The following memorandum was adopted by a group of 25 major law firms, including Bryan Cave LLP, to assist in analyzing and advising on a variety of issues arising under Section 402 of the Sarbanes-Oxley Act of 2002.

Sarbanes-Oxley Act

Interpretive Issues Under § 402 – Prohibition of Certain Insider Loans

Section 402 of the Sarbanes-Oxley Act of 2002 was enacted to prohibit publicly-traded companies from providing personal loans to directors and executive officers. Among the reasons identified were concerns over the use of company funds to provide personal financing to insiders. In the absence of legislative or regulatory guidance, private practitioners are in the position of having to interpret the statutory provisions in order to advise companies on compliance. This involves determining which arrangements should be considered prohibited by the statute and which arrangements should not be considered prohibited because they do not present the concerns the statute was designed to address.

INTRODUCTION

This Outline describes a variety of interpretive issues that practitioners are addressing under § 402 of the Sarbanes-Oxley Act of 2002. The purpose of the Outline is to prepare a blueprint for a consensus among practitioners on these issues. There is no implication as to the status under § 402 of matters beyond those addressed in this outline (such as split dollar life insurance arrangements). Instead, this outline represents an initial list of issues for consensus.[1]

Section 402 is a component of a very recent statute that was enacted quickly and as to which there is only limited legislative history. Section 402 contains substantial ambiguities and has not been the subject of any official guidance. Subject to that context, a conclusion below that an activity is "permissible" means that in our view, in the absence of contrary official guidance, the activity should not be considered a violation of § 402.

GENERAL PRINCIPLES

Principles of statutory construction. Section 402 should be interpreted in accordance with customary principles of statutory construction. For example, while the same words used in different provisions of a statute are ordinarily given the same meaning,

[1] Throughout this Outline the grandfather exclusion may be available even though not specifically referred to.

there are recognized circumstances when the context requires different meanings, particularly when the provisions are enacted at different times and address separate subjects with different policy considerations. See "Relationship to margin regulations" below. Also, the apparent breadth of a provision's coverage without benefit of definition of key terms (see "Meaning of personal loan" and "Meaning of arrange" below) permits greater reliance on the underlying policies and purposes of the statutory provision in interpreting its meaning. The absence of legislative or regulatory guidance also leaves room for reasonable good faith interpretations.

Relationship to margin regulations. While the words "extension of credit" and "arrange" in § 402 (adding new § 13(k) to the Exchange Act) are the same as those used in Exchange Act §§ 7 (margin) and 11(d) (credit on new securities in distribution), the policies behind §§ 7 and 11(d) are fundamentally different from the policy underlying § 402.

The policy underlying the margin provisions is to protect the securities markets, customers and broker-dealers from the risks of over-leveraging and to limit speculation, and the policy underlying § 11(d) is to deter share pushing. The policy underlying § 402 appears intended to protect against improper behavior of directors and executive officers and to ensure the proper use of corporate assets by issuers not otherwise in the business of making personal loans.[2] Accordingly, § 402 does not necessarily require the same reading of the concepts of "extension of credit" and "arrange" as used under the margin regulations and § 11(d).

Meaning of "personal loan." The prohibitions of § 402 apply only to an extension of credit "in the form of a personal loan." This suggests that only certain extensions of credit are subject to the prohibition of § 402 and that they must meet two separate requirements.

