Impact of Sarbanes-Oxley Act on Benefits and Executive Compensation

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In the wake of the Enron collapse and the recent corporate scandals at WorldCom and other companies, major accounting overhaul legislation, the Sarbanes-Oxley Act of 2002,[1] was enacted on July 30, 2002. In addition to its many corporate and accounting reforms, the Sarbanes-Oxley Act also contains provisions which are having a significant impact in the benefits and executive compensation area for public companies.[2] Major changes in this area include provisions to:

- Prohibit publicly-traded companies from making or arranging loans to their directors and executive officers;
- Expedite Securities and Exchange Commission (SEC) reporting of insider trades;
- Prohibit corporate directors and executive officers from trading employer securities during a plan blackout period with respect to those securities; and
- Require Employee Retirement Income Security Act (ERISA)-covered individual account plans to provide 30 days notice of blackout periods.

This article discusses these and other benefits and executive compensation provisions of the Sarbanes-Oxley Act.

EXECUTIVE LOANS

In reaction to reports of multi-million dollar loans to CEOs and other executives,[3] Congress added a provision to the Sarbanes-Oxley Act which prohibits a public company from directly or indirectly extending credit, or arranging for an extension of credit, in the form of a personal loan to a director or an executive officer of the company. This prohibition came in the form of an amendment of the Securities Exchange Act of 1934 (Exchange Act) and became effective immediately upon enactment on July 30, 2002.

While the term "executive officer" is not explicitly defined in the Sarbanes-Oxley Act, it is widely expected that the definition of the term in Rule 3b-7 under the Exchange Act will apply. Rule 3b-7 defines an executive officer as the president; any vice president in charge of a principal business unit, division, or function (such as sales, administration, or finance); and any other officer or other person who performs a policy-making function, including for a subsidiary. This definition is very similar to the definition of "officer" used for purposes of Section 16 of the Exchange Act, which contains the short swing profit liability rules and requires insiders to report trades in company stock.

Limited exceptions from this loan prohibition are made for:

- Certain extensions of consumer credit (e.g., credit cards, home improvement loans, or certain margin loans to employees of broker-dealers) made in the ordinary course of a company's consumer credit business, provided the credit terms for the executive are no more favorable than those available to the general public; and
- Certain loans made by banks.

Loans and other extensions of credit in effect on July 30, 2002, are not affected by the Sarbanes-Oxley Act, provided there is no material modification or any renewal of the loan on or after such date. Finally, the loan prohibition does not apply to investment companies registered under Section 8 of the Investment Company Act of 1940.[4]

Scope of Loan Provision

Sarbanes-Oxley Act Section 402 makes it unlawful for an issuer.

> directly or indirectly, including through any subsidiary, to extend or maintain credit, to arrange for the extension of credit, or to renew an extension of credit, in the form of a personal loan to or for any director or executive officer (or equivalent thereof) of that issuer.

The Sarbanes-Oxley Act does not define the term "personal loan," nor what it means "to extend, maintain or arrange for the extension of credit." Because the provision was added to the legislation as a floor amendment late in the process, there is no committee or conference report language that describes the intended scope of the key terms of the provision.

The broad wording of the provision, the limited list of exceptions, and the lack of any legislative history or SEC guidance to date, have raised concerns that many types of transactions, including routine, broadly available arrangements, may be prohibited as to executive officers and directors. These potentially prohibited "loans" include the following:

- Cashless option exercises with a broker arranged for by the employer;
- Employer payments of premiums under split-dollar life insurance arrangements;
- Loans from 401(k) and other qualified plans;
- Relocation loans and advances;
- Use of an employer-paid (or guaranteed) credit card for personal expenses;
- Payment of litigation expenses when an executive is sued over company-related matters,
- Advances for travel expenses; and
- Signing or retention bonuses which must be repaid (often with interest) if the executive terminates employment under certain circumstances.

Until there is some further guidance issued on the loan prohibition, many public companies are avoiding these types of transactions with executive officers and directors.

Congressional Guidance

As stated above, the conference report on the Sarbanes-Oxley Act provides no guidance on the scope of this provision, and further Congressional action to clarify the scope of, or provide further exemptions from, this provision is considered unlikely. It is possible, however, that Congress could consider the issue of loans from 401(k) and other qualified plans as part of an Enron-related pension bill.

