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<http://prod.resource.cch.com/resource/scion/document/default/09013e2c857786c8?cfu=TAA>

Intended, at least in part, to protect 401(k) plan accounts from the effects of corporate fraud, the Sarbanes-Oxley Act has missed its mark. Many of its benefits-related provisions merely impose burdensome administrative requirements on plans without offering plan participants any real protection.

After much ado about how to prevent scandals such as those involving Enron, WorldCom, and Adelphia (just to name a few), Congress passed the Sarbanes-Oxley Act of 2002 (the Act) on July 30, 2002, and President George W. Bush signed it into law. While most of the Act is directed at the accounting industry and relates to corporate fraud, there are also some provisions aimed specifically at employee benefits plans. In particular, the Act attempts to address the perceived inequity that occurred when Enron 401(k) plan participants were prevented during a blackout period from trading out of depreciating company stock in their 401(k) plan accounts while Enron executives bailed out of their outside-the-plan personal holdings. The Act tries to do this in two ways: by prohibiting insider trading during blackout periods and by requiring advance notice to participants of when blackout periods will occur.

Furthermore, Congress's scatter-shot approach to the economic woes caused by corporate misconduct has led to a prohibition on loans to directors and executive officers that may impact qualified plan loans, cashless exercises of stock options, and split-dollar life insurance programs.

Interim final Labor regulations (an interesting oxymoron) mandated by Congress were released in late October 2002 [[DOL Reg. §§ 2520.101-3, 2560.502c-7](#)] and the Final Rules were released just as we were going to press. [Fed. Reg. Vol. 68, No. 16, page 3716] These are discussed below, but the required securities regulations have not yet been issued. However, it is worthwhile nonetheless to examine where we are at this time with some of the more important benefits-related changes, particularly in light of the fact that some of the abovementioned statutory provisions are already effective.

New Blackout Period Rules

What Is a Blackout Period?

Blackout period is a term generally used in the benefits industry to describe a time frame during which participant direction of investments in a 401(k) or other plan is temporarily suspended, commonly due to a change in the fund holder or recordkeeper or a change from balance-forward to daily recordkeeping. For this change to take place, the accounts and assets in a retirement plan must be frozen for a period of time. During that period, the prior recordkeeper prepares a full accounting for the plan and transfers that information to the new recordkeeper. The new recordkeeper then establishes that information on its computer systems. Once that process is complete, a switch is flipped, and the employees can again direct investment changes. Blackout periods often range from a few days to a few weeks, and in rare cases, even a few months.

Prior to enactment of the Sarbanes-Oxley Act, the Employee Retirement Income Security Act of 1974 (ERISA) contained no specific guidance about blackout periods. As a result, plan administrators followed a general "best practice" or commonsense approach when instituting a blackout period based on the general fiduciary obligations to act prudently and for the exclusive purpose of providing benefits and defraying expenses. [[ERISA § 404\(a\)\(1\)](#)] Generally, the goal was to make the blackout period as short as possible and minimize the disruption to the participants as much as possible. Usually, participants were notified of the blackout period in advance, and advised when the period ended.

Notwithstanding the press-induced public perception that blackouts are evil conspiracies on the part of employers (induced, for example, by calling them *lock-downs*-a term that was not used in the benefits industry before the Enron scandal), these freeze periods are often necessitated by the fiduciaries' fulfillment of their ERISA obligations. For example, fiduciaries are obligated to monitor the services performed by the recordkeeper and fundholder and to replace them if doing so would be prudent-such as if they underperform, if their fees are too high, or if better services are available from another provider. The replacement process cannot be effected without a blackout period.