First, the transaction must take the form of a loan, not merely be an extension of credit. In the absence of a statutory definition or controlling legislative history, terms are given their ordinary meaning. The term "loan" is commonly understood to be

---

[2] The title of § 402 is "enhanced conflict of interest provisions," indicating that conflicts of interest are the policy behind the prohibition. The operative words of § 402 that an issuer shall not, "directly or indirectly, … extend or maintain credit, [or] arrange for the extension of credit, … in the form of a personal loan" are identical to those of the Senate bill (the Act added "including through any subsidiary" and the express prohibition on renewing an extension of credit). The accompanying Report of the Senate Committee on Banking, Housing, and Urban Affairs describes an earlier version of § 402, which required only 8-K reporting within 7 days of the making of covered loans and of "conflicts of interest," to be defined by the SEC. It cites as examples of problematic loans certain personal loans made to executives of identified companies, describing the concern in some cases as lack of disclosure about these loans to investors or the board of directors. The Senate adopted an amendment to proposed § 402 sponsored by Senators Schumer and Feinstein eliminating the disclosure approach and instead creating the prohibition appearing in the bill passed by the Senate and appearing in the Act. In her remarks on the Senate floor, Sen. Feinstein noted conflicts of interest that limit the ability of outside directors, in particular, to voice their criticism of the issuer.

narrower than "extension of credit." As a result, the fact that a transaction may, for example, be deemed for margin regulation or other regulatory purposes to involve an extension of credit is not sufficient to trigger the § 402 prohibition. Where a transaction involves actual or potential credit exposure, there will still be situations in which the transaction is not "in the form of a … loan." An example of this would be indemnification advances discussed below in item 6. In other cases, a transaction may involve an element of extension of credit, but be primarily intended to confer an immediate or deferred compensation benefit on the individual for services rendered, analogous to salary or bonus, and not requiring repayment of fixed amounts. An example of this would be the tax indemnity payments discussed below in item 9.

Second, the loan must be a "personal loan." We believe that a loan is not a "personal loan" if the primary purpose of the loan, from the perspective of the issuer, is to advance the business of the issuer (other than merely through benefiting employees and directors of the issuer). Where an extension of credit is made in the ordinary course of business primarily for business purposes, but involves limited ancillary personal credit, it should not be considered "in the form of a personal loan." For example, business travel advances and use of company credit cards and company cars, as discussed below in items 1-3, may involve limited ancillary personal use (*e.g.*, personal items included in hotel room charges) but should not be subject to the § 402 prohibition because the arrangements are primarily for the benefit of the issuer, not the employee, and they are not personal loans within the ordinary meaning of that term.

Meaning of "arrange." The concept of "arranging" necessarily requires some level of issuer involvement in the loan by a third party. While certain limited facilitation of a "personal loan," such as providing information or confirming that the issuer will comply (as well as the method by which the issuer will comply) with its existing obligations, should not constitute "arranging," more substantial levels of facilitation or participation by the issuer may be deemed to be "arranging." Given the conflict of interest-oriented policy of § 402, the use of company assets or facilitation by the issuer of an arrangement that would affect the behavior of directors or executive officers is more likely to involve an "arranging." There also may be circumstances in which an issuer is "arranging" but in which the issuer should not be viewed as "arranging" a "personal loan." For example, an issuer could develop a broadly based employee benefit program involving incidental loans that are available on the same terms to all participants. While the issuer may have arranged the benefit program, it should not be viewed as having arranged "personal loans" because of the incidental nature of the loan feature. An example of this would be loans from 401(k) plans discussed below in item 11.

SITUATIONS INVOLVING "PERSONAL LOAN" ISSUES

1. Travel and similar advances

Permissible – Advances of cash, in accordance with company policy, to cover reimbursable travel and similar expenses incurred while performing executive responsibilities. The advances should be reasonable in relation to the anticipated expenses and settled by the employee with the employer through documentation to show the extent of the reimbursable expenses incurred and a reimbursement to the company of any unused advance. No interest would be charged, and the period of the advance should be in accordance with typical cycles of documentation of these types of expenses within the company. (not personal loan because primarily for business purpose)

2. Personal use of company credit card, required to be reimbursed

Permissible – If company policy permits only business use and limited ancillary personal use (*e.g.*, personal items included in hotel room charges) and requires settlement within a reasonable period (*e.g.*, monthly). Personal items should be paid by the employee within a reasonable period after such charges have been presented. (not a personal loan because primarily for business purpose)

