



# Federal Register

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## **Part IV**

## **Department of Labor**

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**Pension and Welfare Benefits  
Administration**

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**29 CFR Parts 2520, et al.**

**Final Rule Relating to Notice of Blackout  
Periods to Participants and Beneficiaries;  
Civil Penalties and Conforming Technical  
Changes on Civil Penalties Under ERISA;  
Final Rules**

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

RIN 1210-AA90

**Final Rule Relating to Notice of Blackout Periods to Participants and Beneficiaries****AGENCY:** Pension and Welfare Benefits Administration, Labor.**ACTION:** Final rule.

**SUMMARY:** This document contains a final rule 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 affected 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. The final rules provide guidance to plan sponsors, administrators, participants and beneficiaries regarding the requirements for furnishing notices of blackout periods in individual account pension plans.

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

**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, was enacted on July 30, 2002. 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 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. Final rules implementing this civil penalty appear elsewhere in today's issue of the **Federal Register**.

On October 21, 2002, the Department published an interim final rule, including a model notice, in the **Federal Register** (67 FR 64766) for public comment. The Department received 14 comment letters in response to its request for comments. Set forth below is an overview of the final rule and the public comments submitted on the interim final rule.

**B. Overview of Final Rule and Comments****1. General**

Paragraph (a) of § 2520.101-3 of the final rule, like the interim final rule, 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.

**2. Content of the Notice § 2520.101-3(b)(1)**

Paragraph (b)(1) of § 2520.101-3 of the final rule, like the interim final rule, sets forth the content 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), like the interim

final rule, provides 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) requires that the notice set forth information concerning the length of the blackout period. The interim final rule required that the notice set forth the expected beginning date and ending date of the blackout period. A number of commenters expressed concern about the difficulty of projecting thirty or more days in advance the specific beginning and ending dates of a blackout period, noting that a wide range of events (e.g., problems with plan records or recordkeeper, extensive document reviews and data reconciliation, required modifications to systems and software) that may affect actual dates. As a result of such events, commenters state that specific dates are likely to be missed, and updated notices with their attendant costs would have to be furnished. In an effort to avoid this problem, sponsors and fiduciaries may be encouraged to establish unnecessarily long blackout periods, thereby depriving participants and beneficiaries of their right to exercise their affected rights for a longer period of time. To address this problem, commenters suggested that the notice be permitted to identify a range of dates during which the blackout period might begin and end. The suggestions included: A range of plus or minus 3 business days, 5 days, 7 days; identification of the "week of \_\_\_\_" during which blackout period might begin and end; and a description of events that might result in the end of the blackout period. Some commenters suggested that where a range of dates is provided, participants also would be furnished a toll-free number or web site that would enable them to determine the specific date on which the blackout period began and ended. One commenter suggested that where other than a specific date is given in the notice, a subsequent less formal notice should be provided to inform the participants of the beginning or ending of the blackout.

The Department continues to believe that it is important that participants and beneficiaries have sufficiently specific information 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. However, the Department also recognizes the difficulty of projecting specific beginning and ending dates thirty or more days in advance of a blackout period and that there may be significant costs to providing updated notices, most or all of which will be charged to the individual accounts of the plans' participants.

The Department is persuaded that allowing a limited range of dates for purposes of defining the beginning and ending dates for a blackout period in the required notice will serve to provide participants and beneficiaries with adequate pre-blackout period planning information, provided that they also have access during such dates to information to determine whether the blackout period has begun or ended. In addition, the Department is persuaded that such an approach will help to reduce plan administrative costs that might otherwise result from multiple notices; thereby preserving assets for the retirement security of plan participants and beneficiaries.

As amended, paragraph (b)(1)(iii) permits the notice to describe the length of the blackout period by reference to either: (A) The expected beginning date and ending date of the blackout period; or (B) the calendar week during which the blackout period is expected to begin and end, provided that during such weeks information as to whether the blackout period has begun or ended is readily available, without charge, to affected participants and beneficiaries, such as via a toll-free number or access to a specific web site, and the notice describes how to access the information.

