TAX REFORM SUGGESTIONS FROM ENRON

By

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Tax reform initiatives have recently been proposed to change the way stock options are taxed and reported on financial statements; to impose additional fiduciary responsibilities on pension plan trustees and to limit ownership of company stock in retirement plans; and to limit corporate tax shelter activity.[1] The collapse of Enron renewed Congressional interest in these long-standing tax problem areas that over the years industry interest groups have rallied to oppose.[2] Whether the financial problems at Enron might have been alleviated had the proposed tax reform legislation been enacted is unclear. But it is certain that extreme events, such as Enron's collapse, give legislators the ability to push legislation forward which languishes when the economy booms.[3]

There is no way to know exactly how much Enron actually engaged in these controversial tax strategies.[4] But it is clear that Enron's finances are mentioned as part of the rationale for recent legislative proposals to deal with these tax issues. For example, critics urge that Enron's financial picture would have been clearer to investors if stock options had been more clearly reported in financial statements.[5] Press reports abound about irate employees losing their nest eggs when Enron stock imploded and decimated employee pension savings.[6] And there is no way to know exactly how many tax shelter deals Enron engaged in through special purpose entities ("SPEs") that both reduced taxes and hid details of financing arrangement from constituents.[7] While it is impossible to judge whether tax law changes would have changed the Enron result, Enron has focused legislative attention on these tax areas and some legislative changes are likely.

Stock Options

Compensating employees with stock options is a popular mechanism to give employees a stake in the company's future. They are particularly important to start-up companies with little cash with which to pay employees. Options give the employee the ability, but not the obligation, to purchase stock at a stated price within a given time period. Proponents argue that employees' interests are more aligned with those of the company when employees will benefit along with shareholders by rising stock prices. Opponents argue that excessive use of stock options unjustly enriches managers at the expense of shareholders by diluting equity and by causing managers to focus on creating short-term stock gains versus long-term value enhancement strategies.

Stock options can either be granted under qualified or non-qualified plans.[8] Qualified options are issued under specific Internal Revenue Code provisions such as incentive stock options,[9] and employee stock purchase plans.[10] Incentive stock options are relatively small programs and are not discussed here. Qualified stock options under section Code 423 are issued pursuant to shareholder-approved

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plans. These plans are generally offered to virtually all company employees and the options are often purchased through payroll deductions. These plans qualify for favorable tax treatment because they contain non-discrimination and vesting rules and there are dollar limits on the amount of stock offered through these qualified plans. These rules ensure that the qualified options will not be offered exclusively to highly compensated employees.

Non-qualified stock options do not meet the specific Code requirements but are taxed under general compensation rules.[11] Non-qualified stock options are by far the most flexible plans and are not burdened by the nondiscrimination requirements of other employee plans. Therefore, they can be issued exclusively to reward highly compensated employees. Following standard compensation inclusion rules, the employee includes in income (and the employer deducts) the fair market value of anything of value received <u>unless</u> there is a substantial risk of forfeiture.[12] Stock options, for example, might be forfeited if the employee does not remain employed for a certain period of time and, therefore, the option's value would not be included in income when received. Rather, the value would be recognized as income when the restrictions lapse.[13] Further, if the fair market value of the option is not ascertainable at issuance, there is also no income inclusion/deduction until exercise of the option.[14] Most non-qualified stock options are issued at a strike price above the stock's current fair market and are, therefore, treated as not having an ascertainable value. The stock options are treated as not taxable when issued, and instead, they are taxed only when the options are exercised.[15]

With most non-qualified employee stock options, the employee is taxed and the employer takes a tax deduction in the year of option exercise. The amount taxed/deducted is the difference between the exercise price and fair market value of the shares. The employee's income inclusion and the corresponding employer deduction generate an employer tax savings through the deduction even though no cash is paid to the employee. For example, suppose an employee is given an option to purchase shares at $30 when the shares are trading at $28. The employee is not taxed at the time of issuance because the options do not have an ascertainable value. If the stock goes up in value to $40, the employee exercises the option and pays $30 for each share. So, if stock price exceeds the option exercise price by $10, and the employee exercises options to purchase 1,000 shares, the compensation received/deducted is $10,000. The employer tax deduction is worth $10,000 multiplied by the corporate tax rate. If that rate is 34 percent, the option exercise results in a $3400 tax benefit to the employer, even though no cash was paid. If the stock goes down in value and is worth less than the exercise price, the options will not be exercised and no income or deduction results.