3. Personal use of company car, required to be reimbursed

Permissible – If personal use of company car is limited and ancillary to business use and reimbursement is required to be settled within a reasonable period without interest. (not a personal loan because primarily for business purpose)[3]

4. Relocation payments subject to reimbursement

Permissible – Advancement of reimbursable relocation expenses (costs ultimately to be borne by the issuer) if treated the same as travel and similar advances. (not a personal loan because primarily for business purpose)

5. "Stay" and "retention" bonuses subject to repayment

Permissible – Employment, severance and retention plans and agreements commonly providing for the payment of a sum of money to an employee that is contingent upon a stated length of employment or similar condition, with a provision requiring the employee to repay the issuer if he or she terminates employment before the designated date or otherwise fails to meet the conditions of the payment. The obligation is not represented by a note. (not loans because they are primarily for compensation purposes reportable for federal income tax purposes and with no

---

[3] If personal use is permitted without reimbursement, there is still no § 402 issue because it is compensation not involving any extension of credit.

expectation of the issuer at the time made that a portion will be required to be reimbursed)

6. **Indemnification advances**

Description: Indemnification advances may occur under charter, by-laws or indemnification agreements or D&O policies, where repayment is required under some circumstances (*e.g.*, if ultimately determined not to have acted with the standard of care required to receive indemnification under state law or the contract).

Permissible – Reasons considered persuasive include the following:

i. Well-developed and longstanding state policy interest in providing indemnification advances (unrelated to insider conflicts of interest). Neither the text of § 402 nor the limited legislative history suggests that Congress intended to limit historic state authority in this area. The prospect of indemnification becoming unavailable could significantly discourage service as an executive officer or director, to the detriment of public companies.

ii. Not "in the form of a … loan" because at the time a commitment arises (*e.g.*, at outset of employment), and presumably even at time advancement occurs, the indemnified party is only contingently required to repay the issuer and the contingency makes the likelihood of such repayment reasonably uncertain.

iii. Not "personal" because expenses are incurred in connection with services to the issuer that constitute a business purpose regardless of whether ultimately these amounts need to be repaid. The repayment obligation contemplated by the arrangement and triggered by external events does not change the business nature of the arrangement.

7. **Deferred compensation**

Description: Deferred compensation in which executive officers make an "investment" (through deferring compensation) in an index or notional assets with terms giving them a favorable "return" (*e.g.*, more upside than downside; no recourse to officer beyond amount of investment), but the right to a "return" is merely an unsecured payment obligation of the issuer and the amount of the return is based on a formula (which in some cases deducts the amount of deemed company leverage from the gross return). There is no separate investment vehicle in which the executive officer invests or actual amount loaned by the issuer to the executive officer. The "return" may be measured by reference to an investment vehicle to which the issuer has made a loan or for which it has arranged a loan. In some cases, there are forfeiture provisions that apply to employee's "investment," the company's "contribution" or both for a period of time.

Permissible – Regardless of any forfeiture period and any individual variation of the leverage factor among participating employees (no extension of credit by the issuer; compensation). In fact, the executive officer is extending credit to the issuer, represented by the deferred compensation obligation.

8. **Leveraged co-investment**

   Description: Issuer or subsidiary sponsors an investment limited partnership or other entity that will own actual investment assets. The sponsor lends money, or arranges for a third party to lend money, to the entity or a subsidiary of the entity or acquires a fixed income preferred partnership interest (not having substantial equity characteristics such as sharing of loss) in the entity, all as part of the sponsor's ordinary course of business. The proceeds of the loan or preferred partnership interest are used by the entity or subsidiary to make leveraged purchases of assets. Investors in the entity include directors and executive officers.

   a. Should be permissible – If there is a substantial majority in dollar value and a significant number of outside (non-employee) investors, directors and executive officers participate on the same terms as the outside investors, the loan is made on commercial terms, the loan is not contingent on, and is made irrespective of, director or executive officer participation, and investor capital commitments are not pledged to the lender and do not otherwise provide for recourse by lender or issuer against investor (business loan to the partnership, not a personal loan to the director or executive officer).

   b. Increased Risk of § 402 Violation – Same as a. above but director or executive officer capital commitment or partnership interest is pledged to lender or lender otherwise has recourse to director or executive officer.

