

COVINGTON & BURLING

1201 PENNSYLVANIA AVENUE NW
WASHINGTON, DC 20004-2401
TEL 202.662.6000
FAX 202.662.6291
WWW.COV.COM

WASHINGTON
NEW YORK
LONDON
BRUSSELS
SAN FRANCISCO

October 2002

COMPENSATION AND BENEFIT POINTERS

This issue of Compensation and Benefit Pointers identifies a variety of significant current developments affecting executive compensation and employee benefit programs.

- **Plan Amendment Deadlines:** The Economic Growth and Tax Relief Reconciliation Act of 2001 (“EGTRRA”) made major changes in the laws governing tax-qualified retirement plans. In many cases, an employer must adopt *good faith* EGTRRA plan amendments by December 31, 2002, in order to be eligible to adopt *final* EGTRRA amendments during an extended remedial amendment period (which will not expire before the end of 2005). Employers with pending applications for GUST determination letters, employers with non-calendar-year plans, and employers that do not wish to implement optional EGTRRA provisions immediately might have more time to adopt some or all of the *good faith* EGTRRA amendments.
- **Blackout Period Restrictions:** The Sarbanes-Oxley Act restricts trading in certain shares of employer stock by directors and executive officers during certain blackout periods under a public company’s individual account retirement plans. (Blackout periods often occur when a plan changes investment funds or recordkeepers.) The Act also requires the administrator of an individual account plan to provide advance notice of certain blackout periods to affected participants and beneficiaries. The notice requirement applies regardless of whether the employer is a public company, and includes a definition of blackout period that differs from the definition in the Act’s trading-restriction provision.
- **Ban on Personal Loans to Executives:** The Sarbanes-Oxley Act generally prohibits a public company from making, or arranging for, a personal loan to an executive officer or director. This broadly-written provision raises questions about the lawfulness of many commonplace arrangements that might be viewed as providing for personal loans to executives, including split-dollar life insurance, broker-assisted cashless exercise arrangements under stock option plans, relocation loans, and § 401(k) plan loans. In general, it is advisable for public companies to review their compensation, benefit, and expense reimbursement arrangements in light of this provision.
- **Tax Treatment of Split-Dollar Life Insurance:** The IRS has published proposed regulations that would fundamentally alter the tax treatment of split-dollar life insurance arrangements entered into after final regulations are issued. Existing arrangements are covered by transition rules set forth in IRS Notice 2002-8, which gives employers and executives a number of planning opportunities to consider regarding the handling of existing split-dollar arrangements.
- **ERISA Obligations of Directors and Officers:** The U.S. Department of Labor (the “DoL”) has filed an amicus brief in the ERISA litigation against Enron’s directors and

officers, including the members of the Compensation Committee of Enron’s Board of Directors, Enron’s CEO (Ken Lay), and the members of Enron’s Administrative Committee (the named fiduciary of Enron’s benefit plans). The DoL contends that the defendants might have breached their fiduciary duty to disclose to participants material information about serious threats to Enron’s plans. The DoL also contends that Enron’s directors and officers might have breached their duty to monitor the Administrative Committee’s performance or incurred co-fiduciary liability for fiduciary breaches by the Administrative Committee (e.g., because they withheld from the Committee material information regarding Enron’s financial condition). Employers might wish to consider whether their current plans and procedures adequately address the DoL’s arguments.

- **“Youth” Discrimination:** The U.S. Court of Appeals for the Sixth Circuit has held, in *Cline v. Dynamics Land Systems, Inc.*, that the Age Discrimination in Employment Act provides a cause of action for employees within the protected class (employees age 40 or older) who claim that their employer discriminated against them on the basis of age because of its more favorable treatment of employees *older* than themselves. This controversial conclusion conflicts with the views of a number of other courts, and calls into question the legality of such arrangements as retiree health plans and early retirement window programs that cover only some employees over age 40 (e.g., only those retiring after attaining age 55).

The lawyers in Covington & Burling’s Employee Benefits Group play a leading role in advising and representing employers in employee benefits matters. We frequently appear before the Congress, federal agencies, and federal courts to resolve major issues of law, policy, and finance. Our employee benefits practice covers all types of benefit arrangements, from pension, profit-sharing, and stock bonus plans (including 401(k) plans, ESOPs, and multiemployer plans), to medical, life insurance and other welfare benefit arrangements, as well as executive compensation and incentive programs.

Members of Covington & Burling’s Employee Benefits Group			
John M. Vine 202.662.5392 jvine@cov.com	Amy N. Moore 202.662.5390 anmoore@cov.com	Richard C. Shea 202.662.5599 rshea@cov.com	Julie M. Edmond 202.662.5123 jedmond@cov.com
Michael J. Francese 202.662.5413 mfrancese@cov.com	Robert S. Newman 202.662.5125 rnewman@cov.com	Monique J. La Fleur 202.662.5374 mlafleur@cov.com	Michael L. Hadley 202.662.5269 mhadley@cov.com
Seth J. Safra ^{*/} 202.662.5411 ssafra@cov.com	Eric J. Brignac ^{**/} 202.662.5351 ebrignac@cov.com	Kathryn A. Capone ^{***} 202.662.5074 kcapone@cov.com	
^{*/} Admitted in Maryland, but not admitted in the District of Columbia. ^{**/} Admitted in North Carolina, but not admitted in the District of Columbia. ^{***/} Not a lawyer; Employee Benefits Compliance Specialist.			

This memorandum provides general information, not legal advice as to any specific matter. It should not be used as a substitute for appropriate legal advice.

www.cov.com

© 2002 Covington & Burling