Both employers and employees like the system, and it generates tax deductions for the employer and a benefit to the employee with no cash involved. Companies report information to shareholders about outstanding options issued and options exercise in financial statement notes. Under the accounting standards, no compensation cost is recorded if the exercise price is greater than the market price on the grant date. Subsequent fluctuations in value are not reflected in the income statement.[16] Generally, then, no part of the option compensation appears in the income statement and, therefore, does not reduce financial-statement reported earnings. The changes appear in shareholder equity.

The number of shares outstanding may change if newly issued shares are given to employees who exercise options and actually purchase shares, and earnings per share could change with the larger number of shares outstanding.

Some critics have argued that failure to account for options as a compensation expense distorts financial statement income.[17] A serious proposal in the early 1990's by the FASB to change the financial statement reporting was heavily lobbied against and was ultimately withdrawn.[18] If stock options were to be treated as an income statement expense, many publicly-traded companies would report considerable decreases in profitability. A bill has been introduced to limit the tax deduction to the stock option expense deducted on the corporations' financial statement.[19] The sponsors, Senator Levin (D-MI) and McCain (R-AZ) have stated the bill is a response to the Enron bankruptcy. There is a lot of opposition to changing the accounting rules through tax legislation. Senate Finance Committee Chairman Max Baucus (D-MT) has held hearings and has stated that he prefers for the Financial Accounting Standards Board rather than Congress to address the accounting treatment.[20] There is opposition to several aspects of the Levin-McCain bill. Some argue the current treatment of options is correct because options affect equity and not income. Others argue that options are intended as compensation and should be treated as an expense. Some opposition to the bill comes from those who oppose attempts to legislate conformity of financial and tax accounting.[21]

Pension Plans

The collapse of Enron had devastating effects on its employees and retirees who had invested their company retirement plans in Enron stock. 57.73 percent of the Enron 401(k) plan assets were invested in Enron stock, which declined in market value from over $80 per share into less than one dollar per share in 2001.[22] Several proposals have been floated which address several aspects of the Enron retirement plan losses. They are broadly grouped into proposals that call for additional statutory limits on the amount of employer stock held in retirement plans and proposals that require employers to provide investment education, particularly about asset diversification, to employees.[23]

The Enron situation is an example of the trend in funding retirement benefits that has emerged over the past twenty years: the trend away from defined benefit plans and towards defined contribution plans.[24] Defined benefit plans are very useful for employees who remain at a single employer for most of their careers because the largest part of benefits accrue as length of service and salary increase. Defined contribution plans are especially valuable for the estimated seventy-five percent of workers who do not stay with a single employer for a long period.[25] After vesting, defined contribution retirement benefits are portable and can be rolled-over into individual retirement accounts. The employer also has more certainty about his pension costs and no actuarial assumptions about investment return or employee tenure have to be made as they would to properly fund defined benefit plans. ERISA, the Employee Retirement Income Security Act, was enacted in 1974 in large part to protect employees from abusive practices by employers in managing retirement plan assets. ERISA imposed stringent fiduciary obligations on plan managers concerning the types of investments suitable for plans, vesting, and plan actuarial assumptions. ERISA also imposed insurance costs on plan assets to provide governmental insurance for payment for defined benefits. When ERISA was enacted in 1974, there were about 200,000 defined contribution plans and 100,000 defined benefit plans; currently there are 800,000 defined contribution plans and 60,000 defined benefit plans.[26]

