

This outline is a modified version of the legislative update speech Marc Sciscoe presented on 9/5/02.

RETIREMENT LEGISLATIVE UPDATE



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September 5, 2002**

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RETIREMENT LEGISLATIVE UPDATE

I. Corporate and Auditing Accountability, Responsibility, and Transparency Act of 2002 [a.k.a.Sarbanes – Oxley Act of 2002 (H.R. 3763)]

This legislation was signed into law July 30, 2002.

A. Background

1. ERISA places few limitations on the ability of a profit sharing or stock bonus plan to invest in employer stock/special provisions encourage ESOPs.
 - a. The stock must be a qualifying employer security, i.e., stock, a marketable obligation, or an interest in a publicly-traded partnership. (ERISA, §407(a)(1))
 - b. 10% limitation applicable to defined benefit plans does not apply to an eligible individual account plan (i.e., a profit sharing or stock bonus plan that expressly provides for the acquisition of employer securities).
 - c. In general, ERISA requires that plan assets be diversified so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so/normal ERISA diversification requirements do not apply to acquisition or holding of qualifying employer securities.
 - d. Special provisions apply if 401(k) arrangement requires elective deferrals to be invested in employer securities.
2. Large pension losses caused by corporate meltdowns.
 - a. In most of the affected plans, investments in employer stock were made at the participant's direction.
 - b. Securities law claims
 - c. ERISA claims
 - i. misrepresentation
 - ii. imprudence
 - iii. lock-in or black-out

B. Sec. 306 – Prohibition of Insider Trades During Pension Fund Blackout Periods

1. Insider trades are prohibited during a blackout period, if the equity security was acquired through services as a director or officer of an issuer. Proceeds received due to such a transaction must be returned to the issuer regardless of intent.
 - a. Issuer - means an issuer (as defined in section 2 of the Securities Exchange Act of 1934 (15 U.S.C. 78c)), the securities of which are registered under section 12 of that Act (15 U.S.C. 781), or that is required to file reports under section 15(d) (15 U.S.C. 78o(d)), or that files or has filed a registration statement that has not yet become effective under the Securities Act of 1933 (15 U.S.C. 77a et seq.), and that it has not withdrawn.
 - b. Blackout period – in general, any period of more than 3 consecutive business days during which the ability of at least 50% of the participants or beneficiaries under all individual account plans of the issuer to buy or sell an interest in any employer security is suspended.
 - i. A blackout period does not include a regularly scheduled period where participants and beneficiaries are prohibited from purchasing, selling, or transferring an interest in any equity if such period is –
 - (I) incorporated in the plan document; and
 - (II) timely disclosed to employees before becoming participants under the plan or as a subsequent amendment to the plan; or
 - ii. any suspension period imposed only when persons become participants or beneficiaries or cease to be participants or beneficiaries in an plan by reason of a corporate merger, acquisition, divestiture or similar transaction involving the plan or plan sponsor.
 - c. Issuer must notify SEC and affected directors or officers of blackout period.
 - d. Actions to recover profits from transactions described in paragraph 1 may be brought within 2 years. May be brought as a derivative action.
2. ERISA is amended to require notice by the plan administrator of an impending blackout period (as defined in subsection (e)). The plan

administrator must notify participants of individual account plans and issuers of any employer securities subject to a blackout period.

- a. The notice must include:
 - i. the reasons for the blackout period,
 - ii. an identification of the investments and other rights affected,
 - iii. the expected beginning date and length of the blackout period,
 - iv. if investments are affected, a statement advising the participant or beneficiary to evaluate the appropriateness of their current investment decisions keeping in mind their inability to direct or diversify assets credited to their accounts during the blackout period, and
 - v. any other items mandated by the Secretary through regulation.
- b. Notices described in the paragraph above must be provided to participants and beneficiaries at least 30 days in advance of the blackout period.
 - i. Exceptions: The 30 day advance notice requirement is not applicable in any situations when a plan fiduciary determines in writing that:
 - (I) a deferral of the blackout period would violate ERISA §404(a)(1)(A) or (B);
 - (II) the inability to provide the 30-day advance notice is due to events unforeseeable or circumstances beyond the control of the plan administrator;
 - ii. When an above described exception exists the notice must be provided to all plan participants and beneficiaries to whom the blackout period applies as soon as reasonably possible under the circumstances unless such a notice in advance of the termination of the blackout period is impracticable.
 - iii. Notices may be provided in electronic form.
- c. This notice requirement does not apply to blackout periods in connection with a merger, acquisition, divestiture, or similar

