DEPARTMENT OF THE TREASURY
WASHINGTON, D.C. 20220

JUL 23 1998

ACTION

MEMORANDUM FOR DEPUTY ASSISTANT SECRETARY ZELIKOW

FROM: Edwin L. Barber, III
Director, Office of African Nations

SUBJECT: Response letter to Christopher M. Long of Enron Corporation

ACTION-FORCING EVENT: [(b)(5)]

RECOMMENDATION: [(b)(5)]

_____ **Agree** _____ **Disagree** _____ **Let's Discuss**

ATTACHMENT: Tab A: Response Letter to Christopher M. Long

[(b)(5)]

00100000000092

TREASURY CLEARANCE SHEET

NO. _____
Date 07/22/98

MEMORANDUM FOR: ☐ SECRETARY ☐ DEPUTY SECRETARY ☐ EXECUTIVE SECRETARY
X ACTION ☐ BRIEFING ☐ INFORMATION ☐ LEGISLATION
☐ PRESS RELEASE ☐ PUBLICATION ☐ REGULATION ☐ SPEECH
☐ TESTIMONY ☐ OTHER: _____

FROM: Malachy Nugent, Office of African Nations
SUBJECT: Response Letter to Christopher Long of Enron Corporation

REVIEW OFFICES (Check when office clears)

☐ Under Secretary for Finance
- ☐ Domestic Finance
- ☐ Economic Policy
- ☐ Fiscal
  - ☐ FMS
  - ☐ Public Debt

☐ Under Secretary for Int'l Affairs
- ☐ International Affairs

☐ Enforcement
- ☐ ATF
- ☐ Customs
- ☐ FLETC
- ☐ Secret Service

☐ General Counsel

☐ Inspector General

☐ IRS
- ☐ Legislative Affairs
- ☐ Management
- ☐ OCC

☐ Policy Management

☐ Scheduling

☐ Public Affairs/Liaison

☐ Tax Policy

☐ Treasurer
- ☐ E & P
- ☐ Mint

☐ Savings Bonds

☐ Other _____

NAME (Please Type)	INITIAL	DATE	OFFICE/ROOM NO.	TEL. NO.
INITIATOR(S)				
Malachy Nugent	MBN	7/22/98	OASIA/INN (4303 NY)	622-0332
REVIEWERS				
Edwin L. Barber III	ELBee	7/23/98	OASIA/INN (4311 NY)	622-1730

SPECIAL INSTRUCTIONS

☐ [illegible] _____ ☐ Executive Secretary _____ Date _____

00100000000093

013737

DEPARTMENT OF THE TREASURY
WASHINGTON, D.C. 20220

January 15, 1999

MEMORANDUM FOR SECRETARY RUBIN

FROM: **MICHAEL S. BARR**
DEPUTY ASSISTANT SECRETARY
COMMUNITY DEVELOPMENT POLICY

SUBJECT: **Letter From Kenneth L. Lay, Enron Corporation**

ACTION FORCING EVENT:

Reply to Kenneth L. Lay's letter regarding endorsement of Houston's Empowerment Zone application.

RECOMMENDATION:

That you sign the attached letter.

✓ Agree _____ Disagree _____ Let's Discuss

Attachment

Tab 1: Response letter to Kenneth L. Lay

00100000000106

DEPARTMENT OF THE TREASURY 011103
WASHINGTON, D.C. 20220

October 27, 1999

ACTION

ACTION

MEMORANDUM FOR SECRETARY SUMMERS

FROM: Neal S. Wolin
Acting General Counsel

SUBJECT: Response to Letter from Kenneth L. Lay, Chairman and Chief Executive Officer of Enron Corp.

ACTION-FORCING EVENT

[(b)(5)]

RECOMMENDATION

[(b)(5)]

BACKGROUND

[(b)(5)]

EXECUTIVE SECRETARIAT

00100000000137

[(b)(5)]

ATTACHMENTS

EXECUTIVE SECRETARIAT CORRESPONDENCE COVER SHEET

Thursday, January 17, 2002

ACTION REQUIRED

PROFILE #: 2002-SE-000543

DATE CREATED: 01/17/2002

ADDRESSEE: Paul H. O'Neill
Secretary

AUTHOR: Buckley, Allen
Smith Helms Mulliss & Moore

SUBJECT: Proposed Enron Pension Legislation

ABSTRACT: Encloses draft legislation to provide greater security for employees' retirement benefits while protecting fiduciaries from potential liability exposure if certain protections are provided to employees, such as Enron.

TASK ASSIGNMENT MEMORANDUM

ASSIGNED TO: David Aufhauser
General Counsel

DATE DUE: 01/29/2002

REQUIRED ACTION: Direct Reply

DISTRIBUTION: EXECUTIVE SECRETARIAT

SMITH HELMS MULLISS & MOORE, L.L.P.
Attorneys at Law

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Suite 750
Atlanta, Georgia 30309
(404) 962-1000

direct: 404-962-1042
fax: 404-962-1200
Allen.Buckley@SmithHelms.com

January 15, 2002

VIA UPS OVERNIGHT

Mr. Paul O'Neil
Department of the Treasury
Treasury Secretary
1500 Pennsylvania Avenue, NW
Washington, DC 20220

Re: Proposed Enron Pension Legislation

Dear Mr. O'Neil:

I am an attorney who specializes in retirement plan benefits. Enclosed is a bill that our firm has drafted in response to the ENRON situation and similar matters.

The bill relates to retirement plans, and it would amend the Employee Retirement Income Security Act of 1974 (ERISA). We respectfully request that you consider the bill. A sponsorship request was made yesterday to the following U.S. Senators: Max Cleland, Zell Miller, John Edwards, Mike DeWine, Mike Enzi, and Judd Gregg. These materials have been sent to Dick Wickersham of the Internal Revenue Service. (He informed the undersigned that he would forward the materials to officials at the U.S. Department of Labor.)

Also enclosed are: (1) a bullet summary of the bill's provisions; (2) a summary of the reasons for the bill; and (3) an article authored by the undersigned discussing ERISA's fiduciary duties applicable to eligible individual account plans (i.e., plans that invest or permit investment in company stock) under ERISA. The article ties into the fiduciary aspects of the bill.

We believe that the enclosed bill provides needed protection for retirement plan participants while at the same time fills some gaps in ERISA that need to be filled to protect plan fiduciaries and sponsors. Thus, the bill attempts to strike a balance between employees' needs and employers' needs. Simply put, we believe that the enclosed bill is a better bill than those proposed to date, because it analyzes the entire set of problems that exist with respect to company stock in retirement plans and non-diversification in general.

Among other things, the bill:

-reduces employee risks relating to company stock by placing greater burdens on plan fiduciaries unless either: (a) a substantial diversified retirement plan is supplied by the

employer; or (b) substantial limits are placed on participants' ability to invest in company stock; and

-rewards employers who offer a substantial diversified retirement plan.

Your consideration of this matter is greatly appreciated.

Sincerely,

SMITH HELMS MULLISS & MOORE, L.L.P.

Allen Buckley

Allen Buckley

AB/sis
Enclosure
cc: Ms. Elaine Chaos, Secretary of Labor (via UPS overnight mail w/ encls.)
Mr. Donald Evans, Secretary of Commerce (via UPS overnight mail w/ encls.)

57338

A BILL

To amend the Employee Retirement Income Security Act of 1974 to provide greater security for employees' retirement benefits while protecting plan fiduciaries from potential liability exposure if certain protections are provided to employees.

Be it enacted by the Senate and House of Representatives of the Untied States of America in Congress assembled,

SECTION 1. SHORT TITLE

This Act may be cited as the "Retirement Security Act of 2002."

SECTION 2. LIMITATIONS ON FIDUCIARY LIABILITY EXPOSURE IN THE EVENT EMPLOYEE RETIREMENT PROTECTION IS PROVIDED.

1. Section 404(a)(2) of the Employee Retirement Income Security Act of 1974 ("ERISA") is amended to read as follows:

(2) Subject to the following provisions of this paragraph, in the case of an eligible individual account plan (as defined in § 407(d)(3)), the diversification requirement of paragraph (1)(C) and the prudence requirement (only to the extent that it requires diversification) of paragraph (1)(B) is not violated by acquisition or holding of qualifying employer real property or qualifying employer securities (as defined in § 407(d)(4) and (5)). However, the duties described in subsection (a)(1) shall not apply to the acquisition or holding of qualifying employer securities by any eligible individual account plan (including any matching employer contributions account therein invested in qualifying employer securities) if the summary plan description for the plan thoroughly describes the risks of non-diversified investments (as defined in subparagraph (E)) and explains the impact of bankruptcy or insolvency of any issuer of common stock on the issuer's shareholders (both in a manner understandable to participants), and either: (a) the plan sponsor of such plan or an affiliate thereof also maintains a substantial retirement plan, as defined in subparagraph (A) of this paragraph, in which the participants of the eligible individual account plan are eligible to participate; or (b) the plan sponsor does not maintain a substantial retirement plan (as defined in subparagraph (A)), but the plan is described in subparagraph (B) of this paragraph. In addition, if the eligible individual account plan is an employee stock ownership plan (as defined in § 407(d)(6)) or a stock bonus plan (as described in subparagraph (D) of this paragraph), that is fully funded by contributions of the plan sponsor or its affiliates, but a substantial retirement plan (as defined in subpargraph (A)) is not maintained, then, provided that the summary plan description for the plan thoroughly describes the impact of a reduction in value of qualifying employer securities and the implications to the plan of bankruptcy or insolvency of the plan sponsor or other issuer of qualifying employer securities under the plan (in a manner understandable to participants), the duties described in the first sentence of this paragraph (2) shall apply to such a plan only in the event of bankruptcy or insolvency (as defined in Internal Revenue Code § 108(d)(3)) of the company the stock of which is held by the plan as qualifying employer securities.

(A) For purposes of this paragraph (2), the term "substantial retirement plan" means a plan that is funded solely by employer contributions and that is either: (i) a defined benefit pension plan that does not invest in employer securities under which: (a) benefits accrue at a constant rate, and an accrual is granted to any participant who performs a year of service (as defined in § 202(a)(3)(A)) during a plan year, (b) annual benefits at Social Security retirement age or prior thereto in the form of a life annuity (or other annuity actuarially equivelant thereto) with respect to a participant who has accrued benefits for thirty years equal or exceed one-third of the final average compensation of the participant over the three, four and five year period (as specified in the plan) immediately preceding retirement or termination (or lesser period for an individual who does not work the minimum three, four or five year period specified in the plan), and (c) cost of living adjustments are applied to accrued benefits and pension distributions annually at a rate which equals or exceeds the cost of living adjustments applicable to Social Security retirement benefits for the year; or (ii) a defined contribution plan that does not invest in employer securities, and that: (a) is not subject to participant direction of investments, and (b) allocates a contribution equal to six percent (6%) of the participant compensation for each plan year to any participant who performs a year of service (as defined in § 202(a)(3)(A)) during the plan year. For purposes of this subparagraph, "compensation" means compensation as defined in Internal Revenue Code § 415(c)(3).

(B) An eligible individual account plan is described in this subparagraph if: (i) participant contributions (whether elective deferrals under Internal Revenue Code § 402(g) or otherwise) may be used to purchase qualifying employer securities; (ii) a participant is not required, under the plan's terms, to invest any of his participant contributions account in qualifying employer securities; and (iii) a participant may not direct that more than twenty percent (20%) of his participant contributions account be invested in qualifying employer securities (as defined in § 407(d)(5)). The foregoing provision shall not limit, in any manner, a plan's ability to invest any portion or all of any employer matching contributions accounts in qualifying employer securities.

(C) A plan that permits (but does not require) participant contribution accounts to be invested in qualifying employer securities may convert to a plan described in subparagraph (B) of this subsection (a)(2) and, in doing so, may utilize the part of the participants' respective contributions accounts in excess of the twenty percent (20%) limit of subparagraph (B) (as determined on any day within one year of enactment of the Retirement Security Act of 2002) to increase the investment in qualifying employer securities of any existing employer matching contributions accounts of such participants without participant consent, provided that such action occurs within two years of the date of enactment of the Retirement Security Act of 2002.

(D) A stock bonus plan is described in this subparagraph (D) if it is designed to invest primarily or exclusively in qualifying employer securities, and it satisfies the conditions for tax qualification under Internal Revenue Code § 401(a) and the other requirements prescribed by the Secretary of the Treasury applicable to stock bonus plans.

(E) For purposes of this subparagraph (E), a non-diversified investment is an investment in any security, bond, indenture or interest issued by a single organization (or by any organization and affiliated organizations), and any direct or indirect interest in real estate, provided that an interest in a real estate investment trust (as defined in Internal Revenue Code § 856) shall not be a non-diversified investment. For purposes of the preceding sentence, an interest in an organization

other than a real estate investment trust (as defined in Internal Revenue Code § 856) that is not traded on a public stock exchange or similar exchange shall be considered an interest in real estate if more than fifty percent (50%) of the fair market value of the organization's assets are real estate interests.

(F) The foregoing provisions of this paragraph (2) shall not reduce the fiduciary duties of subsection (a)(1) in the event of a sale, merger, reorganization or similar transaction with respect to the issuer of qualifying employer securities (as defined in § 407(d)(5)).

SECTION 3. SPECIFICATION THAT ALLOWING PARTICIPANTS TO DIRECT INVESTMENTS INTO NON-DIVERSIFIED ACCOUNTS GENERALLY IS A FIDUCIARY ACTION.

1. The following sentence is added to ERISA § 404(c)(1), to follow the last sentence thereof:

Notwithstanding the preceding provisions, the provisions of § 404(a)(1) shall apply to any action concerning the ability of participants to invest in non-diversified investments (as defined in subsection (a)(2)(E)), including the determination of the percentage that a participant can invest his individual account in non-diversified investments, unless the summary plan description for the plan thoroughly describes the risks of non-diversified investments and the impact of bankruptcy or insolvency on any issuer of common stock on the issuer's shareholders (in a manner understandable to participants), and either (i) a substantial retirement plan (as defined in subsection (a)(2)(A)) is maintained in which the participants of the plan participate, or (ii) the plan prohibits participants from investing more than twenty percent (20%) of their individual accounts in any non-diversified investment (as defined in subsection (a)(2)(E)).

SECTION 4. BURDEN OF PROOF IN THE EVENT OF BANKRUPTCY OR INSOLVENCY OF SPONSOR OF CERTAIN ELIGIBLE INDIVIDUAL ACCOUNT PLANS.

1. A new subsection (n) is added to § 502, to read as follows:

(n) If an eligible individual account plan (as described in § 407(d)(3)(A)) is maintained, but a substantial retirement plan (as defined in § 404(d)(2)(C)) that benefits the participants of the eligible individual account plan is not maintained, then, unless the plan is either described in § 404(a)(2)(B) or is an employee stock ownership plan or a stock bonus plan described in the last sentence of § 404(a)(2), in any lawsuit alleging breach of the duties of § 404(a)(1) applicable to eligible individual account plans, the burden of proving compliance with such rules with respect to purchasing or holding of qualifying employer securities shall lie with the fiduciaries charged with investment oversight of such qualifying employer securities in the event of bankruptcy or insolvency (as defined in Internal Revenue Code § 108(d)(3)) of the issuer of qualifying employer securities.

ELIGIBLE INDIVIDUAL ACCOUNT PLANS LEGISLATION PROPOSAL BULLET SUMMARY

1. If the plan sponsor maintains a "substantial retirement plan" that does not invest in company stock, then ERISA's fiduciary duties of diversification, prudence and loyalty do not apply to any other plan or portion thereof to the extent that such plan invests, or permits investment in, company stock (i.e. eligible individual account plans-hereafter, "EIAPs"). Accordingly, there would be no potential ERISA cause of action with respect to the EIAP(s) of the plan sponsor due to purchase or holding of company stock, even if the plan sponsor files bankruptcy, assuming: (a) all transactions in company stock have been at arm's length; (b) no commissions have been charged with respect to purchases or sales; and (c) plan terms have been followed. A "substantial retirement plan" is a defined as: (a) a non-contributory defined benefit plan which does not backload accruals and that supplies a 33.3% of final average pay pension plus COLAs for an employee who works 30+ years; or (b) a defined contribution plan with a 6% employer contribution which is not invested via participant direction.

2. If #1 does not apply, and the plan is funded (partially or fully) by employee contributions, then the plan must place a 20% limit on the amount of employee-funded accounts that can be invested in company stock in order for the relief from ERISA's fiduciary duties described in #1 above with respect to company stock to apply. Employees could not be required to invest any portion of their contributions accounts in company stock. No limits would exist, however, on the amount of investment in company stock with respect to matching contributions accounts. Under a transition rule, excess amounts in employee-funded accounts with respect to a plan that permits (but does not require) investment in company stock could be transferred to existing matching contribution accounts over a 2-year period without participant consent. If these limits are not followed, the duties applicable to EIAPs under current law would apply, except that the burden of proof would lie with fiduciaries in the event of a lawsuit if the sponsor went bankrupt or became insolvent.

3. If a substantial retirement plan (as described in #1 above) is not supplied, and the plan is an ESOP or stock bonus plan that is fully funded by employer contributions, then relief from ERISA's fiduciary duties as described in #1 above applies. However, such relief would not apply in the event that the employer filed bankruptcy or became insolvent. Instead, the duties of prudence and loyalty applicable under current law would apply.

4. If the conditions of #1 above are not met, and a plan allows direction of investments into non-diversified investments such as individual company stocks, then ERISA's fiduciary duties apply to the design feature that allows investment into non-diversified investments, including the percentage of any participant's account that can be invested in company stock, unless either: (a) a substantial retirement plan is maintained; or (b) the plan limits investment in any one non-diversified investment to 20% of participants' accounts. Whether the duty has been met will depend on the facts and circumstances including, but not limited to, the limitations placed on participants' abilities to invest in non-diversified investments and the disclosures provided to participants about the risks of lack of diversification of investments.

The ability of participants and plan trustees to participate in lawsuits brought outside ERISA would not be impacted. ERISA's fiduciary duties would continue to apply in all of the above cases in the event of any corporate reorganization, stock sale or other major transaction involving the employer. The reliefs supplied above would apply only if summary plan description explains the risks of investment in non-diversified investments, including company stock.

57098

Summary of Reasons for Company Stock and Directed Investment Changes Proposal

Enron corporation's stock price experienced a precipitous fall in late 2001, culminating with Enron's bankruptcy filing. Many employees chose to invest in ENRON stock through Enron's 401(k) plan. Matching employer contributions under the 401(k) plan were made in Enron stock. As a result, the retirement benefits of participants in the ENRON 401(k) plan that were heavily invested in Enron stock have become almost worthless.

A similar situation recently occurred at Lucent Technologies, although Lucent has not filed bankruptcy. In both the Enron situation and the Lucent Technologies situation, lawsuits have been filed alleging breach of fiduciary duties under the Employee Retirement Income Security Act of 1974 ("ERISA").

Many corporate retirement plans (other than Enron's and Lucent's) allow or require employees to invest substantially in company stock, thus potentially causing part or all of the retirement benefits of the employees of the companies that sponsor such plans to be subject to tremendous risk. The Enron situation or the Lucent situation could occur at any of these companies.

Aside from the employees' risk problem, employers who sponsor retirement plans must appoint fiduciaries to oversee the investments and administration of their plans. Such fiduciaries often are company officers and/or board members. ERISA places substantial fiduciary duties on such individuals, including the duty to act prudently, and creates personal liability in the event of failure to fulfill these duties. Since a substantial amount of money is often accumulated in retirement plans, to induce officers or board members to serve as fiduciaries, the employer/plan sponsor typically will indemnify a fiduciary who is subject to liability under ERISA if the fiduciary has acted in good faith.

