

DEPARTMENT OF LABOR**Pension and Welfare Benefits Administration****29 CFR Part 2520**

RIN 1210-AA90

Interim Final Rule Relating to Notice of Blackout Periods to Participants and Beneficiaries**AGENCY:** Pension and Welfare Benefits Administration, Labor.**ACTION:** Interim final rule with request for comments.

SUMMARY: This document contains interim final rules under new section 101(i) of the Employee Retirement Income Security Act of 1974 (the Act or ERISA). Section 101(i) of ERISA, which was enacted into law on July 30, 2002 as part of the Sarbanes-Oxley Act of 2002 (the SOA), provides that written notice is to be provided to participants and beneficiaries of individual account plans of any "blackout period" during which their right to direct or diversify investments, obtain a loan or obtain a distribution under the plan may be temporarily suspended. This interim final rule is published pursuant to section 306(b)(2) of the SOA in order to carry out the provisions of section 101(i) of ERISA, and to invite the public to submit comments on the interim regulation so as to obtain information as to what further guidance in this area would be helpful to plan administrators and their advisors in fulfilling their duties to provide notice of blackout periods.

DATES: *Effective date:* This interim final rule is effective January 26, 2003 and shall apply to blackout periods commencing on or after that date.

Comment date: Written comments on this interim final rule must be received by November 20, 2002.

ADDRESSES: Written comments on the interim final rule (preferably three copies) should be submitted to: Office of Regulations and Interpretations, Pension and Welfare Benefits Administration, Room N-5669, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210. Attention: Blackout Notice Regulation. Written comments may also be sent by Internet to the following address: e-ORI@pwba.dol.gov. All written comments will be available for public inspection at the Public Disclosure Room, Pension and Welfare Benefits Administration, U.S. Department of Labor, Room N-1513, 200 Constitution

Avenue, NW., Washington, DC, from 8 a.m. to 4:30 p.m. (Monday-Friday).

FOR FURTHER INFORMATION CONTACT: Janet A. Walters, Office of Regulations and Interpretations, Pension and Welfare Benefits Administration, U.S. Department of Labor, Washington, DC 20210, (202) 693-8510 (not a toll free number).

SUPPLEMENTARY INFORMATION:**A. Background**

The Sarbanes-Oxley Act of 2002 (the SOA), Pub. L. 107-204, enacted on July 30, 2002, provides that the Secretary of Labor shall promulgate within 75 days of enactment interim final rules necessary to carry out the provisions of section 306(b) of the SOA and, accordingly, these interim final rules will become effective without advance notice and comment.

Section 306(b)(1) of the SOA amended section 101 of ERISA to add a new subsection (i), requiring that administrators of individual account plans provide notice to affected participants and beneficiaries in advance of the commencement of any blackout period. For purposes of this notice requirement, a blackout period generally includes any period during which the ability of participants or beneficiaries to direct or diversify assets credited to their accounts, to obtain loans from the plan or to obtain distributions from the plan will be temporarily suspended, limited or restricted. The most common reasons for imposition of a blackout period include changes in investment alternatives or recordkeepers, and corporate mergers, acquisitions, and spin-offs that impact the pension coverage of groups of participants.

ERISA section 101(i)(6) provides that the Secretary shall issue model notices that meet the requirements of subsection (i). A model notice is included as part of this interim final rule.

Section 306(b)(3) of the SOA amends ERISA section 502 to establish a new civil penalty applicable to a plan administrator's failure or refusal to provide the blackout notice required by section 101(i) of ERISA. Interim final rules implementing this civil penalty also appear elsewhere in today's issue of the **Federal Register**.

The issuance of these interim final rules will help serve to preserve and protect the retirement benefits of American workers and their families.

B. Overview of Interim Final Rules

In general, the rules being adopted in this interim final rule track the provisions of ERISA section 101(i), as

added by section 306(b)(1) of the SOA. The following is a general overview of the interim final rule, to be codified at 29 CFR 2520.101-3.

Paragraph (a) of § 2520.101-3 describes the general requirement of section 101(i) of ERISA that administrators of certain individual account plans provide notice of blackout periods to participants and beneficiaries whose rights under the plan will be temporarily suspended, limited or restricted by a blackout period (the "affected participants and beneficiaries"), as well as to issuers of employer securities held by the plan.

Paragraph (b) of § 2520.101-3 sets forth the requirements for notices to be furnished to affected participants and beneficiaries. Paragraph (b)(1) provides that the notices shall be written in a manner calculated to be understood by the average plan participant and sets forth the specific content requirements applicable to the notices. The content requirements of the regulation essentially track the requirements of section 101(i)(2)(A) of the Act. Paragraph (b)(1)(ii) makes clear that the notice must include a description of the rights otherwise available under the plan to affected participants and beneficiaries that will be temporarily suspended during the blackout period, in addition to the identification of the investments subject to the blackout period. Paragraph (b)(1)(iii) makes clear that the notice must contain the expected beginning and ending date of the blackout period. In the Department's view, an indication of the expected length of the blackout period is intended both to enable participants and beneficiaries to factor the duration of the blackout into their pre-blackout period investment and other decisions and to apprise participants and beneficiaries as to when they will be able to recommence exercising their rights under the plan. Accordingly, it is the view of the Department that the description of the length of the blackout period must include the expected ending date of the blackout period.

Paragraph (b)(1)(iv) requires the inclusion of a statement advising participants and beneficiaries to review their current investments in light of their inability to direct or diversify their assets during the blackout period and provides that use of the advisory statement contained in paragraph 4. of the model notice (at paragraph (e)(2)) will satisfy this content requirement for the notice.

Section 101(i)(2)(A)(v) of the Act provides that notice shall contain "such other matters as the Secretary may require by regulation." In this regard,

the Department has added, for purposes of this interim final rule, two informational items.