Possible SEC Guidance

As stated above, the loan prohibition was added to the Exchange Act.

The SEC has broad rulemaking authority under the Exchange Act and under Sarbanes-Oxley Act Section 3(a). Congress, however, did not explicitly authorize the SEC to provide additional exemptions from the loan prohibition, unlike other sections of the Sarbanes-Oxley Act (e.g., Section 306—provisions restricting insider trades during blackout periods and Section 304—requiring forfeitures of bonuses, etc., if financial restatements are required).

Hopefully, the SEC will issue some interpretation of the provision indicating that some or all of the transactions listed above are permissible, but there are no guarantees.

Federal Securities and Other Laws

Pending SEC rules or interpretations on the loan prohibition provision, SEC rules in the compensation and benefits area may provide some guidance as to the scope of the provision. SEC rules in this area[5] generally indicate that less disclosure or scrutiny is required of:

- Small loan amounts;
- Advances for routine employee expenses;
- Arrangements made to facilitate cashless exercises of options; and
- Transactions occurring pursuant to generally applicable terms of a broad-based employee benefit plan.

The SEC's rules in the compensation and benefits area do not, however, provide much guidance on the scope of such terms as "personal loan" or "arranging an extension of credit." Thus, the SEC or a court may look to other areas for guidance.

Federal securities laws and SEC rules in other areas would probably be the first place to look for guidance. For example, similar language on "directly or indirectly extending credit or arranging for credit to or for an individual" is found in the rules on margin loans and broker-dealers under Section 7(c)(1) and 11(d)(1) of the Exchange Act. Thus, interpretations of these provisions by the SEC and the Board of Governors of the Federal Reserve System may provide guidance on the intended scope of the loan provision.

Absent helpful guidance in the federal securities law, the SEC or a court may look to other federal laws or state laws. A company's method of accounting for a transaction may also be a key factor in the analysis. The manner in which a transaction is treated by the company and the executive for federal income tax purposes may also be relevant.

Federal Tax Law

Federal securities laws and SEC rules in the compensation and benefits area do sometimes draw distinctions based on the federal tax treatment of a transaction or arrangement.[6] Thus, the SEC or a court may look to federal tax law in interpreting the scope of the loan prohibition, particularly since treatment as a loan is a critical distinction for such purposes.

Relevant Case Law A transfer of funds from an employer to an employee may be treated either as a nontaxable loan or as compensation for services taxable to the employee under the Internal Revenue Code Section 61(a)(1). Relevant case law provides that the proper treatment for such a transfer will be determined based on whether a true debtor-creditor relationship has been established, taking into account all the facts and circumstances surrounding the transfer.[7] The primary factors courts have examined in determining whether such a relationship has been established include:

- The existence of a written note;
- Formal action by the employer authorizing the loan;
- The recording of the debt on the employer's books;
- The existence of a repayment schedule;
- The accrual of interest on the debt at an agreed rate;
- The existence of collateral for the debt; and
- Actual repayments made and/or the likelihood of repayments.[8]

When a significant number of these factors are present, loan treatment for federal income tax purposes has typically been approved by the courts.[9] If very few or none of these factors are present, however, courts have held that the amounts received under purported loans should be treated as taxable compensation income to the employees.[10] Often, these cases involve loans to owners and/or situations where the employee receives reduced (or no) other taxable compensation for his services while receiving the purported loans.[11]

IRS Technical Advice Memorandum The IRS recently addressed whether certain loans with forgiveness provisions were bona fide loans or taxable compensation in Technical Advice Memorandum 200040004 (the TAM). Of course, unlike a regulation or other official IRS announcement on which it is intended that taxpayers rely, a TAM will not be entitled to judicial deference as an agency interpretation.

In the TAM, the IRS concluded that the loans at issue should not be

treated as loans for federal income tax purposes. According to the IRS, the loans at issue in the TAM were evidenced by notes providing for repayment of principal and interest in five annual installments, and were secured by employer stock held by the employee-borrowers. The loans provided for forgiveness of unpaid principal and interest upon the death or disability of the employee-borrower or termination of employment other than for cause.