transaction involving the plan or plan sponsor and occurs only when a person becomes or ceases to be a participant or beneficiary due to the plan merger, acquisition, divestiture, etc. The notice requirement will be satisfied in this situation if the notice is provided to all participants and beneficiaries to whom the blackout period applies as soon as reasonably practicable.

- d. Participants and beneficiaries must be notified of any changes in the length of the blackout period as soon as reasonably practicable.
- e. A blackout period, in regards to this notice requirement, means in connection with an individual account plan any period for which any ability of participants or beneficiaries under the plan, which is otherwise available under the plan, to direct or diversify assets credited to their accounts, to obtain loans from the plan, or to obtain distributions from the plan is temporarily suspended, limited, or restricted for any period of more than 3 consecutive business days.

[Note: The notice requirement definition of a blackout period differs significantly from the definition regarding the insider trading rules. The insider trading rules provisions define a blackout period as a 3-day period where at least 50% of participants/beneficiaries are impeded from freely trading. The notice requirement provisions define a blackout period in broader terms. Specifically, the period consists of a 3-day period when any participant/beneficiary is restricted from freely shifting his accounts among investment options.]

- f. A blackout period does not include a suspension, limitation or restriction:
 - i. that occurs due to the application of the securities laws,
 - ii. a plan change that provides for a regularly scheduled suspension, limitation, or restriction that is disclosed to participants or beneficiaries through a summary of material modifications or other materials describing specific investment alternatives under the plan, or
 - iii. pursuant to a QDRO.
- g. Civil Penalties for Failure to Provide the Notice – the Department of Labor may impose a civil penalty on the plan administrator of up to \$100 a day from the date of the administrator's failure or refusal to provide notice to participants and beneficiaries; each

violation to any single participant/beneficiary will be treated as a separate violation.

[Note: This penalty has the potential to be significantly higher than the penalty related to the insider trading provisions.]

- h. Effective Date – 180 days after the date of the enactment of this Act (July 30, 2002).

C. Sec. 402 – Enhanced Conflict of Interest Provisions

- 1. General Rule – Executives and directors are prohibited from receiving personal loans by the corporation.

- 2. Exceptions:

- a. loans for home improvement/manufactured homes,
- b. consumer credit loans,
- c. extension of credit under an open end credit plan or a charge card,
or
- d. an extension of credit by a broker or dealer

that are (i) made in the ordinary course of the consumer credit business of the issuer, (ii) generally made available by the issuer to the general public, and (iii) on market terms or terms that are no more favorable than those offered by the issuer to the general public.

- e. Loans made by institutions subject to the insider lending restrictions of the Federal Reserve Act are also exempt from the General Rule.

D. Sec. 904 – Criminal Penalties for Violations of ERISA

Penalties are increased under ERISA Section 501 to include:

- 1. a monetary fine of up to \$100,000 (previously \$5,000); and/or
- 2. imprisonment of up to 10 years (previously 1 year).
- 3. The maximum fine imposed on a person not an individual is \$500,000 (previously \$100,000).