The Department decided to permit reference to "the calendar week" because, unlike 3 or 5 or 7 day, plus or minus, ranges, it provides both the flexibility for plan administrators and a clearer degree of certainty for plan participants and beneficiaries. As reflected in the description of the change, specific information must be readily available, without charge, to participants and beneficiaries during the identified "week of \_\_\_\_\_" as to whether the blackout has begun or ended. The regulation provides examples as how this requirement can be satisfied, namely via a toll-free number or access to a specific web site. "Calendar week" is defined in the regulation, at paragraph (d)(5) to mean "a seven day period beginning on Sunday and ending on Saturday."

For example, in the case of a plan that expects to have a four week blackout period beginning February 10, 2003 and ending March 7, 2003, the notice of the blackout period could, in accordance

with the final rule, indicate that the blackout period for the plan will begin "the week of February 9, 2003 and end the week of March 2, 2003." The notice also would have to indicate the means by which participants and beneficiaries can determine, during the weeks of February 9 and March 2, whether the blackout period has begun or ended. It is the view of the Department that, given the benefits to affected participants and beneficiaries of specific beginning and ending dates, the regulation should not be construed to preclude the use of a specific beginning date and a "week of \_\_\_\_\_" ending date, or the converse.

The Department notes that, in the case of a plan that permits participants to exercise their rights up to the commencement of the blackout period (e.g., as might be the case where participants are permitted to trade daily), the timing of the advance notice must be calculated back from the earliest possible beginning date identified in the notice. For example, in the case of a plan identifying the blackout period as beginning the "week of February 9," February 9 will be the beginning of the blackout period for purposes of applying the timing rule of the regulation.

The Department has modified paragraph 3 of the model notice (at paragraph (e)(2) of the final rule) to reflect the availability of alternative approaches to describing the length of the blackout period.

Finally, some commenters noted that blackout periods often affect certain rights longer than others (e.g., a 20 day blackout for loans and a 10 day blackout for distributions and investment changes) and requested clarification that one notice describing the different blackout periods is permitted under the regulation. There is nothing in the regulation that is intended to limit the ability of plan administrators to use a single notice to describe different blackout periods, provided that the advance notice and other requirements of the regulation can be satisfied with respect to such blackout periods.

Paragraph (b)(1)(iv) of the final rule, like the interim final rule, 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.

With regard to paragraph 4 of the model, commenters requested a clarification that the sentences relating

to the risks of investments in individual securities are not required in those instances where a plan does not permit investments in such securities.

Paragraph 4 of the model in the final rule, therefore, has been modified to clarify that the last two sentences are required only where the plan permits investments in individual securities.

Section 101(i)(2)(A)(v) of the Act provides that the notice shall contain "such other matters as the Secretary may require by regulation." In this regard, the Department added, for purposes of the interim final rule, two informational items.

First, given the importance of adequate advance notice of blackout periods to plan participants and beneficiaries, paragraph (b)(1)(v) of the interim final rule provided 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) would 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) would 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).) The Department received no comments on paragraph (b)(1)(v) and is adopting the provision without change in the final rule.

Second, the Department had 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) provided 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 received one comment on this provision requesting a clarification that the contact person is not required to be an individual and could be the department employing the individual who would be answering questions (such as the benefits department). The regulation is not intended to require the

identification of a specific person. Rather, the regulation is intended to require the identification of a sufficiently specific source for answering questions concerning the blackout period that participants and beneficiaries will not be confused as to whom their questions should be addressed. The Department has modified paragraph (b)(1)(vi) of the final rule and paragraph 6 of the model notice (at paragraph (e)(2) of the final rule) by substituting "contact" for "person" to clarify this matter.

Finally, two commenters requested a clarification that notice of blackout periods may be furnished with other information, such as information relating to the change in service providers. There is nothing in the regulation that is intended to preclude blackout notice information from being furnished with other plan information, including benefit statements. However, given the importance of the blackout notice information to participants and beneficiaries, plan administrators should take steps to ensure that the blackout notice information is prominently identified in the furnished materials.