First, given the importance of adequate advance notice of blackout periods to plan participants and beneficiaries, the Department believes that, in those situations where 30 days advance notice is not furnished, participants and beneficiaries should be furnished an explanation as to why the plan was unable to furnish at least 30 days advance notice. Paragraph (b)(1)(v) of the interim final rule, therefore, provides that, where notices are furnished less than 30 days in advance of the last date on which affected participants and beneficiaries could exercise affected rights immediately before the commencement of the blackout period, the notice must contain a general statement concerning the Federal law requirement of 30 days advance notice and an explanation as to why such notice could not be furnished. The requirement for a general statement in paragraph (b)(1)(v)(A) will be satisfied if the notice contains the general statement appearing in paragraph 5.(A) of the model notice at paragraph (e)(2). Paragraph (b)(1)(v) does not apply to the exceptions in paragraph (b)(2)(ii)(C) involving blackout periods in connection with mergers, acquisitions, divestitures, or similar transactions inasmuch as notices of such blackout periods are required to be furnished as soon as reasonably possible. (See ERISA section 101(i)(3).)

Second, given the potential impact of a blackout period on a participant's or beneficiary's financial planning, it is likely that participants and beneficiaries will have questions about a blackout period. For this reason, the Department has determined that the notice should contain the name, address and telephone number of a person who can answer questions concerning the blackout period. Specifically, paragraph (b)(1)(vi) provides that the notice must contain the name, address and telephone number of the plan administrator or other person responsible for answering questions regarding the blackout period.

The Department specifically invites comments on what, if any, additional information should be required to be contained in the blackout notice furnished to participants, beneficiaries and issuers under this section.

Paragraph (b)(2) describes the timing requirements applicable to furnishing the notice to affected participants and beneficiaries. Paragraph (b)(2)(i) provides that notice shall be furnished at least 30 days, but not more than 60 days, in advance of the last date on

which affected participants and beneficiaries could exercise their affected rights immediately before the commencement of any blackout period. It is the view of the Department that Congress, in providing a 30-day advance notice requirement, intended to ensure that each participant and beneficiary affected by a blackout period had an adequate opportunity both to consider the effects of the blackout period on their investments and financial plans and to take action, if appropriate, in anticipation of the blackout period. In order to ensure that each affected participant and beneficiary is afforded an opportunity to assess the potential effects of a blackout, as contemplated by Congress, the interim rule requires that, except to the extent otherwise provided, the 30-day period must be counted back from the last date on which the participant or beneficiary had the right to take action under the terms of the plan in anticipation of the blackout period.

For example, in the case of an individual account plan that provides for daily trading, the 30-day period would be counted back from the date immediately preceding the commencement of a blackout period affecting the right to trade. In the case of a plan that provides participants and beneficiaries the right to direct their investments on a monthly basis, notice would have to be provided at least 30 days prior to the month preceding the month in which a blackout period affecting such rights occurs. For example, under a plan permitting participants to direct their investments during the first fifteen days of each month, it is determined that in order to change recordkeepers, participant direction of their investments will have to be suspended from the 1st to the 15th of May. If the 30-day notice period were counted from the date immediately preceding the commencement of the blackout period, notice could be provided on April 1st, thereby affording participants only 15 days (April 1st–15th) to consider and take action in anticipation of the blackout period. Under the regulation, notice is required to be furnished at least 30 days in advance of the last date on which participants could exercise the affected rights immediately before the commencement of the blackout period. In the immediate example, the last date on which participants could take action in anticipation of the blackout period would be April 15th, accordingly notice would have to be provided to participants not later than March 16th.

The Department notes that all references in the regulation to “days”

are references to calendar days, not business days, unless specifically noted otherwise. For purposes of the interim final rule, the Department also established an outside maximum period of 60 days preceding the last day on which participants and beneficiaries could exercise the affected rights immediately before the commencement of a blackout period in order to ensure that notice is not furnished so far in advance of the commencement date so as to undermine the importance of the notice to affected participants and beneficiaries. The Department notes that if a plan administrator wishes to provide a longer period for affected participants and beneficiaries to consider the effects of a blackout period on their individual accounts, there is nothing in the interim final rule that precludes an administrator from supplementing the requirements of the regulation, by furnishing earlier or more frequent notices than that required by the interim final rule, provided that at least one notice is provided to participants and beneficiaries that complies with the timing and content of the interim final rule. The Department specifically invites comments on the need for, and length of, such a limitation on advance notice of blackout periods.

Paragraph (b)(2)(ii)(A) and (B) sets forth two circumstances under which the 30-day advance notice requirement does not apply. The first circumstance is where a deferral of the blackout period would result in a violation of the exclusive purpose and prudence requirements of section 404(1)(A) and (B) of the Act. For example, the ABC company has announced that it is filing for bankruptcy. The ABC company's 401(k) plan has ABC common stock as one of its investment options. F, the 401(k) plan administrator, determines that, given this event, it would not be prudent to continue to permit participants to direct investments into ABC company stock, effective immediately. In such a situation, F would not, pursuant to § 2520.101–3(b)(2)(ii)(A), be required to give 30 days notice to the affected participants and beneficiaries, but would be required to notify them in writing as soon as possible of the blackout period.

The second circumstance under which the 30-day advance notice requirement does not apply is where commencement of the blackout period is due to events that were unforeseeable or circumstances that were beyond the control of the plan administrator. For example, the DEF company's profit-sharing plan's recordkeeper has informed plan administrator G that due

to a major computer failure, the computer program for recording and processing loans and distributions from the plan has been incapacitated and that it will take approximately ten days to fix the system. In such a situation, G would not, pursuant to § 2520.101–3(b)(2)(ii)(B), be required to give 30 days' notice to the affected participants and beneficiaries of their temporary inability to receive loans and distributions from the plan, but would be required to notify them as soon as reasonably possible, unless G determines that such notice in advance of the termination of the blackout is impracticable. The Department anticipates that plan administrators will rely on this exception only in rare circumstances.

In both of the foregoing circumstances, the plan administrator must make a written determination with respect to the circumstances precluding compliance with the 30-day advance notice requirement. The interim final rule, at paragraph (b)(2)(iv), requires that such determinations must be dated and signed by the plan administrator.