Many employers also encourage additional employee saving for retirement by offering 401(k) plans in which employees voluntarily set aside part of their compensation that the employer may or may not match. In general, under ERISA, pension plans may not hold more than ten percent of their assets in employer stock. The largest exceptions are for profit-sharing plans, stock bonus plans, thrift plans and ESOPs (employee stock ownership plans).[27] Company stock is found primarily in the cash-or-deferred arrangements, also called 401(k) plans, for the large publicly traded companies.[28] These 340,000 plans have 43 million participants with $1.7 trillion in assets.[29] The ERBI estimates that about 19 percent of 401(k) plan assets are invested in employer stock.[30] That percentage rises in plans in which company stock is offered as an employer match or investment option, which occurs primarily in plans for large companies. [31]

401(k) plans and other voluntary employee-funded contribution plans were initially intended to encourage employees to voluntarily increase their retirement savings in order to supplement their defined benefit employer-provided pension and social security. Over the next twenty years since ERISA's enactment, employers found they could save money and actually contribute less to retirement benefits by changing from defined benefit plans to defined contribution plans and 401(k) plans. Because the employer no longer bore the risks and benefits of investing assets to pay pension benefits, those risks and benefits were shifted to the employees.[32]

As the Congress ponders whether to make changes in the retirement plans, some recent academic findings may be instructive. Employees take the path of least resistance and most do not readily change their investment decisions once they are initially made. A study by Wharton researchers of seven large corporate plans involving over 200,000 employees showed employees follow the easiest path, which is often doing nothing.[33] As a practical matter, many employees never vary from the plan's "default" provision. So, for example, employees rarely change their initial enrollment status: if they are required to "elect" to join the plan, they do not join; or conversely if an employee must "opt out" because the plan automatically enrolls him, the employee seldom drops out of the plan once automatically enrolled. Further, automatic enrollees tend to adopt the contribution percentages and investment choices set as the default election by the plans. The default elections tend to be conservative and may ultimately be insufficient to provide for retirement. Employers matching of employee contributions at virtually any level also increased employee rates of saving and of participation. The authors, though, comment on the fact that many employers provided matches were in the form of employer stock. Employer stock does not provide sufficient diversification as an investment strategy and the authors urge that it not be the default investment.[34]

One of the dilemmas in pension plan reform is that providing any retirement benefit by employers is voluntary. There is no legal requirement for employers to provide retirement benefits, although tax incentives, employment market pressures, and social welfare concerns make employer sponsored retirement plans desirable. The degree of asset diversification depends on what type of plan an employer offers. Virtually no diversification out of employer stock is required for an Employer Stock Ownership Plan (ESOP) until the employee has reached the age of 55. After age 55 with 10 years of plan participation, a participant must be permitted to diversify up to 25 percent of the value of his account per year.[35] The majority of defined contribution plans, including profit-sharing plans, stock bonus plans and ESOPs have no limit on the amount of employer securities. Holding employer securities in such plans does not violate the fiduciary requirement of asset diversification. Only money purchase defined contribution plans and defined benefit plans are subject to a requirement that limits plan assets to no more than 10 percent of the plan assets being invested in employee stock.[36]

After Enron, various reform plans have been put forward.[37] Some seek to forbid retirement plans from holding more than a small percentage of employer stock, while others permit the holding, but require employers to provide additional alternative investments. ESOP plans can generally continue to hold employers stock but some form of required asset diversification is planned for voluntary employee contributions and elective deferrals, as opposed to employee contributions.