### 3. *Timing of the Notice* § 2520.101-3(b)(2)

Paragraph (b)(2) of the final rule, like the interim final rule, describes the timing requirements applicable to furnishing the notice to affected participants and beneficiaries. Paragraph (b)(2)(i) of the interim final rule provided 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. Some commenters indicated that the 30 day window created by the regulation within which to provide notices to affected participants and beneficiaries was not sufficient to prepare and furnish notices and suggested that the regulation extend the 60 day maximum period for furnishing advance notice to 90 days. One commenter suggested changing the minimum notice requirement to 45 days and the maximum period to 90 days, while another commenter suggested changing the minimum requirement to 60 days and the maximum requirement to 90 days to enable furnishing of the notice with quarterly benefit statements. After careful consideration of the comments on this provision, the Department has determined to retain the provision of the interim final rule without change.

The Department continues to believe that the 30 day minimum and 60 day maximum advance notice requirements of the interim final rule serve to ensure that affected participants and beneficiaries have sufficiently timely notice to enable them to 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. The 30-day minimum notice requirement is based on the statutory standard set forth in section 101(i)(2)(B) of ERISA. The 60-day maximum period is intended 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 is concerned that if the only blackout notice is furnished 90 days in advance, many participants and beneficiaries would be inclined to defer consideration of the effects of the period on their individual accounts and some would, by virtue of the passage of time, forget altogether. As noted in the preamble to the interim final rule, there is nothing in the regulation that precludes an administrator from supplementing the requirements of the regulation, by furnishing earlier or more frequent notices than that required by regulation, provided that at least one notice is provided to participants and beneficiaries that complies with the timing and content of the rule. The Department also notes that, in most instances, plan administrators will have the flexibility to determine a beginning date for the blackout period that would permit timely notification of the blackout period to be made with the quarterly benefit statements furnished to affected participants and beneficiaries.

Like the interim final rule, the final rule requires that the notice periods be counted back from the last date on which the participant or beneficiary could exercise the affected rights immediately before the commencement of the blackout period. One commenter requested a clarification that the time period must take into account implementation of the exercised rights of the participant or beneficiary. The point of the advance notice is to enable participants and beneficiaries to take action in anticipation of a blackout period. Accordingly, merely affording participants or beneficiaries the opportunity to give investment instruction, or request a loan, or request a distribution without the ability to have such instruction or request implemented prior to the blackout

period would be contrary to both the regulation and the statute. Therefore, plan administrators must take into account plan requirements, procedures and other factors that may affect implementation of participant or beneficiary instructions or requests in determining the last date on which participants and beneficiaries could exercise the affected rights before the commencement of the blackout period.

The timing rules are exemplified by the following. 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 permits participants to direct their investments during the first fifteen days of each month, if a plan administrator determines 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.

As with the interim final rule, all references in the regulation to "days" are references to calendar days, not business days, unless specifically noted otherwise.

Like the interim final rule, the final rule, at 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(a)(1)(A) and (B) of the Act. For example, the ABC Company has announced that it is filing Chapter 11 bankruptcy. The ABC company's 401(k) plan has ABC common stock as one of its investment options. F, the 401(k) plan fiduciary and administrator, determines that, given this event, it would be prudent to temporarily

suspend investments in the 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 this regard, the Department notes that problems attendant to changes in recordkeepers will rarely be unforeseeable or beyond the control of the plan.

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

Section 101(i)(3) of ERISA 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. Like paragraph (b)(2)(ii)(C) of the interim final rule, the final rule 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.

One commenter requested that the foregoing exception be extended to situations where the affected participants participate in both plans immediately before a plan merger and to situations where a plan merger or spin-off is not the result of a corporate merger, acquisition, divestiture or similar transaction. The Department believes that the exception at issue was intended to be applied to the narrow circumstances set forth in the statute. Moreover, the Department is not persuaded, on the basis of the information provided, that the burdens attendant to providing advance notice in the circumstances described by the commenter outweigh the benefits of the notice to affected participants and beneficiaries.