The fiduciary duties of ERISA generally require an analysis by an investment fiduciary of whether it is prudent to purchase or hold investments under a retirement plan, including company stock. This duty exists even though plans designed to invest in company stock (i.e., "eligible individual account plans") are exempt from ERISA's general fiduciary duty that plan investments be diversified (to reduce the risk of large losses). Particularly given the interaction of the Federal securities laws with ERISA, it is very difficult to determine whether this duty has been met, and difficult to act should a determination be made that purchasing or holding company stock is an imprudent course of action. The case law to date regarding ESOPs has held that investment in company stock is presumed to be a prudent course of action, and participants bear the burden of proving that the fiduciaries acted imprudently. ESOP fiduciaries can be sued even though, by statute, ESOPs are required to be designed to invest primarily in employer securities. Stock bonus plans are, similar to ESOPs, designed to invest substantially in

employer securities. The law in this area, however, is far from clear, and there is no law defining fiduciary duties relating to 401(k) plan investments in employer securities.[1]

Diversification of investments reduces risk. Sophisticated investors are knowledgeable of this axiom. Generally speaking, however, employee participants in retirement plans are not sophisticated investors. Given the chance, often based on "tips," etc., many of these individuals will invest disproportionately in one or a few stocks in an effort to accumulate wealth quickly. Such a course of action can be dangerous.

In recent years, the 401(k) plan has become the most popular retirement plan. Previously, most plan sponsors hired fiduciaries to invest the assets of the retirement plans that they sponsored; in recent years, however, employers have created investment fund options in which employees can individually direct the investment of their accounts. Under ERISA § 404(c), ERISA's fiduciary duties are presumed to be met with respect to such a plan if certain conditions are met. Even with this presumption, plan fiduciaries must act prudently when deciding upon investment options to be made available. In order to satisfy the requirements of ERISA § 404(c), the investment options offered must be diversified in nature. In very recent years, a new trend has arisen with respect to participant-directed accounts, which often allow participants to invest their accounts in any manner desired, including investment in stocks of individual companies. Typically, the amount or percentage of a participant's account that can be invested in a single investment option is not subject to limitation. Many professionals are concerned that participants, who lack investment expertise, will subject their retirement benefits to excessive risk by failing to properly diversify their accounts.

Disclosure of the risks of failure to diversify can only help prevent problems. However, given that many individuals are prone to taking risky actions, it is doubtful that increased disclosure rules alone will cure the problems relating to investments by participants in company stock and other non-diversified investments.

Employers may offer only one retirement plan, offer more than one retirement plan or offer a retirement plan with different components to it – e.g., a 401(k) component and a profit sharing component. Ordinarily, plan design actions, including the decision regarding the type of plan to be offered and the amount of benefits to be supplied, are plan "settlor" functions which are not subject to ERISA's fiduciary duties. In addition to plan investment oversight, plan administration matters are subject to ERISA's fiduciary duties. Plan sponsors and the courts often find it difficult to distinguish a plan design action from a plan administration or investment action.

Proposal. Under the Proposal, if an employer sponsors and fully funds a pension plan that does not invest in company stock, and supplies a significant retirement income of thirty-three and one-third percent (33⅓%) of final average compensation over the 3-5 year period preceding retirement (plus cost of living adjustments after retirement) for an employee who has worked 30 or more years, then any other retirement or deferred

[1] Concerning ESOPs, see Moench v Robertson, 62 F.3d 553 (3rd Cir. 1995) and Kuper v. Iovenko, 66 F.3d 1447 (6th Cir. 1995).

compensation plan of the employer that invests in company stock should be subject to a relatively low standard of expected rate of return requirements, because the employer has fully funded and provided for substantial retirement benefits. The term "non-diversified investments" generally refers to a plan investments such as real estate or a single company's stock that are not an internally diversified investment medium, such as a mutual fund. If a company uses such a plan (called a "substantial retirement plan"), any benefits provided under any other retirement plan its sponsors, such as an eligible individual account plan, would simply serve to supplement the sufficient retirement plan income. Under the Proposal, if a substantial retirement plan is maintained, then ERISA's fiduciary duties do not apply to the purchase or holding of company stock by any eligible individual account plan of the employer (provided that plan terms are followed, no commissions are charged with respect to sales or purchases of company stock and sales transactions relating to company stock are at arm's length). For these purposes, a defined contribution plan will qualify as a substantial retirement plan if it does not provide for participant direction of investments and such plan provides an annual allocation as a percentage of Internal Revenue Code section 415 compensation which equals or exceeds six percent (6%) of such compensation. Furthermore, if a "substantial retirement plan" is maintained, provided adequate disclosures about the risks of failure to diversify are supplied, any defined contribution plan that allows employees to direct their investments into non-diversified investments would be exempt from ERISA's fiduciary duties with respect to the structure of such component and investments offered, provided adequate disclosures are made to employees regarding the risks of non-diversification.

In the cases where the employer does not sponsor a substantial retirement plan, the employee's retirement income is less secured, and additional security is necessary. Under the Proposal, in such a case, if the plan is a 401(k) plan or other plan partially funded by employee contributions, the plan shall be deemed to satisfy ERISA's fiduciary duties with respect to purchasing and holding of company stock only if no more than twenty percent (20%) of any participant's elective deferrals (or employee contributions) account can be invested in company stock. Employees could not be required to invest in company stock. Excess funds in an employee's elective deferrals account (or employee contributions account) currently invested in company stock in excess of the above limitation would need to be transferred to other investments within the two-year period beginning on the date of enactment and such transfers must commence within one year of the date of enactment. Maintenance of the 20% limit would be necessary whenever investment changes are permitted. If a plan that required or permitted investment of employee contributions in company stock did not follow these parameters, then ERISA's duty of prudence would apply to purchases and holding of company stock; however, in the event of bankruptcy or insolvency of the plan sponsor, in any lawsuit, the fiduciaries would bear the burden of proving that they acted prudently with respect to purchasing and/or holding of company stock in any lawsuit. In addition, if the plan allows (but does not require) investment in company stock, then the plan can provide that shares of company stock required to be divested from an employee's elective deferrals (or other contributions) account because they are in excess of the above 20% limitation could, in lieu of being divested, be exchanged for investments in the matching contributions account not invested in company stock, without participant consent.

In the situation described in the preceding paragraph, any portion of such plan consisting of employer-provided matching contributions could be invested in company stock. This could be done either voluntarily by the employee or involuntarily pursuant to plan terms. The employer could establish any parameters with respect to investment of matching contributions, including complete investment of the matching contributions account in company stock without participant consent.

Also under the Proposal, if an employer does not maintain a "substantial retirement plan" but maintains an ESOP or stock bonus plan, and all contributions to such plan are made by the employer, then ERISA's fiduciary duties are considered met with respect to purchasing or holding of company stock if plan terms are followed, no commissions are charged with respect to purchases or sales and all transactions are at arm's length. However, in the event of bankruptcy or insolvency, as under current law, participants could challenge a fiduciary's actions under ERISA's duty of prudence, based on the facts and circumstances.

Participants and the trustee of any retirement plan could, as under current law, participate in any other lawsuits with respect to company stock held. In all of the above cases, ERISA's fiduciary duties would apply in the event of a sales or reorganization transaction of the plan sponsor. In any case not described above with respect to any retirement plan not covered above, the ordinary, current law ERISA fiduciary duties would apply, except that fiduciaries would have the burden of proving that they acted prudently with respect to purchasing and/or holding of company stock in any lawsuit if the employer files bankruptcy or becomes insolvent.

While ERISA's fiduciary duties do not ordinarily apply to plan design matters, they often apply to actions relating to plan investments. Because most participants are unsophisticated with respect to investments, plan design features which allow participants to invest in non-diversified investments such as an indiviual company's stock may be subject to ERISA's fiduciary duties. (It is not certain whether such a design feature would be subject to ERISA's fiduciary duties under current law.) Under the Proposal, such a design feature is an action that is subject to ERISA's fiduciary duties unless if adequate disclosures regarding non-diversified investments are provided to participants and either: (a) a substantial retirement plan is maintained for the participants; or (b) the maximum percentage that a participant's account can be invested in non-diversified investments does not exceed twenty percent (20%). The determination of whether the fiduciaries have acted prudently will be based on all of the facts and circumstances, including, but not limited to, the limits provided by the plan on participants' ability to invest in non-diversified investments and disclosures provided to participants regarding the risks of lack of diversification of investments.

Fiduciaries are always concerned with potential liability under ERISA for breach of fiduciary duties. As a result, many employers may find it beneficial to redesign their plans as necessary to fall within the exemptions from the fiduciary duty rules supplied by the Proposal.

In any case, in order for the fiduciary relief provisions described above to apply, if the plan invests in company stock or allows participants to direct their investments into any non-diversified investments (including, but not limited to, company stock), the plan's summary plan description would need to explain the risks inherent in investment in a single stock and in non-diversified investments in general. The explanation would include a summary of what happens when a company becomes insolvent and/or files bankruptcy.

AUTUMN 2001

JOURNAL of PENSION BENEFITS

ISSUES IN ADMINISTRATION, DESIGN, FUNDING AND COMPLIANC

Volume 9 • Number 1 • Autumn 2001

COLUMNS

FEATURE ARTICLES

A PANEL PUBLICATION

ASPEN PUBLISHERS, INC.

Eligible Individual Account Plans and ERISA's Fiduciary Duties

By ALLEN BUCKLEY

What are an ERISA fiduciary's duties when dealing with an eligible individual account plan? This article explores that question, to which there is no clear answer.

Imagine you've just been hired as the investment fiduciary of an employee stock ownership plan (ESOP) of a large company (XYZ Corp.) that has been in existence in a stable industry for a long time. In Year 1 of your engagement, the company is not doing well but is nowhere near bankruptcy. In accordance with plan terms, substantially all of the ESOP's assets are invested in company stock. Legal counsel has advised that you need not diversify the assets as would ordinarily be necessary for a typical retirement plan, but you must act prudently. Counsel has also informed you that you could be personally liable for any losses incurred by plan participants as a result of a breach of your fiduciary duty.

The average of the month's high (ask) price and the month's low (bid) price (hereafter, the average price) for the company stock held by the ESOP for December of Year 1 is $13.125. Thereafter, XYZ's situation worsens. The average price for the month of July of Year 2 is $10.875. The average price for December of Year 2 is $8.993.

Things then get worse. The first sentence of an article of a December of Year 3 edition of *Newsweek* magazine reads: "For months XYZ Corp. has been inching closer to bankruptcy, dragged down by a sales curve that seemed to slip another notch with every fresh headline on the Company's crisis." The same article states that XYZ Corp.'s *daily* losses are running between $6 million and $8 million. The average price for the month of December of Year 3 is $6.83.

As the fiduciary overseeing this company's ESOP, should you now, at the end of Year 3, sell the company stock of the ESOP (or begin selling) and then diversify the proceeds so as to attempt to produce a respectable return for the participants? If you sell now, will you be questioned for not having sold in Year 1? Or in Year 2? Could you have already failed to act prudently by not selling before things got this bad?

You don't sell, hoping the company will come back. In Year 4, the company's stock price continues to fall, but the company continues to avoid bankruptcy. For December of Year 4, the average price is $5.50. Time to sell?

In Year 5, things even get worse. The stock continues to fall. The average price for December of Year 5 is $3.07. You fear that if you don't sell and the company goes bankrupt, you'll surely be sued for not having sold and produced something worthwhile for the participants. You ask yourself, why didn't I sell in Year 1? Or at least in Year 2? You could have utilized the sales proceeds of the company stock to purchase blue chip mutual funds. You ask yourself, why haven't I al-

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ready been sued? Time to sell so as to get *something* for the participants? (Surely if you sell now you'll be questioned for not having sold earlier for a higher price—the *Newsweek* article looms in your mind.)

In Year 6, you begin attending seminars on wealth preservation with titles such as "Offshore Trusts: Come Join the Party!" Somehow, things stagnate. Then, things begin to turn around. By December of Year 6, the average price has rebounded to $14.83. Thank goodness you didn't sell at $3.07!

Year 7 is even better. For December of Year 7, the average price is $27.75. For December of Year 8, the average price is $29.57. For December of Year 9, the average price is $44.375. The success continues thereafter. What if you had sold at $3.07? What about at $13.125 or $6.83?

Although the ESOP is imaginary, the story is otherwise true. The company is Chrysler Corp., and Year 1 was 1977. (The name Chrysler was included in the *Newsweek* quotation, not XYZ Corp. [Tom Nicholson et al., "Will the Bailout Leak," *Newsweek*, Dec. 31, 1979])

If Chrysler maintained an ESOP or other eligible individual account plan (e.g., a stock bonus plan) that invested exclusively or primarily in company stock, under current law its fiduciaries would likely have agonized over what direction they should pursue as the company continued to decline. Each day could have been the all-time low (the worst day on which to sell) preceding a turnaround, or could have been the day before the day bankruptcy proceedings began. It is the law relating to this company stock scenario that this article primarily examines. Related issues are also discussed.

(The pendulum may have recently begun to swing back the other way for Chrysler—now Daimler Chrysler. An article in the January 31, 2001, edition of *The Atlanta Journal-Constitution* is titled "Chrysler plan to cut 26,000 jobs revives memories of late 1970s.")

ERISA's GENERAL RULE

Under Section 404(a)(1)(B) of the Employee Retirement Income Security Act of 1974 (ERISA), a fiduciary in charge of investment of a retirement plan's assets generally must make sure that the plan's assets are diversified so as to minimize the risk of large losses. A fiduciary of a retirement plan is defined in ERISA Section 3(21) to include any person who exercises any discretionary authority or control respecting management or disposition of the plan or its assets. If, however, a plan is an eligible individual account plan (EIAP) under ERISA Section 407(d), and the plan so provides, the assets may be invested primarily or exclusively in common stock of the plan sponsor, provided such investment (and continued investment) does not run afoul of ERISA's duty to act prudently. As explained below and exemplified above, the prudence issue can present a conundrum for plan fiduciaries.

Under ERISA Section 407(d)(3), EIAPs can take the form of ESOPs, stock bonus plans, or profit sharing plans. Under Internal Revenue Code (Code) Section 4975(e)(7), a money purchase pension plan can be part of an ESOP. Technically, an ESOP can consist of a stock bonus plan and a money purchase pension plan. Quite often, an EIAP will be invested exclusively or almost exclusively in company stock. Under Code Section 4975(e)(7), an ESOP must, by its terms, be designed to be invested primarily in certain employer securities. Failure to be so invested over a significant period of time could cause a plan to fail to qualify as an ESOP, potentially resulting in significant detrimental tax consequences.

ERISA's FIDUCIARY DUTIES AND EIAPs

Under ERISA Section 404(a)(1)(B), a fiduciary of a pension plan must act with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of like character and with like aims. Under ERISA Section 404(a)(1)(C), a plan fiduciary generally must diversify the investments of a pension plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so. ERISA Section 404(a)(2), however, provides that in the case of an EIAP, the diversification requirements of ERISA Section 404(a)(1)(C) and the prudence requirement (to the extent that it requires diversification) of ERISA Section 404(a)(1)(B) are not violated by the acquisition or holding of qualifying employer securities.

Under ERISA Section 404(a)(1)(D), a fiduciary must act in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of Titles I and IV of ERISA. If a plan provision violates the generally applicable fiduciary rules, it cannot be followed. For example, a plan that provides that all of its assets or a specific subset or portion thereof is to be invested in company stock would be lawful provided that such investment did not violate the otherwise applicable fiduciary duties of ERISA. Under ERISA Section 408(e), for purchases or sales

to qualify for exemption from the prohibited transaction rules, the sales price must be for adequate consideration and no sales commissions can be charged.

A duty of loyalty to plan participants also exists under ERISA. Under this duty, the fiduciaries must act for the participants' best interests, even if doing so is contrary to the plan sponsor's or the fiduciary's best interests.

When combined, the rules described in the preceding paragraphs lead to the conclusion that an EIAP that is designed (by its terms) to invest exclusively or virtually exclusively in employer stock can be so invested by the fiduciaries with respect to both the existing trust fund and any future contributions to the trust, provided that such actions would be taken by a prudent fiduciary familiar with EIAPs and investments in general when acting under the same circumstances, given that the ordinarily applicable duty to diversify is eliminated from the fiduciary analysis equation. The question is, since an EIAP is designed to be invested in company stock, when is the (limited) prudence standard applicable to EIAPs violated? A violation could mean liability for breach of fiduciary duty.

THE QUESTION

The issue of EIAP prudence begs the question of whether the company stock held by the trust of the plan must be a prudent investment under the applicable ERISA standards, or whether a lesser standard might apply. For example, the prudence requirement (i.e., that the fiduciaries act prudently) might simply require that the plan's terms concerning purchases and percentages of company stock holdings be followed, sufficient liquidity be retained, required securities law and ERISA disclosures be made, and ERISA's requirements that (1) no sales commissions be charged on purchases (or sales) and (2) no more than fair value be paid for company stock be followed. To the author's knowledge, there is no clear answer to the question. As discussed further below, the limited case law to date dealing with ESOPs has presumed that company stock needs to be a prudent investment under the applicable ERISA standards.

If ERISA's duty of prudence requires merely that plan terms be followed, disclosure requirements be satisfied, sufficient liquidity be retained, and purchases and sales be made for fair value without commission charges, there should be no magic to compliance with the law. If an EIAP provides that all of its assets can be invested in company stock, then, subject to liquidity needs, provided purchases are made at a price that does not exceed fair market value and sales are likewise made at fair market value, and no commissions are charged, up to 100 percent of the plan's assets could be invested in company stock. If investment of employee contributions were required or allowed, compliance with certain disclosure rules under federal securities laws would also be necessary, as further disclosed below.

If the correct interpretation of the statutory language is that company stock must be a prudent investment, the question of exactly what constitutes a prudent investment must be analyzed. As stated above, without really analyzing the question presented above, the limited case law to date has presumed that company stock must be a prudent investment under ERISA standards.

LEGISLATIVE HISTORY

The legislative history of ERISA does not provide a clear answer to the foregoing question. The Senate Report to ERISA provides the following:

> The committee bill generally prohibits employee benefit plans from acquiring stock or other securities of the employer. This is provided because generally *investment in an employer's securities subjects plan participants to a double risk of loss. If an employer has severe financial reverses, his employees may not only lose their jobs (and the employer's contributions for their retirement may substantially decrease), but they may also suffer a loss from decreases in the securities' value and dividends.* Also, if the trust is permitted to invest in securities of the employer, the fiduciary may well be subject to great pressure to time the purchases and sales so as to improve the market in those securities, whether or not the interests of protecting retirement benefits of plan participants may be adversely affected.
>
> *However, the bill provides a special rule for profit-sharing plans because the concept of these plans is that employees should share in profits through dividends and appreciation as well as through employer contributions out of profits. As a result it is not a violation of this securities-of-the-employer rule for a profit-sharing plan to invest all or any part of its assets in securities of the employer if the securities are readily tradable in an established securities market.* However, where the securities are not tradable on an established market, then no more than 10 percent of the profit-sharing trust's assets is to consist of the employer's securities. This limit is needed because of the greater difficulty in selling such securities and therefore the greater risk involved in this situation.
>
> *Moreover, the bill does not limit acquisition of employ-*

> *er's stock by stock bonus plans, since limitations in these cases would be inconsistent with the nature of these plans.*

[S. Rep. No. 93-383 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4890, 4983 (emphasis added)]

The Conference Report to ERISA provides as follows:

> However, a special rule is provided for individual account plans which are profit-sharing plans, stock bonus plans, employee stock ownership plans, or thrift or savings plans, since these plans commonly provide for substantial investments in employer securities or real property....
>
> In recognition of the special purpose of these individual account plans, the 10 percent limitation with respect to the acquisition or holding of employer securities or employer real property does not apply to such plans if they explicitly provide for greater investment in these assets. *In addition, the diversification requirements of the substitute and any diversification principle that may develop in the application of the prudent man rule is not to restrict investments by eligible individual account plans in qualifying employer securities or qualifying employer real property.*

[H.R. Conf. Rep. No. 93-1280, (1974), *reprinted in* 1974 U.S.C.C.A.N. 5038, 5097 (emphasis added)]

Concerning the prudent man rule, the Conference Report to ERISA provides:

> The conferees expect that the courts will interpret this prudent man rule (and the other fiduciary standards) bearing in mind the special nature and purpose of employee benefit plans.

[H.R. Conf. Rep. No. 93-1280, (1974), *reprinted in* 1974 U.S.C.C.A.N. 5038, 5083.]

> [T]he diversification requirements of the substitute and any diversification principle that may develop in the application of the prudent man rule is not to restrict investments by eligible individual account plans in qualifying employer securities or qualifying employer real property.

