

May 2002

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Recommended Citation

Millon, David (2002) "Enron and the Dark Side of Worker Ownership," *Seattle Journal for Social Justice*: Vol. 1: Iss. 1, Article 9.

Available at: <https://digitalcommons.law.seattleu.edu/sjsj/vol1/iss1/9>

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Enron and the Dark Side of Worker Ownership

David Millon¹

Enron Corporation, once an exemplar of growth through innovation, now epitomizes a range of ailments afflicting corporate America. These include executive greed of obscene magnitude, deceitful earnings management and accounting tactics, woefully inattentive board oversight, ineffective disclosure requirements, and flaccid auditing practices.²

One area of special concern is the catastrophic effect of Enron's collapse on the retirement security of its lower-level employees. As Congress considers a range of possible reforms, one aspect of this disaster has not received much attention. The Enron 401(k) retirement plan, heavily and therefore fatally invested in Enron's own stock, was a vehicle for workers to participate in ownership of the business. Advocates on both ends of the political spectrum have promoted worker ownership for many years, for ideological as well as efficiency-based reasons. In this essay, I recall some of the arguments that have been advanced in support of increased opportunities for worker ownership in this country. I then caution that the Enron debacle reveals worker ownership's dark side in the publicly held corporation context.

WORKER OWNERSHIP IN AMERICA

Investor ownership dominates the American business landscape, but advocates of worker ownership can point to some notable exceptions. Many small-scale artisanal and other kinds of firms are organized as worker-owned cooperatives. The plywood manufacturing co-ops of the Pacific Northwest are a notable example.³ Worker ownership also prevails in many professional service industries, including law, accounting, investment banking, architecture, medicine, and others. Although recent legal developments encourage rejection of the traditional partnership form of organization in these

industries, limited liability companies and limited liability partnerships continue to be owned by their principals rather than by outside investors.

Through Employee Stock Ownership Plans (ESOPs), workers own shares in thousands of small and large business corporations in a broad range of industries. ESOPs are employee benefit plans funded by employer contributions of the company's own stock. Through its ESOP, United Airlines is the largest majority employee-owned company in the world, but 2,500 of the over 11,500 companies that have ESOPs in place are wholly or majority owned by their employees.⁴

Although not typically thought of in these terms, an increasingly important vehicle for worker ownership is the 401(k) retirement plan. These are defined-contribution plans. As such, they depend on employee contributions, typically supplemented by matching contributions from the employer. The employee usually is allowed to determine the allocation of his or her contribution among a number of investment options. Typically, the employer matches some percentage of the employee's contribution, with the match taking various forms depending on the plan. The employee's income tax liability is deferred as to his or her contributions, while the employer's contributions generate immediate tax benefits.

Retirement benefits under defined-contribution plans depend on the amounts contributed to the employee's individual account by the employee and employer and the performance of the assets in which those contributions are invested. The employee bears the risk that these investments may produce insufficient retirement resources. In contrast, defined-benefit plans require the employer to assume responsibility for funding the employee's post-retirement pension, typically calculated as a percentage of pre-retirement salary. The employer therefore bears the risk that it could be unable to meet these obligations.⁵

The most common type of defined-contribution plan is the 401(k). An estimated 42 million Americans participate in 401(k) plans, which hold a total of \$1.8 trillion in assets.⁶ Defined-contribution plans have replaced defined-benefit plans as the more common type of retirement program. As

of 1999, 42% of the private sector labor force participated in defined-contribution plans while only 25% participated in defined-benefit plans.⁷

The 401(k) plan facilitates worker ownership because ERISA allows individual accounts to invest in company stock. While individual plans vary, most allow employees to allocate their contributions entirely to the purchase of company stock.⁸ Many also provide that the employer's matching contribution must be entirely in the form of its own stock. Over 11 million workers participate in 401(k) plans that hold company stock.⁹ While ERISA limits company stock to 10% of the assets held by defined-benefit plans, no such limit applies to 401(k) plans in which the employee makes the investment decisions.¹⁰ The average amount of company stock in 401(k) plans holding such stock is approximately 30% of total asset value,¹¹ but plans at many large corporations hold far more. Concentrations of greater than 60% are not unusual¹² and company stock holdings at some plans are as high as 95%.¹³ As these data indicate, the spread of defined-contribution retirement plans is turning thousands of workers into owners of their corporate employers.