Paragraph (b)(2)(iii), like the interim final rule, 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 or other fiduciary 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.

One commenter requested as a clarification as to whether the ability to furnish sufficient advance notice is determined by reference to the ability of the plan administrator to provide such notice to all affected participants and beneficiaries. It is the view of the Department that paragraph (b)(2)(iii), as well as paragraph (b)(4) relating to changes in the length of the blackout period, require that an administrator take steps to furnish notice as soon as reasonably possible to all affected participants and beneficiaries and, therefore, to the extent that an administrator has the ability to furnish notice to some participants and beneficiaries earlier than other

participants and beneficiaries, which may be the case where electronic disclosure is available, the administrator has an obligation to provide such notice, even though providing advance notice to other participants and beneficiaries (e.g., by mail) may be impracticable.

Two commenters suggested that the timing rules should not apply with respect to new participants inasmuch as furnishing such notice as part of the plan enrollment package might be a problem because different third-party vendors may prepare the materials and, in addition, new participants are likely to have little, if any, funds that would be affected by the blackout period. The Department is not persuaded that administrative burdens and small account balances justify an exception to the timing rules for new plan participants. Accordingly, no exception from the timing requirements has been adopted for new participants. The Department notes, however, that if an employee becomes a participant after blackout notices have been furnished to the plan's participants and beneficiaries, the administrator would be required to furnish a notice to the newly eligible employee as soon as reasonably possible pursuant to the exception in § 2520.101-3(b)(2)(ii)(B).

#### 4. Form and Manner of Furnishing Notice § 2520.101-3(b)(3)

Like the interim final rule, paragraph (b)(3) of the final rule 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. One commenter indicated that the "reasonably accessible" standard of the SOA is intended to be broader than the standards under § 2520.104b-1 and the regulation, therefore should be modified accordingly. The Department disagrees with the commenter's interpretation of the statute. It is the view of the Department that the standards set forth in § 2520.104b-1(c), relating to the use of electronic media, are intended to ensure reasonable access to electronic communications by participants and beneficiaries consistent with the statute. Accordingly, the provision of the interim final regulation is being retained without modification.

In the preamble to the interim final rule, the Department indicated that 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. Two commenters indicated that the circumstances under which a notice is considered to be furnished should be

expanded to include delivery by overnight mail, third class mail, private delivery services, and interoffice mail. It is the view of the Department that interoffice mail is essentially hand delivery and, therefore, a document would not be considered furnished until received by the participant. On the other hand, the Department agrees that with the commenters that there are other methods of delivery that should be accorded the same deference as electronic transmission and first class mail. In this regard, it is the view of the Department that a blackout notice will be considered furnished on the date of mailing if it is accomplished by first class mail, certified mail or Express Mail; or on the date of delivery to a "designated private delivery service" within the meaning of 26 U.S.C. 7502(f). In the case of notices furnished electronically, notices will be considered furnished on the date of transmission.

One commenter requested clarification of whether furnishing notice to the last known address of a participant or beneficiary is sufficient. Furnishing a notice to the last known address of a participant or beneficiary would be sufficient where the plan utilizes a method of delivery described in § 2520.104b-1 and the fiduciaries of the plan have taken reasonable steps to keep plan records up-to-date and to locate lost or missing participants.

#### 5. Changes in Length of Blackout Period § 2520.101(b)(4)

Paragraph (b)(4) describes the notice requirements applicable to changes in the length of the blackout period. The final rule, like the interim final rule, provides that 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. In this regard, the Department reiterates that to the extent that an administrator has the ability to furnish notice to some participants and beneficiaries earlier than other participants and beneficiaries, which may be the case where electronic disclosure is available, the administrator has an obligation to provide such notice, even though providing advance notice to other participants and beneficiaries (e.g., by mail) may be impracticable.

#### 6. Notice to Issuer of Employer Securities § 2520.101-3(c)

Paragraph (c) of § 2520.101-3 of the final rule, like the interim final rule, 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. As with the interim final rule, 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. 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.