Fiduciaries were also motivated pre-Sarbanes-Oxley to carefully plan and carry out blackout periods because they wanted to retain the limitations on fiduciary liability under [ERISA Section 404\(c\)](#). Under [ERISA Section 404\(c\)](#), the plan fiduciaries may be relieved of liability for individual account losses that are the result of the participants' direction of the investments in their accounts. [ERISA Section 404\(c\)](#) generally applies only when the participant is able to affirmatively elect how his or her account is to be invested. [[DOL Reg. § 2550.404c-1\(a\)\(1\)](#), [\(c\)\(1\)\(i\)](#)]; see also the preamble to final DOL regulations. 57 Fed. Reg. 56906, § IV] Labor regulations also require that the plan give the participant the opportunity to modify investment choices "with a frequency which is appropriate in light of market volatility to which the investment alternative may reasonably be expected to be subject." [[DOL Reg. § 2550.404C-1\(b\)\(2\)\(ii\)\(B\)](#)] Some fiduciaries have wondered, therefore, whether [Section 404\(c\)](#) protection is available to fiduciaries during a blackout period, when participants may not modify their elections for, say, 30 days. Although participants are unable to direct any investments during this period of time (perhaps violating the "affirmative election" rules noted above), the regulations to [Section 404\(c\)](#) indicate that the protection may be available so long as trades are permitted at least once per quarter. [[DOL Reg. § 2550.404c-1\(b\)\(2\)\(ii\)\(C\)](#)] In their attempt to comply to the greatest extent possible with the market volatility rule of [ERISA Section 404\(c\)](#), fiduciaries have commonly tried to make the blackout period as short as possible, and the administrative functions during the blackout period as efficient as possible. (It is also noteworthy that to the extent that the blackout is occasioned by a change in investment options, the [Section 404\(c\)](#) protection may be lost in any event-at least temporarily. If the investments are "mapped" from prior options to the new choices, there is no affirmative direction by participants with regard to the new investment options, so [ERISA Section 404\(c\)](#) is inapplicable until the participants affirmatively confirm the mapped choices or make new directions.)

Blackout Periods After Sarbanes-Oxley

The Act does not disturb the historic fiduciary analysis of appropriate actions to be taken by plan fiduciaries in a blackout period. The Act adds two express rules about blackout periods. First, it provides that plan administrators must provide advance notice of blackouts to participants and beneficiaries (with some exceptions, which are discussed below). Second, if the plan undergoing the blackout period contains employer securities, the Act limits personal trading in those securities by directors and certain executive officers during the blackout. These rules are in addition to, and not a replacement for, the normal fiduciary duties that apply to blackouts.

Notice Requirement

The Act requires that the plan administrator provide advance written or electronic (if it is reasonably accessible to the recipient) notice of a blackout period to participants and beneficiaries at least 30 days in advance of the beginning of the blackout period. The Labor regulations modify this rule in two ways. First, they clarify that the 30-day period relates not to the beginning of the blackout period, but to the last day on which the participants could exercise their affected rights. [[DOL Reg. § 2510.101-3\(b\)\(2\)](#)]



Example.

Assume that trades are effected only on the 15th and 31st days of the month, and the blackout period will begin on June 20, 2003. Because the last date on which investments could be traded is the 15th of the month, the notice would need to be provided 30 days before the last trade date (June 15, 2003), or by May 16, 2003.

The second change in the rules under the Labor regulations is that the notice must be provided not more than 60 days before the last day on which participants may exercise their rights. This may produce an

interesting anomaly if notice is provided 59 days before the last possible trade date, but then the blackout period is delayed at the last moment for several days. Will the fact that the original notice falls outside what is ultimately the "60-day period" become problematic, or will compliance with the rules be determined by reference to the originally intended blackout beginning? The regulations do not say.

Commentators to the interim rules noted that predicting the exact dates of the blackout period with certain is difficult. In response, the Final Rule permits the notice to advise participants that the blackout period will begin or end something during a given calendar week. Participants must also be given a number to call to find out if the blackout period has begun or ended. [DOL Reg. § 101-3(b)(1)(iii)(B)]

The regulations contain a model notice for use by plan administrators. [DOL Reg. § 2520.101-3(e)(2)] Plan administrators are not required to use the model language, but a notice using the model is deemed by the Department of Labor (DOL) to be in the correct form. If the model is not used, the notice must be written in a manner calculated to be understood by the average participant and include the following elements:

1. The reasons for the blackout period;
2. A description of the rights and an identification of the investments affected by the blackout;
3. The expected beginning date and *ending date* of the blackout period;
4. If the blackout affects investments, a statement that the participant or beneficiary should evaluate the appropriateness of his or her current investment decisions in light of the inability to direct or diversify assets credited to his or her account during the blackout period;
5. If the notice is not being provided at least 30 days before the last day on which participant rights may be exercised, a statement that federal law generally requires 30 days advance notice, and an explanation as to why this notice requirement could not be met. As will be discussed below, there are times when 30 days advance notice is not possible, and failure to give notice in that time frame may be excused. Even in those circumstances, this additional information must be provided to participants and beneficiaries; and
6. The name, address, and telephone number of the plan administrator or other person to whom questions regarding the blackout period should be addressed.

If the blackout period will affect employer securities in the plan that are subject to Securities and Exchange Commission (SEC) registration, the plan administrator must also provide notice of the blackout period to the issuing company. The regulations require that the notice to the issuer contain items 1 through 4 listed above for the participant notices and be furnished at the same time as the participant notices.