BENEFITS OF WORKER OWNERSHIP

Proponents of worker ownership point to a number of justifications. While some of these ideas depend on non-instrumental notions of human dignity, advocates also base their arguments on the beneficial consequences of worker ownership.

One set of arguments emerges from the critique of capitalism and emphasizes the elimination of conflict between capital and labor. Integrating work and ownership can make it possible for decisions about compensation and the organization and pace of work to be made in a non-adversarial manner. Control over work by the workers themselves promises to reduce exploitation and alienation and promote the possibility of self-actualization through work.¹⁴

A different ideological agenda justifies worker ownership by reference to notions of democratic self-governance. By transferring control from outside

investors to the workers themselves, worker ownership can facilitate democratization of decision-making within the workplace. In this regard, the values of “liberty and popular sovereignty” can be just as relevant to the economic context as they are assumed to be in the political arena.¹⁵ While self-governance may be defended as a good in itself, positive psychological consequences can include the sense of satisfaction that can come from being “one’s own boss.” In this regard, participation in workplace self-governance can also provide training for active involvement in a democratic society’s political processes.¹⁶

Efficiency benefits are also asserted. Although data are not entirely conclusive, worker ownership appears to increase firm productivity in many cases.¹⁷ Ownership can bring about higher worker effort levels through greater organizational commitment, motivation, and sense of being “part of a team.” Enhanced job satisfaction can increase worker morale, which in turn can favorably influence job performance. Because ownership gives workers a direct stake in the benefits of their own increased output, they know that they, rather than outside investors, will reap the fruits of their efforts.

A further efficiency benefit is the reduction of the costs of monitoring worker performance.¹⁸ Investor-owners face the challenge of ensuring that workers put forth sufficient effort. When workers are owners, as a group they bear the costs of low effort and therefore have an incentive to optimize their own effort levels. Although individual workers may still be inclined to shirk (because the individual enjoys the full benefit of leisure but bears only a fraction of the cost), they will have strong incentives to monitor each other’s activities and are likely to be able to do so more efficiently than non-employee investors acting through agents.

For the small-scale firm, an identity between ownership and management can enhance efficiency by reducing agency costs. To the extent owners are directly involved in management, their active self-interest should yield better decision-making than is likely to obtain under management by non-owner outsiders.¹⁹ Costs that otherwise would be involved in attempting to

ensure managerial accountability, either through enforcement of legal rules or through financial efforts to align the interests of non-owner managers with those of owners, are reduced or eliminated.

For larger-scale enterprises, in which share ownership is broadly dispersed among large numbers of workers—and often outside investors as well—worker ownership typically does not result in direct participation in management. Worker-owners must rely on agents to manage the firm in their interest and therefore face the same agency cost problem that investor-owners confront as a result of the separation between ownership and control. Nevertheless, even in large corporations worker ownership can reduce the costs of reliance on agents.²⁰ By virtue of firm-specific human capital investments and relatively limited exit options, workers have stronger incentives than outside investors to insist on management accountability. As a practical matter, they may be better positioned to act cooperatively to maximize their voting power in comparison to dispersed investor-owners facing significant collective action costs. Employees, being present, may also have better access to information about their agents' performance.

WORKER OWNERSHIP'S DARK SIDE

While support for worker ownership comes both from political progressives and from hard-nosed proponents of efficiency, Enron's recent collapse should remind everyone that there is a dark side to worker ownership. Under Enron's 401(k) plan, employees could contribute up to 15% of salary (subject to a ceiling) to their individual accounts. Employees could allocate their contributions entirely to Enron stock or could choose from among a number of well-diversified mutual funds.²¹ At the urging of Chief Executive Officer Ken Lay, lower-level Enron employees invested huge amounts of their 401(k) retirement savings in Enron stock.²² Enron's matching contributions were made entirely in Enron stock. That fact may itself have further encouraged employees to invest their contributions in company stock rather than in one or more of the other available investment vehicles.²³ While shares attributable to the employees' own contributions could be real-

located, the matching shares could not be sold until the account holders reached the age of 50.