(H.R. Conf. Rep. No. 93-1280 (1974), *reprinted in* 1974 U.S.C.C.A.N. 5038, 5097.)

AUTHORITIES ON FIDUCIARY DUTIES

The decision to establish a plan that invests in employer securities is a settlor function and not a fiduciary function. Settlor functions include plan design as well as establishment and termination decision making by the plan sponsor. [*See* Lockheed Corp. v. Spink, 517 U.S. 882, 116 S. Ct. 1783, 135 L. Ed. 2d 153 (1996).] If a plan that directs that investment be made in employer securities qualifies as an EIAP, the fiduciary must act with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of like character with like aims.

Labor Regulations

ERISA requires that a plan fiduciary act prudently. Labor Regulations Section 2550.404a-1(b) provides that the prudence rule is satisfied if the fiduciary (1) has given *appropriate consideration* to the facts and circumstances the fiduciary knows or should know are relevant to the particular investment or investment course of action involved, including the role of the investment in the plan's portfolio, and (2) has acted accordingly. Hence, the fiduciary would presumably need to analyze the financial situation of the employer, the industry outlook in general, and all information it has or should have in making its decision as to whether investment (or continued investment) in company stock is prudent. As discussed below, if the plan's investment oversight fiduciaries are company "insiders," an issue exists as to whether inside information should be utilized when making investment decisions regarding company stock.

Obviously, the decision of whether to divest all of the company stock of a plan that, by its terms, is designed to be invested in company stock would require significant consideration. But when does such consideration need to be given? Quarterly? Annually? Daily? When the stock is up? When it is down?

It is uncertain whether the answer to the prudence question relating to company stock produces an all-or-nothing result. If the question is whether company stock is a prudent investment under ERISA, it appears that a negative answer would mean full divestiture. It may be, however, that prudence would require only cessation of the purchase of company stock. Oddly enough, such a situation might occur when the stock was trading at an all-time high, or when the company was teetering on bankruptcy. In either case, the all-or-nothing conclusion appears to be the most logical, although it may not be feasible. (See securities law discussion below.)

Labor Regulations Section 2550.404a-1(b) provides that "appropriate consideration" shall include, but not be limited to, (A) determination by the fiduciary that the particular investment or investment

course of action is reasonably designed, as part of the portfolio, to further the purposes of the plan, taking into consideration the risk of loss and the opportunity for gain (or other return) associated with the investment or investment course of action, and (B) has considered the following factors: (1) liquidity, (2) return relative to the funding objectives of the plan, and (3) diversification. It is important to note that this regulation was drafted to apply to plans in general, not to cover EIAPs that invest primarily in employer securities specifically. Therefore, the regulation must be "toned down" to deal with EIAPs. Accordingly, for example, the diversification factor does not apply.

Concerning (A), determining that the investment is reasonably designed to further the purposes of the plan, taking into consideration potential risk of loss and opportunity for gain, EIAPs which are ESOPs or stock bonus plans ordinarily are designed to cause the participants to share in the fortunes of the company, good or bad. Also, as stated above, ERISA Section 404(a)(1)(B) requires that the fiduciary use the care, skill, prudence and diligence under the circumstances that a prudent man acting in like capacity and familiar with such matters would use in the conduct of an enterprise of like character and with "like aims." As noted in the legislation history, the "aim" of an EIAP is for the participant to share in the fortune of the employer company. That aim would be difficult to achieve without investing substantially in company stock.

Concerning liquidity, if the company stock of the plan sponsor held by the EIAP is traded daily on a public stock exchange, this factor should be met. If the company stock is not publicly traded, the liquidity of the stock will require an analysis of the facts surrounding the investment. The stock of most private companies is illiquid in the short term. Given that substantial legislation exists encouraging the formation of ESOPs, and almost all ESOPs relate to small companies, it would appear to be unfair to apply the liquidity factor to ESOPs.

Labor Regulations Section 2550.404a-1(b) provides that the remaining requirement, return relative to the funding objectives of the plan, must be analyzed in light of the nature and objectives of the plan. It is difficult to determine what this requirement would mean for an EIAP that invests exclusively or almost exclusively in company stock. It appears from the foregoing discussion from the legislative history (and acceptance of Congress that EIAPs result in sharing in the company's risk and return) that the return could be appropriately geared *solely* toward the company's success, thus making the factor completely irrelevant. If so, then, for a publicly traded company, the stricter standard (i.e., that the investment be prudent) would be identical to the more lenient standard that plan terms be followed, disclosures be made, and so forth. Alternatively, it might be that the appropriate return factor is the rate of return for the industry in which the company conducts business. In that case, private companies might need to compare themselves with public companies in the same industry.

The proposed regulations under ERISA Section 404(a)(1)(B) listed volatility as a factor. The preamble to the final regulations discusses the exclusion of volatility as a factor under the final regulations. The preamble suggests that such factor is part of the "role of the investment in the plan's portfolio." The preamble states that volatility must be considered as part of the prudence equation when volatility is present; however, since this factor was not actually included in the final regulations, it appears that volatility need not be separately considered. Some stocks, such as those of public utility companies and real estate investment trusts (REITs), ordinarily experience insignificant volatility. Volatility is particularly relevant when a participant's distribution amount is determined as of a particular day, and a distribution is payable upon a particular event, such as termination of employment. If company stock is experiencing a downturn when a participant terminates employment (or is involuntarily terminated), the distribution amount payable to the participant will be relatively low. Since a plan ordinarily cannot distribute vested accounts in excess of $5,000 without participant consent, this issue ordinarily presents a problem only if a cash-out provision exists as to small accounts, such as one applicable upon termination of employment. (A problem could exist in other cases. For example, a profit sharing plan might require that a distribution be taken at normal retirement age. Most plans, however, do not require that benefits be distributed upon attainment of normal retirement age.)

Case Law

Apparently realizing the dilemma fiduciaries face, the case law has been very pro-fiduciary. A degree of latitude has been granted to ESOPs by two U.S. courts of appeals. As stated above, by statute ESOPs are plans that are "designed to invest primarily" in employer securities. These words are required to be included in the language of ESOP documents. Case law has recog-

nized that ESOP fiduciaries must struggle with the statutory ESOP duty to invest primarily in employer securities and ERISA's fiduciary duty of prudence. Two U.S. circuit courts have resolved this conflict by ruling that an ESOP fiduciary's investment in employer stock is presumed prudent, but a participant (or participants) can overcome this presumption by showing that a prudent fiduciary acting under similar circumstances would have made a different investment decision. [*See* Moench v. Robertson, 62 F.3d 553 (3d Cir. 1995); Kuper v. Iovenko, 66 F.3d 1447 (6th Cir. 1995); *see also* Eccles and Gordon, "3rd and 6th Circuits Apply Abuse of Discretion Standard to Failure of ESOP Fiduciaries to Diversify Plan Assets," 4 ERISA Litigation Rep. 16 (Dec. 1995).] In light of the Chrysler comeback discussed above (and similar comebacks) and the legislative history of ERISA, it is difficult to imagine a situation in which participants would be able to overcome the presumption.

In *Kuper v. Iovenko* [66 F.3d 1447 (3d Cir. 1995)], a class action lawsuit, the participant plaintiffs alleged, among other things, that the ESOP fiduciaries breached their fiduciary duties by failing to diversify the plan's assets when a substantial loss in value occurred. The stock dropped from a price in excess of $50 per share to a price slightly more than $10 per share. The fiduciaries had access to several items of financial and other information from which they could gauge potential changes in stock value.

The fiduciaries in *Kuper* argued that the terms of the plan did not grant them discretion to diversify the plan's assets. Concerning this issue, the court ruled that the "purpose and nature of ERISA and ESOPs precludes a plan's per se prohibition against diversification or liquidation." [Kuper, 66 F.3d at 1457] The court also noted the dual nature of ESOPs, which serve both as an employee retirement benefit plan and a technique of corporate finance. The court stated:

> Because of these dual purposes, ESOPs are not designed to guarantee retirement benefits, and they place employee retirement assets at much greater risk than the typical diversified ERISA plan.

[Kuper, 66 F.3d at 1459 (citing Moench v. Robertson, 62 F.3d 553, 571 (3d Cir. 1995)]

After thoroughly analyzing both Congress's intention to encourage ESOPs and ERISA's fiduciary duties, the court ultimately balanced the two purposes by adopting *Moench's* position that

> an ESOP fiduciary who invests the assets in employer stock is entitled to a presumption that it acted consistently by virtue of that decision. However, the plaintiff may overcome that presumption by establishing that the fiduciary abused its discretion....

[*Id.*]

Other Authorities and Means of Determination

Before the enactment of ERISA, stock bonus plans that were not ESOPs were granted latitude by the IRS with respect to return requirements. In Revenue Ruling 69-65 [1969-1 C.B. 114], the IRS ruled that stock bonus plans that require investment exclusively in employer stock are exempt from the requirement that they earn a "fair return commensurate with the prevailing rate." This fair return requirement was announced in Revenue Ruling 57-372. [1957-2 C.B. 256]

It is uncertain whether a profit sharing plan (including a profit sharing plan that includes a cash or deferred arrangement under Code Section 401(k)) that is an EIAP is entitled to a presumption of prudence. To be conservative, since the courts have thus far required that company stock be a prudent investment, a profit sharing plan's fiduciaries in charge of investment oversight might assume the presumption of prudence does not apply, and that the decision to invest in company stock must be based on the general prudence standard, that is, relative to other investment options that are available. Whether a presumption of prudence exists or not, the prudence issue should remain the same.

If the prudent investment standard applies, some mechanism must be established to determine prudence. In this regard, courts generally measure prudence by the process by which a decision was made, and not by the result. Often, professional analysts of brokerage companies track the stock of publicly traded companies as an investment option. Ratings such as buy, hold, and sell are commonly applied. Since the analysts are professionals whose fate is tied to their advice to their clients, if a sufficient number of analysts track a stock and most of those analysts rate the company's stock as a hold or a buy or the equivalent thereof, it would seem that the fiduciaries could utilize such results for a finding of prudence. Presumably, the analysts utilize all public information available when making their determinations and recommendations. Of course, since analysts

rarely give sell ratings, interpretation of recommendations might be necessary. In this regard, in June 2001, the Securities and Exchange Commission (SEC) issued a warning that analysts' reports may not be unbiased as a result of conflicts of interest.

In sum, in the author's opinion, at present there is no absolute law on the matter. The limited case law from the U.S. courts of appeals to date (applicable to ESOPs) has presumed that a relatively subjective investment standard applies, but has then placed the burden on participants to prove that the standard has been violated by an abuse of discretion.

INSIDER TRADING RULES

If the persons monitoring prudence are company insiders, an issue exists as to whether any inside information they acquire must or can be utilized in their prudence analysis. The interaction of two rules causes a dilemma when company insiders are the fiduciaries who oversee investment of the company's retirement plans, if company stock is a plan investment:

1. *ERISA rule.* Fiduciaries must act prudently and for the exclusive benefit of participants.
2. *SEC rule.* Rule 10b-5, promulgated under Section 10(b) of the Securities Exchange Act of 1934, as amended (the Exchange Act), among other things prohibits company insiders from purchasing or selling securities "on the basis of material, nonpublic information" concerning a company. Thus, any insider can purchase or sell securities while in possession of such information only if he or she first discloses such information. [*See* Chiarella v. United States, 445 U.S. 222, 227–35 (1980).] Material nonpublic (i.e., inside) information is information that a reasonable investor would likely consider significant to an investment decision and that has not been disseminated to the investing public. A classic example of inside information is a forthcoming earnings report.

The apparent rationale behind Rule 10b-5 is that an insider should not be able to utilize his or her superior knowledge to the detriment of an unknowing purchaser. Rule 10b-5 is of particular concern to publicly traded companies, since open market trading in the company's securities is more likely to involve an informational advantage on the part of company insiders than is a privately negotiated transaction.

ERISA Section 514(d) provides that ERISA will not alter, impair, modify, invalidate, or supersede any other federal law, or any rule or regulation issued under any other federal law. [*See also* Chiarella v. United States, 445 U.S. 222, 230–34 (1980); Feldman v. Simkins Indus., Inc., 679 F.2d 1299 (9th Cir. 1982).] Based on this provision, a fiduciary should not be required to violate Rule 10b-5 in order to comply with ERISA. The author, however, could find no case law that supports or refutes this position.

As a practical matter, it is unrealistic to think that someone can "tune out" a portion of his or her brain when performing a prudence analysis. This practicality is one more reason why the lesser standard of prudence should be applied.

A few cases have addressed what happens when a conflict arises between a general non-ERISA fiduciary duty and the insider trading rules. One court has ruled that if a conflict arises between the two duties, the fiduciary must remove him- or herself from the conflict or face potential liability to either or both parties to whom he or she owes a duty. [Cede & Co. v. Technicolor, Inc., 634 A.2d 345 (Del. 1992).] It should also be noted that under state law, officers and directors generally have a duty of loyalty to the company they serve. [*See id.*] They have a duty not to disclose confidential information of the company that could cause harm to the company, and informing potential purchasers of company stock of negative information could be harmful to a company. For example, such information could reduce the company's credit rating, thereby increasing its cost of capital. Federal securities laws similarly recognize the duty owed by officers to the company to refrain from disclosing material information because "[i]nformation can be among a corporation's most valuable assets." [*See* United States v. Chestman, 947 F.2d 551, 576–78 & n.5 (2d Cir. 1991) (*en banc*) (Winter, J., concurring in part and dissenting in part).]

There is no statutory definition of the term *insider* for Rule 10b-5 purposes, but the courts have defined the term to include corporate officers and directors and other persons who have access to confidential information intended to be available only for a corporate purpose. [*See* Chiarella v. United States, 445 U.S. 222, 230–34 (1980); Feldman v. Simkins Indus., Inc., 679 F.2d 1299, 1304 (9th Cir. 1982); SEC v. Fox, 654 F. Supp. 781, 790 (N.D. Tex. 1986).] Often, corporate officers with access to inside information are the plan's fiduciaries in charge of investment oversight. Under ERISA, company officers can serve as plan fiduciaries. When acting as plan fiduciaries, however, they must follow the ERISA fiduciary duty

rules, and must ordinarily put any duty to the corporation aside to the extent that duty is inconsistent with ERISA's fiduciary duties.

It appears from the ERISA statute alone that in the case of a traditional EIAP in which participants cannot direct investments to or from company stock, a prudent fiduciary who is a corporate officer would need to utilize all of the information at his or her disposal in deciding whether company stock remains a prudent investment. Under the prudent investment standard discussed above (if it applies), if the inside information led the fiduciaries to conclude that company stock was no longer a prudent investment, the obligation to sell would presumably exist. Rule 10b-5, however, would require a disclosure of the negative inside information to potential buyers. Disclosure of this information would presumably cause the potential buyers to refuse to buy at the then-current market price. Hence, the only price at which the stock would sell would be a new market value, as adjusted downward to take into account the inside information, and the loss that the fiduciaries would be attempting to avert would not be prevented. If the fiduciaries did not offer the stock for sale, the value would eventually be reduced when the inside information became public knowledge.

An argument could be made by participants that not selling on the basis of inside information, when the information is available to the fiduciary insiders, or alternatively, disclosing the information to potential purchasers, would be a violation of ERISA's duty to act prudently and for the exclusive benefit of participants. The argument would be that the duty to act for the exclusive benefit of participants would require acting on the basis of all information available to the fiduciaries, not just public information, and would further prohibit disclosure of such information to potential purchasers, which disclosure would lower the price received upon sale. (It is important to remember in this regard that "bad" information that might cause the price of company stock to go down is not something that should result in a sale of company stock. Only bad information that would lead a reasonable person, knowledgeable as to investments, to conclude that it would be imprudent to continue to invest in company stock should result in a sale of company stock.) As stated above, informing the third party of such information would effectively foreclose the possibility of a sale to such person, at least at the then-market value. Utilization, however, of such information without informing the third-party purchasers would result in a violation of the fiduciary's duty to such purchaser under Rule 10b-5. Again, ERISA does not require such an action.

Often the terms of the governing plan provide that the fiduciaries are indemnified by the company for actions taken in good faith. If one assumes the fiduciaries acted in good faith, and assumes the enforceability of such indemnification provisions (which would likely be far from clear in reality), in the event of a sale of company stock and a loss by a third-party purchaser when material negative inside information was not disclosed, followed by liability of the fiduciaries, any reimbursement by the company to the fiduciaries for their liability to third-party purchasers should be for an amount approximately equal to the stock's decline in value since the transaction. (Notwithstanding the foregoing, the SEC is authorized, under Section 21A of the Exchange Act, to seek restitution of up to three times the profit gained or loss avoided as a result of insider trading.) This payout would, in turn, reduce the assets of, and hence the value of, the company. All shareholders would be harmed, and all employee participants could be indirectly harmed.*

If inside information were not utilized, and no sale occurred when utilization of such information would have resulted in a sale (and hence no liability existed with respect to any third party), participants might sue based on a claim that the fiduciaries acted improperly by not selling the stock when utilization of inside information would have led a reasonable person to conclude that the stock was no longer a prudent investment. In such a case, in the unlikely event of liability, the fiduciaries should still be indemnified for their actions if governing documents so provided and if they acted in good faith. The good-faith argument would be that a sale would have required disclosure of the inside information, which would have reduced market value. Hence, the loss would have been incurred anyway. Therefore, under either approach, the company's resources could be depleted, and this would reduce the value of the company to all shareholders. (A very difficult question would be raised in the very unlikely event that the recovery of the third-party purchaser or the participants from the company was foreclosed because of the bankruptcy of the company. The question would be, which party should sustain the loss?)

Nothing would prevent the company from delegating the obligation to analyze the prudence of investment in company stock to a third-party professional. Such a delegation should prevent the ERISA-SEC issue from arising, because the third party should

*Correction to be made in the Winter 2001-2 edition.

not possess inside information. The downside of the independent fiduciary approach is cost. Depending on the value of the company stock in issue, an independent fiduciary would likely charge a substantial sum to deal with such a high-risk task on an ongoing basis. It is likely that these costs could technically be charged to the plans as a cost incident to maintaining plan investments. Query, however, whether participants would really benefit from such an expense. Charging their accounts for such an expense could itself arguably be a breach of fiduciary duty, especially if no or little additional value would be provided by the independent fiduciary. Charging such an expense to the employer would reduce the employer's net worth and the expense would thereby have a much smaller (and indirect) impact on participants.

Although nothing in ERISA technically prohibits a third party from acting as the sole fiduciary with respect to investment oversight, the independent fiduciary approach may raise the issue of a potential ERISA violation simply because of the transfer of the decision-making process from someone with superior knowledge to someone with inferior knowledge. (This could be true even if no inside information existed.) This issue would be particularly acute if the prudent investment standard is applicable and the transfer was made at a time when the (additional) inside information would lead a reasonable person to conclude that the investment status of the stock has gone from prudent to imprudent. The plan fiduciaries could argue that taking such action was necessary to avoid a conflict.

It should also be noted that if a lawsuit arose under any of the scenarios presented, technically the seller would ordinarily be the trustee. If the trustee did not possess inside information, a violation would probably also exist under the securities laws if, for example, participants were notified of inside information that would cause a reasonable investor to believe that the stock has ceased to be a prudent investment, and the participants subsequently directed the trustee to sell company stock. A directed trustee would ordinarily seek indemnification from the company for any loss it incurred.

Based on the foregoing authorities, it appears that there is no "correct" answer, and possibly no best solution to the ERISA fiduciary duties/SEC Rule 10b-5 issue. Under recently promulgated SEC Rule 10b5-1, a purchase or sale is presumed to have been made "on the basis of" inside information if the person making the purchase or sale was *aware* of the information when making the purchase or sale. Although this presumption is subject to certain affirmative defenses, it negates the need to prove that an insider "utilized" information in deciding to trade. Thus, instructing insider fiduciaries to consider all knowledge except inside information in performing their prudence analysis would be of no real utility in dealing with this apparent conflict. Utilization of an outsider should help prevent the possibility of liability to participants or third parties. The benefits of utilizing an outsider would need to be weighed against the detriment incident to using an outsider, particularly if the fees of the third party would be charged to the plan. It might be that the costs are such that a prudent fiduciary would not incur them. If a third party is retained, the conservative approach would be to have the company pay the fees.