Enron employees lost large amounts of value in retirement assets because they were so heavily invested in the shares of their employer. Employees invest in their employer's stock because the employees believe both in the company and in the assurances of senior managers. Employees invest in their employer in large part because it is the company they think they know best. The employees have put most of their eggs in one basket by investing both their human capital and a large part of their financial assets in the employer company. Such behavior defies all the rules of investment asset diversification. An employee's future is already tied to the success of the company he works for, and that risk is multiplied if retirement assets are also invested there.[38]

Except for broadly stated fiduciary responsibilities under ERISA, present law does not require employers to provide detailed investment education to employees.[39] In fact, many employers are extremely reluctant to provide advice for fear of later litigation if planning advice does not work out as anticipated and the employee's account experiences a loss or shortfall. One of the main reasons for using defined contribution, as opposed to defined benefit plans, is to shift investment risk and return to the plan participants and away from the employer (plan sponsor).

In response to Enron losses, many changes to pension plans have been proposed. *JCT Discussion of the House Ways and Means, Bill HR 3669* describes new, required "investment education notices to participants". The notice would require "…an explanation, for long-term retirement security…of generally accepted investment principles, including risk management and diversification, and a discussion of the risk of holding substantial portions of a portfolio in securities of any one entity, such as employer securities.[40] The only guidance about what this means is that it has to be written "in a manner calculated to be understood by the average plan participant and provide sufficient information (as determined under Treasury guidance) to allow recipients to understand the notice."[41] It is hard to imagine that plan sponsors will stray from boilerplate-routinized disclosures in order to avoid liability for investment advice or asset returns based on this standard.

The second provision of the bill would require plan participants to be given advance notice of "lock-out" periods, temporary periods in which their ability to change investments or obtain distributions or loans might be restricted. High-ranking employees would also be prohibited from trading in employee shares during the lockout. Enron employees were particularly upset by their inability to access plan assets while the plan administrator changed during a 13-day period in which Enron stock went from $19.98 per share to $13.81 per share. At the same time, executives were selling nonplan Enron stock in the market

One little noticed trade-off in the House bill is the loosening of the nondiscrimination rules currently applicable to pension plans. The current rules require plans to provide equivalent benefits to moderate as well as highly compensated employees. The proposal would make the coverage requirements more flexible. Again, tension exists between, on one hand, requiring workers' protections in exchange giving tax benefits to employers to provide plans, and overly draconian rules that discourage employers from providing benefits at all, on the other.

Tax Shelters

Tax return information is confidential and only some tax items are ever disclosed in the firm's financial statements. A brief study by the Citizens for Tax Justice (CTJ) deduced a few things from Enron's footnote disclosures: Enron formed almost 900 special purpose entities, probably partnerships or limited liability companies, in tax haven countries.[42] Almost 700 of these were in the Cayman Islands. In addition, although Enron paid taxes in some foreign jurisdictions, it actually filed refund claims for $382 million in US taxes in the past four years.[43] The CTJ report speculated that the tax refund resulted from tax shelters and from employee stock option expenses which are tax deductible but which are not shown as financial statement expenses.[44] One cannot know what effect the tax shelter, special purpose entities (SPEs) had in the Enron case. One can speculate that SPEs were used both for tax purposes and to keep liabilities off the balance sheet. It is clear, in any case, that Enron aggressively engaged in transactions which took advantages of technical rules and definitions that may not have had economic efficacy had the tax benefits not materialized.

Taxpayers and the government are required to follow the Internal Revenue Code and judicially-created rules to determine the tax consequences of particular transactions.[45] And taxpayers spend a great deal of time, energy and money structuring transactions to minimize, avoid or defer taxation. Some of these transactions have business purpose, aside from the tax benefit but some are deliberately structured for tax benefit alone. "There are fundamental disagreements on fundamental questions that lie at the heart of the tax shelter debate, such as the magnitude of the problem, why the problems exist, and appropriate responses to the problem."[46] Much of the code law and a few statutory provisions deal with tax shelter transactions that literally comply with Code sections but that "yield results that are unwarranted, unintended or inconsistent with the underlying policy of the provision."[47] Often these transactions make very little economic sense apart from the tax benefits the transactions generate. Professor Michael Graetz once defined a tax shelter as "a deal done by very smart people that, absent tax considerations, would be very stupid." [48]