9. **Tax indemnity payments to overseas-based executive officers**

   Description: The issuer agrees to pay the excess of the higher overseas income tax over what the US-only tax would have been. In some cases, settlement is in a lump sum following the close of the tax year after all amounts can be calculated. In other cases, settlement is on a gross basis, with the issuer paying the executive officer the full amount of the non-US taxes on their due dates, and the officer paying the issuer the full amount of the US taxes on their due dates. A similar arrangement could exist for non-US executives who relocate to the United States.

   Permissible – Not in the nature of a loan; primarily compensation in the form of a tax swap.

SITUATIONS INVOLVING "ARRANGING" ISSUES

10. **Parent/shareholder loans to executive officer of "issuer" subsidiary (who is not also executive officer or director of parent)**

    a. Parent is non-US 12g3-2(b)-exempt public company (*i.e.*, not an "issuer"), or loan is from non-issuer shareholder, and subsidiary is wholly-owned § 15(d)-reporting "issuer":

       i. *Traditional loan.* Depends on whether subsidiary has "arranged."

- Permissible – If there is clear evidence the loan is made by reason of service to the parent, not the subsidiary. It is helpful if similar loans are also offered to similarly situated employees of the lender who are not directors or executive officers of the subsidiary.
- Permissible – If it can otherwise be clearly shown that the subsidiary has not "arranged."

In both cases, factors to be considered include director and executive officer interlocks and the relative size of the parent and the subsidiary.

ii. *Cashless option exercise for parent stock*. May well be permitted under 13. below; if not, depends on whether subsidiary has arranged and mechanics of cashless exercise in foreign markets.

b. Same scenario as above, but subsidiary is a majority-owned § 13(a)-reporting issuer with publicly traded common stock – same conclusion as above. (Cashless option exercises for subsidiary stock should be analyzed under 13. below.)

c. Same scenario as above, but parent is also an "issuer" (US public company or SEC-registered non-US company) – same conclusion as above, unless the director or executive officer is also a director or executive officer of the parent (in which case there is a presumptive risk of a § 402 violation for traditional loans; cashless option exercise should be analyzed under 13. below).

11. Loans from 401(k) plan

Permissible –

i. In most cases, economic consequence is effectively executive officer borrowing from himself or herself. The principal of such a loan could have been contributed by an executive over many years of employment with the issuer (subject to a variety of limits under both the Internal Revenue Code and the terms of the plan) and through multi-year returns in any number of possible investments in the plan. The loan principal may even have been substantially accumulated through another employer's qualified plan and only recently rolled over to the issuer's 401(k) plan, and thus have no connection whatsoever to employment with the issuer let alone any connection to current compensation.

ii. Loan is from 401(k) plan, not issuer. Loans may be taken only against vested balances. These plans are non-discriminatory between higher- and lower-paid employees and not established with a principal purpose of providing credit. Loan features are ubiquitous and exist to encourage participation in the plan. Current IRS regulations limit loans to $50,000.

iii. Not a loan arranged by issuer. This is the case even if the plan fiduciaries are issuer employees and must approve loan, given ERISA responsibilities of plan fiduciaries to act in interests of participants not those of employer. Payroll

deductions for loan repayments and adoption of plan with loan feature are not a sufficient type or degree of issuer involvement to change the conclusion.

iv. No need for additional limitations. In general, any conflict-of-interest considerations in connection with 401(k) plans are already addressed by ERISA's extensive fiduciary responsibility and prohibited transaction rules.

v. ERISA exemption that permits loans to "rank and file" requires that <u>all</u> participants be permitted to borrow.