SEC DISCLOSURE RULES

A tax-qualified plan may allow voluntary employee contributions to be invested in company stock. SEC disclosure rules exist to protect the employee. For companies that file reports with the SEC under the Exchange Act, the company shares that are available for "purchase" by employees under such plans (as well as "interests" in such plans) must generally be registered with the SEC under the Securities Act of 1933, as amended (the Securities Act). The relatively simple Form S-8 can generally be utilized for this purpose. Because an S-8 filing incorporates other SEC filings of the company by reference, it is relatively easy to assemble. Fees must be paid to the SEC, based on the number of shares registered.

If the Securities Act registration requirements apply, a prospectus must be issued to the eligible participants who may buy company stock. Often, plan sponsors and/or administrators combine the prospectus with the plan's summary plan description (SPD). Every participant must receive an SPD. (Much of the information required by the prospectus requirements will be supplied in a typical SPD.) The combined document will ordinarily state that it is both an SPD and part of a prospectus under the securities laws. One of certain specified documents, such as an annual report or Form 10-K containing the most recent annual financial statements of the company, must ordinarily be issued with the prospectus. Thereafter, each participant investing in employer stock must be treated as a shareholder for disclosure purposes. Accordingly, such participants must receive copies of annual reports, proxy statements, and the like. In addition, upon the filing of a Form S-8, the

plan itself will become subject to a duty to file its annual financial statements with the SEC on Form 11-K.

For companies that do not have a reporting duty under the Exchange Act, SEC Rule 701 may offer relief from these registration requirements. Rule 701 can be utilized to exempt both company stock and interests in tax-qualified and other benefit plans from registration under the Securities Act. No filing with the SEC is required if Rule 701 applies, although a filing under applicable state securities laws may be required. Limits exist on the amount of employer securities that can be sold pursuant to Rule 701. If Rule 701 can be utilized, certain disclosure rules will apply. If sales of employer securities under Rule 701 do not exceed $5 million in any 12-month period, the employer must deliver only a copy of the plan document to participants. If the plan is subject to ERISA, this requirement is satisfied by (1) delivering the SPD and any summaries of material modifications (SMMs) and (2) making the plan document available for copying and inspection upon request. If such sales do exceed $5 million in any such period, the employer must also deliver to participants certain financial information and a description of risks involved in investing in the securities. Compliance with Rule 701 does not necessarily insure compliance with the antifraud standards of the federal securities laws.

401(K) PLANS

There are no special rules or exceptions for 401(k) plans. If company stock is an investment option, it must meet the prudence standard, whatever it might be. If one assumes that the standard is that company stock must be a prudent investment, query how the equation is impacted if (1) investments can be changed daily, and/or (2) numerous other diversified investment options such as mutual funds exist. For a 401(k) plan that provides for daily investment changes and makes numerous diversified investment options available, it would seem that compliance with SEC disclosure rules, plan terms, and ERISA's purchase and sale rules (i.e., no commissions, fair value) should suffice to satisfy ERISA's fiduciary duties. At present, however, there is no "law" to this effect.

For plans subject to ERISA Section 404(c), thorough, specific rules apply if company stock is an investment option. The preamble to the final ERISA Section 404(c) regulations, however, states that fiduciaries must act prudently when choosing investment alternatives. Most practitioners believe that the preamble is a correct interpretation of the law; that is, whether or not ERISA Section 404(c) applies, fiduciaries must act prudently when choosing investment options to be offered. Since (1) the language in the preamble is not part of the final regulations, and (2) the ERISA Section 404(c) regulations concerning company stock are thorough, it is possible that an independent analysis of the prudence of offering company stock as an investment alternative may be unnecessary.

Company stock can be somewhat of a circular equation. Many companies hope that their employees will invest therein. Two possible reasons might include increased effort/productivity (with resulting increased stock price) and increased demand for the stock (thereby increasing stock price). When a company which sponsors a participant-directed plan induces a participant to invest in its stock, presumably no ERISA issues or potential exposure exists if: (1) the company is not a fiduciary, (2) the participant is free to choose from a portfolio which includes company stock and several diversified investment options; and (3) the participant is supplied with information about the 401(k) plan's other diversified investments and about the risk-reducing benefits of diversification. However, if less than all three of the foregoing conditions exist, it would seem that a fiduciary duty breach could possibly exist, depending on the facts.

Concerning prudence, it is relatively easy to pick a mutual fund that is prudent. Most mutual funds carry tens to hundreds of stocks and/or bonds. Thus, if a few of the investments go bad, the impact on the overall fund will not be devastating. Similarly, it is not difficult to act prudently when choosing a mix of mutual funds to be offered. Most plans offer, at minimum, a money market fund, a large company equity fund, and a balanced fund. If these options are supplied, it is unlikely that a prudence challenge could be mounted based on the mix offered.

Then comes company stock. It is not diversified. Thus, relative to mutual funds, it is a much riskier investment. But, as the legislative history to ERISA points out, EIAPs serve a different purpose. The employee who works at the company and gets a feel of the business can decide whether he or she wants to risk some of his or her capital based on his or her feel for and knowledge of the one company with which he or she is very familiar. Thus, mutual funds and company stock are "apples and oranges," and any attempted comparison would be unreasonable.

SMALL COMPANIES

There are no separate rules for small employers maintaining EIAPs. The rules described above apply.

Investment in company stock would need to be prudent, since diversification is not part of the equation. What does this mean for a small company with a significant net worth that produces little or no profits for its shareholders? Does a duty exist to sell the company stock and invest the proceeds in investments that produce reasonable returns, such as blue chip mutual funds? Or does the EIAP nature negate the need to consider such a possibility? Does it matter if the plan is an ESOP? To the author's knowledge, there are no answers to these questions. Presumably, fiduciaries of small companies need not shop their company regardless of the level of profitability, but should consider any purchase offers that arise. In this regard, all companies hope to, and plan to (at least eventually), make a profit.

UNWORKABILITY

If the law is that company stock must be a prudent investment, regardless of the trustee's awareness of inside information, the limited prudence requirement puts a fiduciary in a difficult situation. When the stock is at an all-time high, a sale would produce a relatively great return. Under the traditional "buy low/sell high" mentality, the EIAP would have served its purpose—the employees' efforts presumably caused the stock to increase, and the sale will reap them rewards that can then be diversified and held for retirement. For most EIAPs, the plan would need to be amended to allow for diversification. Once the stock reaches an all-time high, oddly, some might argue it is an imprudent investment, because it has a relatively weak potential upside, thus necessitating a sale of the stock with or without permissive plan terms. Although all stocks go through ups and downs (to the author's knowledge, no publicly traded stock has ever only gone up in value), simply because a stock is trading at an all-time high does not mean it will not continue to increase in value. In this regard, every company is different. A fiduciary who seeks to sell the stock that has been rising could be questioned for his or her actions—it was doing so well, so why did you sell? A sale often is the "end of the line." Many ESOPs relate to small private companies, where the ESOP's trust owns all or a substantial portion of the stock of the sponsor company. A sale to another company would ordinarily cause the company to be a subsidiary of a larger entity—a drastic change. Could ERISA's duty of prudence require such a change? Decisions to "sell out" or merge ordinarily fall outside of ERISA. When the company is wholly owned by an EIAP, however, ERISA fiduciary responsibility will come into play when a purchase offer is received. Absent an amendment, an ERISA fiduciary duty challenge could potentially arise for failing to follow the plan's terms. The fiduciary might argue, in certain cases, that the offer was one that no prudent fiduciary would refuse. [*See* Central Trust Co. v. American Avents Corp., 771 F. Supp. 871 (S.D. Ohio 1989).]

If the ESOP (or other EIAP) relates to a publicly traded company, and the ESOP owns a minority interest in the company, amending the plan (if necessary) and selling the company stock when it is trading at a relatively high price could be difficult. Depending on various factors, the ESOP would likely be an "affiliate" of the company for purposes of securities laws, and thus unable to sell all of the stock at once in the open market. This would force the plan to sell the stock gradually over time in accordance with SEC Rule 144. Furthermore, if corporate insiders recommend to management that the plan be amended to convert from EIAP status, the message to the market might be harmful to the stock's price. Specifically, investors could interpret such a move as indicating that the stock will not appreciate further, thus potentially causing a sell-off that would reduce the stock's market value. Lawsuits could be anticipated.

In contrast, when a company experiences financial difficulties, a fiduciary is put in a difficult position if the plan is an ESOP or other EIAP that owns all or a substantial portion of the company's stock. A sale at a low price will produce a relatively poor return. If the stock is close to worthless, any potential future loss would be insignificant. As noted above, a sale to another company will result in a change of control, and the return on the sale may be relatively low. The fiduciary could be questioned for not having acted earlier. But, at any given point in time, the future of a company cannot be foreseen. Consider the Chrysler situation described at the beginning of this article. Many people credit much of Chrysler's turnaround to the efforts of Lee Iaccoca. Recently, Chrysler merged with Daimler Mercedes Benz. Was investment in Chrysler stock a prudent action in 1981, when the value was near $3 per share and the company was teetering on bankruptcy? Looking back, it sure was. If, however, Chrysler had maintained an EIAP and sold out when the stock was at an all-time low, that judgment call would surely have been questioned (at least it almost certainly would be in today's litigious environment), probably in the form of a class action lawsuit.

Chrysler is but one example of a turnaround. In recent years, IBM stock fell drastically before IBM

mounted a comeback. More recently, AT&T has come upon hard times.

Contrast Chrysler with Boston Market, Inc., formerly Boston Chicken, Inc. (BC). The stock of BC doubled on the day of its initial public offering (IPO) in 1993. In 1996, the company opened its one thousandth store, and its annual sales were $1.2 billion—47 percent higher than 1995 sales. The stock traded at $41.50 per share in December 1996. Despite the growth, debt always burdened the company, and profits never came. The stock began to drop. By June 1, 1998, it had dropped to $2.16 per share. In June 1998, BC's chief executive officer was quoted: "I remain fully committed to doing everything necessary to achieve a turnaround for this company." Would he be BC's Lee Iaccoca? Would BC's stock rebound? The answer to both questions is no. The turnaround never came, and in October 1998, the company filed bankruptcy. Before the bankruptcy, in May 1998, Arthur Andersen LLP, BC's auditors, issued an audit opinion questioning the company's ability to remain in business. Immediately following the issuance of that opinion, the company's shares lost more than one-third of their value. [*See* Stacy Roth, "Running Out of Cluck? Boston Chicken Stock Takes Big Hit," *Daily News of L.A.*, May 30, 1998, at B1.] If company stock must be a prudent investment, query whether such an opinion could be the turning point when sales need to begin. (The author has personal feelings about BC's demise—having bought in at $5 per share in 1998 and later sold in the same year for $0.88 per share.) As in the Chrysler situation, however, each day that BC's stock dropped could have been the ultimate low. BC could have been Chrysler. It wasn't.

What the future will hold for any company can never be determined. There simply are too many variables (e.g., new technology, law changes, natural disasters, political unrest) that factor into any company's fate. A comparable situation exists with the "dot coms" of the world. In 1999, they were the darlings of the investment world; today, most of those that remain are in bankruptcy or are experiencing financial trouble.

POLICY

When an employee takes a job, he or she buys the entire package of compensation and benefits. If company stock is a retirement plan investment, the employee should live with the results—good or bad. SEC rules exist to allow employees risking their own funds to make informed investment decisions. EIAPs should not become a "heads I win, tails you lose" game with plan fiduciaries on the losing side. EIAPs are part of what inspires employees to do a good job. They should not be utilized as a mechanism for Monday-morning quarterbacking. So far, the courts have been unwilling to hold fiduciaries accountable. It is unfortunate that a more certain standard does not apply so that fiduciaries would not be left with a constant uneasy state of mind.

In any event, an EIAP plan sponsor that maintains a separate, diversified retirement plan that provides relatively substantial retirement benefits should be exempt from any "higher" standard of care described above. In such a case, the other plan presumably provides the retirement security sought by ERISA, allowing the EIAP to serve as a pure equity-sharing device.

CONCLUSION

What exactly must be done by an ERISA fiduciary to comply with ERISA when dealing with an EIAP is not certain. If company stock must be a prudent investment vis-à-vis other investment options available, many EIAPs could easily violate this standard, potentially subjecting their fiduciaries to liability. In contrast, if the standard is a more realistic standard of merely ensuring that plan terms are met, liquidity needs are satisfied, necessary disclosures are made, and purchases and dispositions of company stock are properly executed, then the standard is realistically attainable by EIAPs.

Given the constantly uncertain future of any company, and the ability of any company's fate and value to change, the ERISA standard should be the lower standard—following plan terms, ensuring liquidity needs are met, making necessary disclosures, and executing transactions appropriately. For every bankruptcy, there is a turnaround. If the disclosures required under securities laws are made to participants, this standard should be applied even if the EIAP's assets are composed of both company and participant contributions.

and hopefully won't have to redo my testing from prior years. (Gulp!) Along similar lines, I have persuaded Lonie Hassel to write about the infamous Code Section 401(l), the section in the code dealing with asset transfers in corporate transactions.

I do like to mention our columnists who expend lots of time and energy to come up with pithy columns four times per year. I've already mentioned some, but will elaborate on others who have a column in this issue.

Tess Ferrera, in her plan fiduciary column, has addresses a question about good Samaritans; i.e., the service providers who discover fiduciary breaches and take steps to rectify them. Will they become fiduciaries because of their actions? Will they violate client confidentiality by reporting such breaches to the DOL? Read on for answers to these intriguing questions.

I mentioned David Levin earlier. He has been writing our Legal Developments column since we started JPB in 1993. I don't believe he's missed a column and I'm very grateful for his continuing support. "QDROs, 404(c) Plans, and a Bear Market or The Incredible Shrinking Divorce Decree" discusses bad things that can happen when divorces get ugly and the market is going down.

We have a new columnist, Lisa Germano. Lisa, who previously edited the monthly newsletter "The Pension Plan Administrator," will be bringing her skills to JPB and writing our Plan Administration column. In this issue, she discusses the new small plan audit requirements. Our previous columnist, Lorraine Dorsa, will be moving over to the Plan Compliance column. Due to my goof, Lorraine's column did not get through. I apologize to Lorraine and our readers and encourage you to look for Lorraine's column in the Spring issue.

Chris Cumming, our Tax-Exempt Entities columnist, has written about the use of automatic enrollment in 403(b) plans. Fred Reish and Joe Faucher, our 401(k) Investment Issues columnists have authored a piece on the subject of whether plans are required to have an investment policy statement. Mike Moskal, our usual Plan Investments columnist, has instead penned a letter to the editor this time about the Boehner Investment Advice bill.

I send my good wishes to all our readers for a happy, healthy, and prosperous 2002!

Joan Gucciardi
January, 2002

CORRECTION TO ALLEN BUCKLEY'S ARTICLE IN *JOURNAL OF PENSION BENEFITS* VOLUME 9 NUMBER 1, AUTUMN 2001

On page 34, in the first full paragraph in the right hand column, the last sentence (which begins "All shareholders would be...") should have read as follows: "All shareholders would be harmed, and all employee participants could be indirectly harmed."

LETTER

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... representing the United States in the 110-meter hurdles, Swift is training in the same ... for the 2000 Olympic Games in Sydney, Australia. He has worked at UPS for 14 years and is currently in the human resources department in Oakland, California. He is a member of the global UPS Athlete ...

0010000000432

ENRON, TAX HAVENS, AND TAX SHELTERS

[(b)(5)]

Answer:

[(b)(5)]

Background

[(b)(5)]

See 1/24/02 NYT article included in background materials.

Question: [(b)(5)]

Answer:

[(b)(5)]

Question: [(b)(5)]

Answer:

[(b)(5)]

Question: [(b)(5)]

Answer:

[(b)(5)]

Background

[(b)(5)]

Question: [(b)(5)]

Question: [(b)(5)]

Answer:

[(b)(5)]

Background

[(b)(5)]

See 1/15/02 WSJ article included in background materials.

Question: [(b)(5)]

Answer:

[(b)(5)]

See 1/17/02 NYT article included in background materials.

Question: [(b)(5)]

Answer:

[(b)(5)]

Question: [(b)(5)]

Answer:

[(b)(5)]

See 1/19/02 St Petersburg Times article included in background material.

Harvey, Reavie

From: LaKritz, Robb
Sent: Tuesday, December 11, 2001 1:42 PM
To: Harvey, Reavie
Subject: FW:

Can you please clear Jim Langdon in for 3:15 at have him report to your office. I will come down and meet him then.

Thanks.

Robb LaKritz

-----Original Message-----
From: Langdon, Jim [mailto:jlangdon@AKINGUMP.COM]
Sent: Tuesday, December 11, 2001 1:41 PM
To: 'Robb.LaKritz@do.treas.gov'
Subject: RE:

in the event our meeting still works... [(b)(6)] ....jcl

-----Original Message-----
From: Robb.LaKritz@do.treas.gov [mailto:Robb.LaKritz@do.treas.gov]
Sent: Tuesday, December 11, 2001 10:30 AM
To: jlangdon@AKINGUMP.COM
Subject: RE:

Just send me your SS# and birthdate.

Thanks.

Robb LaKritz

-----Original Message-----
From: Langdon, Jim [mailto:jlangdon@AKINGUMP.COM]
Sent: Tuesday, December 11, 2001 10:30 AM
To: 'Robb.LaKritz@do.treas.gov'
Subject: RE:

That would be great.....I will see you at 3:30 ...jcl

-----Original Message-----
From: Robb.LaKritz@do.treas.gov [mailto:Robb.LaKritz@do.treas.gov]
Sent: Tuesday, December 11, 2001 9:33 AM
To: jlangdon@AKINGUMP.COM
Subject: RE:

How is 3:30 p.m. here at Treasury?

Thanks.

Robb LaKritz

-----Original Message-----
From: Langdon, Jim [mailto:jlangdon@AKINGUMP.COM]
Sent: Tuesday, December 11, 2001 9:33 AM
To: 'Robb.Lakritz@DO.Treas.gov'
Subject:

Robb....I hope you have found your way back home by now and have readjusted to this time zone....no longer is this easy for me! I would like to visit with you at your convenience on this credit crunch issue in the energy sector.... [(b)(5)]

,best regards,,,jcl

The information contained in this e-mail message is intended only for the personal and confidential use of the recipient(s) named above. This message may be an attorney-client communication and/or work product and as such is privileged and confidential. If the reader of this message is not the intended recipient or an agent responsible for delivering it to the intended recipient, you are hereby notified that you have received this document in error and that any review, dissemination, distribution, or copying of this message is strictly prohibited. If you have received this communication in error, please notify us immediately by e-mail, and delete the original message.

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[OUTSIDE SCOPE]

Dam, Ken

From: Dam, Ken
Sent: Tuesday, January 08, 2002 3:54 PM
To: LaKritz, Robb
Subject: RE:

I hope os. I'd like to. Check with Reavie.

-----Original Message-----
From: LaKritz, Robb
Sent: Tuesday, January 08, 2002 2:45 PM
To: Bair, Sheila
Cc: McCardell, Dan; Adams, Tim; Dam, Ken; Gross, Jared; Kupfer, Jeffrey
Subject:

Sheila,

Do you have time tomorrow to meet with Dan McCardell and me to discuss an internal policy roundtable we are hoping put together on issues related to the Enron situation and ancillary developments?

Thanks.