II. National Employee Savings and Trust Equity Guarantee Act (S. 1971)

- A. Sponsor: Senator Charles E. Grassley
- B. Latest major action: 8/2/02 – placed on legislative calendar
- C. Stated Goal: To protect the retirement security by ensuring the diversification of pension assets and by providing workers with adequate access to and information about their pension plans.
- D. Key Provisions:
 - 1. Diversification Requirements
 - a. Generally apply to plan years beginning on or after January 1, 2003.
 - b. Apply only to “applicable defined contribution plans.” An applicable defined contribution plan is any defined contribution plan that holds publicly traded employer securities.
 - Exception for ESOPs with no 401(k), employee after-tax, or employer matching contributions.
 - c. Adds a new Section 401(a)(35) to the Internal Revenue Code and Section 204(j) to ERISA.
 - d. Participants must be able to invest elective deferrals (and earnings thereon) contributed to their account in the form of publicly traded employer securities in any other investment option offered under the plan.
 - e. Participants with 3 or more years of service must have the right to invest any publicly traded employer securities allocated to their accounts in any other investment option offered under the plan.
 - f. Plan must offer at least 3 investment options.
 - g. Plan may not impose restrictions or conditions on the investment of publicly traded employer securities that are not imposed on the investment of other plan assets (other than restrictions or conditions required by securities laws).

2. Protection of participants from suspension of ability to diversify plan assets
 - a. Generally apply to plan years beginning on or after January 1, 2003.
 - b. Apply only to “applicable defined contribution plans.” For this purpose, an applicable defined contribution plan is a defined contribution plan that permits a participant to direct the investment of his account.
 - c. Imposes excise taxes under Code and civil penalties under ERISA for failure to provide prior notice of a transaction suspension period.
 - d. “Transaction suspension period” means a temporary or indefinite period of 2 or more consecutive days during which there is a substantial reduction (other than by reason of securities laws) in the rights of 1 or more participants to direct investments in a defined contribution plan.
 - e. The plan administrator must provide a written notice of any transaction suspension period to each participant to whom the transaction suspension period applies (and to any employee organization representing such participants).
 - f. In general, the notice must be given at least 30 days before the beginning of the transaction suspension period.
3. Certain sales and purchases of company stock by corporate insiders subject to excise tax on golden parachute payments
 - a. Generally, this provision will apply to sales and exchanges occurring more than 120 days after enactment.
 - b. If there is a sale or exchange of company stock in a corporation by a corporate insider while a transaction suspension period affecting the ability of participants to invest company stock is in effect with respect to a defined contribution plan, any amount realized by the corporate insider on the sale or exchange will be treated as an excess parachute payment.
4. New Code requirement regarding periodic pension benefit statements
 - a. Generally, this requirement will be effective for plan years beginning after December 31, 2003.

- b. Apply only to "applicable defined contribution plans." An applicable defined contribution plan is any defined contribution plan that permits a participant to direct the investment of his account.
- c. An applicable defined contribution plan must furnish a pension benefit statement to a plan participant at least once each calendar quarter and to a plan beneficiary upon written request but no more frequently than once during a 12-month period.
- d. In general, the benefit statement must indicate the total benefits accrued and the nonforfeitable pension benefits, if any, or the earliest date on which benefits will become nonforfeitable. This statement must also include the value of any assets held in the form of employer securities and an explanation of any limits or restrictions on the right of the participant to direct investment of his accounts; and an explanation of the importance, for the long-term retirement security of participants, of a well-balanced and diversified investment portfolio including a discussion of the risk of holding substantial portions of a portfolio in the security of one entity.
- e. The statement may be provided in written, electronic, or other appropriate form.
- f. Imposes on the employer a tax of \$100 per participant or beneficiary each day a plan is noncompliant with this requirement.

III. Protecting America's Pensions Act of 2002 (S. 1992)

- A. Sponsor: Senator Edward M. Kennedy
- B. Latest Major Action: 7/26/02 – placed on legislative calendar
- C. Stated Goal: To provide requirements for diversification of plan assets, disclosure, account access, and accountability for defined contribution plans that are individual account plans.
- D. Key Provisions:
 - 1. Diversification Requirements
 - a. The effective date of this provision will be determined after the enactment of this Act.
 - b. Generally applies to individual account plan under which employee may direct investments.