12. Loans from annuities and other broad-based employee benefit programs

Assume the programs are written by third parties, are made available to a broad base of employees on similar terms, are not principally for the purpose of establishing a loan facility and the employees (not the issuer) pay for the program benefits.

Permissible –

i. Loan is from annuity writer or program, not issuer.

ii. Issuer should not be regarded as having arranged the loan, because purpose of the program was to confer employee benefits and the loan is merely an ancillary feature.

SITUATIONS INVOLVING BOTH "PERSONAL LOAN" AND "ARRANGING" ISSUES

13. "Cashless" option exercise[4]

Description: These transactions involve the broker paying the issuer the exercise price on the date required by the plan (on T or T+3) and selling (on T) at least enough of the stock to be acquired on exercise of the option to pay for the exercise price and related tax withholding, in each case for the benefit of the insider. The broker uses the proceeds of sale to pay the exercise price (or reimburse itself if it has paid the exercise price before settlement of the sale) and to remit applicable withholding taxes to the issuer and remits the balance to the insider. If the issuer fails to deliver (or is late in delivering) the stock on T+3, the broker may borrow stock to settle the trade and repay the borrowed stock with stock received from the issuer. In order for the broker to execute the transaction in a cash account (or utilize the stock issuable upon exercise as collateral in a margin account) and to avoid net capital charges, Section 220.3(e)(4) of Regulation T and SEC interpretations of Rule 15c3-1 require the broker to obtain an acknowledgment from the issuer that it will deliver the stock promptly. It is assumed the broker observes these requirements. Generally, for tax

[4] The following are not prohibited by § 402: (a) use of other stock to pay the exercise price pursuant to the terms of the plan (no extension of credit); (b) the company simply issuing a smaller number of shares (the net version of (a)), and (c) use of insider's other credit sources, including margin borrowing secured by other securities, to pay the cash exercise price, assuming the issuer is not involved in arranging the credit (no arranging).

purposes the exercise date (T) is considered the purchase date for the stock issuable upon exercise and the sale date for that stock. The issuer incurs on that date an obligation to pay related withholding taxes on the issuer's next withholding tax payment date. (The analysis in this document does not extend to the situation where a margin account is established in connection with the exercise and the insider subsequently begins trading in that account on a leveraged basis.)

a. *General analysis*. Some versions of "cashless" exercise are properly analyzed as not involving a personal loan by either the issuer or broker or as not involving arranging by the issuer. Although some versions of "cashless" exercise involve short-term incidental extensions of credit to the executive officer or director by the issuer or the broker, thereby raising credit and arranging issues under the margin regulations, and possibly § 402, the apparent policy of § 402 should permit the conclusion that "cashless" exercise in general does not involve the type of personal loan intended to be prohibited by § 402. Supporting arguments include:

   i. These arrangements are generally available to all participants in the option plan on the same terms and, therefore, do not introduce issues of discriminatory access to preferential terms.

   ii. Internal technicalities of the various versions – such as whether the issuer facilitates the "cashless" exercise by appointing the broker, whether the issuer delivers stock before payment or whether the broker advances the exercise price before receipt of stock – should not result in different answers under § 402. In the end they all have the same purpose of facilitating realization by the optionee of the value of his or her option by bridging the practical problems of attempting to settle two transactions at or about the same time. In addition, all achieve the same result – permitting a simultaneous or nearly simultaneous exercise of the option and sale of the underlying stock. In economic reality, all forms of "cashless" exercise are equivalent to a sale of the option itself (which is a fully-paid-for instrument) for its in-the-money value by the optionee to the broker, similar to the sale of a warrant to the underwriter by a selling stockholder in an underwriting of the underlying stock.

   iii. The fact that the issuer incurs a withholding tax obligation to the government on T, but in some scenarios may not receive cash until T+3, should not be considered an extension of credit to the employee, because although the obligation arises because of the employee's option exercise, the withholding tax obligation is under tax law that of the issuer itself, not an obligation of the employee being satisfied by the issuer.[5]