As of January 2001, close to two-thirds of the assets held by the Enron 401(k) plan consisted of Enron's own common stock.²⁴ Many employees held even higher percentages in their individual accounts. The benefits to Enron were substantial. By funding its employees' retirement with its own stock, Enron was able to compensate its workers with a non-cash currency that—unknown to them—appeared to be far more valuable than it really was.²⁵ In the process, Enron's use of this overvalued currency for its 401(k) and ESOP contributions allowed it to purchase massive tax benefits at bargain prices.

For Enron's employees, the high levels of company stock in their retirement accounts were disastrous. When Enron's stock price collapsed—falling from a high of nearly \$90 per share in 2000 to its current price of about \$.25—employees lost up to 99% of the value of their retirement accounts. Fifteen thousand employees have seen the value of the company's 401(k) plan decline by \$1.3 billion since Enron's high water mark.²⁶ An administrative assistant named Deborah Perrotta, for example, lost not only her job but also \$40,000 in retirement savings.²⁷ Many others lost far more.²⁸

Prior to the crash, legal restrictions would have prevented employees from selling their ESOP and employer-match 401(k) shares in any event. However, the 401(k) Enron shares attributable to their own contributions that could otherwise have been reallocated to other investments were frozen during a crucial period—from October 29 to November 12, 2001—while a new plan administrator was assuming control. Even without the lockdown, however, these assets might as well have been illiquid because workers were unaware of the full extent of Enron's precarious financial condition. On October 16, the company had already made an unanticipated announcement of a \$618 million third-quarter loss (and \$1.2 billion reduction in shareholders' equity), but during the lockdown period Enron executives must have been planning for the Chapter 11 filing, which was made on December 2.

Of course, Enron's senior management labored under no such disabilities and behaved accordingly. Lay, while encouraging workers to keep buying Enron stock,²⁹ sold \$16 million worth of shares back to the company during August 2001 and kept on selling through October 26, the eve of the lockdown.³⁰ On September 24, Lay told employees that Enron stock was a great bargain, but didn't bother to mention that he himself had sold \$20 million worth during the previous six weeks.³¹ Lay had already made a \$20.7 million profit through exercise of Enron stock options earlier in the year.³²

The extreme lack of diversification that characterized Enron's 401(k) retirement plan, though legal,³³ obviously played a huge role in the hardship that has fallen upon its rank-and-file employees. The fundamental premise of modern financial economics is the importance of a diversified investment portfolio as a safeguard against industry-wide and firm-specific risk.³⁴ Generally speaking, as investors broaden their portfolios to include a range of stocks, they can reduce their risk to a level approaching that of the market as a whole. In contrast, by "putting all their eggs in one basket," Enron's employees were entirely at the mercy of that company's fortunes.

Unfortunately, the fate of Enron's employees is not unique. Several large corporations' 401(k) plans heavily funded with company stock have suffered similar losses, including Nortel Networks, Lucent Technologies, and Global Crossing Ltd.³⁵ Even greater disasters are possible: Over 80% of the securities held by retirement plans at Abbott Laboratories, Anheuser-Busch, BB&T, Coca-Cola, Pfizer, and Sherwin-Williams consist of the company's own stock; at Procter & Gamble the figure is nearly 95%.³⁶ Even if the risk of complete failure at these companies is remote, no single company's future can be predicted with certainty. Employees' retirement security at these companies is even more closely linked to the firm's future than it was at Enron and therefore far more risky than is necessary.

Plans like Enron's and those just mentioned provide a vehicle through which workers can participate in ownership of their employer. As such, they may provide many of the benefits touted by advocates of worker ownership.

Even so, Enron should make clear beyond doubt that those benefits can come at a great cost.

LESSONS FROM ENRON

Diversification

The huge losses suffered by workers at Enron and at other corporations whose now worthless retirement plans were heavily invested in company stock could have been avoided by diversification. This point is obvious, but it is made even more urgent by the additional risk that workers face due to the fact that their investments of human capital are unavoidably undiversified. Many jobs require workers to obtain special training, assimilate into a unique fabric of co-workers, and acquire knowledge about a particular company's culture. Because job requirements and work environments differ in important ways, workers cannot readily transfer these kinds of investment to a new employer. Their value is largely firm-specific, so, if the company fails, the employee loses not only any financial capital invested in the employer's stock but also his or her human capital investment. While diversification is not an option with regard to human capital investments (because people work at one job at a time), certainly the risk presented by this phenomenon should make financial diversification all the more urgent.