Section 101(i)(3) generally provides that in any case in which a blackout period applies only to one or more participants or beneficiaries in connection with a merger, acquisition, divestiture, or similar transaction involving the plan or plan sponsor and occurs solely in connection with becoming or ceasing to be a participant or beneficiary under the plan by reason of such merger, acquisition, divestiture, or similar transaction, the 30-day advance notice requirement shall be treated as met if the notice is furnished to such participants and beneficiaries to whom the blackout period applies as soon as reasonably practicable. Paragraph (b)(2)(ii)(C) makes clear that notice to such participants and beneficiaries is an exception to the general rule that the 30-day notice be furnished to all affected participants and beneficiaries.

Paragraph (b)(2)(iii) provides that, in any case in which the 30-day advance notice rule is not required to be applied, the administrator is required to provide notice as soon as reasonably possible under the circumstances, unless such notice in advance of the termination of the blackout period is impracticable. If, therefore, a plan administrator concludes under such circumstances that notice could not be furnished in sufficient time in advance of the termination of the blackout period to alert participants and beneficiaries of the termination date and resumption of plan rights, no notice would be required to be provided under this section. Such

might be the case where the need for a blackout period is determined only a few days before the beginning of the blackout period and the blackout period is only a few days in duration. The Department invites comments on, and examples of, circumstances under which the furnishing of notice in accordance with the regulation would be impracticable.

Paragraph (b)(3) provides that the blackout notice must be in writing and may be furnished in any manner permitted under 29 CFR 2520.104b–1, including through electronic media. For purposes of this interim final rule, a blackout notice will be considered furnished as of the date of mailing, if mailed by first class mail, or as of the date of electronic transmission, if transmitted electronically. The Department specifically invites comments on the appropriateness of such furnishing rule.

Paragraph (b)(4) describes the notice requirements applicable to changes in the beginning or ending date of the blackout period. The interim final rule provides that, under such circumstances, the administrator is required to provide all affected participants and beneficiaries with an updated notice explaining the reasons for the change in the date(s) and identifying all material changes in the information contained in the prior notice. The updated notice must be provided as soon as reasonably possible, unless such notice in advance of termination of the blackout period is impracticable.

Paragraph (c) of § 2520.101–3 describes the plan administrator's obligation to provide notice of a blackout period to the issuer of employer securities held by the plan and subject to the blackout period. Paragraph (c)(1) generally provides that the content and timing requirements applicable to the furnishing of notices to participants and beneficiaries also apply to the furnishing of notices to the issuer of employer securities. While the interim final rule does not require that all the information required to be included in the notice to participants and beneficiaries be included in the notice to the issuer, it is the view of the Department that a plan administrator may satisfy its obligation to notify the issuer by providing the same notice furnished to participants and beneficiaries under this rule.

Paragraph (c)(2) provides that the notice of the blackout period shall be furnished to the agent for service of legal process for the issuer, unless the issuer has provided the plan administrator the name of another

person for service of such notice. Paragraph (c)(2) is intended to ensure that there is no ambiguity as to whom the administrator must serve notice of the blackout period. Pursuant to section 306(a)(6) of the SOA, issuers are required to notify directors, executive officers, and the Securities and Exchange Commission of the blackout period.

Paragraph (d) of § 2520.101–3 sets forth, for purposes of the interim final rule, definitions of: (1) "blackout period"; (2) "individual account plan"; and (3) "one-participant retirement plan", each of which is identical to the definitions in section 101(i)(7), (8)(A) and 8(B) of the Act, respectively. Paragraph (d)(4) defines the term "issuer" for purposes of the notice provisions. Consistent with the provisions of section 2(a)(7) of the SOA, issuer means an issuer as defined in section 3 of the Securities Exchange Act of 1934 (15 U.S.C. 78c),¹ the securities of which are registered under section 12 of the Securities Exchange Act of 1934, or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934, or files or has filed a registration statement that has not yet become effective under the Securities Act of 1933 (15 U.S.C. 77a *et seq.*), and that it has not withdrawn.

Paragraph (e) of § 2520.101–3 provides a model notice to facilitate compliance with the blackout notice requirements by plan administrators. Use of the model is not mandatory. However, the interim final rule provides that use of the advisory statement set forth at paragraph 4. of the model notice will be deemed to satisfy the notice content requirements of paragraph (b)(1)(iv) of the rule pertaining to advising participants and beneficiaries about the importance of reviewing their plan investments in anticipation of their inability to direct or diversify their investments during the blackout period. The interim final rule also provides that use of the general statement set forth in paragraph 5. of the model notice will be deemed to satisfy the requirement of

¹ Section 3 of the Securities Exchange Act of 1934 defines the term "issuer" to mean any person who issues or proposes to issue any security; except that with respect to certificates of deposit for securities, voting-trust certificates, or collateral-trust certificates, or with respect to certificates of interest or shares in an unincorporated investment trust not having a board of directors or of the fixed, restricted management, or unit type, the term "issuer" means the person or persons performing the acts and assuming the duties of depositor or manager pursuant to the provisions of the trust or other agreement or instrument under which such securities are issued; and except that with respect to equipment-trust certificates or like securities, the term "issuer" means the person by whom the equipment or property is, or is to be, used.

paragraph (b)(1)(v)(A) that the notice contain a general statement that Federal law requires furnishing of blackout notices in advance of the blackout period.

This model is intended to deal solely with the content requirements prescribed in paragraph (b)(1) and not other matters with respect to which disclosure may be required, such as changes in investment options.

Paragraph (f) of § 2520.101-3 sets forth the effective date of the interim final rule. Pursuant to paragraph (f), the rule is effective January 26, 2003—the effective date of the SOA section 306 amendments to ERISA. Paragraph (f) provides that the notice requirements shall apply to blackout periods commencing on or after January 26, 2003, and that, for blackout periods beginning between January 26, 2003 and February 25, 2003, plan administrators shall furnish notice as soon as reasonably possible. This provision is intended to ensure that a statutorily required notice be provided with respect to blackout periods which commence before February 26, 2003.

This interim final rule does not deal with the application of the fiduciary provisions as they relate to the timing and administration of a blackout period.

C. Request for Comments

In addition to the specific requests for comments identified above, the Department encourages all interested persons to submit their comments, suggestions and views concerning the provisions of this interim final rule, including the model notice. In particular, the Department is interested in any area in which additional guidance would facilitate compliance with these important rules.