- i. Exception for employers that maintain a defined benefit plan in addition to the individual account plan.
 - ii. Defined benefit plan must cover at least 90% of the participants covered by the individual account plan and provide the minimum accrual rate.
- c. Prohibits allowing elective deferrals to be invested in employer securities if employer contributions are invested in employer securities.
 - d. A plan that offers an investment option through an open brokerage account must prohibit the purchase of employer securities through such option.
 - e. Adds a new Section 404(e) to ERISA.
 - f. Plan must offer at least 3 investment options in addition to employer securities.
 - g. Plan must give participant the immediate right to reinvest any employee contributions and elective deferrals invested in employer securities in any other investment option provided by the plan.
 - h. Plan must give participant the right after no more than 3 years of service under the plan to reinvest any employer contributions of employer securities in any other investment option provided by the plan.
 - Exception for ESOPs that have no contributions (or earnings) that are subject to Section 404(k)(3) or (m) of the Code.
 - i. Plan must provide pass-through voting rights for publicly-traded employer securities.
 - j. The plan must effectuate an investment change within 30 days after the participant's election.
 - Exception where plan provides fixed investment periods.
 - k. At least 30 days before a participant may elect to reinvest employer securities, plan must provide participant with a notice of his rights and describe the importance of diversification.
 - l. Secretary of Labor should within one year provide to the Committee on Education Workforce of the House and the Committee on Health, Education, Labor, and Pensions of the

Senate recommendations as to whether newly enacted ERISA Section 404(e) should be applicable to nonpublicly traded securities and if so the Secretary should propose appropriate legislation.

2. Protection for fiduciaries who designate and monitor qualified investment advisers.
3. Pension Benefit Disclosure Requirements
 - a. The administrator of an individual account plan must provide quarterly benefit statements to participants in a plan that permits participant direction and to a participant upon request.
 - b. The administrator of a defined benefit plan must furnish a benefit statement at last once every 3 years to each participant and to a participant upon request.
 - c. Contents of statement are similar to those required by the Grassley bill/more stringent warning of risks of failing to diversify.
 - d. Civil penalties of up to \$1,000 a day may apply against a plan administrator for the failure or refusal to provide participants or beneficiaries with the benefit statement on at least a quarterly basis.
 - e. Material investment information must be provided to participants or beneficiaries in an accurate form and misleading information will be treated as a violation of this provision.
 - f. Disclosure of insider trading must be reported to the SEC and the issuer's website. In addition, any participants who do not have access to the website must be provided a written disclosure in an appropriate form.
4. Access and Accountability Requirements
 - a. Generally apply to plan years beginning after the date of the enactment of this Act. The plan administrator must provide a written notice of any lockdown period 30 days prior to such period. The lockdown period must be a reasonable period of time.
 - b. Employers are not protected from fiduciary liability in regard to investments during the lockdown time period. This legislation also directs the Secretary of Labor to issue guidelines and establish safe harbors to help guide fiduciaries during this period.

- c. Plan fiduciaries of plans that have more than 100 participants or beneficiaries must have adequate insurance to protect plan participants or beneficiaries.
- d. In the case of a participant who is entitled to a distribution under a defined benefit plan, the administration must inform the participant of his right to receive calculations and worksheets.
- e. Fiduciary liability is extended to insiders who hold publicly traded stock and can normally participate in or conceal a breach of fiduciary duty.
- f. Joint boards of trustees are required to hold plan assets in a trust where participants or beneficiaries equal 100 or more.
- g. The right to a civil action between a participant or beneficiary and the plan sponsor may not be waived.
- h. An Office of Pension Participant Advocacy must be created in the Department of Labor.
- i. PBGC must provide a report regarding the potential for the development of an insurance system for individual account plans.
- j. Secretary should issue a report that discloses the fees charged by individual account plans to participants.
- k. This legislation provides for additional enforcement measures, including remedies against actions that interfere with ERISA protected rights. Protections for whistleblowers are also included in the legislation.
- l. Plan administrators of plans with more than 100 participants or beneficiaries are required to provide specific information comparing lump sum distributions and other forms of benefits, if participants have these choices regarding their distributions options.

IV. American Competitiveness and Corporate Accountability Act of 2002 (H.R. 5095)

- A. Sponsor: Representative William M. Thomas
- B. Latest Major Action: 7/11/02 –Referred to the House Committee on Ways and Means.
- C. Stated Goal: To improve and simplify compliance with the internal revenue laws.