The IRS acknowledged that the loans in question appeared "in form" to be bona fide loans. The IRS concluded they were not loans "in substance," however, largely because the loans did not create an unconditional and personal obligation on the part of the employee to repay the loans. Thus, the IRS placed great emphasis on whether loans were likely to actually be repaid.

Proposed Split-Dollar Regulations The IRS recently issued proposed regulations which—for arrangements after final rules are published—would require employer payments of premiums under certain split-dollar life insurance arrangements to be treated as loans.[12] The sort of arrangement which will warrant this treatment is referred to commonly as a "collateral assignment" split-dollar arrangement. Existing split-dollar arrangements may, but generally are not required to, be treated as loans for tax purposes, however.[13]

Analysis of Particular Types of Loans

Public companies and their advisers have been struggling to interpret this loan prohibition and decide which, if any, of the transactions listed above are still permissible. Summarized below are some thoughts on the types of potential loans which have been of great interest to these companies.

Cashless Exercise of Options The cashless exercise of an option through a broker has few, if any, of the typical features of a loan (e.g., a note, repayment schedule, interest, or collateral). Such an arrangement, however, may involve the extension of credit from the issuer or the "arranging" of credit by the issuer (where the issuer sets up the arrangement for the executive with a broker). While Senator Charles Schumer did not mention cashless exercises when he introduced the loan provision,[14] he was recently quoted as saying that he believed the provision did apply to these types of arrangements.[15]

It seems that the particular mechanics of a cashless exercise transaction need to be understood to evaluate whether there is an extension of credit to the executive. An extension of credit could result if the issuer

delivers the option shares before receiving the exercise price (the issuer extends credit) or if the broker advances the exercise price to the issuer before it receives the option shares from the company (the issuer arranges for the broker to extend credit).

As stated above, the SEC has provided exemptions or relaxed requirements in the compensation area for broadly-based plans or arrangements, as well as specifically for cashless option exercise procedures. Further, under federal tax law, such an extension of credit has few, if any, of the characteristics of a loan. Hopefully, the SEC will issue some sort of relief for these programs, particularly where they are available under broadly-based stock option plans.

In the meantime, permissible alternatives to cashless exercise programs exist for executive officers and directors. These individuals should be able to pay the exercise price of their options with previously acquired shares of company stock or to obtain loans from their own brokers to effect a cashless exercise.

Split-Dollar Arrangements Like a cashless option exercise transaction, a split-dollar life insurance arrangement has few, if any, of the typical indicia of a loan. Again, while Senator Schumer did not mention split-dollar arrangements when he introduced the loan provision,[16] he was quoted as saying that the provision was intended to ban these types of arrangements.[17]

On split-dollar arrangements, the consensus among practitioners seems to be that "collateral assignment" arrangements, as opposed to endorsement arrangements, are of principal concern. Collateral assignment arrangements look more like loans, as the executive is generally treated as the owner of the policy, and the employer typically only has the right to be repaid the premiums it paid on the policy upon the death of the executive. As stated above, under the IRS's proposed regulations, these collateral assignment arrangements may need to be treated as loans for federal tax purposes, albeit only in the future. Hopefully, the SEC will issue guidance at least indicating that endorsement arrangements will not be treated as loans under this provision.

While premium payments made prior to July 30, 2002, pursuant to an existing split-dollar policy are exempt from the Sarbanes-Oxley Act provision, if such an arrangement is of a type prohibited by the provision, an issue arises as to premium payments after such date. If an employer was obligated to make premium payments under the arrangement pursuant to a pre-July 30 agreement with the executive, then any such premium payments arguably should not be treated as new extensions of credit.

If no such contractual obligation existed before July 30th, however, premium payments after this date are even more problematic. Employers may wish to work out a deferral of premium payments under such an arrangement with the relevant insurance company rather than risk a new extension of credit to an executive.

Loans from Qualified Plans Unlike some of the other transactions listed above, loans from 401(k) and other qualified plans do have most or all of the typical features of a loan. As with cashless exercise programs, the potential problem with these loans is that the company may be seen as "arranging" a loan to an executive from a third party (the plan) with which it has a relationship.