Currently there are several statutory provisions to combat abusive corporate tax behavior.[49] Some disallow certain benefits and losses between related taxpayers;[50] some restrict transfers to foreign subsidiaries; some require a taxpayer's accounting method to clearly reflect income;[51] and some permit the IRS to rearrange intercompany pricing decisions to reallocate income, loss or deductions between related taxpayers.[52] In addition there are specific provisions intended to limit the deduction of tax shelter losses mainly for individuals and to limit finance-oriented tax shelters.[53]

Judicial constraints on tax shelters are extremely important but are hard to apply and sometimes overlap. Tax motivated transactions often literally comply with statutory language but have unintended results. Such transactions are sometimes disallowed under the step transaction doctrine, sham transaction doctrine, economic substance transactions, substance over form requirements and the business purpose requirement.[54] These doctrines are often confused, overlap, or are inexactly applied by courts and the Internal Revenue Service. But the concept underlying all of them is to ascertain whether the transaction was done for economic or business reasons apart from the sought-after tax results.[55]

On March 20, 2002, the Treasury Department and Internal Revenue Service issued a "Plan to Combat Abusive Tax Avoidance Transactions."[56] In the plan they describe the tax code as "an abomination unworthy of our society" which "undermines notions of law" because of its complexity.[57] The statement abhors the amount of time and creative intellectual effort that goes into complying with, or exploiting, intended and unintended loopholes by taxpayers and their advisors. Such effort would be better spent on "productive investments in our economy". The current system undermines compliance, and the public's sense of fairness because large corporations devise "exotic" ways to "manipulate highly technical provisions of the tax law in inappropriate ways". "Abusive tax avoidance transactions are not structured for business reasons but instead are structured to take advantage of a complex tax code to obtain benefits that Congress did not intend."[58]

All of the tax shelter avoidance proposals call for "transparency – insuring that questionable transactions are disclosed and subject to IRS scrutiny".[59] Transparency connotes two things: disclosure adequate to understand the complex transactions and presentation of facts in a standardized format so the disclosure is itself not hidden in a complex tax return. According to the Treasury Assistant Secretary for Tax Policy, new rules are needed. "Simply put, if a taxpayer is comfortable entering into a transaction, a promoter is comfortable selling it, and an advisor is comfortable blessing it, they all should be comfortable disclosing it to the IRS." [60] It is extremely difficult to distinguish between a legitimate business transaction and an impermissible, tax evasion motivated, abusive "tax shelter". IRS Commissioner for Large and Mid-Size Businesses, Larry Langdon said it was like pornography and you know it when you see it.[61]

Under current law, promoters are required to register with the Internal Revenue Service certain "tax shelter" transactions that will either create a specific level of tax benefits or are required by their promoters to be kept confidential.[62] The complexity of the current disclosure rules actually encourages taxpayers to find technical ways to avoid making return disclosures by carefully parsing the regulations.[63] Under the current system taxpayers must disclose specific "listed transactions": loss transactions exceeding certain amounts (if tax benefits exceed $10 million over several years); brief holding period transactions resulting in tax credits; significant book-tax differences (over $10 million); and transactions marketed by promoters under the requirement that they be kept confidential. Promoters must also maintain lists of their clients.[64] And corporations must disclose certain “listed transactions” on their tax returns.[65]