---

[5] Note also that if the employee had paid for the stock and reimbursed the amount of the withholding taxes on T by check, it is very possible that even more time would have elapsed before the issuer was actually in funds for the amount it incurred as a withholding obligation on T. Just as we do not

(continued ...)

iv. Any extension of credit is not in the form of a personal loan, but is instead ancillary to the principal purposes of the program, which are bridging logistical settlement issues and simplifying for all employees the mechanics of exercising options. The broker is looking to the stock issuable on exercise, not to the individual credit of the optionee or other assets in the optionee's account, as the source of proceeds to cover the exercise price and applicable withholding tax.

v. While the margin and net capital analyses do not drive the § 402 analysis, it should be noted that Section 220.3(e)(4) of Regulation T and SEC interpretations of Rule 15c3-1 expressly permit "cashless" option exercises on the same basis as cash transactions not involving extensions of credit.

b. Because some versions of cashless exercise involve longer than intraday extensions of credit by the issuer or broker (and may involve other credit characteristics such as interest charges), or active arrangement of a cashless exercise program by the issuer, the level of comfort that can be attained with respect to a particular cashless exercise program may depend on the mechanics used to execute the cashless exercise.

Assuming there is no advancement of stock by the issuer before payment of the exercise price, the greatest level of comfort can be attained under those scenarios involving the absence of any advance of cash by the broker before settlement of the related sale transaction (usually T+3), or the absence of the issuer's arranging of the broker used. In these scenarios the analysis is, respectively, that any extension of credit is for the shortest practicable period and purely a function of the practical inability to settle both the exercise and the trade simultaneously, or that there is no "arranging" by the issuer.

c. Description of scenarios

i. Plan provides for payment of exercise price against delivery of stock at the time of settlement of the related sale transaction (often T+3):

- Permissible – Issuer appoints broker and has previously agreed with broker to deliver stock at the time of settlement of the related sale transaction, and in fact can assure that it does so (*e.g.*, through pre-delivery of treasury shares to issuer account at broker or through use of DTC's DWAC system). (no personal loan)
- Permissible – (A) Issuer has not previously agreed with broker, (B) broker is selected by insider with no involvement by issuer, and (C) all issuer

(... continued)

examine the actual facts underlying the settlement of a payment by check to determine whether there has been some hypothetical extension of credit, we should not look at the mechanical steps that underlie a commercially normal three-day stock purchase settlement procedure.

does is perform the ministerial act of acknowledging to broker upon broker's request that issuer will deliver stock promptly, whether or not the plan terms so require. (no personal loan and no arranging)

- Permissible – Issuer distributes to employees a list of several brokers experienced in these types of transactions. (no personal loan and no arranging)

ii. Plan provides for payment of exercise price *prior* to settlement of the related sale transaction:

- Permissible – (A) Issuer has not previously agreed with broker, (B) broker is selected by insider with no involvement by issuer, and (C) broker advances the exercise price and withholding taxes to the issuer on the exercise date, but (D) all issuer does is perform the ministerial act of acknowledging to broker upon broker's request that issuer will deliver stock promptly, whether or not the plan terms so require. (no arranging)
- Permissible – Issuer distributes to employees a list of several brokers experienced in these types of transactions. (no arranging)
- Should be permissible based on the apparent policy of § 402 – Issuer appoints broker and has previously agreed with broker that broker will advance the exercise price to the issuer on the exercise date, and issuer will deliver stock promptly on T+3.

iii. Plan provides for delivery of treasury shares by company prior to payment of the exercise price:

- Should be permissible based on the apparent policy of § 402.

iv. The above conclusions are not affected by the fact that the issuer contracts with an administrative agent to administer the stock option plan and process exercises of stock options (including "cashless" exercises) and pays the agent annual administrative and per exercise fees.