Robb LaKritz

BRIEFING

MEMORANDUM FOR UNDER SECRETARY GEITHNER

FROM: Meg Lundsager
Deputy Assistant Secretary for Trade & Investment Policy

SUBJECT: OPIC Financing for the Cuiaba Bolivia-Brazil Pipeline

ISSUE: [(b)(5)]

[(b)(5)]

OPTIONS:

[(b)(5)]

CONCLUSION:

[(b)(5)]

AGENCY VIEWS:

[(b)(5)]

TELEPHONE CALLS:

[(b)(5)]

ANALYSIS:

[(b)(5)]

[(b)(5)]

G.Christopulos/ITI/OPIC/Cuiaba-opt

Cleared by:
GHSills/ITI
JEichenberger/IDB
WSchuerch/ID

PDohlman/Desk

cc: MColby/IDB

DRAFT

[(b)(5)]

[(b)(5)]

[(b)(5)]

G.Christopulos/ITI/OPIC/Cuiaba-opt

Cleared by:
GHSills/ITI
JEichenberger/IDB
WSchuerch/ID
PDohlman/Desk

cc: MColby/IDB

Draft 6/9
BRIEFING

MEMORANDUM FOR UNDER SECRETARY GEITHNER

FROM: Meg Lundsager
Deputy Assistant Secretary for Trade & Investment Policy

William Schuerch
Deputy Assistant Secretary for Development, Debt & Environment Policy

SUBJECT: OPIC Financing for the Cuiaba Bolivia-Brazil Pipeline

Issue: [(b)(5)]

Recommendation: [(b)(5)]

[(b)(5)]

[(b)(5)]

[(b)(5)]

Drafted by:

G.Christopulos/ITI

Cleared by:
HWalsh/IDB
GHSills/ITI

cc: MColby/IDB

g;iti/opic/Cuiaba

Questions for US Embassy in Indonesia re CalEnergy Project

[(b)(5)]

ITI; 1/23/98

g:\iti\memos\calen.q

[(b)(5)]

Information

MEMORANDUM FOR ASSISTANT SECRETARY GEITHNER

FROM: Meg Lundsager
Deputy Assistant Secretary for Trade & Investment Policy

SUBJECT: [(b)(5)]

Introduction

[(b)(5)]

[(b)(5)]

[(b)(5)]

[(b)(5)]

[(b)(5)]

Drafted by: GChristopulos/ITI

Reviewed by: GHoar, Director/ITI
COuellette/ITI
M/Muench/GCI
GSampliner/GCI
MMonderer/IDD
SSager/IDA
BSetser/IMI
JCentina/IDB
JWeiner&PWest/Intl Tax Counsel

BOLIVIA-BRAZIL GAS PIPELINES

Talking Points

[(b)(5)]

Bolivia-Brazil Gas Pipeline & ENVIRONMENT ISSUES

Introduction

[(b)(5)]

Other Environmental Issues

[(b)(5)]

Main Bolivia-Brazil Gasoducto

[(b)(5)]

Cuiaba Gasoducto

[(b)(5)]

[(b)(5)]

BRIEFING

MEMORANDUM FOR DEPUTY SECRETARY EIZENSTAT

FROM: Timothy F. Geithner
Under Secretary (International Affairs)

SUBJECT: Call From OPIC President Munoz

[(b)(5)]

[(b)(5)]

Donovan, Meg

From: Sills, Gay
Sent: Thursday, July 12, 2001 5:41 PM
To: Rao, Geetha; Berg, Katie; Grewe, Maureen; Resnick, Bonnie; Christopulos, Greg; Sampliner, Gary
Cc: Donovan, Meg; Mills, Marshall; McDonald, Larry; Radelet, Steve
Subject: RE: Dabhol meeting on Enron/OPIC project at NSC

OK WITH ME

-----Original Message-----
From: Rao, Geetha
Sent: Thursday, July 12, 2001 5:39 PM
To: Sills, Gay; Berg, Katie; Grewe, Maureen; Resnick, Bonnie; Christopulos, Greg; Sampliner, Gary
Cc: Donovan, Meg; Mills, Marshall; McDonald, Larry; Radelet, Steve
Subject: RE: Dabhol meeting on Enron/OPIC project at NSC
Importance: High

We have a final set of talking points for both Treasury and State to send over to NSC by COB today ..... please comment by 6 pm today if you have any concerns.... it is line with what we had suggested. We've also posed some questions to OPIC. Thanks! and sorry for the short deadline!

-----Original Message-----
From: Speck, Janet G [mailto:SpeckJG@state.gov]
Sent: Thursday, July 12, 2001 5:20 PM
To: 'Rao, Geetha'; Usrey, Gary S; Gadzinski, Peter S; Shub, Adam M(E); Walker, M Karen; 'brooks, jo'
Cc: Scholz, Wesley S; Delare, Thomas L; Bay, Janice F
Subject: TALKING POINTS FOR US EMBASSY- INDIA

Attached are talking points for the Embassy to deliver to the GOI re Dabhol. They have been revised as per Treasury's suggestions. Please let me know asap if you have further comments so that we can forward them to the NSC tonight. Thanks.

<< File: EmbtalkY1 Dabhol rev.doc >>

-----Original Message-----
From: Sills, Gay
Sent: Thursday, July 12, 2001 3:18 PM
To: Rao, Geetha; Berg, Katie; Grewe, Maureen; Resnick, Bonnie; Christopulos, Greg; Sampliner, Gary
Cc: Donovan, Meg; Mills, Marshall; McDonald, Larry; Radelet, Steve
Subject: RE: Dabhol meeting on Enron/OPIC project at NSC

[(b)(5)]

-----Original Message-----
From: Rao, Geetha
Sent: Thursday, July 12, 2001 11:01 AM
To: Rao, Geetha; Berg, Katie; Sills, Gay; Grewe, Maureen; Resnick, Bonnie; Christopulos, Greg; Sampliner, Gary
Cc: Donovan, Meg; Mills, Marshall; McDonald, Larry; Radelet, Steve
Subject: RE: Dabhol meeting on Enron/OPIC project at NSC
Importance: High

Attached are the talking points that State sent over this morning. Please review and send back any comments by 1:30 pm TODAY. We need to submit a joint set of TPs today. Also note that [(b)(5)]

any other suggestions?

<< File: EmbtalkY1 State.doc >>

-----Original Message-----
From: Rao, Geetha
Sent: Wednesday, July 11, 2001 4:13 PM
To: Berg, Katie; Sills, Gay; Grewe, Maureen; Resnick, Bonnie; Christopulos, Greg; Sampliner, Gary
Cc: Donovan, Meg; Mills, Marshall; McDonald, Larry; Radelet, Steve
Subject: RE: Dabhol meeting on Enron/OPIC project at NSC

Katie, [(b)(5)]

Thanks to all.

-----Original Message-----
From: Berg, Katie
Sent: Wednesday, July 11, 2001 4:09 PM
To: Sills, Gay; Rao, Geetha; Grewe, Maureen; Resnick, Bonnie; Christopulos, Greg; Sampliner, Gary
Cc: Donovan, Meg; Mills, Marshall; McDonald, Larry; Radelet, Steve
Subject: RE: Dabhol meeting on Enron/OPIC project at NSC

I must admit to never having heard of this problem. Geetha's revised talking points look good to me, but I would suggest that [(b)(5)]

-----Original Message-----
From: Sills, Gay
Sent: Wednesday, July 11, 2001 3:54 PM
To: Rao, Geetha; Grewe, Maureen; Resnick, Bonnie; Christopulos, Greg; Sampliner, Gary
Cc: Donovan, Meg; Mills, Marshall; McDonald, Larry; Radelet, Steve; Berg, Katie
Subject: RE: Dabhol meeting on Enron/OPIC project at NSC

i thinkit is [(b)(5)] am adding katie berg. she does export credits. and eximbank

-----Original Message-----
From: Rao, Geetha
Sent: Wednesday, July 11, 2001 1:54 PM
To: Grewe, Maureen; Sills, Gay; Resnick, Bonnie; Christopulos, Greg; Sampliner, Gary
Cc: Donovan, Meg; Mills, Marshall; McDonald, Larry; Radelet, Steve
Subject: RE: Dabhol meeting on Enron/OPIC project at NSC
Importance: High

Attached are the revisions to the OPIC talking points that OPIC sent over late yesterday.

[(b)(5)]

The Charge from the US Embassy will most likely deliver the points to the GOI. Please comment asap. Thanks.

<< File: EmbtalkY1.doc >>

-----Original Message-----
From: Grewe, Maureen
Sent: Wednesday, July 11, 2001 12:52 PM
To: Sills, Gay; Resnick, Bonnie; Christopulos, Greg; Sampliner, Gary; Rao, Geetha
Cc: Donovan, Meg; Mills, Marshall; McDonald, Larry; Radelet, Steve
Subject: Dabhol meeting on Enron/OPIC project at NSC
Importance: High

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Readout of meeting:
Attendees: NSC, State (EB front office and investment office, South Asia Bureau), Treasury (Grewe, Rao, Sampliner), Commerce, OPIC (President Peter Watson, GC Ron Jonkers and several others)

[(b)(5)]

[(b)(5)]

Geetha will circulate revised points today. Please comment as quickly as you can and by cob today if possible, so we can try to coordinate with State. Call me or Geetha if you have any questions or need other background.

Thanks.

TALKING POINTS FOR US EMBASSY- INDIA

Re: Meeting with Ministries of Finance and Power and Dabhol Lenders' Steering Committee

[*Follow-up to meeting between Principal Secretary and National Security Advisor Mishra and OPIC President Watson in Washington*]

[(b)(5)]

[(b)(5)]

Donovan, Meg

From: Sills, Gay
Sent: Thursday, July 12, 2001 4:10 PM
To: Rao, Geetha
Cc: Donovan, Meg
Subject: RE: Dabhol meeting on Enron/OPIC project at NSC

ok with me

-----Original Message-----
From: Rao, Geetha
Sent: Thursday, July 12, 2001 3:52 PM
To: Sills, Gay
Cc: Donovan, Meg
Subject: RE: Dabhol meeting on Enron/OPIC project at NSC

[(b)(5)]

<< File: EmbtalkY1 State 2.doc >>

-----Original Message-----
From: Sills, Gay
Sent: Thursday, July 12, 2001 3:44 PM
To: Rao, Geetha
Cc: Donovan, Meg
Subject: FW: Dabhol meeting on Enron/OPIC project at NSC

-----Original Message-----
From: Donovan, Meg
Sent: Thursday, July 12, 2001 3:21 PM
To: Sills, Gay
Subject: RE: Dabhol meeting on Enron/OPIC project at NSC

[(b)(5)]

-----Original Message-----
From: Sills, Gay
Sent: Thursday, July 12, 2001 3:18 PM
To: Rao, Geetha; Berg, Katie; Grewe, Maureen; Resnick, Bonnie; Christopulos, Greg; Sampliner, Gary
Cc: Donovan, Meg; Mills, Marshall; McDonald, Larry; Radelet, Steve
Subject: RE: Dabhol meeting on Enron/OPIC project at NSC

[(b)(5)]

-----Original Message-----
From: Rao, Geetha
Sent: Thursday, July 12, 2001 11:01 AM
To: Rao, Geetha; Berg, Katie; Sills, Gay; Grewe, Maureen; Resnick, Bonnie; Christopulos, Greg; Sampliner, Gary
Cc: Donovan, Meg; Mills, Marshall; McDonald, Larry; Radelet, Steve
Subject: RE: Dabhol meeting on Enron/OPIC project at NSC
Importance: High

Attached are the talking points that State sent over this morning. Please review and send back any comments by 1:30 pm TODAY. We need to submit a joint set of TPs today. [(b)(5)]

[(b)(5)] any other suggestions?

<< File: EmbtalkY1 State.doc >>

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From: Rao, Geetha
Sent: Wednesday, July 11, 2001 4:13 PM
To: Berg, Katie; Sills, Gay; Grewe, Maureen; Resnick, Bonnie; Christopulos, Greg; Sampliner, Gary
Cc: Donovan, Meg; Mills, Marshall; McDonald, Larry; Radelet, Steve
Subject: RE: Dabhol meeting on Enron/OPIC project at NSC

Katie, [(b)(5)] We'll go ahead
Thanks to all.

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From: Berg, Katie
Sent: Wednesday, July 11, 2001 4:09 PM
To: Sills, Gay; Rao, Geetha; Grewe, Maureen; Resnick, Bonnie; Christopulos, Greg; Sampliner, Gary
Cc: Donovan, Meg; Mills, Marshall; McDonald, Larry; Radelet, Steve
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Cc: Donovan, Meg; Mills, Marshall; McDonald, Larry; Radelet, Steve; Berg, Katie
Subject: RE: Dabhol meeting on Enron/OPIC project at NSC

[(b)(5)] am adding katie berg. she does export credits. and eximbank

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Sent: Wednesday, July 11, 2001 1:54 PM
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Subject: RE: Dabhol meeting on Enron/OPIC project at NSC
Importance: High

[(b)(5)]

The Charge from the US Embassy will most likely deliver the points to the GOI. Please comment asap. Thanks.

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From: Grewe, Maureen
Sent: Wednesday, July 11, 2001 12:52 PM
To: Sills, Gay; Resnick, Bonnie; Christopulos, Greg; Sampliner, Gary; Rao, Geetha
Cc: Donovan, Meg; Mills, Marshall; McDonald, Larry; Radelet, Steve
Subject: Dabhol meeting on Enron/OPIC project at NSC
Importance: High

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[(b)(5)]

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Geetha will circulate revised points today. Please comment as quickly as you can and by cob today if possible, so we can try to coordinate with State. Call me or Geetha if you have any questions or need other background.

Thanks.

Donovan, Meg

From: Toloui, Ramin
Sent: Thursday, July 12, 2001 9:00 AM
To: Grewe, Maureen; Donovan, Meg
Subject: RE: Dabhol meeting on Enron/OPIC project at NSC

Thank you both.

-----Original Message-----
From: Grewe, Maureen
Sent: Thursday, July 12, 2001 9:00 AM
To: Donovan, Meg; Toloui, Ramin
Subject: RE: Dabhol meeting on Enron/OPIC project at NSC

Nope, that's pretty much right.

Ramin -- we are going to do an info note on the Dabhol project, just so John has some idea about it, in case it needs higher level attention at some point. Thanks.

-----Original Message-----
From: Donovan, Meg
Sent: Thursday, July 12, 2001 8:08 AM
To: Toloui, Ramin; Grewe, Maureen
Subject: RE: Dabhol meeting on Enron/OPIC project at NSC

[(b)(5)]

Maureen -- did I garble that too badly?

-----Original Message-----
From: Toloui, Ramin
Sent: Wednesday, July 11, 2001 8:43 PM
To: Donovan, Meg; Grewe, Maureen
Subject: RE: Dabhol meeting on Enron/OPIC project at NSC

Didn't get to raise with JBT before the end of the day. Should I wait until we have points for him to review?

-----Original Message-----
From: Donovan, Meg
Sent: Wednesday, July 11, 2001 1:00 PM
To: Grewe, Maureen
Cc: Toloui, Ramin
Subject: RE: Dabhol meeting on Enron/OPIC project at NSC

thanks Maureen...

[(b)(5)]

Assume we should wait until the talking points are available to bring this to JBT's attention?

-----Original Message-----

From: Grewe, Maureen
Sent: Wednesday, July 11, 2001 12:52 PM
To: Sills, Gay; Resnick, Bonnie; Christopulos, Greg; Sampliner, Gary; Rao, Geetha
Cc: Donovan, Meg; Mills, Marshall; McDonald, Larry; Radelet, Steve
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[(b)(5)]

interests might diverge.

[(b)(5)]

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Thanks.

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From: Donovan, Meg
Sent: Wednesday, July 11, 2001 1:00 PM
To: Grewe, Maureen
Cc: Toloui, Ramin
Subject: RE: Dabhol meeting on Enron/OPIC project at NSC

thanks Maureen...

Ramin -- we should probably bring JBT into the loop on this? Background is that [(b)(5)]

Assume we should wait until the talking points are available to bring this to JBT's attention?

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From: Grewe, Maureen
Sent: Wednesday, July 11, 2001 12:52 PM
To: Sills, Gay; Resnick, Bonnie; Christopulos, Greg; Sampliner, Gary; Rao, Geetha
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Donovan, Meg

From: Rao, Geetha
Sent: Wednesday, July 11, 2001 4:13 PM
To: Berg, Katie; Sills, Gay; Grewe, Maureen; Resnick, Bonnie; Christopulos, Greg; Sampliner, Gary
Cc: Donovan, Meg; Mills, Marshall; McDonald, Larry; Radelet, Steve
Subject: RE: Dabhol meeting on Enron/OPIC project at NSC

Katie, [(b)(5)]

Thanks to all.

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To: Rao, Geetha; Grewe, Maureen; Resnick, Bonnie; Christopulos, Greg; Sampliner, Gary
Cc: Donovan, Meg; Mills, Marshall; McDonald, Larry; Radelet, Steve; Berg, Katie
Subject: RE: Dabhol meeting on Enron/OPIC project at NSC

i thinkit is [(b)(5)] and eximbank

am adding katie berg. she does export credits.

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From: Rao, Geetha
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Cc: Donovan, Meg; Mills, Marshall; McDonald, Larry; Radelet, Steve
Subject: RE: Dabhol meeting on Enron/OPIC project at NSC
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Please comment asap. Thanks.

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Thanks.

Donovan, Meg

From: Sampliner, Gary
Sent: Wednesday, July 11, 2001 2:38 PM
To: Rao, Geetha; Grewe, Maureen; Sills, Gay; Resnick, Bonnie; Christopulos, Greg
Cc: Donovan, Meg; Mills, Marshall; McDonald, Larry; Radelet, Steve
Subject: RE: Dabhol meeting on Enron/OPIC project at NSC

I think the revisions [(b)(5)]

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Subject: RE: Dabhol meeting on Enron/OPIC project at NSC
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TALKING POINTS FOR US EMBASSY- INDIA

Re: Meeting with Ministries of Finance and Power and Dabhol Lenders' Steering Committee

[*Follow-up to meeting between Principal Secretary and National Security Advisor Mishra and OPIC President Watson in Washington*]

[(b)(5)]

[(b)(5)]

Donovan, Meg

From: Rao, Geetha
Sent: Thursday, July 12, 2001 2:25 PM
To: Donovan, Meg
Subject: RE: Dabhol meeting on Enron/OPIC project at NSC

[(b)(5)]

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From: Donovan, Meg
Sent: Thursday, July 12, 2001 1:54 PM
To: Rao, Geetha
Subject: FW: Dabhol meeting on Enron/OPIC project at NSC
Importance: High

I couldn't resist. [(b)(5)]

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Subject: RE: Dabhol meeting on Enron/OPIC project at NSC

Katie, [(b)(5)] We'll go ahead and send

forward the points to State to push for a joint agreement on talking points... Thanks to all.

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Thanks.

Donovan, Meg

From: Grewe, Maureen
Sent: Wednesday, July 11, 2001 1:23 PM
To: Donovan, Meg
Subject: RE: Dabhol meeting on Enron/OPIC project at NSC

great, thanks!

-----Original Message-----
From: Donovan, Meg
Sent: Wednesday, July 11, 2001 1:22 PM
To: Grewe, Maureen
Cc: Toloui, Ramin
Subject: RE: Dabhol meeting on Enron/OPIC project at NSC

thanks Maureen...

Ramin's call on the info memo, but it sounds [(b)(5)] On talking points you're probably right.

I'll give Ramin the background on the OPIC seat as soon as he has time to breathe.

-----Original Message-----
From: Grewe, Maureen
Sent: Wednesday, July 11, 2001 1:17 PM
To: Donovan, Meg
Cc: Toloui, Ramin
Subject: RE: Dabhol meeting on Enron/OPIC project at NSC

Happy to be guided here. Not sure John really needs to see these particular points if we succeed in making them more general (would be in keeping with typical USG points). But let me know if you want him to see it and I'll make sure they get to you.

Probably an info memo is a good idea though? What do you think?

Do we know if Treasury has filled its seat on OPIC's Board that used to be occupied by Stu Eizenstat? Larson is on the OPIC Board and will be reviewing the points.

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From: Donovan, Meg
Sent: Wednesday, July 11, 2001 1:00 PM
To: Grewe, Maureen
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To: Sills, Gay; Resnick, Bonnie; Christopulos, Greg; Sampliner, Gary; Rao, Geetha
Cc: Donovan, Meg; Mills, Marshall; McDonald, Larry; Radelet, Steve
Subject: Dabhol meeting on Enron/OPIC project at NSC

Importance: High

This is a readout of the meeting at NSC this morning. There is also an ACTION request. USG agencies are requested to get back to NSC by cob tomorrow with comments on OPIC's suggested talking points for a demarche to the GOI by the Charge in Delhi. I talked to the State reps after the meeting (from South Asia bureau, Investment office and Larson's office) and they seem to be basically in the same place as I was on what an appropriate message might be. My proposed plan is that Geetha will take a first crack at comments on the talking points and circulate them within Treasury as early as possible this afternoon. I am requesting that everyone provide comments by cob today, so that we can circulate our comments to State and try to come up with joint suggested points to submit to NSC by cob tomorrow. Please let me know if you have any concerns about this plan.