For purposes of the notice requirements, the Act defines the term *blackout period* to mean any period of more than three consecutive business days during which *any* ability of a participant or beneficiary under an individual account plan to direct any assets or to obtain distributions or loans is suspended, limited, or restricted. The Act specifically excludes from this definition any suspension that arises from the application of securities laws or from the receipt of a qualified domestic relations order, and any regularly scheduled suspension of which the participants and beneficiaries were made aware prior to joining the plan or subsequent to a plan amendment instituting the scheduled suspension. [ERISA § 101(i)(7)]

If, after notice has been given, the plan administrator realizes that there will be a change in the length of the blackout period, the plan administrator must provide notice of the change to all affected participants and beneficiaries as soon as reasonably practicable, unless notice prior to the termination of the blackout period is impracticable. [ERISA § 101(i)(4)]

Notices may be provided as soon as reasonably possible if the plan administrator determines that postponing the blackout period to allow for the notice period would violate the fiduciary duties under ERISA or if the plan administrator determines that it is unable to provide the notice within the 30-day period due to unforeseen circumstances out of its control. The Act requires that the plan administrator's determination that its noncompliance with the 30-day advance notice rules be in writing, and the regulations require that it be dated and signed by the fiduciary.

One-participant plans are not required to comply with the notice requirements. [ERISA § 101(i)(8)] In classic ERISA doublespeak, a "one-participant plan" is not necessarily a plan covering one participant. A plan is a one-participant plan if (a) the participant owns 100 percent of a sole proprietorship or corporation and the plan covers only the owner and the owner's spouse; or (b) all participants are partners or spouses of partners. Furthermore, to qualify as a one-participant plan, the plan must not be combined with any other

plan to meet the coverage rules of [Section 410\(b\) of the Internal Revenue Code \(Code\)](#) and may not cover a business that is a member of a controlled or affiliated service group. Finally, the plan may not cover a company that leases employees. (It is unclear for this purpose whether the employer's occasional use of a temporary employee from a third party will mean that the plan is not a one-participant plan.)

The Act also provides a limited exception to the notice rules if a blackout period applies to one or more participants or beneficiaries who are entering the plan or ceasing participation solely in connection with a merger, acquisition, divestiture, or similar transaction involving the plan or the plan sponsor. In this situation, the plan administrator needs only to notify the affected participants and beneficiaries as soon as reasonably practicable. Note that all of the elements of notice required under the Act apply to this limited notice as well. [\[ERISA § 101\(i\)\(3\)\]](#) The Act further authorizes the Secretary of Labor to issue regulations expanding the exceptions to the notice rule if that is in the interests of participants and beneficiaries. [\[ERISA § 101\(i\)\(5\)\]](#)

The result of a failure to give notice can be draconian. The Act amends [ERISA Section 502](#) to permit the Secretary of Labor to charge penalties of "up to" \$100 per day per participant or beneficiary for the failure to provide timely notice. According to the interim final rules to this section, this penalty accrues from the date of the plan administrator's failure or refusal to provide the required notice until the final day of the blackout period. This means that being one day late on the notice can produce a penalty of \$100 per day per participant through the entire blackout period—a very expensive result. Commentators to the interim final rules objected to this potentially harsh result, but the DOL declined to change this provision in the Final Rule. The Preamble to the Final Rule contemplates that factors such as the speed with which late notice is given will weigh heavily on the DOL's decision as to the penalty amount that is actually assessed. [Preamble to the Final Rule, Section B.1]

Before a penalty is assessed, the DOL must provide a notice to the plan administrator of its intent to assess the penalty. [\[DOL Reg. § 2560.502c-7\(c\)\]](#) The administrator then has 30 days in which to file a statement showing that there was compliance with [ERISA Section 101\(i\)](#) or that there were mitigating circumstances for its noncompliance. Based on this statement, the DOL may determine that no penalty assessment is warranted or waive all or part of the penalty. [\[DOL Reg. § 2560.502c-7\(d\)\]](#) If the plan administrator fails to respond within the 30-day period, this is deemed to be a waiver of the right to appear and contest the facts alleged in the DOL's notice and is also deemed to be an admission of the facts alleged in the notice. This waiver and admission applies for all proceedings involving the assessment of the penalty by the DOL. [\[DOL Reg. § 2560.502c-7\(f\)\]](#) In other words, a failure to act in that 30-day period is sudden death for the plan administrator, as far as further contesting the penalty goes.