Written comments on the this rule should be submitted to: Office of Regulations and Interpretations, Pension and Welfare Benefits Administration, Room N-5669, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210. Attention: Blackout Notice Regulation. Written comments may also be sent by Internet to the following address: e-ORI@pwba.dol.gov. Written comments on this rule must be received no later than November 20, 2002. The comment period is being limited to 30 days to enable the Department to adopt changes to the interim final rule prior to the effective date of the SOA amendments.

D. Regulatory Impact Analysis

Summary

The costs associated with this interim final rule arise primarily from the

statutory requirement to prepare and distribute advance notices of the imposition of blackout periods. The aggregate costs for plans required to provide this notice are estimated to be \$13.9 million per year. The benefits afforded participants and beneficiaries by the statute and interim final rule cannot be quantified, but are expected to be substantial. This requirement will ensure that notices are always provided, are timely, and have appropriate content. Economic benefits will accrue to participants or beneficiaries as a result of their enhanced ability to exercise control over their retirement plan assets with adequate information to inform their decisions. The assurance of receiving advance notice of events that may be critical to participant decisionmaking will increase confidence in the security of retirement assets and promote new and continued plan participation. This guidance will also assist plan administrators in their efforts to fulfill their obligations to participants and beneficiaries. Finally, the requirement for notice to issuers of employer securities affected by blackout periods will serve to some extent to equalize the rights of plan participants and beneficiaries and the officers and directors of the issuer with respect to those securities.

Benefits and Costs

The SOA amendments to ERISA and this implementing guidance will have several important benefits. First, acknowledging that plan administrators impose blackout periods from time to time in the ordinary course of business, the SOA ensures the communication of critical information to affected participants and beneficiaries. The timing and content of the required notice will ensure that participants and beneficiaries are aware of significant events affecting their ability to make meaningful decisions concerning their retirement savings. While many plan administrators may currently provide disclosures similar to those required by the statute and interim final rule, this new requirement will ensure that appropriate information is provided in a consistent and timely manner.

This advance knowledge will have economic value and increase confidence in the security of retirement savings. Timely notice and an understanding of the reasons for and expected duration of a blackout period will benefit participants and beneficiaries economically by offering them ample opportunity to assess their current investments decisions, and to adjust their exposure to loss if they wish to do so, to the extent possible within the

existing options available under the plan. Advance notice of blackout periods cannot eliminate fluctuations of market value during a period when existing investment instructions cannot be modified. However, notice will allow affected participants and beneficiaries to maximize their exercise of control as they deem appropriate under their current circumstances.

Assurance of the opportunity to exercise control with adequate knowledge, in advance of events that will affect their ability to exercise control, will increase participant and beneficiary confidence that the plan is being operated prudently. Participants frequently express concern when significant changes are made to plan options, or when rights previously available are temporarily limited. Assuring knowledge of the timing and reasons for such changes should serve to promote confidence in the security of retirement savings and promote continued growth in participation in the retirement plans offered by plan sponsors.

Guidance on the statutory notice requirement will benefit plan sponsors and administrators by clarifying the manner in which they may discharge their obligation to ensure that participants and beneficiaries have access to information necessary to make informed and meaningful investment decisions. Blackout periods occur for a variety of reasons. Their occurrence and timing are often, but not always, within the control of the plan administrator. The most common reasons for imposition of a blackout period include changes in investment alternatives or recordkeepers, and corporate mergers, acquisitions, and spin-offs that impact the pension coverage of groups of participants. Plan administrators will wish to ensure that proper accounting and record transfer is accomplished as timely and accurately as possible, while at the same time fulfilling their obligation to advise participants about important matters affecting their rights under the plan.

The value of these many benefits cannot be specifically quantified. However, the conclusion that advance notice of blackout periods produces economic benefits is consistent with mainstream economic theory and corroborated by evidence. For example, theory posits that financial market prices respond quickly to new information. Delays in executing trades have been shown to be costly. Advance notice of a blackout in trading enables affected participants to adjust their positions to manage their exposure to such costs. The benefits are expected to

outweigh the costs of the statute and the interim final rule.

Administrators of about 85,150 affected plans are estimated to incur costs of approximately \$13.9 million each year to prepare and distribute blackout notices to 12 million covered participants. This total consists of about \$8 million per year for 295,000 small plans (an average of about \$110 per plan), and \$5.8 million per year for 45,000 large plans (an average of about \$510 per plan). These costs are primarily attributable to the effect of the statutory provisions, and would in fact be estimated to be greater in the absence of a model notice due to higher notice preparation time. Because plans commonly provide advance notice of blackout periods voluntarily, much of this cost is inherent in normal business practice, and the incremental cost of the advance notice requirement will be less than total estimated here. Because the costs of the statute arise from notice provisions, the data and methodology used in developing these estimates are fully described in the Paperwork Reduction Act section of this statement of regulatory impact.

Request for Comments

The Department is interested in receiving comments from the public concerning the assumptions used in developing these estimates. Additional information as to the likely frequency of blackout periods, and other circumstances that might give rise to blackout periods would be particularly useful for informing any future decisions about the timing or content of the blackout notices. Identification of sources of variability in the costs and benefits of providing notices and of potential differential impacts on small plans would also be useful.

Executive Order 12866

Under Executive Order 12866 (58 FR 51735), the Department must determine whether a regulatory action is "significant" and therefore subject to review by the Office of Management and Budget (OMB). Section 3(f) of the Executive Order defines a "significant regulatory action" as an action that is likely to result in a rule (1) having an annual effect on the economy of \$100 million or more, or adversely and materially affecting a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities (also referred to as "economically significant"); (2) creating serious inconsistency or otherwise interfering with an action taken or planned by

another agency; (3) materially altering the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raising novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order. It has been determined that this interim final rule is significant within the meaning of section 3(f)(4) of the Executive Order. OMB has, therefore, reviewed the interim final rule pursuant to the Executive Order.

