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Public Companies Sponsoring 401(k) Plans Should Consider Modifying Their Plan Loan Programs in Light of New Guidance From the Department of Labor.

PUBLIC COMPANIES SHOULD CONSIDER RESTRICTING 401(K) PLAN LOANS FOR EXECUTIVE OFFICERS AND DIRECTORS

By Steven J. Friedman and Christine L. Richardson

The Sarbanes-Oxley Act, passed by Congress in July 2002, prohibits publicly-held corporations from arranging personal loans (including extending credit of any kind) for its executive officers and directors (or the equivalent thereof). Since the passage of Sarbanes-Oxley, it has been unclear whether the loan prohibition applies to loans under 401(k) plans. The Securities and Exchange Commission ("SEC"), the government agency responsible for administering Sarbanes-Oxley, has not yet clarified this issue. To date, publicly-traded employers have been reluctant to create any loan restrictions — as may be required under Sarbanes-Oxley — since such a restriction could violate ERISA which provides that 401(k) loans be offered on a "reasonably equivalent" basis to all plan participants.

On April 15th, however, the Department of Labor (the "DOL") issued Field Assistance Bulletin 2003-1. This Bulletin provides that employers will not violate ERISA if they bar executive officers and directors from taking 401(k) plan loans. The DOL acknowledged in the Bulletin that it was uncertain whether Sarbanes-Oxley prohibits executive officers and directors from taking 401(k) plan loans. This guidance though now allows publicly-traded employers to take the most conservative compliance approach by revising their documents governing plan loan programs to disallow such loans for executive officers and directors pending further guidance. **The DOL has, in effect, put employers on notice that if loan programs are not revised and if subsequent regulatory guidance provides that 401(k) plan loans are in fact prohibited by Sarbanes-Oxley, employers may be in violation of the statute if executive officers or directors have taken such loans.**

Sarbanes-Oxley has attracted the attention of employers because, unlike most legislation relating to benefit plans, it contains criminal as well as civil sanctions for noncompliance. We will publish further guidance on Sarbanes-Oxley when it is issued.

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