An IRS review was undertaken in the year 2000 filing season to determine how well the current tax shelter disclosure law works. The results were “disappointing”. The apparent willingness of certain taxpayers and their advisors “to parse words in a manner that narrows requirements and expands exceptions has been disappointing”.[66] Under current law, there is no penalty for the taxpayer’s failing to disclose a reportable tax shelter transaction. Instead, disclosure would mitigate an accuracy related penalty by showing there was reasonable cause for an underpayment of tax. There are also penalties on tax return preparers where the understatement is because a position is taken that has no “realistic possibility of success”.[67] Nonpreparer promoters can be liable for a penalty for failing to register a tax shelter or to maintain client lists.[68] But these provisions are insufficient deterrents to playing the audit lottery. “Enhanced penalties are necessary to alter the ‘risk/reward’ analysis taxpayers undertake when entering into their transactions”.[69]

The IRS review of 2000 tax returns disclosed into two categories of problems: required disclosures are simply not made or transactions are deliberately structured to manipulate the exceptions to disclosure requirements. Taxpayers and their advisors have little incentive not to game the current system by taking questionable positions about questionable transactions. In addition to more required disclosure, additional penalties are being sought against tax return preparers, tax shelter promoters and taxpayers themselves for failing to adequately disclose aggressive transactions. These enhanced and additional penalties would be levied for failing to keep records and disclose lists of investors to whom promoters sold tax shelter plans. Disclosure requirements would be extended beyond corporations to include partnerships, S corporations, trusts and high-income individuals.[70] Under current law only corporations are required to make disclosures. The Treasury proposal acknowledges that much of the tax avoidance occurs through the use of partnerships, trusts, and S corporations and the Treasury wants disclosure to a central location as part of its deterrence effort.

Another problem exists because current Code sections 6011, 6111 and 6112 have differing definitions of tax shelter transactions which must be disclosed or registered or for which client lists must be kept. One part of any legislative remedy would simplify and standardize the tax shelter definitions. Changes would also be made to the list of exceptions to eliminate the ability of promoters to broadly interpret the exceptions to avoid disclosure. And to reinforce the disclosure requirements, penalties should be directly imposed for failure to disclose and to provide information on taxpayers and promoters. Under current law, failure to disclose is not subject to a separate penalty, but is only a factor in determining the accuracy-related penalty. The new penalties for non-disclosure would be non-waivable and would be in addition accuracy-related penalties. Further, any additional regulation should require corporate taxpayers to disclose any such penalties in their SEC filings available to shareholders.

Conclusion

The collapse of Enron’s stock price and the damage it caused to investors, employees, and the market will lead to new legislation. Proposals are being reviewed to change how stock options are taxed and reported on financial statements, to impose additional fiduciary responsibilities on pension plan trustees and to limit ownership of company stock in plans, and to limit corporate tax shelter activity and use of SPEs. Whether these tax changes would have changed the Enron result is not at all clear. What is clear is that many aspects of the tax and financial reporting system have been aggressively exploited and taxpayers and their advisors have to be given incentives to apply sound business judgment and economic reality to their tax decisions.

Footnotes

[1] Stock options: Ending the Double Standard for Stock Options Act, H.R. 4075, S. 1940, 107th Cong., 2d Sess. (2002); Pension plans: Pension Security Act of 2002 H.R. 3762, 107th Cong., 2d Sess. (2002) (passed House 4/11/02); Employee Retirement Savings Bill of Rights, H.R. 3669, 107th Cong., 2d sess. (2002); Retirement Account Protection Act of 2001 H.R. 3509, 107th Cong., 2d sess. (2002); Protecting America's Pensions Act of 2002 S. 1992, 107th Cong., 2d sess. (2002); Corporate Tax Shelters: *See generally*, discussion at notes 40-70. The FASB is also working on changes to the rules for Special Purpose Entities. *See FASB to Address Financial 'Conduits' in SPE Effort; Work on Guarantees Continues*, 50 D.T.R. G-6 (March 14, 2002). *See also*, *SEC and FASB Considering Four Major Rule Changes*, I0MA FIN'L. EXEC. NEWS 3 (May 2002)

[2] *See e.g.*, Joseph Bachelder, *Executive Compensation: Proposed Accounting Interpretation on Stock Options*, 1999 N.J. LAW J., 29 (Aug. 2, 1999). (history of FASB attempts to expense stock options and subsequent retreat). *See also*, Richard Dunham, A. Borrus and M. McNamee, *Reform Lite: In Scandal's Wake, the Government May Make Only Modest Changes*, Business Week, Apr. 1, 2002, at p. 30.