For several reasons, it is hoped that the SEC will issue some interpretive relief for loans from 401(k) and other qualified plans. First, as stated above, the SEC has provided exemptions or lesser requirements in the compensation area for broadly-based plans. Second, as stated above, the SEC has provided exemptions or lesser requirements for small loans, and, under the tax laws, plan loans may not exceed $50,000. Third, in most cases, the participant—and not the company—bears the loss if a plan loan is not repaid. Finally, the ERISA rules for participant loans[18] generally require that plan loans be available to all participants and beneficiaries on a reasonably equivalent basis. Thus, there could be prohibited transaction issues under ERISA if plan loans were not available to executive officer participants.

Risks of Violating Prohibition

Sarbanes-Oxley Act Section 1106 also increased the already significant penalties for a willful violation of the Exchange Act.[19] An individual could now face a fine of up to $5 million or imprisonment for up to 20 years. A corporation can now be fined up to $25 million for a willful violation. Thus, public companies would be well advised to take the conservative approach and not engage in any potentially prohibited transaction with an executive officer or director unless the SEC issues an applicable exemption or provides clarification that a transaction is not an "extension of credit . . . in the form of a personal loan."

EXPEDITED SEC REPORTING FOR INSIDER TRADES

The Exchange Act was also amended, effective August 29, 2002, to require directors, officers, and 10 percent owners to report to the SEC

transactions involving company stock or swap agreements involving company stock, by the end of the second business day following the date of the transaction. Within one year of enactment:

- Reports will need to be filed electronically;
- If the company maintains a Web site, the reports must be available on the Web site by the end of the business day following the date of the filing; and
- The SEC will also have to make these reports available on its Web site by the end of the business day following the date of the filing.

In August, the SEC issued rules implementing the new two-day reporting requirements.[20] The rules make clear that, in addition to transactions which previously were required to be reported on a Form 4, the two-day reporting deadline will also apply to the following types of benefit plan transactions:

- Grants, awards, and acquisitions of issuer equity securities from the issuer exempt under Exchange Act Rule 16b-3(d), such as grants of options;
- Dispositions of issuer equity securities to the issuer exempt under Rule 16b-3(e), such as a sale of shares to the issuer pursuant to the exercise of an option; and
- Rule 16b-3(f) "discretionary transactions," such as movements of 401(k) plan funds between a company stock fund and another investment option.

Most transactions involving a company stock fund option under a nonqualified deferred compensation plan (including the "investment" of periodic deferrals into the fund) will also be subject to the new two-day rule.

The types of transactions described above were previously reportable on Form 5 up to 45 days after the end of a company's fiscal year. The SEC rules make clear that all transactions under "tax-conditioned plans" other than "discretionary transactions" (as such terms are defined under Rule 16b-3) remain exempt from reporting.

As authorized by the Sarbanes-Oxley Act, the SEC rules provide for limited extensions of the two-day deadline for transactions pursuant to arrangements that meet the affirmative defense conditions of Exchange Act Rule 10b5-1(c) and "discretionary transactions," provided the insider does not select the date of execution. Such transactions will need to be reported within two business days after the insider receives notice of the transaction, but the notification date may be no later than the third busi-

ness day after the transaction is executed.

Finally, the SEC stated that it is still considering issuing rules requiring expedited disclosures of Rule 10b5-1 plans and company loans and guarantees.

FORFEITURE OF BONUSES AND STOCK GAINS

If a public company is required to restate financial statements filed with the SEC as a result of misconduct, Sarbanes-Oxley Act Section 304 requires the company's CEO and CFO to pay the company an amount equal to:

- Any bonus, incentive award, or equity-based compensation received by the executive during the 12-month period beginning on the date the statements were first filed with the SEC, and
- Any profits realized by the executive on the sale of company stock during this 12-month period.

The amounts to be paid under these provisions are very unclear. Further, the provisions appear to apply to such an officer even if he or she was not involved in the misconduct resulting in the restatements. Finally, there appears to be no requirement that the amount forfeited be related to the period subject to restatement. The SEC is, however, given explicit authority to exempt persons from these provisions as it deems necessary and appropriate.

INSIDER TRADING DURING BLACKOUT PERIODS

Sarbanes-Oxley Act Section 306 make it unlawful for directors and executive officers of a public company to acquire or transfer any company equity securities during a "blackout period" at an individual account plan with respect to the equity security. The prohibition applies with respect to those securities acquired in connection with the director or the executive officer's service or employment as a director or officer. The issuer or an owner of the issuer security may bring an action to recover for the issuer any profits realized on such a transaction by the director or executive officer. This provision is effective January 26, 2003, but good faith compliance will be treated as satisfying the requirements until applicable regulations are issued.