Readout of meeting:
Attendees: NSC, State (EB front office and investment office, South Asia Bureau), Treasury (Grewe, Rao, Sampliner), Commerce, OPIC (President Peter Watson, GC Ron Jonkers and several others)

[(b)(5)]

[(b)(5)]

Geetha will circulate revised points today. Please comment as quickly as you can and by cob today if possible, so we can try to coordinate with State. Call me or Geetha if you have any questions or need other background.

Thanks.

Donovan, Meg

From: Grewe, Maureen
Sent: Wednesday, July 11, 2001 1:17 PM
To: Donovan, Meg
Cc: Tolouí, Ramin
Subject: RE: Dabhol meeting on Enron/OPIC project at NSC

Happy to be guided here. Not sure John really needs to see these particular points if we succeed in making them more general (would be in keeping with typical USG points). But let me know if you want him to see it and I'll make sure they get to you.

Probably an info memo is a good idea though? What do you think?

Do we know if Treasury has filled its seat on OPIC's Board that used to be occupied by Stu Eizenstat? Larson is on the OPIC Board and will be reviewing the points.

-----Original Message-----
From: Donovan, Meg
Sent: Wednesday, July 11, 2001 1:00 PM
To: Grewe, Maureen
Cc: Tolouí, Ramin
Subject: RE: Dabhol meeting on Enron/OPIC project at NSC

thanks Maureen...

[(b)(5)]

Assume we should wait until the talking points are available to bring this to JBT's attention?

-----Original Message-----
From: Grewe, Maureen
Sent: Wednesday, July 11, 2001 12:52 PM
To: Sills, Gay; Resnick, Bonnie; Christopulos, Greg; Sampliner, Gary; Rao, Geetha
Cc: Donovan, Meg; Mills, Marshall; McDonald, Larry; Radelet, Steve
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Thanks.

DEPARTMENT OF THE TREASURY
WASHINGTON

Facsimile Transmittal

From

Office of Multilateral Development Banks (OASIA/IDB)
1500 Pennsylvania Avenue, N.W.
Room 3501 MT
Washington, D.C. 20220
(Fax # 202-622-2505)

Date: 1/29/01 Page 1 of 7 Page(s)

To: DAS Schuerch

Tel. #
FAX #

From: Gene Clapp

Comments:

For 4:00 Enron Meeting:

1) Commerce letter to Truman

2) Enron letters to USED at WB & IMF

Bradshaw, Tara

From: Press_Office@finance-rep.senate.gov
Sent: Monday, January 14, 2002 5:18 PM
To: Jill_Gerber@finance-rep.senate.gov
Subject: Enron, retirement plan rules

For Immediate Release
Monday, Jan. 14, 2002

Grassley Explores New Protections for Retirement Plan Participants

WASHINGTON - Sen. Chuck Grassley, ranking member of the Committee on Finance, is pursuing whether Congress should tighten up protections for retirement plan participants in light of Enron's collapse.

"Millions of Americans have hundreds of billions of dollars invested in employer-sponsored retirement plans," Grassley said. "These plans receive favored treatment under the federal tax code. The Committee on Finance has the primary responsibility, under its jurisdiction, for making sure retirement plans comply with the tax code and other laws. Our committee also has the responsibility to fix any weaknesses that might leave retirement plan participants in trouble if their employer goes under."

Grassley said the details of the Enron retirement plans are still forthcoming. However, he said, some areas already are emerging as targets for scrutiny. Specific areas Grassley is looking into are:

Company stock. Under current rules, a company can restrict a retirement plan participant from selling the match received in company stock through an employee stock ownership plan. (Enron employees' company stock matches were restricted.) Grassley is researching whether employees should be able to change this investment choice prior to an arbitrary age.

Mandated purchases of company stock. Current law allows a plan sponsor to compel employees to purchase up to 10 percent of employer stock as a condition of participating in a 401(k) plan. Grassley said he thinks this rule should be eliminated.

Fiduciary rules. These rules ensure that companies properly invest and handle retirement plan money, including spending the money for the exclusive benefit of their employees. Retirement plans are tax-favored vehicles, authorized under the Internal Revenue Code. Grassley said he wants to learn whether Enron officials violated their fiduciary duties and in general, whether Congress should change the existing rules.

Black-outs. A "black-out" or "lockdown" occurs when a plan is shut down for a period of time to allow, for example, change to another plan administrator. Enron had such a "black-out," though the length of time is disputed. Grassley said he wants to get the facts on this event because it may coincide with the decline in the company's stock value.

Mandated diversification of stocks in retirement plans. Some legislation has been introduced that mandates employees hold no more than a certain percentage of stock in their 401(k) plan. Diversification in one part of the plan should indicate that all investments should be mandated. Grassley said he has an open mind, but thinks mandates are not desirable nor particularly feasible.

Grassley said he is pursuing these ideas with experts from outside groups and agencies such as the Treasury Department, the Labor Department and the

Pension Benefit Guaranty Corporation.

"The tax code smiles on retirement plans, for good reason," Grassley said. "Tax breaks encourage employers to set up retirement plans and employees to take part in those plans. If employers find it easy to break the rules, then Congress has to re-write the rule book. Otherwise, employees counting on a secure retirement might be left out in cold."

In addition to the retirement plan track, Grassley said he is part of an effort to look into whether Enron used certain tax vehicles that might have masked the company's financial condition.

-30-

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-30-

Bradshaw, Tara

From: Washington Linda J [Linda.J.Washington@irs.gov]

Sent: Friday, January 18, 2002 10:46 AM

To: Carolyn Walas (E-mail); Charles A. Lacijan (E-mail); Charles L. Kolbe (E-mail); Denise L. Goss (E-mail); Desler, Anne; George E. Farr (E-mail); Hart, Dale; Heather B. Rosenker (E-mail); Joelle Jordan (E-mail); Karen Hastie Williams (E-mail); Loretta J. Bassette (E-mail); Lrlevitan (E-mail); Marlene Loor (E-mail); Maureen C. Allen (E-mail); Steve Nickles (E-mail); Tara Bradshaw (E-mail); Taylor, Gloria

Subject: IN THE NEWS: 1/18/02

Today`s Contents

Dow Jones Newswires

January 17, 2002

TAX FACTS: IRS Chief Wants to Stop Declining Audit Rate

By JENNIFER CORBETT DOOREN

Of Dow Jones Newswires

WASHINGTON -- The head of the Internal Revenue Service wants to put a halt to the sharp drop in taxpayer audits.

IRS Commissioner Charles Rossotti says audits are necessary to encourage individuals and businesses to pay their required amount of taxes.

Rossotti made his comments Wednesday during a news conference on the IRS's plan to conduct special taxpayer audits in order to improve the agency's overall audit program. Unless lawmakers on Capitol Hill have strong objections, the IRS will likely begin conducting audits on 50,000 taxpayers as part of its "national research program" this fall.

Rossotti hopes the research program will allow the IRS to better target its annual audits to people who are cheating the government rather than folks who pay their fair share of taxes. He says improving annual audits is especially important because fewer of them are being conducted.

In fiscal year 2000 about 618,000 individual taxpayer audits were completed, which is down from 1.9 million in 1995.

While taxpayers would probably love it if the IRS audit rate continued to drop or even go away, Rossotti said audits are "a critical part of administering the tax system." He says actual audits and the threat of being audited keeps the tax system fair by encouraging people to truthfully report their incomes and deductions in order to pay the required amount of tax.

"At the level it's (audits) at now it's very hard to do that," Rossotti said.

Ideally, he said, he's like to "slightly increase" the audit rate, but barring that he hopes the declining audit rate will at least stabilize and that the new research program will eventually make the current level of audits "more targeted and more effective."

In the next few years, Rossotti hopes the IRS will be able to extend its tax-audit study to corporations.

IRS Changes Rules for Foreign Taxpayer ID

The Internal Revenue Service has issued regulations effective Thursday that allow casinos and other entities that find themselves needing to pay foreign people unexpected earnings to issue those earnings without first obtaining a taxpayer identification number in limited circumstances.

Current law requires casinos and other payers of earnings to obtain a taxpayer identification number for a foreign person. The IRS has an expedited process for obtaining the taxpayer ID number, but the expedited process cannot be used when IRS offices are closed on weekend or holiday.

Without a taxpayer ID the casino or other entity must withhold a 30% tax on earnings such as gambling winnings. But many countries have tax treaties with the U.S. that exempt gambling earnings and other earnings or apply a different tax rate. If a foreign person who doesn't have a U.S. taxpayer ID number receives gambling earnings on a weekend, they must later file a form with the IRS to obtain a full or partial refund of the 30% tax that is withheld. If a foreigner has a U.S. taxpayer ID the paying entity can withhold the proper amount of tax subject to the tax treaty.

The new regulations allow casinos and other paying entities to pay a foreign person and withhold tax at the rate agreed to by a particular country's tax treaty with the U.S. without first obtaining the taxpayer ID number if it is during a time when the IRS is closed, such as on a weekend. The regulations require the paying entity to obtain a taxpayer ID number the first day the IRS is reopen for business.

House Health Subcommittee Chair Seeks Medicare-Choice Boost

House Ways and Means Health Subcommittee Chairwoman Nancy Johnson, R-Conn., is seeking to boost funding for so-called Medicare-Choice programs by $1.2 billion starting next fiscal year.

This comes after the Centers For Medicare and Medicaid Services announced it could only give private health insurers who participate in the Medicare-Choice program a 2% increase in payments. Johnson noted that health costs rose 11% last year. She says unless Congress approves additional funding for Medicare-Choice, seniors will be in "jeopardy of losing quality health care."

2. IRS moves to renew audits to check compliance * REUTERS

REUTERS

01/17/2002 13:30

IRS moves to renew audits to check compliance

WASHINGTON, Jan 17 (Reuters) - This fall the U.S. Internal Revenue Service will begin reviewing a "statistically valid" sample of tax returns in an effort to update its information on taxpayer compliance.

The reviews, announced on Wednesday, will include less than 50,000 of the 132 million individual returns filed annually. The new audits, dubbed the National Research Program, will take the place of a previous efforts discontinued in 1988.

"If we can't make sure that everyone pays their fair share, then honest taxpayers get stuck making up the difference. So, tracking taxpayer compliance is a cornerstone of a fair tax system," Treasury Secretary Paul O'Neill said in a statement.

The largest portion of the audits, about 30,000, will deal with only selected portions of returns, not the painstaking "line-by-line" approach used in the past.

Another 9,000 audits will include exchanging correspondence with taxpayers. The IRS said some taxpayers contacted for the audits likely would have heard from the IRS anyway in its routine of matching up information.

"The IRS is working smarter," said IRS Commissioner Charles Rossotti. "We have found new ways to use existing information to measure tax compliance. The process is substantially less intrusive on taxpayers, but will help us catch tax cheating and improve tax administration."

By gathering data on taxpayer compliance, the IRS hopes to shrink the so-called tax gap, the difference between total tax liability and taxes paid voluntarily and on a timely basis. That gap for all taxes, including individual, business, employment and estate levies, was estimated at $278 billion in the 1998 tax year.

In comparison, the budget surplus seen in Fiscal Year 2001 was much smaller, at $127.02 billion.

3. They Had a Chance to Say Goodbye * Newsday

Newsday (New York, NY)

January 18, 2002 Friday ALL EDITIONS

SECTION: NEWS, Pg. A28

LENGTH: 523 words

HEADLINE: **They Had a Chance to Say Goodbye**

01/18/2002

Assistant U.S. Attorney Noelle M. DiMarco is presenting the case before U.S. District Judge Keith Ellison.

DiMarco is trying to prove to the jury that the four defendants falsified tax returns for at least 20 of their clients resulting in a 27-count indictment.

The penalties in the case carry up to five years for conspiracy and three years for each of the counts, plus fines of up to $250,000.

The case stands on claims that the taxpayers' earned income credit was disallowed by the government and ordered to be paid back, while the government indicted the tax preparers for allegedly falsifying information on the tax returns to get the credit.

Margaret "Peggy" Alverdi, a 15-year veteran employee of the IRS was the government's witness Wednesday.

Alverdi audited some of the taxpayers' claims and disallowed their earned income credit despite that in some cases, she had found no fraud.

The tax cases were referred to Alverdi by IRS Special Agent Garry Ploetz as part of the Border Preparer Project, an investigation that apparently covers the U.S.-Mexico border.

Gonzalez's attorney Emilio Davila tried to show the jury that Alverdi's ruling to disallow the credit came because she was "preprogrammed" by Ploetz, who was following up on a criminal investigation under the Border Preparer Project.

Alverdi disagreed with the word "preprogrammed."

Davila then asked her if she knew why Gonzalez was indicted on a tax return filed electronically that she didn't prepare.

Alverdi answered, "No, I don't know."
Gonzalez was indicted on seven counts.

During cross-examination by Davila, Alverdi admitted that in three of the claims she had audited no fraud was found and she marked "no" on the form's box.

Davila showed the jury Alverdi's report on which she indicated on the audit she performed on the tax return of Abel Moreno she had placed a question mark instead of indicating "yes or no" in finding negligence or fraud.

In the two audits done for Antonio Hernandez for years 1995 and 1996, she had indicated that no fraud was found.

Alverdi testified she spoke to Hernandez on the telephone and he had explained that he had named his sister as a dependent because their parents had not sent them any support money while they lived with their aunt. Hernandez was claiming $3,346, which was disallowed by the auditor.

During the cross examination of the witness, Davila managed to get on the record that Hernandez was trying to help his sister, an honor roll student at a local high school.

Earlier in the day, Alverdi was cross-examined by attorney Fausto Sosa, who represents Elizabeth Benavides.

The government expects to present more than 50 witnesses and continue presenting its testimony on Thursday.

15. FEDERAL DIARY: Florida Lawmaker Suggests Another Road to 'Offset' Relief * The Washington

Post

The Washington Post

January 18, 2002, Friday, Final Edition

SECTION: METRO; Pg. B02; FEDERAL DIARY STEPHEN BARR

LENGTH: 746 words

HEADLINE: **Florida Lawmaker Suggests Another Road to 'Offset' Relief**

BYLINE: Stephen Barr

BODY:

A top House Republican has offered a plan to modify the "government pension offset," a provision of Social Security law that reduces benefits for thousands of people who retired or will retire under the Civil Service Retirement System.

Rep. E. Clay Shaw Jr. (R-Fla.), chairman of the House Ways and Means Social Security subcommittee, has proposed revamping the offset formula as part of a bill that would ease the burden on the Social Security system by encouraging younger workers to invest in personal retirement accounts.

Under the offset, a spousal or survivor Social Security benefit is cut by two-thirds of the person's government pension. Shaw's proposal would peg the offset at one-third of an individual's government annuity. Many federal retirees feel the two-thirds offset is too harsh. Some lose their entire Social Security benefit, and others, especially women who held lower-income jobs, can ill afford to have their retirement income reduced, retirees point out.

Officials at the National Association of Retired Federal Employees, which has lobbied for several years to repeal or change the offset, said they were encouraged by Shaw's proposal, which is part of legislation aimed at ensuring the survival of Social Security.

In their view, Shaw's proposal acknowledges retiree complaints that the offset is a serious problem. It also provides another legislative alternative that may stir debate.

Offset bills have been introduced by various members of Congress during the last decade. For instance, Rep. Howard P. McKeon (R-Calif.) has proposed repealing the offset altogether, and Rep. William J. Jefferson (D-La.) and Sen. Barbara A. Mikulski (D-Md.) sponsored legislation that would guarantee a minimum $ 1,200 combined monthly income before the pension offset could be applied to Social Security spousal benefits.

"If you can go to some kind of markup, or get this fully considered by a committee, you have a range of options to be considered and negotiated with," said Judy Park, NARFE's legislative director.

NARFE estimates that 305,000 beneficiaries are affected by the offset and that the number grows by 15,000 each year.

The offset was enacted in 1977 to end what critics called an unfair advantage for government workers. Before the offset's creation, federal workers could receive a full government pension and a full spousal benefit under Social Security.

But Social Security, under its "dual-entitlement rule," does not pay full benefits to private-sector workers who earned a retirement benefit and also are eligible for a spousal benefit. The rationale behind the rule is that a person who receives a retirement pension is less dependent on a spouse and not entitled to a full spousal benefit.

Shaw held a hearing on the offset in the summer of 2000, and he signaled last year that he might rethink the formula as part of a comprehensive plan to reshape Social Security.

That comprehensive plan -- the "Social Security Guarantee Plus Plan" -- has now taken shape and includes his proposed change in the offset formula. Shaw's plan would create a voluntary program under which workers would receive a refundable tax credit of 2 percent to 3 percent of their earnings for investment in stocks and bonds. Participating workers would receive a lump-sum payout on retirement, and Social Security would use earnings from the accounts to help pay regular benefits. Ultimately, Social Security's projected cash shortfalls would be eliminated, the Shaw plan promises.

The prospects for Shaw's legislation are unclear. Congress is headed into an election year, which can create political crosswinds for members trying to move Social Security legislation. In addition, President Bush's Social Security commission suggested that Congress take at least a year to discuss options before overhauling the system.

Marlene Kawaguchi, a telecommunications manager at the International Broadcasting Bureau, retired Dec. 31 after more than 37 years of government service.

Miguel Torrado, associate commissioner for personnel at the Social Security Administration, will be the guest on "The Business of Government Hour" at 8 a.m. tomorrow on WJFK radio (106.7 FM).

"The King Holiday, Federal Employees and Community Service" will be the topic for discussion on the Imagene B. Stewart call-in program at 8 a.m. Sunday on WOL radio (1450 AM).

1/30/02
12:55p

Chuck -

I belatedly found this business card in my drawer - I have no other place or context for the matter. My note on the back indicates we met w/ the Emerson rep + others in 8/99 to discuss the troubled situation of Independent Power Producers (IPPs) in Indonesia.

Pls give me a call if you have any Qs - Tom Wells suggested I pass this over to you.

Marilyn Muench
X. 21986

05000

Enron International
1775 Eye Street, N.W.
Suite 800
Washington, D.C. 20006
(202) 466-9153

Edith Terry
Manager
Global Affairs

Fax (202) 331-4717
Cellular (202) 744-0659
terrye@enron.com

05001

01000000000072

8/95 [illegible]

[illegible] IPP

MEMORANDUM FOR JEAN HANSON

FROM: DENNIS I. FOREMAN
DEPUTY GENERAL COUNSEL AND
DESIGNATED AGENCY ETHICS OFFICAL

SUBJECT: *The Secretary's letter re Enron Corp.*

SUMMARY

[(b)(5)]

DISCUSSION

[(b)(5)]

[(b)(5)]

Granat, Rochelle

From: Fall, James III
Sent: Wednesday, January 16, 2002 7:38 AM
To: Wunderlin, Linda
Cc: Munk, Russell; Granat, Rochelle; Kimack, Michael
Subject: Enron - request of Treasury for any Enron Contacts

Joseph Hillings, the former head of the Enron office in Washington until his retirement last March, has been a personal friend for more than twenty five years. I have had periodic contact with him as a personal friend, sometimes for lunch at Treasury and outside. When questions have arisen about who paid for the lunch, I have discussed with the GC's office in each instance. James H. Fall

4 December 2001

Production Team
(81-3) 3213-6269

Japan Daily Notes

Japan Daily Notes: 4 December 2001

Research Summary

Highlights:

- **BANKS:** Impact of Enron Similar to Mid-size Domestic Bankruptcy (Yamada)

Merrill Lynch & Co.
Global Securities Research & Economics Group
Global Fundamental Equity Research Department

BANKS: Impact of Enron Similar to Mid-size Domestic Bankruptcy

Main Points:

- ***News:*** The FSA provisionally estimate the total size of Japanese bank lending to Enron at around ¥100bn. Exposure amounts total around ¥35.3bn for MTFG and ¥33bn for Sumitomo Mitsui. However, these also include project finance deals that are not subject to Enron's corporate risk. The banks will have to make reserves in FY3/02, but the size of the impact is similar to a mid-size domestic bankruptcy (*Nikkei*).
- ***Earnings Implication:*** On a net basis (excluding project finance and loan sales), Sumitomo Mitsui has outstanding credit of ¥25.8bn with Enron, while UFJ has a mere ¥1.8bn. Mizuho's total loans appear to be slightly above MTFG's when including loans to affiliates. For each of these banks, however, the losses are likely be absorbed in FY3/02 credit costs, so the impact on earnings should be minimal. Additionally, the banks loan exposure to Argentina is small.
- ***Investment Implication:*** Though having a minimal impact on earnings, the realization that Japan's banks have credit risk not only domestically, but also internationally might be a psychological negative. However, the "misclassification" of Enron as a debtor was not limited to Japanese banks – it seems it was classified as a normal or special-mention borrower by US and European banks as well.