Impact of the New Notice Requirements

Those of us in the benefits industry know what appears to be America's best-kept secret: it is rare that a blackout period is initiated without notifying plan participants. In fact, court filings indicate that Enron provided timely advance notice of its blackout period to plan participants and that new notices were provided when the timing of the blackout period was modified. Even the plaintiffs' complaint makes it clear that participants knew of the blackout period before it occurred. [See www.enronsuit.com] Therefore, the new notice rules will likely have little impact on fiduciary conduct, other than evoking a heightened apprehension of accidentally delaying the notice or bypassing some participants or beneficiaries.

What may be more problematic is the breadth of the definition of a blackout period under the Sarbanes-Oxley Act. The definition includes any period during which there is a freeze on the ability of a participant to obtain loans or distributions, except freezes that are caused by a plan provision of which participants and beneficiaries are notified. It appears, therefore, that a plan provision that authorizes distributions or trades by employer securities only at certain plan year intervals—after the end of a calendar quarter, for example—will not constitute a freeze for which a blackout period notice is required, because it is a "regularly scheduled suspension." However, plan sponsors and administrators should be careful about ad hoc decisions to freeze access to distributions or loans during a given period of time for some administrative purpose. As counterintuitive as it may sound, the Act now generally requires 30 days advance notice.

Finally, the Act does not limit the applicability of the notice rules to plans covering U.S. employees. The definitions of *pension plan* and *individual account plan* under ERISA are very broad. As a result, the notice

requirements-and the potential penalties-may extend to plans of a U.S. employer that cover only foreign employees if those plans permit investment selfdirection.

Limitation on Trading by Executives During a Blackout Period

The Act also contains limitations on trades by directors and executive officers of public companies (called *insiders*) in employer securities during a blackout period for a qualified plan. [Act § 306(a)] For this purpose, *blackout period* is more narrowly defined. A blackout period is a period of not less than three consecutive business days in which not fewer than 50 percent of all participants and beneficiaries in individual account plans sponsored by the employer are temporarily prevented from buying, selling, or otherwise transferring employer securities in the plan. Only employer securities acquired by the insider in connection with the insider's service or employment as an insider are subject to the Act's prohibition. The inability of the qualified plan to trade in employer securities may be caused by either the employer or the plan administrator. The same exceptions to the definition of *blackout period* that applied in regard to the notice requirements apply here: regularly scheduled suspensions of which participants are notified and which are incorporated in the plan, and suspensions related to mergers, acquisitions, and dispositions involving the plan or the employer. [Act § 306(a)(4)]

All directors and "executive officers" of the issuing employer are the insiders subject to the prohibition on trading. The term *executive officer* is not defined in the Act, although it is defined in Rule 3b-7 to the Securities Exchange Act of 1934 (Exchange Act) to be the president, any vice president in charge of a principal business unit, division, or function (such as sales, administration, or finance), any other officer who performs a policymaking function, or any other person who performs similar policy-making functions. Executive officers of subsidiaries may be deemed to be executive officers of the issuer if they perform such policymaking functions for the issuer. Presumably the same definition applies under the Act, since this section is a modification of federal securities law.

The Act further requires the employer to notify all affected officers and directors, as well as the SEC, of the blackout period in a timely manner. The Act does not provide instruction on what is to be contained in the notice and does not define *timely manner*.

In summary, if a blackout period occurs and it affects trading in employer securities, the plan administrator must provide notice to:

- The affected participants and beneficiaries; and
- The employer; and The employer must provide notice to
- The directors and executive officers; and
- The SEC.

The penalty for engaging in impermissible trading is that the insider must disgorge any profit received to the issuing employer. This penalty can be forced on the insider through suits by the issuer, or if the issuer refuses to do so, through a derivative action initiated by one or more shareholders. There is a two-year statute of limitations period on these lawsuits. [Act § 306(a)(2)]

Several questions arise in connection with these rules. First, how is *profit* measured for this purpose? If the insider sells stock during the blackout period, the profit could be considered to be the difference between the value of the stock at the beginning of the blackout period and the trade date. In that case, insiders will suffer no penalty for trading in a stock that has decreased in value during the blackout period. An example of this would be the Enron executives, whose personal trades in depreciating employer stock during the October 2001 blackout gave rise to this concern in the first place. On the other hand, profit could be measured as any profit in the stock, as measured by the value of the stock when purchased, as compared to the value when sold. Again, this provides no disincentive or penalty for an insider who sells depreciated stock to "cut his losses" during the blackout period.