The term "blackout period" is defined for this purpose as a period of more than three consecutive business days during which the ability of at least 50 percent of participants or beneficiaries (under all individual

account plans of the issuer) to purchase, sell, or otherwise acquire or transfer an equity security of the issuer is temporarily suspended. The term "blackout period" does not include:

- Regularly scheduled periods in which participants cannot purchase or transfer equity securities of the issuer if the periods are incorporated into the plan and timely disclosed to participants, or
- Suspensions imposed solely in connection with persons becoming participants or ceasing to be participants because of a corporate merger, acquisition, or divestiture involving the plan or plan sponsor.

Issuers are required to timely notify the SEC and affected directors and executive officers of any such blackout period.

The SEC is authorized to issue rules to provide exceptions to the prohibition for purchases pursuant to automatic dividend reinvestment programs or purchases or sales made pursuant to advance elections.

NOTICE TO PARTICIPANTS OF BLACKOUT PERIODS

Sarbanes-Oxley Act Section 306 also amends ERISA Section 101 to require plan administrators to provide affected participants and beneficiaries with at least 30 days advance written notice of any "blackout period" with respect to an ERISA-covered individual account plan. If a required notice is not provided, the Department of Labor (DOL) may assess a civil penalty against the plan administrator of $100 per participant for each day the notice is late.

The term "blackout period" is defined differently for this notice provision. Specifically, a blackout period is any period in which the ability of participants or beneficiaries of an individual account plan to direct or diversify assets in their accounts, obtain loans, or obtain distributions, which is otherwise available under the terms of the plan, is temporarily suspended, limited, or restricted for any period of more than three consecutive business days. The term "blackout period" does not include a suspension, limitation, or restriction which:

- Occurs by reason of federal securities laws,
- Applies in connection with a qualified domestic relations order (QDRO), or
- Is a change to the plan which provides for a regularly scheduled suspension, limitation, or restriction which is disclosed to participants through a summary of material modifications, any materials describ-

ing specific investment alternatives under the plan, or any changes thereto.

Notices may be provided as soon as reasonably possible under the circumstances if (1) the blackout is due to unforeseeable or uncontrollable circumstances or (2) the deferral of the period would violate the ERISA fiduciary rules and a plan fiduciary reasonably so determines in writing. Notices also need only be provided as soon as reasonably practicable under certain circumstances if the blackout is due to a merger, acquisition, or similar transaction involving the plan or the plan sponsor.

Notices must be written in a manner understandable by the average plan participant and must include:

- Reasons for the blackout;
- An identification of the investments and other rights affected;
- The expected beginning date and length of the blackout period;
- When investment directions are affected, a statement that participants should evaluate the appropriateness of current investments in light of their inability to direct or diversify assets during the blackout period; and
- Any other matters required by the DOL in regulations.

Notices may be given in electronic form if reasonably accessible to participants. If the blackout applies to investments in employer securities, the plan administrator is also required to notify the issuer.

If there is a change in the beginning date or length of the blackout period, the plan administrator is required to provide affected participants with notice as soon as reasonably practicable.

This blackout notice provision is effective January 26, 2003, but good faith compliance will be treated as satisfying the requirements until applicable regulations are issued. Any plan amendments that may be required due to the new requirements do not have to be made before the first plan year beginning on or after the effective date, so long as the plan is operated in good faith compliance during the interim period and the amendment is retroactive to the effective date.

TOUGHER ERISA CRIMINAL PENALTIES

The maximum criminal penalties for persons who willfully violate the reporting and disclosure rules of ERISA are increased under Sarbanes-Oxley Act Section 904. For individuals, the maximum fine is increased from $5,000 to $100,000, and for nonindividuals the maximum fine is

increased from $100,000 to $500,000.[21] The maximum prison sentence is increased from one year to 10 years.

ATTORNEYS' DUTY TO REPORT VIOLATIONS

Under Sarbanes-Oxley Act Section 307, the SEC is to issue rules by January 26, 2003, which will require an attorney who represents public companies before the SEC to inform a company's chief legal counsel or CEO when the attorney has evidence of a "material violation of securities law or breach of fiduciary duty or similar violation" by the company or its agents. If the informed executive does not appropriately respond, the rules will require the attorney to report the problem to the audit committee of the company's board of directors, another board committee comprised solely of nonemployee directors, or the full board. The potential impact of this reporting duty on possible ERISA fiduciary breaches is unclear.