Several proposals now before Congress would address the diversification concern in various ways. One bill would limit company stock to 20% of the market value of an employee's 401(k) account.³⁷ Another would restrict company stock to 10% of the part of the individual's account attributable to his or her contributions.³⁸ The need for reform of this kind would seem to be obvious, but the Bush Administration's current proposal ignores this aspect of the diversification problem.³⁹ Business groups do not want to prevent employers from matching employee contributions with company stock, presumably because it's cheaper than using cash.⁴⁰ In addition, some supporters of the president's proposal apparently recognize the incentive effects that can flow from worker ownership.⁴¹

Mandatory diversification would also restrict employees' freedom of choice, but that argument should carry no weight in this context.⁴² Lower-wage employees often lack investment sophistication and therefore are especially prone to misunderstand the risk inherent in an undiversified retirement portfolio. They are actually more likely than higher-wage employees to over-invest in company stock,⁴³ even though lower-wage employees typically are much more dependent on their 401(k) plans for retirement security. Further, it is not just the employees themselves who bear the consequences of bad investment choices. Ultimately, the costs of inadequate retirement resources fall on society at large, to be assumed by private or public agencies.

In the larger context of debates over the benefits of worker ownership, legislatively mandated diversification would sharply curtail the use of the defined-contribution retirement plan as a vehicle for promotion of worker ownership. 401(k) plans are widely available, convenient, tax-advantageous, and subsidized by employers. As such, they are probably the easiest route to ownership for workers employed by large, public corporations. Diversification requirements would come at the cost of loss of this opportunity and the human dignity values and productivity gains that can flow from it. Even so, in light of the disastrous consequences of 401(k) investment in company stock at Enron and elsewhere, one can only hope that the momentum behind legislatively imposed diversification requirements is strong enough to override the president's position and the traditional arguments in favor of worker ownership.

Control

Enron should remind worker ownership proponents of the dangers posed by ownership without control. While lower-level workers were committing their retirement assets to Enron's apparently bright future, management was engaged in elaborate financial shell games, deceitful accounting practices, and increasingly risky projects, all designed to maintain earnings growth at all costs. Enron's obsession with quarterly earnings targets and short-term

stock prices is typical of the approach taken by most corporate managers nowadays.⁴⁴ Enron is not the first company to fall victim to this way of doing business. So far, though, it is the largest.

Non-employee investors have long understood that the value of their investments depends on management decision-making over which they have no real control. Corporate law and market forces exert some amount of pressure on management to perform effectively and responsibly, and equity-based compensation may align its interests with those of investors to a certain extent. But no one believes that these mechanisms are sufficient to ensure management accountability to shareholder interests. Although shareholders elect directors annually, except in unusual cases the vote is nothing but an endorsement of selections made by the CEO. There is and has been for many years a wide separation between ownership and control of our largest corporations.

The position of worker-owners in relation to management is not significantly different from that of outside investors. Many of the democratic values that are supposed to flow from worker ownership simply do not obtain in the public company setting. Self-governance is likely to be limited to the worker's immediate working environment if it is present at all. If it is present, it is typically based on management's commitment to new forms of work organization rather than on the fact that the workers own stock in the business. Since worker-owners almost never hold a majority or even a substantial minority voting interest in a corporation's stock through their 401(k) plans, control at the top level through election of representatives to the board simply does not occur.⁴⁵ Workers, even more than investor-owners, are at the mercy of management decisions over which they have no control.

Stock ownership may cause workers to feel more committed to their employers and heightened motivation may translate into higher productivity. Ownership should also result in a more equitable distribution of gains resulting from increased efficiency. Even so, Enron warns us that worker-owners are no less vulnerable than non-owners to the costs of corrupt, irresponsible, or incompetent managers. Ownership without control really amounts to little

more than a profit-sharing arrangement. The benefits to workers, whether political or financial, may not come close to offsetting their extreme vulnerability to bad decisions made by other people.