Paperwork Reduction Act

The Department of Labor has submitted the information collection request (ICR) included in this interim final rule (the Notice of Blackout Period under ERISA) to OMB for review and clearance in accordance with the emergency review procedures of the Paperwork Reduction Act of 1995 (PRA 95). Emergency clearance is likely to be necessary in order to allow time to consider public comments and obtain OMB approval for the ICR by the effective date of the notice requirement of the SOA (180 days after the date of enactment, or January 26, 2003). OMB approval has been requested by November 20, 2002. A copy of the ICR with applicable supporting statement may be obtained by calling the Department of Labor, Ms. Marlene Howze, at (202) 693-4158, or by e-mail to Howze-Marlene@dol.gov.

Comments and questions about the ICR should be submitted to the Office of Management and Budget, Office of Information and Regulatory Affairs, ATTN: Desk Officer for the Pension and Welfare Benefits Administration, Room 10235, 725 17th Street, NW, Washington, DC, 20503 ((202) 395-7316). Comments should be submitted to OMB by November 20, 2002 to ensure their consideration.

The Department and OMB are particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the

use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

The information collection provisions of this interim final rule are found in paragraphs (a), (b)(2)(ii)(A) and (B), (b)(2)(iv), (b)(4), and (c)(1). A model notice is provided in paragraph (e) to facilitate compliance and moderate the burden associated with supplying notices to participants and beneficiaries as described in the interim final rule. Use of the model notice is not mandatory, and the addition of other relevant information to the advance notice should not be viewed as restricted by the model. This interim final rule provides implementing guidance on the SOA, which, as it pertains to individual account plans under ERISA, generally requires that plan administrators provide affected participants and beneficiaries of individual account plans with advance notice of the commencement of a blackout period. A blackout period is a period of at least 3 business days during which participants' and beneficiaries' otherwise available ability to direct the disposition of assets in their accounts is suspended or restricted. The SOA also requires that the plan administrator provide notice to issuers of employer securities that are subject to a blackout period applicable to a plan. This is a general description for purposes of PRA 95; the provisions of the interim final rule should be relied upon for compliance with the SOA and this implementing guidance.

In order to estimate the potential costs of the notice provisions of section 101(i) of ERISA and this interim final rule, the Department tabulated the number of participant-directed individual account plans and the number of participants, inactive participants and beneficiaries who have not taken distributions, in those plans using the plans' Form 5500 filings for 1998, the most recent year currently available. The Department then projected these counts forward to produce estimates of participant-directed individual account plans and participants for 2002. The projections were based on historical growth of all individual account plans because reliable counts of participant-directed plans are not available for years prior to 1997.

The Department assumed linear growth in the number of plans equal to the rate observed for all small and large individual account plans between 1992 and 1998, producing estimates of 295,000 small and 45,000 large

participant-directed individual account plans in 2002 (totaling 341,000). To project the number of participants in these plans, the Department assumed linear growth in the ratio of participants to total private employment equal to the rate observed in that ratio between 1992 and 1998. The projected ratios for small and large plans in 2002 were applied to total private employment in July 2002 as estimated by the U.S. Bureau of Labor Statistics, producing estimates of 7.4 million small and 40.4 million large plan participants (totaling 47.8 million) in 2002 that would potentially be affected by a blackout period notice requirement.

An assumption was then needed to account for the fact that not all potentially affected plans will impose blackout periods that would trigger the notice requirement, and not all of those imposing blackout periods would do so in any given year. The Department reviewed available literature in an effort to establish a reasonable estimate of the frequency of the imposition of blackout periods that would trigger notice requirements. One small survey of administrators of very large plans indicated that their largest plans had undergone a blackout period at a rate of once each 3 to 4 years. A different survey indicated a lower frequency of blackout periods, at a rate in the area of about 7% of plans per year. No comprehensive statistics on this frequency are available. However, the Department is aware that the imposition of blackout periods is not rare. For this purpose, the Department has assumed that potentially affected plans will impose blackout periods on average once each 4 years. Among these, some will not impose blackout periods, some will impose blackout periods that do not trigger the notice requirement (*e.g.*, a temporary suspension for a period of 3 or less consecutive days), and some may have blackout periods more frequently.

The Department believes that the assumption that 25% percent of potentially affected plans will impose a blackout period in any given year results in a reasonable estimate of the number of plans that will actually be affected. However, the Department requests comments and any additional information that would validate or otherwise inform this assumption. The resulting numbers of plans and participants assumed to be affected by the notice provisions annually are 85,150 and about 12 million, respectively.

It is assumed that the availability of a model notice as provided in paragraph (e) will lessen the time otherwise required to draft a required notice. In

developing burden estimates, the Department has allowed one-half hour for drafting of the elements of the form by the plan administrator, and one hour for legal review of the drafted notice, the latter expense to be incurred as a payment of fees for outside services. This accounts for the burden of preparing the notice, which is estimated at 42,600 hours, and \$6.4 million. No additional preparation time is accounted for to draft the notice required to be provided to an issuer of employer securities under paragraph (c), because this interim final rule requires the content and timing of that notice to be the same as the notice prepared for the purpose of paragraph (b)(1). The burden of this notice would be driven by the number of plans rather than participants, and the notice would be required in far more limited circumstances than the notice to participants under paragraph (b)(1), as it pertains only to the issuer's securities affected by the blackout period in the plan. Only a small segment of participant directed individual account plans hold employer securities that would be subject to the requirements of paragraph (c), on the order of a maximum of about 500 plans per year. The direct cost of delivering such notices would be negligible.

The estimated burden for distribution of the notices takes several factors into account, including an assumed number of participants affected annually, the number of the notices that will be distributed electronically, and on paper, and the differential costs of electronic and paper distribution methods. Estimates of the rate of use of electronic distribution methods are consistent with those used in determining the savings associated with the Department's Final Rules Relating to Use of Electronic Communication and Recordkeeping Technologies by Employee Pension and Welfare Benefit Plans (67 FR 17264, April 9, 2002). Those participants not calculated to receive notice electronically are assumed to receive the notice on paper. Paper distribution is estimated to require one minute per notice for copying and mailing, plus \$0.40 for paper and postage. No time or direct cost is attributed to electronic distribution methods other than the time required to prepare the notice, because it is assumed that notices are drafted in electronic form, plan administrators use existing infrastructure to communicate electronically, and the cost of electronic transmission is negligible. Paper notice distribution is estimated to require

123,500 hours, and cost about \$3 million annually.