D. Key Provisions:

1. Inclusion in gross income the funded deferred compensation of corporate insiders—Section 403 of the Bill.
2. Requires that deferred compensation of any disqualified individual under a funded deferred compensation plan must be included in the gross income of the disqualified individual for the first taxable year in which no substantial risk of forfeiture exists.
 - a. Defines funded deferred compensation plan as any plan that provides for the deferral of compensation.
 - b. Exceptions:
 - i. The employee's rights to the deferred compensation must not be greater than the rights of a general creditor of the employer;
 - ii. All amounts set aside for use to fund the deferred compensation and all attributable income must remain solely the property of the employer; and
 - iii. The amounts referred to in paragraph (ii) above must be available to satisfy the claims of the employer's general creditors at all times.

V. Diversification Legislation

- A. Places limits on the amount of employer securities that may be held by each worker and encourage diversification of plan assets. (H.R. 3692)
- B. Limits the value of individual account plans from being more than 10% invested in employer securities. (H.R. 3677)
- C. Allows participants to diversify their accounts at least quarterly, if invested in employer securities. (H.R. 3677)
- D. Amends ERISA to limit employer stock investment to 20%. (H.R. 3640)
- E. Amends ERISA to permit employees to reinvest employer securities allocated to the employees accounts within 90 days of the allocation. (H.R. 3640)
- F. Amends IRC to allow employees to diversify assets held in ESOPs after 5 years and after the employee has reached age 35. (H.R. 3640)

- G. Amends IRC to reduce an employer's deduction by 50% for employee matching contributions made in employer securities to defined contribution plans. (H.R. 3640)

VI. Blackout Provisions

- A. Prohibits lockdowns for vested participant accounts. (H.R. 3677)
- B. Requires a 30 day notice to participants before a lockdown and limits a lockdown to ten business days.

VII. Insider Trading Provisions

- A. Mandates disclosure regarding the sale of securities by an officer/director in an electronic form:
 - 1. to the Commissioner by the end of the calendar day following the calendar day of the transaction;
 - 2. to the public by the Commission; and
 - 3. on the internal website, if one is maintained by the corporate website, by the end of the calendar day following the calendar day of the transaction. (H.R. 3769)

VIII. Investment Account and Other Disclosure Requirements

- A. Requires plan sponsors to provide semi-annual reports to participants/beneficiaries that fully and accurately disclose the financial health of the plan sponsor and advises the participants of the importance of diversification. (H.R. 3642)
- B. No annual return requirement for qualified or participant retirement plans with less than \$250,000 in plan assets. (H.R. 3762)
- C. Simplified annual return filing process for retirement plans that cover 25 or fewer employees. (H.R. 3762)
- D. Amends ERISA and the Code to require spousal consent for distributions from defined contribution plans. (S. 2707)
- E. Applies joint and survivor annuity rules to defined contribution plans. (S. 2707)

IX. Participant/Beneficiary Access and Fiduciary Accountability Provisions

- A. Amends ERISA and IRC to provide vesting to participants who have completed 3 years of plan participation. (H.R. 3677)

B. Reduces the vesting period from 3 years to 1 year. (H.R. 3657)

X. Secretary of Treasury and Labor Reports Requested by Proposed Legislation

A. Secretary of Treasury should:

1. continue to update and improve the Employee Plans Compliance Resolution System; and
2. modify specified IRC rules relating to pension plan non-discrimination, coverage, and line of business requirements.

(H.R. 3762)

B. Secretary of Labor should:

1. provide revised regulations requiring timely notifications of suspension of pension benefits when a recipient returns to work for an employer from whose pension plan they are currently receiving a retirement annuity; and
2. study and report on (i) model small employer group plans and (ii) the effects of this act on pension plan coverage.

(H.R. 3762)

XI. Small Employer Pension Plan Provisions

A. Proposed legislation would provide a reduction in rates for PBGC premiums for new plans of small employers, sets a flat rate premium at \$5 per plan participant for the first five years of a new single-employer plan with 100 or fewer employees. (H.R. 3762)

B. Proposed legislation would reduce PBGC additional premiums for new and small plans; the variable-rate premium for a new-defined benefit plan is phased in over a five-year period; limits this premium to no more than \$5 times the number of plan participants for small employer plans (25 or fewer employees). (H.R. 3762)

XII. Miscellaneous Provisions

A. Proposed legislation would modify rules for substantial owner benefits and terminated plans:

1. to reduce phase-in periods for guaranteed benefits for 10% or more owner regarding a plan termination; and
2. to reply to allocation of asset rules to a substantial owner with less than 50% ownership and equivalent manners of the participants.