Information

Enron should also remind advocates of worker ownership of the risks involved in holding company stock in the absence of adequate information about the company's prospects. Federal securities laws mandate extensive disclosure requirements. As shareholders, Enron's employees had access to this information. Unfortunately, this proved to be of very limited value because Enron's accounting practices and public statements were designed to do whatever was necessary to encourage continued confidence in Enron stock. Employees were therefore just as ignorant as Enron's investor-owners and the creditors and professional analysts who failed to see what was coming.⁴⁶ Only Enron's executives understood the company's precarious, house-of-cards condition. As we have seen, they managed to sell millions of shares before the collapse.⁴⁷

Federal securities laws were insufficient to protect Enron's worker-owners, just as they failed to protect its other non-insider investors. While worker ownership in smaller-scale businesses may provide workers with important information about a company's financial condition, in the public corporation context share ownership may do very little to improve the informational disparity between management and workers. Under these circumstances, ownership is a very risky proposition. Outside investors can reduce the risk through diversification, but undiversified employee-owners like those at Enron stand to lose all of their savings. The informational handicap inherent in the ownership of public corporation stock is a further reason to question the value of worker ownership in that arena.

CONCLUSION

Worker ownership has drawn support from both ends of the political spectrum. It has been defended on ideological, human dignity grounds, and it has been said to enhance individual psychological well-being as well as

productive efficiency. Enron should provide an unmistakable warning of the serious dangers inherent in using retirement plans to promote worker ownership in the public corporation. To the extent that workers' financial investments in their companies are undiversified, they place their retirement security at serious risk, thereby magnifying the risk they already face as undiversified investors of their own human capital. Stock ownership in the public corporation context typically does not bring with it the opportunity to participate in control over the business' future. Nor does it necessarily provide access to essential information about risk. Worker-owners therefore find not only their job security but also their financial future at the mercy of people who may be unworthy of their trust. Despite worker ownership's many potential benefits in small business, the professions, and elsewhere, claims about its value in the public corporation context deserve skepticism of the highest degree.

¹ Associate Dean for Academic Affairs and J.B. Stombock Professor of Law, Washington and Lee University. I am grateful to my colleague Maureen Cavanaugh for helping me to understand some of the intricacies of employee retirement benefits law. Thanks also to Lyman Johnson and Susan Stabile for helpful criticism and suggestions.

² For a thorough exposition of the problems at Enron and a highly insightful analysis of their policy and theoretical implications, see William W. Bratton, *Enron and the Dark Side of Shareholder Value*, 76 TUL. L. REV. (forthcoming May 2002).

³ See EDWARD S. GREENBERG, *WORKPLACE DEMOCRACY: THE POLITICAL EFFECTS OF PARTICIPATION* (1986). The complex of worker-owned manufacturing and financial cooperatives at Mondragon, Spain, is the best known international example. See, e.g., WILLIAM FOOTE WHITE & KATHLEEN KING WHITE, *MAKING MONDRAGON* (2d ed. 1991).

⁴ The ESOP Association, *ESOP Statistics*, at <http://www.esopassociation.org/pubs/stats.html> (2002) (on file with the Seattle Journal for Social Justice). ESOPs now cover 8.5 million workers or approximately eight percent of the workforce. Approximately 1,000 ESOPs are associated with publicly-held companies; these companies employ over half of the nation's ESOP participants. Additionally, ESOPs provide other notable benefits to the corporations that establish them that have nothing to do with employee benefits. They have been criticized for that reason. See Michael W. Melton, *Demythologizing ESOPs*, 45 TAX L. REV. 363 (1990).

⁵ See JOHN H. LANGBEIN & BRUCE A. WOLK, *PENSION AND EMPLOYEE BENEFIT LAW* 45-55 (3d ed. 2000).

⁶ *Enron and Beyond: Enhancing Worker Retirement Security: Hearing before the Subcomm. on Employer-Employee Relations of the House Comm. on Education and the Workforce*, 107th Cong. 4 (2002) (statement of Prof. Jack L. VanDerhei).