The Department considers that this distribution burden estimate is conservatively high due to the fact that many plans already provide advance notices in the event of the imposition of a blackout period, that most blackout periods arise from changes in investment providers or recordkeepers, and that this advance notice either is or will be included with other informational materials that would ordinarily be supplied to participants or beneficiaries to implement that change.

No additional burden is included for the requirements for written documentation that is to be dated and signed under paragraphs (b)(2)(ii)(A) and (B) and (b)(2)(iv). It is assumed that written documentation is normally maintained in the circumstances described, and that the burden of adding a signature or providing a limited number of copies upon request would be negligible.

Further, no additional burden is estimated for subsequent notices required due to changes described in paragraph (b)(4). The Department has no basis for an estimate of the frequency of changes in the length of blackout periods. Further, the Department believes that plan administrators would typically inform participants of changes in the duration of a blackout period as part of their reasonable and customary business practices, although content and timing might be modified based on the provisions of the SOA and this interim final rule.

The resulting estimates of annual respondents, responses, and hour and cost burden are shown below.

Type of Review: New.

Agency: Department of Labor, Pension and Welfare Benefits Administration.

Title: Notice of Blackout Period under ERISA.

OMB Number: 1210-NEW.

Affected Public: Individuals or households; Business or other for-profit; Not-for-profit institutions.

Respondents: 85,150.

Frequency of Response: On occasion.

Responses: 11,956,000.

Estimated Total Burden Hours: 166,129.

Total Annual Cost (Operating and Maintenance): \$9,351,400.

OMB will consider comments submitted in response to this request in its review of the request for approval of the ICR; these comments will also become a matter of public record.

Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) (RFA), imposes

certain requirements with respect to federal rules that are subject to the notice and comment requirements of section 553(b) of the Administrative Procedure Act (5 U.S.C. 551 *et seq.*) and that are likely to have a significant economic impact on a substantial number of small entities. For purposes of its analyses under the RFA, PWBA continues to consider a small entity to be an employee benefit plan with fewer than 100 participants. The basis of this definition is found in section 104(a)(2) of ERISA, which permits the Secretary of Labor to prescribe simplified annual reporting for pension plans that cover fewer than 100 participants. Because this guidance is issued as an interim final rule pursuant to the authority and deadlines prescribed in section 306(b)(2) of the SOA, RFA does not apply, and regulatory flexibility analysis is not required.

The terms of the statute pertaining to the required notices to plan participants and beneficiaries in the event of a blackout do not vary relative to plan size. This interim final rule addresses the statutory provisions, which are self-executing and do not afford the Department with substantial discretion to exercise regulatory flexibility with respect to small plans. While a cost is expected to be associated primarily with the statutory provisions, the Department believes that the interim final rule imposes no additional cost on small plans. The Department nevertheless wishes to address in its final rulemaking any special issues facing small plans with respect to blackout notices, and any alternatives consistent with the objectives of the statute that may serve to facilitate compliance.

The Department is issuing and requesting comments on a model notice in connection with this interim final rule that is intended to assist with compliance and moderate the administrative burden associated with these required notices. Available data suggest that about 341,000 plans, or 47% of all plans are potentially impacted by the enactment of a blackout notice requirement, in that they are individual account plans that permit any form of individual investment direction.

The statutory blackout notice requirement will potentially affect a significant number of small plans. About 87% of the potentially affected plans are small. However, although most affected plans are small, the participants in those plans represent only about 16% of the 47.8 million potentially affected participants. Based on the assumption that plans will impose a blackout period once every

four years on average, about 73,800 small plans and 11,400 large plans will prepare and distribute notices annually. These affected plans represent about 10% and 2% of all plans, respectively. Affected participants (1.9 million in small plans, and 10.1 million in large plans) represent approximately 2% and 9% of all plan participants, respectively.

A required notice is likely to be prepared once for each applicable blackout period and distributed to the multiple affected participants. The fixed cost of preparing the notice is estimated at approximately \$100 for both large and small plans. The total cost to affected small plans for both preparation and distribution is expected to be about \$110 per year. The comparable annual cost to large plans of about \$510 is substantially greater due to the greater numbers of participants in these plans, and the costs attendant to distribution of the notices.

The Department invites interested persons to submit comments on the impact of this interim final rule on small entities, and on any alternative approaches that may serve to minimize impact on small plans while accomplishing the objectives of the statute.

Congressional Review Act

The rules being issued here are subject to the Congressional Review Act provisions of the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801 *et seq.*) and have been transmitted to Congress and the Comptroller General for review. The rule is not a "major rule" as that term is defined in 5 U.S.C. 804, because it is not likely to result in (1) an annual effect on the economy of \$100 million or more; (2) a major increase in costs or prices for consumers, individual industries, or federal, State, or local government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.

Unfunded Mandates Reform Act

For purposes of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4), as well as Executive Order 12875, this interim final rule does not include any Federal mandate that may result in expenditures by State, local, or tribal governments, and does not impose an annual burden exceeding \$100 million on the private sector.

Federalism Statement

Executive Order 13132 (August 4, 1999) outlines fundamental principles of federalism and requires the adherence to specific criteria by federal agencies in the process of their formulation and implementation of policies that have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. This interim final rule does not have federalism implications because it has no substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Section 514 of ERISA provides, with certain exceptions specifically enumerated, that the provisions of Titles I and IV of ERISA supersede any and all laws of the States as they relate to any employee benefit plan covered under ERISA. The requirements implemented in this interim final rule do not alter the fundamental reporting and disclosure requirements of the statute with respect to employee benefit plans, and as such have no implications for the States or the relationship or distribution of power between the national government and the States.

List of Subjects in 29 CFR Part 2520

Employee benefit plans, Employee Retirement Income Security Act, Pensions, and Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, amend part 2520 of Title 29 of the Code of Federal Regulations as follows:

PART 2520—RULES AND REGULATIONS FOR REPORTING AND DISCLOSURE

1. The authority citation for part 2520 is revised to read as follows:

Authority: 29 U.S.C. 1021–1025, 1027, 1029–31, 1059, 1134 and 1135; Secretary of Labor's Order No. 1–87.