CONCLUSION

The Sarbanes-Oxley Act is already having a major impact on executive loan programs and insider trading reporting for public companies. The blackout provisions are also likely to have a significant effect on benefit plan administration. This first installment of the Congressional response to corporate scandals such as Enron, could be followed by additional changes in the laws governing benefit plans and executive compensation arrangements. Hopefully, SEC and DOL guidance will facilitate compliance and allow nonabusive, broad-based programs to continue with minimal disruption.

NOTES

1. Pub L No. 107-204.

2. Generally, the relevant provisions of the Sarbanes-Oxley Act apply to "issuers" as defined in Sarbanes-Oxley Act Section 2(a)(7). This term includes organizations beyond those typically described as "publicly traded."

3. *See* 148 Cong Record, July 12, 2002, at S6690 (comments of Senator Charles Schumer (D-NY) introducing the loan provision as an amendment to the bill).

4. Sarbanes-Oxley Act Section 405, Pub L No. 107-204.

5. *See* Item 404(c) of Regulation S-K (requiring disclosure of directors' and executive officers' indebtedness to issuer); SEC Release 33-8090 (April 12, 2002) (proposing reporting of loans to directors and executive officers on Form 8-K); Item 601(b)(10)(iii) of Regulation S-K (rules on filing executive plans, contracts and arrangements as exhibits to Forms 10-K and 10-Q); Exchange Act

Rule 16b-3, 17 CFR 240.16b-3 (exemptions from short swing profit rules).

6. *See, eg,* Securities Act of 1933 § 3(a)(2): Investment Company Act of 1940 § 3(c)(11); Exchange Act Rule 16b-3, 17 CFR 240.16b-3. In other areas, however, the SEC rules do not distinguish between tax-favored and other plans. *See, eg,* Item 402 of Regulation S-K; Securities Act Rule 701, 17 CFR 230.701; Form S-8 under the Securities Act of 1933.

7. *See, eg,* Haber v Commissioner, 52 TC 255 (1969), *aff'd per curiam,* 422 F2d 198 (5th Cir 1970).

8. *See, eg, Haber,* 52 TC at 266; Haag v Commissioner, 88 TC 604 (1987), *affd,* 855 F2d 855 (8th Cir. 1988)(*affd without opinion*); Fisher v Commissioner, 54 TC 905 (1970). *See also* Joint Committee on Taxation, Description of Chairman's Modifications to the "National Employee Savings and Trust Equity Guarantee Act" (JCX-74-02), July 9, 2002.

9. *See, eg,* Haag, 88 TC at 616; Gales v Commissioner, 77 TCM (CCH) 1316 (1999) , *acq,* A.O.D. 1999-011; Dennis v Commissioner, 73 TCM (CCH) 3061 (1997).

10. *See, eg,* Haber, 52 TC at 266; McCormack v Commissioner, 52 TCM (CCH) 1321 (1987); Nix v Commissioner, 44 TCM (CCH) 105 (1982).

11. *See, eg,* Haber, 52 TC at 266; McCormack, 52 TCM (CCH) at 1322-23; Nix, 44 TCM (CCH) at 106-08.

12. 67 Fed Reg 45,414 (July 9, 2002).

13. *See* id and IRS Notice 2002-8, 2002-4 IRB 398.

14. *See* endnote 3.

15. JB Treaster and T Rozhon, "Doubts Grow on 'Covering' of Options," *N.Y. Times,* Aug 30, 2002.

16. *See* endnote 3.

17. T Rozhon and JB Treaster, "Insurance Plans of Top Executives Are in Jeopardy," *N.Y. Times,* Aug 29, 2002.

18. ERISA § 408(b)(1).

19. Securities Exchange Act of 1934 § 32(a).

20. SEC Release Nos. 34-46421; 35-27563; IC-25720; File No. S7-31-02 (Aug 27, 2002); *See also* SEC Release No. 34-46313; File No. S7-31-02 (Aug 6, 2002).

21. ERISA § 501.