A third possibility is to measure profit as the difference between the price of the stock at the time sold and the price at the end of the blackout period. This possibility-which is merely conjecture at this point-makes the most sense, as it would affect insiders who sold a decreasing stock during the blackout period. In that case, the "profit" at issue is the failure to suffer the full loss that the insider would have experienced had he or she waited until the end of the blackout period to trade.

The same issues arise in a stock acquisition context. If the insider purchases an appreciating stock during the blackout period, is the "profit" limited to the increases experienced during the blackout period, or to all profits experienced on the stock between purchase and sale? What if the stock depreciates during the blackout period but later increases in value?

A second question arising in connection with these rules concerns the identification of what securities were purchased as a result of the insider's employment. If the insider has acquired employer stock in a variety of manners-through stock options, through restricted stock grants, and through personal purchases-the shares relating to employment might not have been segregated.

Prohibition on Loans to Executive Officers and Directors

The Act addresses another concern stemming from the various corporate scandals of the past year: that of misuse of corporate assets by the people in charge. One inalization of certain loans to directors and executive officers of publicly traded companies. [Act § 402] Under this section, the Exchange Act of 1934 (1934 Act) is amended to make it unlawful for employers to issue, maintain, or arrange for any personal loan or other extension of credit to or for the affected insiders. For this purpose, a company is "publicly traded" if it is registered under Section 12 of the Exchange Act, if it is a reporting company under Section 15d of the Exchange Act, or if it files or has filed a registration statement with the SEC that is not yet effective and has not been withdrawn. [Act § 402(a)(7)]

The prohibition does not apply to loans made by companies that engage in consumer credit as part of their ordinary business for home improvement or manufactured home loans, consumer credit, or extension of credit under an open-end credit plan or charge card if such loans are of a type generally available to the public on the same or less favorable market terms than are available to the public. [Act § 402(a)(2)]

This section of the Act has generated consternation in the benefits community. The broad language of the prohibition may or may not encompass a myriad of transactions, and guidance is needed from the SEC (which is responsible for this section of the Act). First, what is a "personal loan" and what is a "business loan"? Consider the following mixed-purpose transactions, which could be classified as either business or personal loans:

- The company advancing an executive money for expenses expected to be incurred in foreign business travel;
- An employer providing a newly hired executive with funds necessary to relocate for the new job; or
- The company advancing litigation expenses to an executive who may or may not be indemnified under the corporation's bylaws, because the executive will need to repay this advance if he or she ends up not being indemnified.

Interestingly enough, the SEC has informally stated on several occasions that it is not expecting to issue any guidance on this issue in the foreseeable future.

A second concern is how broadly the SEC will interpret the "arranged for" provision. An employer that establishes a qualified plan, documents the plan to permit loans to participants, and then administers the plan's loan program in its role as plan administrator may be considered to "arrange for" such loans. If so, the plan may not permit participant loans to insiders. This may have further ramifications, because ERISA and Labor regulations require that loans be made available to all parties in interest on a reasonably equivalent basis. [ERISA § 408(b)(1)(A); [DOL Reg. § 2550.408b-1\(a\)\(1\)\(i\), \(b\)](#)] As a result, a conservative interpretation of the Act may cause public companies to terminate the participant loan provisions in the plans they sponsor.

Another area that could be impacted by a broad interpretation of the loan prohibition is the practice of permitting executives to engage in a "cashless exercise" of stock options. Generally, if an employee exercises a stock option to purchase the stock, he or she must pay the issuer of the option the option price of the stock. Not all executives are in a position to pay such price in cash. As a result, a transaction is arranged under which the executive simultaneously exercises the options and sells sufficient shares of the stock that will be acquired through the options to enable the purchase price to be paid.



Assume that an executive has options to purchase 100 shares of company stock at \$10. The stock is currently worth \$20. For the executive to exercise the options, he must pay \$1,000. In exchange for that payment, he will receive 100 shares worth \$2,000. In a cashless exercise, the company (or a broker) will exercise the options, obtain the stock, and then sell 50 shares of the stock for \$1,000. The \$1,000 proceeds will then cover the exercise of the option, and the executive will receive the remaining 50 shares of stock.

Cashless exercises may be handled in several ways. If the employer handles the transaction directly, the cashless exercise is effected by the company simply returning 50 shares to the employee when the 100 options are executed. This is called an *immaculate exercise* and does not involve any extension of credit.