⁷ STAFF OF JOINT COMM. ON TAXATION, 107TH CONG., *BACKGROUND INFORMATION RELATING TO THE INVESTMENT OF RETIREMENT PLAN ASSETS IN EMPLOYER STOCK* 1-02 13 (Comm. Print

2002). As was the case for employees at Enron, some private sector employees participate in both defined-contribution and defined-benefit plans.

⁸ PATRICK J. PURCELL, CONGRESSIONAL RESEARCH SERVICE, CRS REPORT FOR CONGRESS: THE ENRON BANKRUPTCY AND EMPLOYER STOCK IN RETIREMENT PLANS 3 (2002), available at <http://www.fei.org/gr/download/MoreEnron.pdf>.

⁹ *Enron and Beyond: Enhancing Worker Retirement Security: Hearing before the Subcomm. on Employer-Employee Relations of the House Comm. on Education and the Workforce*, 107th Cong. 2 (2002) (statement of Prof. Douglas Kruse).

¹⁰ ERISA exempts 401(k) plans from its general diversification requirement. See 29 U.S.C. §§ 1104(a)(2), 1107(b) (2001).

¹¹ *Enron and Beyond*, *supra* note 9, at Table 1.

¹² PURCELL, *supra* note 8, at 4.

¹³ See *infra* text accompanying note 36.

¹⁴ See Jon Elster, *Self-Realisation in Work and Politics: The Marxist Conception of the Good Life*, in ALTERNATIVES TO CAPITALISM 127 (Jon Elster & Karl Ove Moene eds., 1989).

¹⁵ SAMUEL BOWLES & HERBERT GINTIS, DEMOCRACY AND CAPITALISM 3 (1986).

¹⁶ See ROBERT A. DAHL, A PREFACE TO ECONOMIC DEMOCRACY 94–98 (1985).

¹⁷ See Joseph Blasi, Michael Conte & Douglas Kruse, *Employee Stock Ownership and Corporate Performance Among Public Companies*, 50 INDUS. & LAB. REL. REV. 60 (1996) (finding evidence of enhanced performance by public corporations in which employees own at least five percent of company stock).

¹⁸ See Armen A. Alchian & Harold Demsetz, *Production, Information Costs, and Economic Organization*, 62 AM. ECON. REV. 777 (1972).

¹⁹ See Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976).

²⁰ See Henry Hansmann, *When Does Worker Ownership Work? ESOPs, Law Firms, Codetermination, and Economic Democracy*, 99 YALE L.J. 1749, 1768 (1990).

²¹ See *The Enron Pension Investment Catastrophe: Why It Happened and How Congress Should Fix It: Hearing Before Senate Comm. on Government Affairs*, 107th Cong. 2 (2002) (statement of Prof. John H. Langbein). Enron also maintained an ESOP and a defined-benefit pension plan for its employees. *Id.*

²² Joann S. Lublin, *Managers & Managing: As Their Firms Topped, Some CEOs Prospered*, WALL ST. J. EUROPE, Feb. 27, 2002, at A8 (quoting Lay as stating in mid-August 2001: “Now is the time to buy Enron shares”). Lay himself was simultaneously selling millions of dollars worth of his own Enron shares. See *infra* text accompanying notes 30–31.

²³ See Shlomo Benartzi, *Excessive Extrapolation and the Allocation of 401(k) Accounts to Company Stock*, 56 J. FIN. 1747, 1752–54 (2001) (finding that workers at companies that match employee contributions with company stock are more likely to invest their own contributions in company stock). Benartzi also shows that employees tend to extrapolate excessively from past performance to unrealistic expectations about future performance. *Id.* at 1755–61. This would have been especially likely at a company like Enron that enjoyed such strong success prior to its crash.

²⁴ PURCELL, *supra* note 8, at 3.

²⁵ In a similar vein, Enron also used contributions of its overvalued stock to the ESOP to offset—and thereby reduce—its pension obligations under the defined-benefit pension plan. This may have been illegal, but if the pension plan was underfunded, a federal agency will be required to make up the short-fall. See Ellen E. Schultz, *U.S. Taxpayers May Have to Pay Enron Workers’ Pension Benefits*, WALL ST. J., Feb. 27, 2002, at C1.