Sections 2520.102–3, 2520.104b–1 and 2520.104b–3 also issued under 29 U.S.C. 1003, 1171–73, 1185 and 1191–94; and under sec. 101(g)(4), Pub. L. 104–191, 110 Stat. 1936.

Sections 2520.104b–1 and 2520.107 also issued under sec. 1510, Pub. L. 105–34, 111 Stat. 788.

Section 2520.101–3 also issued under sec. 306(b)(2), Pub. L. 107–204, 116 Stat. 745.

2. Add § 2520.101–3 to subpart A to read as follows:

§ 2520.101–3 Notice of blackout periods under individual account plans.

(a) *In general.* In accordance with section 101(i) of the Act, the administrator of an individual account plan, within the meaning of paragraph (d)(2) of this section, shall provide notice of any blackout period, within the meaning of paragraph (d)(1) of this section, to all participants and beneficiaries whose rights under the plan will be temporarily suspended, limited, or restricted by the blackout period (the “affected participants and beneficiaries”) and to issuers of employer securities subject to such blackout period in accordance with this section.

(b) *Notice to participants and beneficiaries—(1) Content.* The notice required by paragraph (a) of this section shall be written in a manner calculated to be understood by the average plan participant and shall include—

(i) The reasons for the blackout period;

(ii) A description of the rights otherwise available to participants and beneficiaries under the plan that will be temporarily suspended, limited or restricted by the blackout period (*e.g.*, right to direct or diversify assets in individual accounts, right to obtain loans from the plan, right to obtain distributions from the plan), including identification of any investments subject to the blackout period;

(iii) The expected beginning date and ending date of the blackout period;

(iv) In the case of investments affected, a statement that the participant or beneficiary should evaluate the appropriateness of their current investment decisions in light of their inability to direct or diversify assets in their accounts during the blackout period (a notice that includes the advisory statement contained in paragraph 4. of the model notice in paragraph (e)(2) of this section will satisfy this requirement);

(v) In any case in which the notice required by paragraph (a) of this section is not furnished at least 30 days in advance of the last date on which affected participants and beneficiaries could exercise affected rights immediately before the commencement of the blackout period, except for a notice furnished pursuant to paragraph (b)(2)(ii)(C) of this section:

(A) A statement that Federal law generally requires that notice be furnished to affected participants and beneficiaries at least 30 days in advance of the last date on which participants

and beneficiaries could exercise the affected rights immediately before the commencement of a blackout period (a notice that includes the statement contained in paragraph 5. of the model notice in paragraph (e)(2) of this section will satisfy this requirement), and

(B) An explanation of the reasons why at least 30 days advance notice could not be furnished; and

(vi) The name, address and telephone number of the plan administrator or other person responsible for answering questions about the blackout period.

(2) *Timing.* (i) The notice described in paragraph (a) of this section shall be furnished to all affected participants and beneficiaries at least 30 days, but not more than 60 days, in advance of the last date on which such participants and beneficiaries could exercise the affected rights immediately before the commencement of any blackout period.

(ii) The requirement to give at least 30 days advance notice contained in paragraph (b)(2)(i) of this section shall not apply in any case in which—

(A) A deferral of the blackout period in order to comply with paragraph (b)(2)(i) of this section would result in a violation of the requirements of section 404(a)(1)(A) or (B) of the Act, and a fiduciary of the plan reasonably so determines in writing;

(B) The inability to provide the advance notice of a blackout period is due to events that were unforeseeable or circumstances beyond the reasonable control of the plan administrator, and a fiduciary of the plan reasonably so determines in writing; or

(C) The blackout period applies only to one or more participants or beneficiaries solely in connection with their becoming, or ceasing to be, participants or beneficiaries of the plan as a result of a merger, acquisition, divestiture, or similar transaction involving the plan or plan sponsor.

(iii) In any case in which paragraph (b)(2)(ii) of this section applies, the administrator shall furnish the notice described in paragraph (a) of this section to all affected participants and beneficiaries as soon as reasonably possible under the circumstances, unless such notice in advance of the termination of the blackout period is impracticable.

(iv) Determinations under paragraph (b)(2)(ii)(A) and (B) of this section must be dated and signed by the fiduciary.

(3) *Form and manner of furnishing notice.* The notice required by paragraph (a) of this section shall be in writing and furnished to affected participants and beneficiaries in any manner consistent with the requirements of § 2520.104b–1 of this

chapter, including paragraph (c) of that section relating to the use of electronic media.

(4) *Changes in length of blackout period.* If, following the furnishing of a notice pursuant to this section, there is a change in the beginning or ending date of the blackout period (specified in such notice pursuant to paragraph (b)(1) of this section), the administrator shall furnish all affected participants and beneficiaries an updated notice explaining the reasons for the change in the date(s) and identifying all material changes in the information contained in the prior notice. Such notice shall be furnished to all affected participants and beneficiaries as soon as reasonably possible, unless such notice in advance of the termination of the blackout period is impracticable.

(c) *Notice to issuer of employer securities.* (1) The notice required by paragraph (a) of this section shall be furnished to the issuer of any employer securities held by the plan and subject to the blackout period. Such notice shall contain the information described in paragraph (b)(1)(i), (ii), (iii) and (vi) of this section and shall be furnished in accordance with the time frames prescribed in paragraph (b)(2) of this section. In the event of a change in the beginning or ending date of the blackout period specified in such notice, the plan administrator shall furnish an updated notice to the issuer in accordance with the requirements of paragraph (b)(4) of this section.

(2) For purposes of this section, notice to the agent for service of legal process for the issuer shall constitute notice to the issuer, unless the issuer has provided the plan administrator with the name of another person for service of notice, in which case the administrator shall furnish notice to such person. Such notice shall be in writing, except that the notice may be in electronic or other form to the extent the person to whom notice must be furnished consents to receive the notice in such form.

(d) *Definitions.* For purposes of this section—

(1) *Blackout period—*

(i) *General.* The term “blackout period” means, in connection with an individual account plan, any period for which any ability of participants or beneficiaries under the plan, which is otherwise available under the terms of such plan, to direct or diversify assets credited to their accounts, to obtain loans from the plan, or to obtain distributions from the plan is temporarily suspended, limited, or restricted, if such suspension, limitation, or restriction is for any

period of more than three consecutive business days.