A second method is when the executive handles the cashless exercise through a broker. The executive signs an irrevocable exercise of the option and provides a copy of the exercise document to the broker. On the strength of the exercise document, the broker establishes a margin account, from which it forwards to the employer the funds necessary to pay the employee's option exercise price. The employer then provides to the broker the stock acquired through the exercise of the option. If desired, the broker sells sufficient shares of the stock to pay back the margin account; alternatively, the margin account may remain open with the stock as collateral.

If the executive arranges for all the transactions with the broker on his or her own behalf, there is no extension of credit by the company. This transaction does not fall within the purview of the Act. However, if the broker has an agreement or even an informal understanding with the employer whereby the broker commonly handles this type of transaction for the employer's executives, the loan may be considered to be "arranged by" the employer.

Often, the cashless exercise through a broker's office is handled through a method sometimes known as a *T+3 transaction*. Under this method, the employer provides the broker with the shares that are being purchased through the exercise of the option, in advance of receiving the option exercise price. The broker then sells sufficient shares to pay the purchase price, and pays those funds back to the employer. This entire transaction is accomplished during the three-day period allotted by the SEC for settlement of stock transactions (hence the name). In this case, it is likely that the advancing of the shares to the broker by the employer is an extension of credit to the employee and that the Act's prohibitions would apply. Nonetheless, some practitioners have opined that T+3 transactions are so quick that any extension of credit is *de minimis*, and are unlikely to be covered by the Act. At this time, this is conjecture, particularly in light of the fact that there is no *de minimis* exception in the Act.

A third potential area of concern relates to collaterally assigned split-dollar arrangements. Under these arrangements, the executive owns a life insurance policy. The employer pays all premiums on the policy. In exchange for the payment of premiums, the executive provides an irrevocable, collateral assignment to the employer of a portion of the cash value of the policy equal to the accumulated premium payments made by the employer.

There has historically been controversy about whether collateral assignment split-dollar programs represent non-interest-bearing loans from the company to its executive. The Internal Revenue Service (IRS) determined at one time that they were not loan transactions, but has since issued regulations indicating that they are loans.

[See [Prop. Treas. Reg. §§ 1.61-22\(b\)\(3\), 1.7872-15](#); [Rev. Rul. 64-328](#), 1964-2 C.B.11] The Federal Reserve also has issued interpretive letters indicating that it does not deem these transactions to be loans; however, those letters make it clear that the Federal Reserve is acceding to the original IRS interpretation. [See Fed. Res. Reg. Serv. 3-1081.3 (Staff Op. Mar. 10, 1981); FRB Interp. Ltr. Apr. 13, 1995, to Mr. Kane]

Loans or extensions of credit in place on July 30, 2002, are grandfathered as long as they are not modified. This—at least, theoretically—assures companies that loans existing on that date do not violate the law.

In the collateral assignment split-dollar context, however, questions remain about the continuation of the program after that date. If the split-dollar agreement requires ongoing payment of the premiums by the company, a reasonable argument may be made that new premium payments (and augmentation of the collateral assignment) are part of an agreement that precedes the Act. On the other hand, if the agreement permits the employer to cease making premium payments at any time, there is also an argument that each

payment of premium is a new and independent loan by the employer. If that is the case, payments after the grandfather date are prohibited loans.

It is unclear how broadly the SEC will interpret the extension of credit rules under the Act. In the meantime, cautious employers may refrain from permitting the types of loans discussed above.

Increase in ERISA Criminal Penalties

On a final note, the Act also enhanced the criminal penalties under [ERISA Section 501](#) for willful violations of ERISA Title I reporting and disclosure requirements. These new penalties apply not only to willful violations of the Sarbanes-Oxley blackout notice provisions but also to any ERISA violation of reporting and disclosure requirements. The maximum fine for an individual has been increased from \$5,000 to \$100,000 and the maximum prison time has been increased from one year to ten years. The maximum fine for a person other than an individual (such as the company) has been increased from \$100,000 to \$500,000.

Conclusion

It is understandable why Congress and the Bush Administration were motivated to address the benefits-related concerns stemming from the recent wave of corporate scandals. Nonetheless, the Sarbanes-Oxley Act does not appear to be the best means by which this could be accomplished. The hallmark of the Act is that it is overbroad. It potentially regulates or prohibits several transactions that did not give rise to any of the concerns that have been expressed. The definition of a blackout period is so inclusive as to create traps for unwary plan administrators that hold distributions for a few days to effect a form or minor procedure change. All in all, many of the new rules will increase the complexity of already burdensome administrative requirements with very little real protection of participants.