

MEMO# 14944

July 23, 2002

SENATE-PASSED ACCOUNTING REFORM LEGISLATION INCLUDES NOTICE REQUIREMENT FOR "BLACKOUT PERIODS" INVOLVING COMPANY STOCK

[14944] July 23, 2002 TO: PENSION COMMITTEE No. 28-02 PENSION OPERATIONS ADVISORY COMMITTEE No. 48-02 RE: SENATE-PASSED ACCOUNTING REFORM LEGISLATION INCLUDES NOTICE REQUIREMENT FOR "BLACKOUT PERIODS" INVOLVING COMPANY STOCK The "Public Company Accounting Reform and Investor Protection Act of 2002" (S. 2673), which passed the Senate by a 97-0 vote on July 15, includes among its provisions a general prohibition against directors and executive officers purchasing, selling, or otherwise acquiring or transferring their company stock during any blackout period with respect to the stock under an individual account plan. In addition, under section 306(a)(2) of S. 2673, no such blackout period generally could take effect earlier than 30 days after the date on which written notice of the blackout period was provided by the plan administrator to plan participants and beneficiaries.¹ A copy of section 306 of S. 2673 is attached. Under section 306(e), the term "blackout period" would mean any period during which the ability of not fewer than 50 percent of the participants and beneficiaries to purchase, sell, or otherwise acquire or transfer an interest in any company stock held in an individual account plan was suspended by the company or a fiduciary of the plan. The term, however, would not include (1) a period in which employees may not allocate their interests in the individual account plan due to an express investment restriction (a) incorporated into the plan; and (b) timely disclosed to employees before joining the plan or as a subsequent amendment to the plan; or (2) any suspension imposed solely in connection with persons becoming participants or beneficiaries, or ceasing to be participants and beneficiaries, in a plan by reason of a corporate merger, acquisition, divestiture, or similar transaction. In addition, the 30-day notice requirement would not apply if the deferral of a blackout period would violate section 404(a)(1)(A) or (B) of ERISA, or if the inability to provide the 30-day notice was due to unforeseeable events or circumstances beyond the reasonable control of the plan administrator. These two exceptions would apply only if a plan administrator reasonably determined in writing that they were applicable. The Securities and Exchange Commission would have rulemaking authority to clarify the application of these provisions "to ensure adequate notice to all persons affected by this subsection, and to prevent evasion thereof."¹

¹ The notice could be provided in electronic form to the extent that such form was reasonably accessible to the recipient. ² S. 2673 would also increase the criminal penalties for willful violations under section 501 of ERISA. Under section 904, the maximum fine for individuals would increase from \$5000 to \$100,000, the maximum term of imprisonment would increase from one year to 10 years, and the maximum fine for entities other than

individuals would increase from \$100,000 to \$500,000. A copy of section 904 is also attached. Kathy D. Ireland Associate Counsel Attachments Attachment no. 1 (in .pdf format)

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