The Result of the Enron Debacle

By Kandice K. Bridges

Approximately 42 million American workers participate in 401(k) plans, which collectively hold a total of two trillion dollars in assets. These workers, and those who practice law in the employee benefits area, are keenly following the government's response to the fall of Enron and the resulting demise of its workers' retirement plan benefits. There have been various proposed bills regarding pension reform since Enron declared bankruptcy last December. This article will address the latest proposal supported by President Bush, as well as the most recent proposal to be issued from Senator Edward Kennedy.

President Bush appointed a task force to review federal laws and regulations that govern retirement plans. This task force consisted of the Secretary of the Treasury, the Secretary of Labor, and the Secretary of Commerce. President Bush's proposals are embodied in the Retirement Security Advice Act of 2001 and the Pension Security Act of 2002. On March 6, 2002, Senator Edward Kennedy joined the ranks of those to introduce legislation by introducing the Protecting America's Pensions Act of 2002 ("PAPA").

Upon advice of the task force, President Bush proposed many changes to safeguard against a recurrence of Enron. One proposed change allows employers to continue making employer matching and discretionary contributions in company stock, but participants would be entitled to diversify these investments after just three years of participation. Employee stock ownership plans would not be affected, unless they included a Code section 401(k) or matching feature, in which case the three-year-diversification rule would apply. His proposal also includes the implementation of notice requirements for suspensions of a participant's ability to change investment options (referred to as a transaction restriction or "blackout" period).

President Bush's proposal would also provide that trading in company stock by officers and senior executives would be limited during periods in which transaction restrictions were in effect. Further, fiduciary liability protection under ERISA section 404(c) (dealing with participant investment

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of plan assets) would not be available during periods in which transaction restrictions were in effect. During these times, the employer would be responsible for the consequences of a participant's inability to control his or her investments if the employer violated its duty to act in the interest of participants when the transaction restriction was imposed. Increased investment information to participants is also part of President Bush's proposal.

Senator Kennedy's proposal, PAPA, would require that employers who do not offer a defined benefit plan would have to decide whether they wanted to provide matching contributions in company stock or provide company stock as an investment option for employees. His proposal does not allow both. Kennedy's proposal includes most of the provisions in President Bush's proposal, but adds several stricter provisions. PAPA provides that benefit statements would be required periodically – once each quarter in the case of a defined contribution plan. There is also a provision for a penalty of up to $1,000 per day if a plan administrator does not provide quarterly statements. PAPA also amends ERISA to provide that a fiduciary or any other person who participates in or undertakes to conceal a fiduciary breach of duty is liable for losses to each participant and beneficiary. Additionally, with respect to defined contribution plans with 100 or more participants, PAPA would require that plan assets be held in a joint trust, with equal representation of the interests of both participants and the plan sponsors.

It is still unclear what provisions will be reflected in the law that is finally passed, but one thing is certain: The fallout from the Enron debacle will have a significant impact on ERISA and the administration of employee benefits.