(ii) *Exclusions.* The term “blackout period” does not include a suspension, limitation, or restriction—

(A) Which occurs by reason of the application of the securities laws (as defined in section 3(a)(47) of the Securities Exchange Act of 1934);

(B) Which is a change to the plan which provides for a regularly scheduled suspension, limitation, or restriction which is disclosed to all affected plan participants or beneficiaries through any summary of material modifications, any materials describing specific investment alternatives under the plan, or any changes thereto; or

(C) Which applies only to one or more individuals, each of whom is the participant, an alternate payee (as defined in section 206(d)(3)(K) of the Act), or any other beneficiary pursuant to a qualified domestic relations order (as defined in section 206(d)(3)(B)(i) of the Act).

(2) *Individual account plan.* The term “individual account plan” shall have the meaning provided such term in section 3(34) of the Act, except that such term shall not include a “one-participant retirement plan” within the meaning of paragraph (d)(3) of this section.

(3) *One-participant retirement plan.* The term “one-participant retirement plan” means a one-participant retirement plan as defined in section 306(b)(1) of the Sarbanes-Oxley Act of 2002.

(4) *Issuer.* The term “issuer” means an issuer as defined in section 3 of the Securities Exchange Act of 1934 (15 U.S.C. 78c), the securities of which are registered under section 12 of the Securities Exchange Act of 1934, or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934, or files or has filed a registration statement that has not yet become effective under the Securities Act of 1933 (15 U.S.C. 77a *et seq.*), and that it has not withdrawn.

(e) *Model notice—(1) General.* The model notice set forth in paragraph (e)(2) of this section is intended to assist plan administrators in discharging their notice obligations under this section. Use of the model notice is not mandatory. However, a notice that uses the statements provided in paragraphs 4. and 5.(A) of the model notice will be deemed to satisfy the notice content requirements of paragraph (b)(1)(iv) and (b)(1)(v)(A), respectively, of this section. With regard to all other information required by paragraph (b)(1) of this section, compliance with the notice

content requirements will depend on the facts and circumstances pertaining to the particular blackout period and plan.

(2) *Form and content of model notice.*

Important Notice Concerning Your Rights Under the [Enter Name of Individual Account Plan]

[Enter date of notice]

1. This notice is to inform you that the [enter name of plan] will be [enter reasons for blackout period, as appropriate: changing investment options, changing recordkeepers, etc.].

2. As a result of these changes, you temporarily will be unable to [enter as appropriate: direct or diversify investments in your individual accounts (if only specific investments are subject to the blackout, those investments should be specifically identified), obtain a loan from the plan, or obtain a distribution from the plan]. This period, during which you will be unable to exercise these rights otherwise available under the plan, is called a “blackout period.” Whether or not you are planning retirement in the near future, we encourage you to carefully consider how this blackout period may affect your retirement planning, as well as your overall financial plan.

3. The blackout period for the plan will begin on [enter date] and end [enter date].

4. [In the case of investments affected by the blackout period, enter the following: During the blackout period you will be unable to direct or diversify the assets held in your plan account. For this reason, it is very important that you review and consider the appropriateness of your current investments in light of your inability to direct or diversify those investments during the blackout period. For your long-term retirement security, you should give careful consideration to the importance of a well-balanced and diversified investment portfolio, taking into account all your assets, income and investments. You should be aware that there is a risk to holding substantial portions of your assets in the securities of any one company, as individual securities tend to have wider price swings, up and down, in short periods of time, than investments in diversified funds. Stocks that have wide price swings might have a large loss during the blackout period, and you would not be able to direct the sale of such stocks from your account during the blackout period.]

5. [If timely notice cannot be provided (see paragraph (b)(1)(v) of this section) enter: (A) Federal law generally requires that you be furnished notice of a blackout period at least 30 days in advance of the last date on which you could exercise your affected rights immediately before the commencement of any blackout period in order to provide you with sufficient time to consider the effect of the blackout period on your retirement and financial plans. (B) [Enter explanation of reasons for inability to furnish 30 days advance notice.]]

6. If you have any questions concerning this notice, you should contact [enter name, address and telephone number of the plan administrator or other person responsible for

answering questions about the blackout period].

(f) *Effective date.* This section shall be effective and shall apply to any blackout period commencing on or after January 26, 2003. For the period January 26, 2003 to February 25, 2003, plan administrators shall furnish notice as soon as reasonably possible.

Dated: October 11, 2002.

Ann L. Combs,

Assistant Secretary, Pension and Welfare Benefits Administration, U.S. Department of Labor.

[FR Doc. 02–26522 Filed 10–18–02; 8:45 am]

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DEPARTMENT OF LABOR

Pension and Welfare Benefits Administration

29 CFR Parts 2560 and 2570

RIN 1210–AA91, RIN 1210–AA93

Civil Penalties Under ERISA Section 502(c)(7) and Conforming Technical Changes on Civil Penalties Under ERISA Sections 502(c)(2), 502(c)(5) and 502(c)(6)

AGENCY: Pension and Welfare Benefits Administration, Department of Labor.

ACTION: Interim final rules and request for comments.

SUMMARY: This document contains interim final rules under the Employee Retirement Income Security Act of 1974 (ERISA) that implement certain amendments to ERISA added as part of the Sarbanes-Oxley Act of 2002 (SOA). The interim final rules establish procedures relating to the assessment of civil penalties by the Department of Labor (Department) under section 502(c)(7) of ERISA for failures or refusals by plan administrators to provide notices of a blackout period as required by section 101(i) of ERISA. These rules are being published as interim final rules pursuant to the authority granted the Department by section 306(b)(2) of SOA. This document also contains interim final rules making conforming technical changes to the agency’s rules of practice and procedure for other civil penalties under section 502(c) of ERISA. The interim final rules affect employee benefit plans, plan sponsors, administrators and fiduciaries, and plan participants and beneficiaries.

DATES: This regulation is effective January 26, 2003. Written comments are invited and must be received by the