[3] *See also*, Joint Committee on Taxation, *Present Law and Background Relating to Executive Compensation*, (JCX-29-02), (April 17, 2002) (comprehensive discussion of nonqualified deferred compensation, split-dollar life insurance and stock-based compensation).

[4] *See* discussion of tax return confidentiality and lack of tax information available from a firm's financial statements in text *infra* n. 42.

[5] *See e.g.*, John Emshwiller and R. Smith, *Murky Waters: A Primer on Enron Partnerships*, Wall St. J., Jan. 21, 2002 at C-1 and Holman Jenkins, *Enron for Beginners*, Wall St. J., Jan. 23, 2002 at A-23.

[6] *See* Edward Wyatt, *Pension Change Puts Burden on the Worker*, N.Y. Times, April 5, 2002, at A-1.

[7] David Cay Johnston, *Enron Avoided Income Taxes in 4 of 5 Years*, N.Y. Times, Jan. 17, 2002 at A-1.

[8] *See* Treas. Reg. § 1.421-7 (a)(1).

[9] I.R.C. § 422.

[10] I.R.C.§ 423.

[11] I.R.C.§§ 61 and 83.

[12] I.R.C. § 83.

[13] *Id*.

[14] Treas. Reg § 1.83-7 (b)(2).

[15] Treas. Reg § 1.83-7 (b)(3).

[16] *See* Accounting Principles Board Opinion 25, *Accounting for Stock Issued to Employers*, and Statement of Financial Accounting Standards No. 123, *Accounting for Stock-Based Compensation*.

[17] *See* n. 2, *supra*.

[18] *Id*.

[19] *Ending the Double Standard for Stock Options* Act, H.R. 4075 and S. 1940, 107th Cong., 2d sess. (2002).

[20] *Republicans Nix Stock Option Expensing Bill, Say Accounting Standards Preempt Tax Code*, 76 D.T.R. G-4. (April 19, 2002).

[21] For a comprehensive discussion of the desirability and feasibility of eliminating book/tax reporting differences, *See* Mitchell Engler, 2001 COLUM. BUS. L. REV. 539.

[22] Jack L. VanDerhei, *The Role of Company Stock in 401(k) Plans, Written Statement Prepared for Hearing on Enron and Beyond: Enhancing Worker Retirement Security, Before the House*