Comment: ***Enron loans:*** MTFG and Sumitomo Mitsui made formal press releases of their loan exposure to Enron on 3 December. MTFG's outstanding credit totaled ¥35.3bn, including some secured loans. Sumitomo Mitsui's was ¥33bn – of which ¥7.2n is project finance, and not subject to Enron's corporate risk – leaving a net credit of ¥25.8bn (US$1/¥123). UFJ's credit of ¥5.8bn includes ¥4bn in loans sold, leaving a net ¥1.8bn. Mizuho has extended ¥15bn in credit to Enron's parent, though we estimate loans to affiliates included would bring its total above MTFG's (see note).

On level with mid-sized domestic bankruptcy: The total of ¥100bn in credit to Enron (a few tens of billions of yen for each of the four major banking groups) ranks it alongside a medium-sized domestic bankruptcy. While difficult to anticipate what extra amounts might be involved at the present stage, this level of exposure should be covered by FY3/02 forecast credit costs (Mizuho and UFJ, ¥2trn, Sumitomo Mitsui, ¥1trn, MTFG, ¥480bn). Moreover, Enron's bond credit rating prior to failure was investment grade triple-B, so it seems it was not only Japanese banks, but also their US and European counterparts who classified Enron as a normal or special-mention borrower.

Investment rating implication: Japanese banks' international lending activity has been on the decrease ever since the 1998 financial crisis, and their credit risk is not as high as it was before. Nevertheless, the realization that Japan's banks have credit risk not only domestically, in the form of large special-mention borrowers, but also internationally, might be a psychological negative. We believe Japanese banks' exposure to sovereigns Argentina and Turkey is small. While Sumitomo Mitsui has some ¥2.3bn in loan exposure to Argentina, and MTFG some ¥89.2bn, in the latter's case, a major proportion of this exposure is to affiliates of multinational corporations with high credit ratings and locally incorporated Japanese companies. – **Yoshinobu Yamada**

(***Note:*** In our 3 December *Intra-day Note*, we estimated the exposure of the four major Japanese banks with Enron at ¥2-20bn per bank, but more precisely this should have read "credit per bank of those belonging to the four major banking groups.")

Major Banks: Loan Exposure to Enron (¥bn)

	Total Exposure	Of Which Project Finance or Loan Sales	Net Exposure
Mizuho	15*	-	-
MTFG	35	-	-
UFJ	6	4 (Loan Sales)	2
SMBC	33	7 (Project)	26

* Exposure to Enron's parent. We estimate that exposure, including affiliates, would surpass MTFG.

Sources: Banks

(Continued)

Lebryk, David

From: Lori.Santamorena@bpd.treas.gov
Sent: Friday, November 30, 2001 7:41 AM
To: David.Lebryk@do.treas.gov
Subject: RE: 1DJC) DJ CSFB: Three Big Banks Have $1.5B Loan Exposure

Dave,

Barbara may have filled you in by now- Kurt/Nadir/Barbara spoke with Glen- he's getting back to us today.

By the way, I saw Norman last night - [(b)(6)] We talked about Enron and the retail swaps study- I'm at the 10am meeting today- the report is due to Congress in late December. He also said the clearing bank interviews at FRBNY were very interesting. Any word on what the next step is?

Lori

Lebryk, David

From: Lebryk, David
Sent: Thursday, January 10, 2002 7:08 PM
To: Hammond, Donald
Subject: RE: FT Article

This doesn't help much either.

Despite continued whispers around Washington that Paul O'Neill's job is in jeopardy, the White House yesterday stood by its man, saying rumours of the outspoken Treasury secretary's imminent downfall were nothing but "kerfuffle" and "nonsense".

Asked whether President George W. Bush's confidence extended to O'Neill's handling of the Argentine crisis - while some critics have accused the Treasury of failing to give Buenos Aires more support, others have slammed O'Neill for not cutting the strapped government loose earlier - Ari Fleischer, White House spokesman, insisted it did.

"O'Neill has done an excellent job," he told a gathering of reporters.

When the irascible Helen Thomas, a columnist for Hearst newspapers and the dean of the White House press corps, reminded Fleischer that the riots and government collapse in Argentina have not generally been viewed as successes where policymakers have done "excellent" jobs, a nonplussed Fleischer said the blame did not fall at O'Neill's feet: "Not everything in the world is in the control of the United States, or even the Treasury secretary."

-----Original Message-----
From: Hammond, Donald
Sent: Thursday, January 10, 2002 5:52 PM
To: Lebryk, David
Subject: FW: FT Article

Intresting

-----Original Message-----
From: Seward, Lachlan
Sent: Thursday, January 10, 2002 11:46 AM
To: Hammond, Donald
Subject: FT Article

Don, Here's the article I mentioned. Lach

Financial Times (London)
January 9, 2002, Wednesday London Edition 1
SECTION: BACK PAGE - FIRST SECTION; Pg. 20
HEADLINE: Whispers in the shadows leave O'Neill vulnerable: US Treasury secretary faces a campaign from enemies within the Bush administration.
Gerard Baker reports:
BYLINE: By GERARD BAKER
BODY:
In Washington, whispers don't stay whispers for long, especially when they

involve someone's career. Sotto voce assertions that someone is on the way up, down, or out, can quickly become deafening.

The man in the echo-chamber at the start of the second year of the administration of George W. Bush is Paul O'Neill, Treasury secretary.

Throughout the holiday break, Washington was abuzz with speculation - not of a positive sort - about Mr O'Neill's future. He has powerful, and increasingly vocal, critics within the Bush administration and in Congress. From the very beginning of the administration, his habit of speaking his mind on what was driving the dollar, the efficacy of international financial co-operation and the folly of fiscal demand management roiled financial markets, troubled his G7 counterparts and raised hackles among his Republican colleagues.

Mr O'Neill was not helped either by a lack of clarity within the administration about who held the reins of economic policymaking.

Lawrence Lindsey, Mr Bush's influential economic adviser, seemed much closer to the president politically and personally. On several occasions last year, the Treasury was forced to insist that it, rather than the White House, was in charge of policy on international economics. Unfortunately, the clarifications only helped to muddy the situation further.

But none of this seemed to worry the ever-cheerful former chief executive of Alcoa, the aluminium producer. As the year wore on, he toned down some of his more quotable remarks and after the tragedy of September 11, politicians and financial markets had more important things to worry about.

But in the last month the political context of Mr O'Neill's vulnerability has changed. When his critics were mostly currency economists and finance ministers of emerging market economies, it did not seem to matter much. But recently he has alienated the conservative base of the Republican party.

In the autumn, when the House of Representatives passed a highly partisan post-September 11 economic stimulus package of tax cuts for business and higher-income Americans, Mr O'Neill dismissed it as "showbusiness".

Republicans were outraged. The Treasury secretary had already irritated some within his own party with his cool support for Mr Bush's Dollars 1,350bn (Pounds 931bn) tax cut in June. There were reports on Capitol Hill of delegations of Republican congressmen preparing to march up to the White House and request Mr O'Neill's removal.

Middle-ranking White House officials have been conferring in private about what they see as Mr O'Neill's shortcomings. A month ago, some were encouraging speculation that his successors were already being lined up. A favourite candidate was Phil Gramm, the ideologically rock-ribbed Texas senator who retires this year. But Mr Gramm's links with Enron, the failed energy-trading company, seem to have removed him from consideration.

To conservatives, the dysfunction at Treasury goes beyond the secretary.

There is also criticism of Peter Fisher, a Democrat and former New York Federal Reserve official, who was appointed by Mr Bush to take charge of domestic financial policy. John Taylor, the respected monetary economist who heads international policy, has been hammered for his handling of the financial crisis in Argentina.

The Free Congress Foundation consulted its members and offered a grading of the performance of Mr Bush's cabinet. There were As for Donald Rumsfeld, the defence secretary, and Dick Cheney, the vice-president; a strong B for John Ashcroft at the Justice department; a C for the multilateralist Colin Powell at the State department and a straight D for Mr O'Neill.

"O'Neill doesn't understand where Republicans should be on the economy and taxes," one respondent to the survey said, according to Steve Lilienthal, foundation spokesman.

Mr O'Neill attracts criticism from non-conservatives too. The suspicion that Treasury may have been overruled more than once by the White House is damaging and seems to have contributed to, and been magnified by, a lack of engagement on the part of Treasury in some big international issues.

Mr O'Neill has remained above the fray, apparently reluctant to be drawn into the fighting around him. But there are signs that the Treasury might be starting to speak up politely in its own defence.

Before Christmas, when a favourable article about Mr O'Neill appeared in the editorial pages of the Washington Post, a Treasury official quickly drew it to the attention of economics reporters.

And before the political obituaries are prepared, it should be remembered that Mr O'Neill has powerful allies. His biggest sponsor is Mr Cheney, the eminence grise of the Bush White House, who worked with Mr O'Neill in the Ford administration. One of his admirers is Alan Greenspan, chairman of the Federal Reserve.

"Well, you know, I have a couple of clients. The most important client is the president of the United States," Mr O'Neill said on NBC's Meet the Press last Sunday.

"As long as they continue to tell me that they're happy with what I'm doing . . . I'm going to be here to help them and be part of their team."

Hammond, Donald

From: Lori.Santamorena@bpd.treas.gov
Sent: Friday, November 30, 2001 8:01 AM
To: david.lebryk@do.treas.gov; donald.hammond@do.treas.gov
Subject: DJ: IN THE MONEY-2:Collateral Key To Counterparties Recovery

this is a good article

----- Forwarded by Lori Santamorena/BPD on 11/30/01 07:58 AM -----

Norman.Carleton@do.treas.gov

11/29/01 06:13 PM

To: Sheila.Bair@do.treas.gov, Peter.Bieger@do.treas.gov, Timothy.Bitsberger@do.treas.gov, Edward.Demarco@do.treas.gov, Karen.Dorsey@do.treas.gov, Martha.Ellett@do.treas.gov, Dina.Ellis@do.treas.gov, Jose.Gabilondo@do.treas.gov, Jared.Gross@do.treas.gov, Lucy.Huffman@do.treas.gov, Gerry.Hughes@do.treas.gov, Tom.McGivern@do.treas.gov, Roberta.McInerney@do.treas.gov, Peter.Nickoloff@do.treas.gov, Brian.Roseboro@do.treas.gov, Anne.Salladin@do.treas.gov, Heidilynne.Schultheiss@do.treas.gov, Amy.Smith@do.treas.gov, Gary.Sutton@do.treas.gov, Brian.Tishuk@do.treas.gov, Steve.Berardi@do.treas.gov, Jill.Cetina@do.treas.gov, Matthew.Eichner@do.treas.gov, Viva.Hammer@do.treas.gov, lsantamorena@bpd.treas.gov, Michael.Novey@do.treas.gov, Fred.Pietrangeli@do.treas.gov, James.Sharer@do.treas.gov, Jean.Whaley@do.treas.gov, Mark.Wiedman@do.treas.gov

cc:

Subject: DJ: IN THE MONEY-2:Collateral Key To Counterparties Recovery

November 29, 2001

IN THE MONEY-2:Collateral Key To Counterparties Recovery

Dow Jones Newswires

Thoughts of an Enron bankruptcy jogged memories of past fillings, such as the case of Drysdale Government Securities Inc., which involved public entities being left on the hook for millions of dollars in uncollateralized government repurchase agreements.

But bankruptcy laws have evolved significantly since the 1982 collapse of Drysdale sent shockwaves through the financial community and forced banks to pay out tens of millions of dollars to cover Drysdale's obligations to other government securities firms.

More recently, Orange County's 1994 bankruptcy following its derivatives debacle and the bitter dispute surrounding German's Metallgesellschaft Ag for breach of forward petroleum contracts suggests that acrimonious and lengthy litigations might be in the offing. In the latter case, many counterparties settled out of court and took "haircuts" after a judge ruled that independent petroleum marketers who entered into long-term hedging contracts as protection against escalating fuel prices could sue the metals and engineering conglomerate for breach of contract.

But the extent to which those cases provide any lessons for Enron and its derivative counterparties remains to be seen, experts said, depending on what sticky and complex issues might arise in potential court actions.

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That's because Dynegy Inc.'s (DYN) decision Wednesday to abandon its plan to rescue Enron all but sealed the fate of the ailing Houston energy trader which has been hobbled by accounting irregularities and unquantified off-balance-sheet liabilities. Enron shares plummeted from about $90 a share

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Whether counterparties will be able to claim exemption from the automatic stay that prevents anyone from terminating contracts with a company that filed for bankruptcy will hinge on the type of deals they're a party to and whether they meet certain statutory requirements. Although Enron and its lawyers are likely to nitpick the unwinding of each and every contract involving the company, legal experts noted that Enron's fondness for EEI agreements should help those entangled in power purchase agreements to liquidate their positions since these contracts treat all participants as forward contracts merchants. Such merchants are exempt from the stay stipulated by section 362A of the bankruptcy code.

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-By Carol S. Remond, 201-938-2074; Dow Jones Newswires;
carol.remond@dowjones.com

(Phyllis Plitch contributed to this column.)

Wiss, Barbara

From: Lori.Santamorena@bpd.treas.gov
Sent: Friday, November 30, 2001 7:52 AM
To: Kurt.Eidemiller@bpd.treas.gov; Nadir.Isfahani@bpd.treas.gov; Chuck.Andreatta@bpd.treas.gov; Glen.M.Owens@stls.frb.org
Cc: barbara.wiss@do.treas.gov
Subject: DOW JONES NEWSWIRES: Bank Regulators See No Systemic Risk From En ron Collapse

November 29, 2001

Bank Regulators See No Systemic Risk From Enron Collapse

By REBECCA CHRISTIE

Of DOW JONES NEWSWIRES

WASHINGTON -- U.S. bank regulators say the financial collapse of energy giant Enron should have little lasting impact on the banking industry.

None of the four major bank regulators expressed concern Thursday that Enron's meltdown would snowball into systemic problems.

"It's something we are looking at. We have not identified anything that would concern us a great deal," said Mark Schmidt, assistant director of supervision for the Federal Deposit Insurance Corporation, of possible ripple effects from Enron's difficulties. "Obviously the Enron situation is something we and other regulators are following closely."

Bank regulators generally don't comment on specific banks. Schmidt said the banks the FDIC has been contacted haven't expressed undue concern about Enron's crisis. Schmidt said regulations and internal guidelines generally limit bank exposure to any one company and even any one industry.

"We are not aware of any individual bank that house outsized direct exposure to Enron," Schmidt said. "Obviously, there will be some losses suffered."

Citigroup was one of the banks with the closest ties to Enron's failed deal with Dynegy Inc., which scotched its buyout bid Wednesday as financial ratings agencies lowered Enron to junk status. Citigroup is regulated by the Office of the Comptroller of the Currency, which had no specific comment on that bank but expressed confidence in the banking industry's ability to weather the storm.

"The OCC continually monitors market conditions and banks are always in the process of taking profits and losses," said a spokesman for the Office of the Comptroller of the Currency. "The OCC is confident that any losses due to market conditions can be accommodated with minimum impact."

Another major would-be dealmaker, JP Morgan Chase, is regulated by the Federal Reserve. The Fed had no specific comment on banks' exposure to Enron, but a spokesman for the Federal Reserve Bank of New York noted Wednesday that "the markets are functioning normally."

The Office of Thrift Supervision, whose members generally lend to homebuyers and smaller businesses, also was not expecting a major ripple effect.

"It looks like the Enron deal would have no broad-range effect on the thrift industry," said Office of Thrift Supervision spokesman Sam Eskanazi, who noted that thrifts tend to lend to smaller businesses. Still, he said OTS was "monitoring the situation carefully."

-By Rebecca Christie; Dow Jones Newswires; 202 862 9249;
rebecca.christie@dowjones.com

Wiss, Barbara

From: Lori.Santamorena@bpd.treas.gov
Sent: Friday, November 30, 2001 8:01 AM
To: Chuck.Andreatta@bpd.treas.gov; Deidere.Brewer@bpd.treas.gov; Kurt.Eidemiller@bpd.treas.gov; Lee.Grandy@bpd.treas.gov; Nadir.Isfahani@bpd.treas.gov; Kevin.Hawkins@bpd.treas.gov; barbara.wiss@do.treas.gov
Subject: DJ: IN THE MONEY-2:Collateral Key To Counterparties Recovery

----- Forwarded by Lori Santamorena/BPD on 11/30/01 08:00 AM -----

Norman.Carleton@do.treas.gov

11/29/01 06:13 PM

To: Sheila.Bair@do.treas.gov, Peter.Bieger@do.treas.gov, Timothy.Bitsberger@do.treas.gov, Edward.Demarco@do.treas.gov, Karen.Dorsey@do.treas.gov, Martha.Ellett@do.treas.gov, Dina.Ellis@do.treas.gov, Jose.Gabilondo@do.treas.gov, Jared.Gross@do.treas.gov, Lucy.Huffman@do.treas.gov, Gerry.Hughes@do.treas.gov, Tom.McGivern@do.treas.gov, Roberta.McInerney@do.treas.gov, Peter.Nickoloff@do.treas.gov, Brian.Roseboro@do.treas.gov, Anne.Salladin@do.treas.gov, Heidilynne.Schultheiss@do.treas.gov, Amy.Smith@do.treas.gov, Gary.Sutton@do.treas.gov, Brian.Tishuk@do.treas.gov, Steve.Berardi@do.treas.gov, Jill.Cetina@do.treas.gov, Matthew.Eichner@do.treas.gov, Viva.Hammer@do.treas.gov, lsantamorena@bpd.treas.gov, Michael.Novey@do.treas.gov, Fred.Pietrangeli@do.treas.gov, James.Sharer@do.treas.gov, Jean.Whaley@do.treas.gov, Mark.Wiedman@do.treas.gov

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November 29, 2001

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But bankruptcy laws have evolved significantly since the 1982 collapse of Drysdale sent shockwaves through the financial community and forced banks to pay out tens of millions of dollars to cover Drysdale's obligations to other government securities firms.

More recently, Orange County's 1994 bankruptcy following its derivatives debacle and the bitter dispute surrounding German's Metallgesellschaft Ag for breach of forward petroleum contracts suggests that acrimonious and lengthy litigations might be in the offing. In the latter case, many counterparties settled out of court and took "haircuts" after a judge ruled that independent petroleum marketers who entered into long-term hedging contracts as protection against escalating fuel prices could sue the metals and engineering conglomerate for breach of contract.

But the extent to which those cases provide any lessons for Enron and its derivative counterparties remains to be seen, experts said, depending on what sticky and complex issues might arise in potential court actions.

Meanwhile, although Enron has yet to file for bankruptcy, most of its derivative counterparties are likely already scrambling to exit their trades.

That's because Dynegy Inc.'s (DYN) decision Wednesday to abandon its plan to rescue Enron all but sealed the fate of the ailing Houston energy trader which has been hobbled by accounting irregularities and unquantified off-balance-sheet liabilities. Enron shares plummeted from about $90 a share last summer to 36 cents Thursday.

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Key to how well or poorly counterparties will make out now that Enron's business has been all but dried out, is how much if any collateral protects their transactions.

So far, it's unclear how much of Enron's derivative transactions were collateralized. But lawyers familiar with the matter said it was likely that a large amount of those contracts were not collateralized.