(H.R. 3762)

- B. Proposed legislation would require a formulary revision for a special interest rate range for additional funding requirements for pension plans for the PBGC. (H.R. 3762)
- C. Proposed legislation would provide that an employee would not include an amount in gross income only because he may choose between a qualified retirement planning service provided by a qualified investment advisor and compensation that would normally be included in gross income. (H.R. 3669)

XIII. Cash Balance Plan Legislation (House Amendment 562 to H.R. 5120)

1. House Amendment 562 to H.R. 5120, as Offered by Sanders of Vermont (Treasury-Postal Appropriations)

None of the funds appropriated by this Act may be used by the Internal Revenue Service for any activity that is in contravention of Internal Revenue Service Notice 96-8 issued on January 18, 1996, section 411(b)(1)(H)(i) or section 411(d)(6) of the Internal Revenue Code of 1986, section 204(b)(1)(G) or 204(b)(1)(H)(i) of the Employee Retirement Income Security Act of 1974, or section 4(i)(1)(A) of the Age Discrimination in Employment Act of 1967. (Approved 308-121 on July 24, 2002.)

2. Cash balance plan/defined benefit plan with certain attributes that resemble a defined contribution plan
 - a. Technically defined benefit plans
 - b. Define benefit by reference to account balance
 - c. Manner of Communication
3. Proponents' Arguments
 - a. Easier to understand
 - b. Only defined benefit plan that reflects current employment patterns
 - c. Provide more security than 401(k) plans

- d. Fairer to women
- 4. Opponents Arguments
 - a. Subterfuge for cutbacks
 - b. Discriminate on the basis of age
 - c. Cash balance plans violate IRS lump sum rules
- 5. Litigation
 - a. Eaton v. Onan
 - b. Lyons v. Georgia Pacific and Esden v. First Boston
- 6. IRS Guidance
 - a. Preamble to proposed regulations
 - b. Notice 96-8
 - c. Determination letter program
 - d. Status of future guidance

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APPENDIX A

Corporate and Auditing Accountability, Responsibility, and Transparency Act of 2002 [a.k.a.Sarbanes – Oxley Act of 2002 (H.R. 3763)]

Omnibus Corporate Reform and Restoration Act of 2002 (H.R. 5110)

National Employee Savings and Trust Equity Guarantee Act (S. 1971)

Protecting America's Pensions Act of 2002 (S. 1992)

Treasury and General Government Appropriations Act, 2003 (H.R. 5120)

American Competitiveness and Corporate Accountability Act of 2002 (H.R. 5095)

Women's Pension Protection Act of 2002 (S. 2707)

Retirement Savings Security Act of 2002 (H.R. 4931)

Insider Trading Full Disclosure Act of 2002 (H.R. 3769)

Pension Protection and Diversification Act of 2002 (H.R. 3692)

Safeguarding America's Retirement Act of 2002 (H.R. 3677)

Employee Pension Freedom Act of 2002 (H.R. 3657)

401(k) Pension Right to Know Act of 2002 (H.R. 3642)

Pension Protection and Diversification Act of 2002 (H.R. 3640)

Employee Savings Protection Act of 2002 (H.R. 3623)

Pension Security Act of 2002 (H.R. 3762)

Employee Retirement Savings Bill of Rights (H.R. 3669)

Retirement Account Protection Act of 2001 (H.R. 3509)

Ending the Double Standard for Stock Options Act (S. 1940)

Pension Plan Protection Act (S. 1921)

Retirement Security Protection Act of 2002 (S. 1919)

Emergency Worker and Investor Protection Act of 2002 (H.R. 3622)

Pension Protection and Diversification Act of 2001 (S. 1838)

Pension Protection Act (H.R. 3463)

Retirement Security Advice Act of 2001 (S. 2269)

Independent Investment Advice Act of 2001 (S. 1677)