Education and Welfare Committee, EMPLOYEE BENEFIT RESEARCH INSTITUTE, T-133, (Feb. 13, 2002) at p.3. *See also*, Jack Van Derkei, *The Role of Company Stock in 401(k) Plans, Written Statement for the House Ways and Means Committee Hearing on Retirement Security and Defined Contribution Pension Plans*, EMPLOYEE BENEFIT RESEARCH INSTITUTE, T-134 (Feb. 26, 2002).
[23] *Id*.
[24] *See* n. 6, *supra*.
[25] Dallas Salisbury, *Written Statement for the Senate Committee on Health, Education, Labor and Pensions Hearing on Protecting the Pensions of Working Americans: Lesson from the Enron Debacle*, EMPLOYEE BENEFIT RESEARCH INSTITUTE. T.-132 (Feb. 7, 2002) at p.3.
[26] *Id*. at 6.
[27] I.R.C. §§ 401-404.
[28] *FACTS from EBRI*, EMPLOYEE BENEFIT RESEARCH INSTITUTE (Jan. 2002) at p.2., www.EBRI.com.
[29] *See* n. 24, *supra* at 6.
[30] *Id*. at 7.
[31] *Id*.
[32] *See* n. 6, *supra*.
[33] *See* Andrew Metrick, J. Choi, D. Laibson, and B. Madrian, *Defined Contribution Pensions: Plan Rules, Participant Theories and the Path of Least Resistance*, U.PA. WHARTON WORKING PAPER SERIES (Jan. 2002).
[34] *Id*.
[35] I.R.C. § 404. *See also*, Richard Thau, *Make Sure 401(k) Participants Get Right Message from Enron*, IOMA MANAGING 401(K) PLANS (May 2002).
[36] I.R.C. § 401(a)(28). *See also* I.R.S. NOTICE 88-56, 98-1 C.B. 540, Q&A 16.
[37] *See* n.2. *supra*.
[38] Statement of Feinstein re diverisification, 55 D.T.R. L-20 (Mar. 21, 2002).
[39] ERISA § 404(c).
[40] JCT *Discussion of HR 3669*. JCX-15-02 AT L-2 (March 13, 2002) and H.R. 3762, n.1 *supra*.
[41] *Id*. at L-12.
[42] *See Less Than Zero: Enron's Corporate Income Tax Payments, 1996-2000*, CITIZENS FOR TAX JUSTICE (Jan. 17, 2002).
[43] *Id*.
[44] *Id*.
[45] *Background and Present Law Relating to Tax Shelters*, JT.COMM TAX., JCX-19-02 (March 19, 2002), at p.2.). *See also*, Roby Sawyers, *Registration Listing and Disclosure of Potentially Abusive Corporate Tax Shelters*, TAX ADVISOR 568 (Aug. 2000). *See also*, Richard Lipton, *Whither Corporate Tax Shelters*, 1999 TAX EXECUTIVE 132 (Mar. 1999).
[46] *Id*.
[47] *Id*.
[48] *Id*. at n.2.
[49] For a general discussion, *see Background* n. 45 *supra*. *See also, Testimony of the Staff of the Joint Committee on Taxation Concerning Interest and Penalties and Corporate Tax Shelters Before the Senate Committee on Finance*, JCX-23-OO (March 7, 2000).
[50] I.R.C. § 269.
[51] I.R.C. § 446.
[52] I.R.C.§ 482.
[53] I.R.C. § 469 (passive activity rules) and I.R.C.§ 7701.
[54] *See* Anthony Casarona, *Regulating Corporate Tax Shelters: Seeking Certainty in a Complex World*, 50 CATH. U.L. REV. 111 (Fall 2000). *See also, Whither Tax Shelters?* n. 18 *supra*; Christopher Hanna, *Business Purpose, Economic Substance, and Corporate Tax Shelters*, 54 SMU L.R. 3 (Winter 2001); and David Shaviro and David Weisbach, *The Fifth Circuit Gets it Wrong in Compaq v. Commissioner*, 94 TAX NOTES NO. 4, (Jan. 28, 2002). (discusses court's rationale in pre-tax profit and business purpose case).
[55] *Id*.
[56] *Treasury Department – Internal Revenue Service Plan to Combat Abusive Tax Avoidance Transactions, Announced March 20, 2002*, 55 D.T.R. L-20. (Mar. 21, 2002).
[57] *Id* at L-2 (Statement of Charles O. Rosetti).
[58] *Id*. at L-22.

[59] *Id*. at L-23.
[60] *Id*. at L-21.
[61] Testimony of Larry Langdon, Senate Finance Committee, (March 21, 2002).
[62] I.R.C. § 6111.
[63] Listed transactions for purposes of Reg. § 1.6011-4T(b)(2) are found in *IRS Notice* 2001-51, 2001-34 I.R.B. 190.
[64] I.R.C. § 6112.
[65] I.R.C. § 6011.
[66] *Plan* n.56 *supra* at L-26.
[67] I.R.C. § 6694.
[68] I.R.C. §§ 6707 and 6708.
[69] *Plan* n. 56 *supra* at L-26.
[70] *Id*. at L-23.