²⁶ Louis Uchitelle, *The Rich are Different: They Know When to Leave*, N.Y. TIMES, Jan. 20, 2002, § 4, at 1.

²⁷ Albert B. Crenshaw, *Rich Employee, Poor Employee*, WASH. POST, Feb. 6, 2002, at E1.

²⁸ Richard A. Oppel, Jr., *Employees' Retirement Plan is a Victim as Enron Tumbles*, N.Y. TIMES, Nov. 22, 2001, at A1 (referring to married couples employed by Enron subsidiary who lost as much as \$900,000).

²⁹ See *supra* note 22.

³⁰ Allan Sloan, *One Enron Lesson: Some Insider Trading Falls Outside the Timely-Reporting Rule*, WASH. POST, Mar. 5, 2002, at E3. Investors were unaware of these transactions because SEC rules do not require disclosure of stock repurchases until 45 days after the close of the fiscal year. For Enron, that was February 14, 2002. *Id.*

³¹ Lay sold a total of \$70 million of stock to Enron during the 2001. *Id.*

³² Oppel, *supra* note 28.

³³ See *supra* note 11.

³⁴ See RICHARD A. BREALEY, AN INTRODUCTION TO RISK AND RETURN FROM COMMON STOCKS 101–21 (2d ed. 1983).

³⁵ Oppel, *supra* note 28.

³⁶ PURCELL, *supra* note 8, at 4.

³⁷ S. 1838, 107th Cong. (2001).

³⁸ H.R. 3463, 107th Cong. (2001). Another bill, recently introduced by Senator Kennedy, would prohibit employee 401(k) plan investments in company stock if the plan allows employer-matching contributions in company stock; the prohibition would not apply, however, if the employer maintains a qualifying defined-benefit pension plan. This bill seems designed more to create an incentive to maintain defined-benefit plans than to address directly the diversification problem. S. 1992, 107th Cong. (2002). See STAFF OF JOINT COMM. ON TAXATION, *supra* note 7, at 20–33, for a complete list of legislation concerning diversification requirements in 401(k) plans and related matters.

³⁹ See STAFF OF JOINT COMM. ON TAXATION, *supra* note 7, at 20 (summarizing the proposal).

⁴⁰ See Kathy Chen, *Questioning the Books: GOP Lawmakers Contest Bush's Ideas for Pension Plans*, WALL ST. J., Feb. 28, 2002, at A4.

⁴¹ Crenshaw, *supra* note 27.

⁴² See generally Susan J. Stabile, *Paternalism Isn't Always a Dirty Word: Can the Law Better Protect Defined Contribution Plan Participants?* 5 EMPLOYEE RTS. & EMP. POL'Y J. 491 (2001).

⁴³ See Colleen E. Medill, *The Individual Responsibility Model of Retirement Plans Today: Conforming ERISA Policy to Reality*, 49 EMORY L.J. 1, 21 (2000).

⁴⁴ For a critical perspective on this phenomenon, see JOSEPH FULLER & MICHAEL C. JENSEN, THE MONITOR GROUP, JUST SAY NO TO WALL STREET, at http://www.monitor.com/binary-data/MONITOR_ARTICLES/object/136.pdf (Jan. 23, 2002) (on file with the Seattle Journal for Social Justice). At Enron, senior executives received bonuses totalling \$320 million for reaching stock-price targets as of the end of 2000. Kurt Eichenwald, *Enron Paid Huge Bonuses in '01; Experts See a Motive for Cheating*, N.Y. TIMES, Mar. 1, 2002, at A1.

⁴⁵ Company stock in participant-directed 401(k) plans typically is voted by the employees themselves. In contrast, company stock held in ESOPs cannot be voted by the employees. Instead, the plan's trustee exercises voting rights, ostensibly on behalf of the plan's beneficiaries.

⁴⁶ Enron's ten largest shareholders were institutions holding from 11.4 to as many as 43 million shares. These investments lost 99.5% of their value in less than a year. Kenneth N. Gilpin, *Plenty of Pain to Go Around*, N.Y. TIMES, Dec. 4, 2001, at C8.

⁴⁷ See *supra* text accompanying notes 30–31.