXCHANGE TRANS-
20 ACTIONS.— Section 408(b) of such Act (as amended by
21 the preceding provisions of this section) is further amend-
22 ed by adding at the end the following new paragraph:

23 “(17) Any foreign exchange transactions, be-
24 tween a bank or broker-dealer, or any affiliate of ei-
25 ther thereof, and a plan with respect to which the

1 bank or broker-dealer, or any affiliate, is a trustee,
2 custodian, fiduciary, or other party in interest, if—

3 “(A) the transaction is in connection with
4 the purchase or sale of securities,

5 “(B) at the time the foreign exchange
6 transaction is entered into, the terms of the
7 transaction are not less favorable to the plan
8 than the terms generally available in com-
9 parable arm’s length foreign exchange trans-
10 actions between unrelated parties, or the terms
11 afforded by the bank or the broker-dealer (or
12 any affiliate thereof) in comparable arm’s-
13 length foreign exchange transactions involving
14 unrelated parties,

15 “(C) the exchange rate used by the bank
16 or broker-dealer for a particular foreign ex-
17 change transaction must be at a rate no less fa-
18 vorable than the rate quoted for transactions of
19 similar size at the time of the transaction as
20 displayed on an independent service that re-
21 ports rates of exchange in the foreign currency
22 market for such currency, and

23 “(D) the bank or broker-dealer, or any af-
24 filiate, does not have investment discretion, or

1 provide investment advice, with respect to the
2 securities transaction.”.

3 (g) DEFINITION OF PLAN ASSET VEHICLE.—Section
4 3 of such Act (29 U.S.C. 1002) is amended by adding
5 at the end the following new paragraph:

6 “(42) the term ‘plan assets’ means plan assets as de-
7 fined by such regulations as the Secretary may prescribe,
8 except that under such regulations the assets of any entity
9 shall not be treated as plan assets if, immediately after
10 the most recent acquisition of any equity interest in the
11 entity, less than 50 percent of the total value of all equity
12 interests in the entity are held by employee benefit plan
13 investors. For purposes of determinations pursuant to this
14 paragraph, the value of any equity interest owned by a
15 person (other than such an employee benefit plan) who
16 has discretionary authority or control with respect to the
17 assets of the entity or any person who provides investment
18 advice for a fee (direct or indirect) with respect to such
19 assets, or any affiliate of such a person, shall be dis-
20 regarded for purposes of calculating the 50 percent
21 threshold. An entity shall be considered to hold plan assets
22 only to the extent of the percentage of the equity interest
23 owned by benefit plan investors. For purposes of this para-
24 graph, the term ‘benefit plan investor’ means an employee
25 benefit plan subject to this part and any plan to which

1 section 4975 of the Internal Revenue Code of 1986 ap-
2 plies.”.

3 **SEC. 305. CORRECTION PERIOD FOR CERTAIN TRANS-**
4 **ACTIONS INVOLVING SECURITIES AND COM-**
5 **MODITIES.**

6 (a) IN GENERAL.—Section 408(b) of the Employee
7 Retirement Income Security Act of 1974 (29 U.S.C.
8 1108(b)), as amended by sections 304 and 601, is further
9 amended by adding at the end the following new para-
10 graph:

11 “(18)(A) Except as provided in subparagraphs
12 (B) and (C), a transaction described in section
13 406(a) in connection with the acquisition, holding,
14 or disposition of any security or commodity, if the
15 transaction is corrected before the end of the correc-
16 tion period.

17 “(B) Subparagraph (A) does not apply to any
18 transaction between a plan and a plan sponsor or its
19 affiliates that involves the acquisition or sale of an
20 employer security (as defined in section 407(d)(1))
21 or the acquisition, sale, or lease of employer real
22 property (as defined in section 407(d)(2)).

23 “(C) In the case of any fiduciary or other party
24 in interest (or any other person knowingly partici-
25 pating in such transaction), subparagraph (A) does

1 not apply to any prohibited transaction if, at the
2 time such transaction is discovered, such fiduciary
3 or party in interest (or other person) knew that the
4 transaction would (without regard to this para-
5 graph) constitute a violation of section 406(a).

6 “(D) For purposes of this paragraph, the term
7 ‘correction period’ means, in connection with a fidu-
8 ciary or party in interest (or other person knowingly
9 participating in the transaction), the 14-day period
10 beginning on the date on which such fiduciary or
11 party in interest (or other person) discovers, or rea-
12 sonably should have discovered, that the transaction
13 would (without regard to this paragraph) constitute
14 a violation of section 406(a).

15 “(E) For purposes of this paragraph—

16 “(i) The term ‘security’ has the meaning
17 given such term by section 475(c)(2) of the In-
18 ternal Revenue Code of 1986 (without regard to
19 subparagraph (F)(iii) and the last sentence
20 thereof).

21 “(ii) The term ‘commodity’ has the mean-
22 ing given such term by section 475(e)(2) of
23 such Code (without regard to subparagraph
24 (D)(iii) thereof).

1 “(iii) The term ‘correct’ means, with re-
2 spect to a transaction, to undo the transaction
3 to the extent possible, but in any case, to make
4 good to the plan or affected account any losses
5 resulting from the transaction and to restore to
6 the plan or affected account any profits made
7 through use of the plan. ”.

8 (b) **EFFECTIVE DATE.**—The amendments made by
9 this section shall apply to any transaction which the fidu-
10 ciary or disqualified person discovers, or reasonably should
11 have discovered, after the date of the enactment of this
12 Act, constitutes a prohibited transaction.