SITUATIONS INVOLVING EXCEPTIONS AND GRANDFATHER

14. Securities-related loans other than margin loans subject to the specific exemption

The specific clause in § 402 exempting certain margin loans subject to § 7 of the Exchange Act should not be read to preclude other lending that is for the purpose of purchasing securities or that is secured by securities if the other lending is a "consumer credit" satisfying the three conditions and is not used to purchase stock of the issuer.

a. Most of the categories of permitted credit in § 402 overlap.

b. Given the specific limit on loans to purchase issuer stock in the margin loan exception, it seems prudent to apply this limit to other securities-related loans.

c. Examples of permissible loans include loans from issuers that are non-US broker-dealers and issuers that are US broker-dealers to non-employee directors (assuming the three conditions are satisfied and they are not used to purchase issuer stock).

15. Drawdowns on committed lines and maintaining demand loans after July 30, 2002

a. *Drawdowns on committed credit lines*. Permissible – as long as issuer is legally committed before July 30, 2002, without issuer having discretion or a termination right (grandfather).

b. *Maintenance of demand loans*. Permissible – if extended before July 30, 2002 (grandfather).

16. Forgiveness of grandfathered loans

a. The issue is whether complete or partial forgiveness, after July 30, 2002, of a grandfathered loan would be a "material modification to any term" of the loan. Forgiveness constitutes a discharge of the loan obligation or part of it and not a modification. Even if considered a material modification, the effect of that modification should be tested when it occurs. In the case of full forgiveness, no loan is outstanding and, in the case of partial forgiveness, there is no modification of the remaining obligation. Additionally, forgiveness would be equivalent to the issuer's granting a bonus to repay the loan. A similar analysis should apply to both the forgiveness and the bonus situations.

   i. Permissible – If forgiveness or bonus/repayment in full.

   ii. Permissible – If partial forgiveness or bonus/repayment in part, to the extent partial prepayment is not prohibited and no other term of the loan is changed.

b. Of course, there may well be other issues, including those relating to disclosure, fiduciary duty and investor relations, that should be considered in the context of granting a bonus to repay or forgiving of an executive officer or director loan.

17. Modification favorable to the issuer

Permissible – Given the purpose of the statute, any modification of a grandfathered loan that is clearly adverse to the insider and beneficial to the issuer should not constitute a "material modification" of the loan, and the loan, as amended, should retain its status as a grandfathered loan. For example, an increase in interest rate, acceleration of scheduled principal payment dates or amounts and/or addition of collateral are not material.

The undersigned firms concur in the above conclusions (recognizing that there is limited legislative history and a lack of official guidance and that advice in any situation is dependent on the particular facts and circumstances). By concurring in the conclusions, the undersigned do not necessarily agree on all aspects of the analysis or give them equal weight. None of the firms subscribing to this document intends thereby to give legal advice to any person. Any person subject to § 402 should consult with an attorney in any situation in which there may be an issue as to the meaning or scope of § 402, including situations that may appear to be identical or similar to those described herein.

October 15, 2002

Alston & Bird LLP
Bryan Cave LLP
Cahill Gordon & Reindel
Cleary, Gottlieb, Steen & Hamilton
Clifford Chance US LLP
Cravath, Swaine & Moore
Davis Polk & Wardwell
Dewey Ballantine LLP
Fried, Frank, Harris, Shriver & Jacobson
Gibson, Dunn & Crutcher LLP
Goodwin Procter LLP
King & Spalding
Latham & Watkins
LeBoeuf, Lamb, Greene & MacRae L.L.P.
Mayer, Brown, Rowe & Maw
Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.
O'Melveny & Myers LLP
Palmer & Dodge LLP
Shearman & Sterling
Simpson Thacher & Bartlett
Skadden, Arps, Slate, Meagher & Flom LLP
Sullivan & Cromwell
Torys LLP
Wachtell, Lipton, Rosen & Katz
Winston & Strawn