Three commenters suggested that notice to the issuer should not be required when the plan administrator and issuer are the same person. The Department does not believe that merely because an issuer and the plan administrator may, as a technical matter, be the same legal entity, that the parties will necessarily be privy to the same information. Nonetheless, there is nothing in the regulation that precludes an issuer of employer securities from designating the plan administrator as the party to receive notices of blackout periods. The Department has amended the regulation, at § 2520.101-3(c), to add a new subparagraph (3) making clear that where an issuer designates the administrator as the person to be furnished notice of a blackout period, the issuer shall be deemed to have been furnished notice on the same date as notice is furnished to affected participants and beneficiaries, thereby relieving the administrator of the obligation to notify itself of a blackout period.

#### 7. Definitions § 2520.101-3(d)

##### a. "Blackout Period"

Paragraph (d)(1) of § 2520.101-3 defines the term "blackout period." The

interim final rule adopted the definition set forth in ERISA section 101(i)(7). The Department received a number of comments on the interim final regulation requesting clarification of specific exclusions from the "blackout period" definition, as well as clarification that certain suspensions, limitations or restrictions imposed on an individual participant's account do not constitute a blackout period as contemplated by the statute or regulation.

#### "Regularly Scheduled" Exclusion

One commenter requested a clarification that the provisions of paragraph (d)(1)(ii)(B), relating to "a regularly scheduled suspension, limitation or restriction," not only applies to those that are plan changes, but also to preexisting plan features. Another commenter requested clarification that "a regularly scheduled suspension, limitation, or restriction" may, for purposes of the exclusion, be contained in and disclosed via enrollment forms, investment policies and other documents pursuant to which the plan is established or operated.

First, the Department does not believe that Congress, in enacting ERISA section 101(i)(7), intended to include preexisting regularly scheduled suspensions, limitations, or restrictions in the definition of the blackout period to the extent such suspensions, limitations, or restrictions are disclosed to participants and beneficiaries. In this regard, the Department notes that section 101(i)(7)(A) of ERISA and paragraph (d)(1)(i) of the regulation, in defining "blackout period," references "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 \* \* \*." (Emphasis supplied). The Department reads the clause "which is otherwise available under the terms of such plan" as referring to preexisting regularly scheduled suspensions, limitations or restrictions. The Department also notes that the "blackout period" definition contained in SOA section 306(a)(4), to be administered by the Securities and Exchange Commission, generally provides that a blackout period does not include "a regularly scheduled period," if such period is incorporated into the plan and timely disclosed to employees. Nonetheless, in an effort to clarify this issue and more closely align the exclusion in ERISA section 101(i)(7)(B)(ii) with SOA section 306(a),

the Department has amended paragraph (d)(1)(ii)(B) of the regulation.<sup>1</sup>

As amended, paragraph (d)(1)(ii)(B) excludes from the definition of blackout period a suspension, limitation or restriction “which is a regularly scheduled suspension, limitation, or restriction under the plan (or change thereto), provided that such suspension, limitation or restriction (or change) has been disclosed to affected plan participants and beneficiaries through the summary plan description, a summary of material modifications, materials describing specific investment alternatives under the plan and limits thereon or any changes thereto, participation or enrollment forms, or any other documents and instruments pursuant to which the plan is established or operated that have been furnished to such participants and beneficiaries.” This amendment also serves to clarify that “regularly scheduled suspensions, limitations and restrictions” may be set forth in and disclosed to participants and beneficiaries in a variety of documents.

The amendment to paragraph (d)(1)(ii)(B), by reference to “materials describing specific investment alternatives under the plan and limits thereon,” also is intended to make clear that restrictions on investments or delays in payment or transfers applicable to particular investments are encompassed within the exclusion to the extent disclosed to affected participants and beneficiaries. Similarly, limits on the ability of participants and beneficiaries to give investment instruction (such as limits on the ability of participants to trade daily) would be covered by the exclusion as a “regularly scheduled suspension, limitation or restriction” to the extent disclosed to affected participants and beneficiaries.

