MEMO# 14966

July 30, 2002

PRESIDENT BUSH SIGNS ACCOUNTING REFORM MEASURE, WHICH INCLUDES NOTICE REQUIREMENT FOR BLACKOUT PERIODS

[14966] July 30, 2002 TO: PENSION MEMBERS No. 35-02 PENSION OPERATIONS ADVISORY COMMITTEE No. 51-02 RE: PRESIDENT BUSH SIGNS ACCOUNTING REFORM MEASURE, WHICH INCLUDES NOTICE REQUIREMENT FOR BLACKOUT PERIODS President Bush today signed into law the "Sarbanes-Oxley Act of 2002," which includes retirement-related provisions concerning blackout periods and criminal penalties under ERISA. A copy of these provisions of the Act is attached. Blackout Periods Under section 306(a) of the Act, company directors and executive officers are prohibited from trading in company stock during any blackout period with respect to the stock, if the stock was acquired in connection with their service or employment as directors or executive officers. The term "blackout period" in this context is defined as any period of more than 3 consecutive business days during which the ability of not fewer than 50 percent of the participants and beneficiaries under all individual account plans maintained by the company to purchase, sell or otherwise acquire or transfer an interest in any company stock is temporarily suspended by the company or a fiduciary of the plan. The term, however, does not include, under regulations prescribed by the SEC, (1) a regularly scheduled period in which participants and beneficiaries are so restricted if (a) the period is incorporated into the plan; and (b) timely disclosed to employees before becoming participants under the plan or as a separate 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, by reason of a corporate merger, acquisition, divestiture, or similar transaction. If the restrictions of this subsection are applicable to a director or executive officer, the company must "timely notify" both the director or executive officer and the SEC of the blackout period. The Act authorizes the SEC, in consultation with the Secretary of Labor, to issue rules to clarify this provision and to provide for appropriate exceptions. Section 306(b) of the Act amends section 101 of ERISA to require a plan administrator to notify affected participants and beneficiaries of an individual account plan 30 days in advance of any blackout period. The term "blackout period" is broader in this context than in the preceding subsection, and includes any period of more than 3 consecutive business days for which any ability of participants and beneficiaries, which is otherwise available under the terms 2 of the plan, to direct or diversify the assets credited to their accounts, or to obtain loans or distributions from the plan, is temporarily suspended, limited, or restricted. The plan administrator must also provide notice "as soon as reasonably practicable" of any change in the beginning date or length of the blackout period after the

provision of the 30-day notice, and must provide “timely notice” to the issuer of any blackout period with respect to company stock. Section 306(b)(7)(B) excludes from the definition of “blackout period” a suspension, limitation, or restriction that (1) occurs by reason of the application of the securities laws; (2) is a change to the plan that provides for a regularly scheduled suspension, limitation or restriction that is disclosed through any summary of material modifications, any materials describing specific investment alternatives, or any changes thereto; or (3) applies only to 1 or more individuals, each of whom is the participant, an alternate payee, or any other beneficiary pursuant to a qualified domestic relations order. In addition, exceptions to the 30-day notice requirement apply if the deferral of the blackout period would violate section 404(a)(1)(A) or (B) of ERISA, or if the inability to provide the 30-day notice is due to events that were unforeseeable or circumstances beyond the reasonable control of the plan administrator. These exceptions apply only if a fiduciary of the plan reasonably determines in writing that they are applicable. If an exception applies, then the notice need not be provided 30 days in advance, but must be furnished to all 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. The Secretary of Labor is authorized to provide by regulation additional exceptions to the requirements of section 306(b) that the Secretary determines are in the interests of participants and beneficiaries. The notice must be written a manner calculated to be understood by the average plan participant and must include (1) the reasons for the blackout period; (2) an identification of the investments and other rights affected; (3) the expected beginning date and length of the blackout period; (4) in the case of investments affected, a statement that the participant or beneficiary should evaluate the appropriateness of their current investment decisions in light of their inability to direct or diversify assets credited to their accounts during the blackout period; and (5) such other matters as the Secretary of Labor may require by regulation. The notice generally must be provided in writing, but may be in electronic or other form to the extent that such form is reasonably accessible to the recipient. The requirements of section 306 do not apply to one-participant retirement plans. Furthermore, if the blackout period applies only to 1 or more participants or beneficiaries in connection with a merger, acquisition, divestiture, or similar transaction and occurs solely in connection with becoming, or ceasing to be, a participant or beneficiary by reason of the transaction, then the notice can be provided to those to whom the blackout period applies “as soon as reasonably practicable.” The Secretary of Labor is authorized to assess a civil penalty against a plan administrator of up to $100 a day for a failure or refusal to provide the required notice, with each violation with respect to any single participant or beneficiary treated as a separate violation. In addition, the Secretary is directed to issue initial guidance and a model notice not later than January 1, 2003, and to issue interim final rules not later than 75 days after the date of enactment. Section 306 takes effect 180 days after the date of enactment. 3 Criminal Penalties Under ERISA Section 904 of the Act increases the criminal penalties for willful violations under section 501 of ERISA. The maximum fine for individuals increases from $5000 to $100,000, the maximum term of imprisonment increases from one year to 10 years, and the maximum fine for entities other than individuals increases from $100,000 to $500,000. Kathy D. Ireland Associate Counsel Attachment Note: Not all recipients receive the attachment. To obtain a copy of the attachment, please visit our members website (http://members.ici.org) and search for memo 14966, or call the ICI Library at (202) 326-8304 and request the attachment for memo 14966. Attachment (in .pdf format)