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-By Carol S. Remond, 201-938-2074; Dow Jones Newswires; carol.remond@dowjones.com

(Phyllis Plitch contributed to this column.)

Wiss, Barbara

From: Glen.M.Owens@stls.frb.org
Sent: Friday, November 30, 2001 8:05 AM
To: David.Lebryk@do.treas.gov
Cc: Barbara.Wiss@do.treas.gov; Lori.Santamorena@bpd.treas.gov; Sheryl.Morrow@fms.treas.gov; kurt.eidemiller@fms.treas.gov; mary.bailey@fms.treas.gov; sam.stokes@fms.treas.gov; craig.sadick@fms.treas.gov; Jean.M.Lovati@stls.frb.org; Harriet.Siering@stls.frb.org
Subject: RE: 1DJC) DJ CSFB: Three Big Banks Have $1.5B Loan Exposure To


ATT200860.gif

[(b)(5)]

If you have any additional questions, please let me know.

Glen Owens
Treasury Relations and System Support
314-444-4772
fax 314-444-8665

David.Lebryk@do
.treas.gov

11/29/01 01:10
PM

To: Lori.Santamorena@bpd.treas.gov,
Barbara.Wiss@do.treas.gov,
Glen.M.Owens@stls.frb.org,
Sheryl.Morrow@fms.treas.gov
cc:
Subject: RE: 1DJC) DJ CSFB: Three Big
Banks Have $1.5B Loan Exposure To

Lori et al-- As a general matter, [(b)(5)]

[(b)(5)]

Dave
-----Original Message-----
From: Lori.Santamorena@bpd.treas.gov
[mailto:Lori.Santamorena@bpd.treas.gov]
Sent: Thursday, November 29, 2001 12:14 PM
To: david.lebryk@do.treas.gov
Subject: 1DJC] DJ CSFB: Three Big Banks Have $1.5B Loan Exposure To

----- Forwarded by Lori Santamorena/BPD on 11/29/01 12:13 PM -----

"PUBLIC DEBT, US DEPT OF TREASURY" <GSRS@bloomberg.net>

11/29/01 12:07 PM

To: LSANTAMORENA@BPD.TREAS.GOV
cc:
bcc:
Subject: 1DJC] DJ CSFB: Three Big Banks Have $1.5B Loan Exposure To

DJ CSFB: Three Big Banks Have $1.5B Loan Exposure To Enron
2001-11-29 11:48 (New York)

NEW YORK (Dow Jones)--Bank Of America (BAC), Citigroup Inc. (C) and J.P. Morgan Chase (JPM) each have an estimated $500 million in direct loan exposure to beleaguered energy trading firm Enron Corp. (ENE), according to Credit Suisse First Boston on Thursday.

While noting that "details on bank exposures to Enron Corp. are not completely transparent," CSFB analysts also said that Bank One Corp (ONE) has a likely $300 million bank loan exposure, and Wachovia Corp. (WB) has a $50 million exposure.

The analysts said that the tallies represent direct loan exposures. They aren't reflective of balance sheet counter-party risk obligations, which could be "significant."

"This remains a highly fluid situation, and may require many of the long list of banks which are likely Enron creditors to take incremental reserve additions in the fourth quarter," the report said.

The CSFB release said that other securities firms do not appear to have a major exposure to Enron, and that it estimates that firms such as Bear Stearns, Goldman Sachs, Lehman Brothers and Merrill Lynch likely have less than $100 million in total loan exposure.

On Wednesday, Enron saw its credit ratings downgraded to junk status by the three major credit ratings agencies, and its proposed acquisition by Dynegy Inc. (DYN) was as a result scuttled.

-By Michael S. Derby, Dow Jones Newswires; 201-938-4192; michael.derby@dowjones.com

(END) Dow Jones Newswires 11-29-01
1148EST(AP-DJ)--11-29-01 1146EST

[IMAGE]
(See attached file: ATT200860.gif)

Wiss, Barbara

From: Lebryk, David
Sent: Friday, November 30, 2001 10:45 AM
To: Wiss, Barbara
Subject: FW: IN THE MONEY-2:Collateral Key To Counterparties Recovery

-----Original Message-----
From: Lori.Santamorena@bpd.treas.gov [mailto:Lori.Santamorena@bpd.treas.gov]
Sent: Friday, November 30, 2001 8:01 AM
To: david.lebryk@do.treas.gov; donald.hammond@do.treas.gov
Subject: DJ: IN THE MONEY-2:Collateral Key To Counterparties Recovery

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11/29/01 06:13 PM

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(Phyllis Plitch contributed to this column.)

Wiss, Barbara

From: Lebryk, David
Sent: Friday, November 30, 2001 11:05 AM
Cc: Wiss, Barbara; Lori.Santamorena@bpd.treas.gov; kurt.eidemiller@fms.treas.gov
Subject: RE: 1DJC) DJ CSFB: Three Big Banks Have $1.5B Loan Exposure To

[(b)(5)]

Dave

-----Original Message-----
From: Glen.M.Owens@stls.frb.org [mailto:Glen.M.Owens@stls.frb.org]
Sent: Friday, November 30, 2001 8:05 AM
To: David.Lebryk@do.treas.gov
Cc: Barbara.Wiss@do.treas.gov; Lori.Santamorena@bpd.treas.gov;
Sheryl.Morrow@fms.treas.gov; kurt.eidemiller@fms.treas.gov;
mary.bailey@fms.treas.gov; sam.stokes@fms.treas.gov;
craig.sadick@fms.treas.gov; Jean.M.Lovati@stls.frb.org;
Harriet.Siering@stls.frb.org
Subject: RE: 1DJC) DJ CSFB: Three Big Banks Have $1.5B Loan Exposure To

[(b)(5)]

If you have any additional questions, please let me know.

Glen Owens
Treasury Relations and System Support
314-444-4772
fax 314-444-8665

David.Lebryk@do

.treas.gov

11/29/01 01:10 PM

To: Lori.Santamorena@bpd.treas.gov, Barbara.Wiss@do.treas.gov, Glen.M.Owens@stls.frb.org, Sheryl.Morrow@fms.treas.gov
cc:
Subject: RE: 1DJC) DJ CSFB: Three Big Banks Have $1.5B Loan Exposure To

Lori et al-- As a general matter, [(b)(5)]

Dave
-----Original Message-----
From: Lori.Santamorena@bpd.treas.gov
[mailto:Lori.Santamorena@bpd.treas.gov]
Sent: Thursday, November 29, 2001 12:14 PM
To: david.lebryk@do.treas.gov
Subject: 1DJC) DJ CSFB: Three Big Banks Have $1.5B Loan Exposure To

----- Forwarded by Lori Santamorena/BPD on 11/29/01 12:13 PM -----

"PUBLIC DEBT, US DEPT OF TREASURY" <GSRS@bloomberg.net>

11/29/01 12:07 PM

To: LSANTAMORENA@BPD.TREAS.GOV
cc:
bcc:
Subject: 1DJC) DJ CSFB: Three Big Banks Have $1.5B Loan Exposure To

DJ CSFB: Three Big Banks Have $1.5B Loan Exposure To Enron
2001-11-29 11:48 (New York)

NEW YORK (Dow Jones)--Bank Of America (BAC), Citigroup Inc. (C) and J.P. Morgan Chase (JPM) each have an estimated $500 million in direct loan exposure to beleaguered energy trading firm Enron Corp. (ENE), according to Credit Suisse First Boston on Thursday.
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Goldman Sachs, Lehman Brothers and Merrill Lynch likely have less than $100
million in total loan exposure.
On Wednesday, Enron saw its credit ratings downgraded to junk status by the
three major credit ratings agencies, and its proposed acquisition by Dynegy
Inc. (DYN) was as a result scuttled.
-By Michael S. Derby, Dow Jones Newswires; 201-938-4192;
michael.derby@dowjones.com

(END) Dow Jones Newswires 11-29-01
1148EST(AP-DJ)--11-29-01 1148EST

[IMAGE]
(See attached file: ATT200860.gif)

Wiss, Barbara

From: Lebryk, David
Sent: Friday, November 30, 2001 11:43 AM
To: 'Glen.M.Owens@stls.frb.org'; Lebryk, David
Cc: Wiss, Barbara; Lori.Santamorena@bpd.treas.gov; Sheryl.Morrow@fms.treas.gov; kurt.eidemiller@fms.treas.gov; mary.bailey@fms.treas.gov; sam.stokes@fms.treas.gov; craig.sadick@fms.treas.gov; Jean.M.Lovati@stls.frb.org; Harriet.Siering@stls.frb.org
Subject: RE: 1DJC) DJ CSFB: Three Big Banks Have $1.5B Loan Exposure To

Glen -- Thanks, your note is very helpful. [(b)(5)]

Thanks.

Dave

-----Original Message-----
From: Glen.M.Owens@stls.frb.org [mailto:Glen.M.Owens@stls.frb.org]
Sent: Friday, November 30, 2001 8:05 AM
To: David.Lebryk@do.treas.gov
Cc: Barbara.Wiss@do.treas.gov; Lori.Santamorena@bpd.treas.gov; Sheryl.Morrow@fms.treas.gov; kurt.eidemiller@fms.treas.gov; mary.bailey@fms.treas.gov; sam.stokes@fms.treas.gov; craig.sadick@fms.treas.gov; Jean.M.Lovati@stls.frb.org; Harriet.Siering@stls.frb.org
Subject: RE: 1DJC) DJ CSFB: Three Big Banks Have $1.5B Loan Exposure To

[(b)(5)]

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11/29/01 01:10
PM

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Lori et al-- As a general matter, [(b)(5)]

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11/29/01 12:07 PM

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-By Michael S. Derby, Dow Jones Newswires; 201-938-4192; michael.derby@dowjones.com

(END) Dow Jones Newswires 11-29-01
1148EST(AP-DJ)--11-29-01 1148EST

[IMAGE]
(See attached file: ATT200860.gif)

Wiss, Barbara

From: Lori.Santamorena@bpd.treas.gov
Sent: Friday, November 30, 2001 2:23 PM
To: david.lebryk@do.treas.gov
Cc: barbara.wiss@do.treas.gov
Subject: 1BN) Wall Street Firms, Pension Funds Face Enron Losses (U

----- Forwarded by Lori Santamorena/BPD on 11/30/01 02:22 PM -----

"PUBLIC DEBT, US DEPT OF TREASURY" <GSRS@bloomberg.net>

11/30/01 02:10 PM

To: LSANTAMORENA@BPD.TREAS.GOV
cc:
Subject: 1BN) Wall Street Firms, Pension Funds Face Enron Losses (U

Wall Street Firms, Pension Funds Face Enron Losses (Update3)
2001-11-30 11:44 (New York)

Wall Street Firms, Pension Funds Face Enron Losses (Update3)

(Updates with Calpers losses.)

New York, Nov. 30 (Bloomberg) -- Wall Street firms such as Bear Stearns Cos., European banks and pension funds including the California Public Employee's Retirement System disclosed losses from investments Enron Corp. expected to top billions of dollars.

Bear Stearns Cos., the sixth-biggest securities firm by capital, said its exposure to Enron is $69 million. Duke Energy Corp., J.P. Morgan Chase & Co., Williams Cos. and other companies together may lose more than $1.4 billion from a collapse of Enron. ABN Amro Holding NV, Abbey National Plc, National Australia Bank Ltd. and other lenders disclosed potential losses.

Enron would be the biggest bankruptcy ever -- and a blow for banks and securities firms already suffering because of an economic slowdown. Enron had more than $15 billion of debt and less than $2 billion of cash as of last week. It must pay $690 million to lenders by mid-December.

``This is having a ripple effect across the world,'' said Robert Penaloza, a fund manager at Aberdeen Asset Management Asia in Singapore.

At least 14 companies have reported exposure to possible losses from Enron tied to either loans or contracts with the Houston-based company.

ABN Amro, the largest Dutch bank, said it may set aside 110 million euros ($97.5 million) to cover loans to the U.S. energy trader. Britain's Abbey National said it's owed almost $165 million. National Australia and other Australian lenders said their Enron exposure totals about $350 million. France's Credit Lyonnais SA said it has $250 million of loans to Enron.

ING to J.P. Morgan

ING Groep NV, the biggest Dutch financial-services company, Dutch financial-services company, said it holds about $195 million in unsecured loans and bonds of Enron. Canadian Imperial Bank of Commerce, the country's third-biggest bank, said Enron owes it $215 million, more than half in unsecured loans, letters of credit and derivatives.

Almost two dozen electricity and natural gas companies said Enron owed them about $700 million as of Wednesday, when Dynegy Inc. abandoned a merger, depriving Enron of cash it needs to avoid insolvency.

Ambac Financial Group Inc., XL Capital Ltd. and other bond

and property-casualty insurers may absorb losses of more than $2 billion if Enron files for bankruptcy protection, said Morgan Stanley Dean Witter & Co. analyst Alice Schroeder.

ABN Amro is one of the lenders behind Enron's $3 billion Indian power plant. Enron owns 65 percent of the Dahhol Power Co. project outside of Bombay, which has been hampered by cost overruns, penalty claims for undelivered power, and conflicts with its only client, the Maharashtra State Electricity Board.

``Should the Enron situation escalate into a full-fledged bankruptcy, we may need to make a provision for 110 million euros for our direct exposure,'' ABN Amro spokesman Martin Winn said. ``Should there be a need to provide for it, we will do so in the fourth quarter of this year.''

London-based Abbey National said it may have to set aside 95 million pounds ($135 million) to cover possible losses from loans to Enron. Profit may be ``down'' in the second half from the year-earlier period because of Enron, said Finance Director Mark Pain in an interview.

Australia to Germany

National Australia said it has A$200 million ($104 million) in secured and unsecured exposure to Enron. ``We had already factored in provisions for this kind of event, and it is consistent with our bad debt outlook for this year,'' said Majella Allen, a spokeswoman.

Australia & New Zealand Banking Group Ltd., the fourth-largest Australian bank, said its direct exposure is $69 million and it has a further $51 million indirect exposure to the U.S. energy trader. ANZ said loans to Enron would not affect its earnings expectations. The bank has already said it expects to put more aside for bad loans this fiscal year.

``Their exposures are a little surprising, but then again Enron is such a huge organization and spans the globe so it deals with syndicates of banks for its facilities,'' said Bill Chatterton, head of equities at ABN Amro Morgans Ltd., the 50 percent-owned private client arm of ABN Amro Australia Ltd.

German banks also are seeing fallout. Dresdner Bank AG, which is owned by Allianz AG, said its exposure to Enron is less than $100 million. HVB Group, Germany's No. 2 bank, has about $100 million of exposure as well. Deutsche Bank AG and Commerzbank AG said their exposure to Enron amounts to ``double-digit'' millions of euros.

Deutsche Bank, Europe's largest bank, has an exposure ``significantly'' below 100 million euros, said Ronald Weichert, a company spokesman.

Energen Corp., an oil and natural-gas explorer and gas distributor, said it has an $18.3 million exposure with the almost bankrupt Enron Corp., which may cut its 2002 earnings by 20 cents to 25 cents a share.

Pension funds will also record big losses. Calpers held 3 million shares as of Wednesday of this week when Enron shares plunged below $1. The California State Teachers Retirement Fund owned about 2 million shares. The New York State Common Retirement System said it lost as much as $60 million on Enron.

Below is a list of some banks and their estimated exposure to Enron:

J.P. Morgan Chase		$500 Million
Credit Lyonnais		$250 Million
Canadian Imperial Bank		$215 Million
ING Groep		$195 Million
Abbey National		$164 Million
Australia & New Zealand Banking		$120 Million
National Australia Bank		$104 Million
Dresdner Bank	Less Than	$100 Million
ABN Amro		$97.5 Million
Deutsche Bank	Less Than	$90 Million
Bear Stearns		$69 Million
Commerzbank	Less Than	$45 Million
HVB Group		$100 Million
Energen		20-25 Cents/Shr

--Michael Nol in New York (212) 318-2384, Jennifer Freedman in Brussels and Tom Giles and Tom Bawden in the London newsroom (44 20) 7330-7171, with reporting by Tansy Harcourt in Sydney, Steve Rhinds in Paris, Silje Skogstad in Frankfurt, Stephen Voss and David Wells in New York, Jim Polson in Princeton, and Daniel Taub in Los Angeles /tq/tm

Story Illustration: To see a series of Bloomberg functions

outlining National Australia Bank's performance, click on (NAB AU
<Equity> CNP000940901O8 <GO>).

NAB AU <Equity>
DYN US <Equity>
ENE US <Equity>
ANZ AU <Equity>
ANZ LN <Equity>
AABA NA <Equity>
CBK GR <Equity>
CRB GR <Equity>
CBK GR <Equity>
CL FP <Equity>

NI Codes:
NI BNK
NI FIN
NI COS
NI ASIA
NI PIP
NI NRG
NI TX
NI US
NI CMD
NI GAS
NI OIL
NI ELC
NI UTI
NI EUROPE
NI BLG
NI UK
NI BENELUX
NI SCR
NI NETHER
NI EMC
NI GER
NI JAPAN
NI MMK
NI FND
NI INS
NI AUD
NI ANZ
NI FRN
NI ASIAX
NI NZ
NI BON
NI COR
NI FRA
NI LST

#<12604>#

-0- (BN) Nov/30/2001 16:44 GMT

Wiss, Barbara

From: Glen.M.Owens@stls.frb.org
Sent: Sunday, December 02, 2001 11:05 AM
To: David.Lebryk@do.treas.gov
Cc: Barbara.Wiss@do.treas.gov; craig.sadick@fms.treas.gov; Harriet.Siering@stls.frb.org; Jean.M.Lovati@stls.frb.org; kurt.eidemiller@fms.treas.gov; Lori.Santamorena@bpd.treas.gov; mary.bailey@fms.treas.gov; sam.stokes@fms.treas.gov; Sheryl.Morrow@fms.treas.gov
Subject: RE: 1DJC) DJ CSFB: Three Big Banks Have $1.5B Loan Exposure To

[(b)(5)]

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11/30/01 10:43 AM

To: Glen.M.Owens@stls.frb.org, David.Lebryk@do.treas.gov
cc: Barbara.Wiss@do.treas.gov, Lori.Santamorena@bpd.treas.gov, Sheryl.Morrow@fms.treas.gov, kurt.eidemiller@fms.treas.gov, mary.bailey@fms.treas.gov, sam.stokes@fms.treas.gov, craig.sadick@fms.treas.gov, Jean.M.Lovati@stls.frb.org, Harriet.Siering@stls.frb.org
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Lori.Santamorena@bpd.treas.gov,

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(END) Dow Jones Newswires 11-29-01
1148EST(AP-DJ)--11-29-01 1148EST

[IMAGE]
(See attached file: ATT200860.gif)

Carleton, Norman

From: Carleton, Norman
Sent: Tuesday, August 07, 2001 8:39 PM
To: 'Raislerk@sullcrom.com'
Subject: RE: CFTC Presentation -- Final Version

Ken,

Thanks. I received it this evening.

Norman

-----Original Message-----
From: Raislerk@sullcrom.com [mailto:Raislerk@sullcrom.com]
Sent: Tuesday August 07, 2001 7:10 PM
To: norman.carleton@do.treas.gov
Subject: FW: CFTC Presentation -- Final Version

This is the right version. Please acknowledge receipt.

-----Original Message-----
From: chendrix@enron.com [mailto:chendrix@enron.com]
Sent: Tuesday, August 07, 2001 6:42 PM
To: Raislerk@sullcrom.com
Subject: RE: CFTC Presentation -- Final Version

Here you go. (See attached file: cftc_final.ppt)

Raislerk@sullcrom.com on 08/07/2001 05:06:50 PM

To: chendrix@enron.com
cc:
Subject: RE: CFTC Presentation -- Final Version

Chris,

As I am sure Scott told you, this presentation went very well. Treasury has asked for copies in electronic form. Can you resend this to me without the notes imbedded so I can forward it on to them. Thanks.

Ken

-----Original Message-----
From: chendrix@enron.com [mailto:chendrix@enron.com]
Sent: Wednesday, August 01, 2001 3:57 PM
To: Raislerk@sullcrom.com
Subject: CFTC Presentation -- Final Version

Attached is the final version of the presentation. (See attached file: cftc_final_presentation.ppt)

immediately.