A number of commenters requested clarification that quarterly freezes on trading involving employer stock, timed to coincide with earnings reports and intended to prevent insider trading, whether fixed dates or determined on a quarter-by-quarter basis, do not constitute blackout periods within the meaning of the regulation when plan materials disclose the dates or explain how the dates will be determined. It is the view of the Department that such

restrictions on trading employer securities would be “regularly scheduled” to the extent the event (*i.e.*, release of the company’s quarterly earnings report) and the restriction (freeze on trading employer securities) and the period of the restriction are described in plan materials and disclosed to the plan’s affected participants and beneficiaries.

#### QDRO Exclusion

A number of commenters also expressed concern that the language of paragraph (d)(1)(ii)(C), relating to suspensions, limitations, or restrictions as a result of a qualified domestic relations order (QDRO), did not take into account the obligations of a plan administrator to impose certain restrictions on the account of a participant during the pendency of a determination as to whether a domestic relations order is qualified. Given the specific obligations imposed on plan administrators pursuant to ERISA section 206(d)(3)(H), the Department does not believe that Congress, in drafting section ERISA 101(i)(7)(B)(iii), intended to limit the subject exclusion only to those restrictions arising after a determination that a domestic relations order is qualified. Accordingly, the Department has amended paragraph (d)(1)(ii)(C) to clarify the application of the exclusion to restrictions imposed during the pendency of a QDRO determination. As amended, paragraph (d)(1)(ii)(C) excludes a suspension, limitation or restriction “which occurs by reason of a qualified domestic relations order or by reason of a pending determination (by the plan administrator, by a court of competent jurisdiction or otherwise) whether a domestic relations order filed (or reasonably anticipated to be filed) with the plan is a qualified order within the meaning of section 206(d)(3)(B)(i) of ERISA.”<sup>2</sup>

#### Individual Participant Actions

Commenters generally requested clarification that the term “blackout period” is not intended to include account restrictions triggered by individual participant actions. Examples of such actions include: Receipt of a tax levy, a dispute over a deceased participant’s account among putative beneficiaries, failure of a participant to obtain a PIN number, or allegations that the participant committed a fiduciary breach or crime

involving the plan. It is the view of the Department that Congress did not intend to encompass within the meaning of “blackout period” restrictions on investment direction, plan loans and plan distributions imposed solely in response to an action involving an individual participant and affecting only the account of that participant, such as those actions identified in the preceding sentence. Rather, the blackout notice requirements are intended to ensure that plan participants and beneficiaries are afforded advance notice of plan-imposed restrictions on their rights in order that they may take appropriate steps in anticipation of the restriction. In the case of actions involving individual participants, the Department agrees with commenters that the affected participant or beneficiary typically will already have notice of any restriction and reasons for such restriction. In response to these comments, the Department has amended the definition of blackout period at paragraph (d)(2) of the regulation to clarify that suspensions, limitations and restrictions precipitated by a participant’s action or the action of a third-party with respect to an individual participant’s account are excluded from the definition of “blackout period.” Specifically, new paragraph (d)(2)(D) excludes from definition of blackout periods, a suspension, limitation and restriction that “occurs by reason of an act or a failure to act on the part of an individual participant or by reason of an action or claim by a party unrelated to the plan involving the account of an individual participant.”<sup>3</sup>

#### Permanent Restrictions

Commenters, noting that the definition of “blackout period” refers to rights that are “temporarily suspended, limited or restricted,” requested clarification that permanent elimination of certain rights would not constitute a “blackout period.” Examples cited by the commenters included: Permanent restriction on new contributions to an investment option, replacement of one investment option with another of a similar type, and termination of the plan. The Department agrees that the blackout notice requirements were not

<sup>1</sup> Section 101(i)(5) of ERISA, as added by SOA section 306(b), provides that the Secretary may establish by regulation additional exceptions to the requirements of subsection (i) of section 101 (the blackout notice requirements) which the Secretary determines are in the interest of participants and beneficiaries. The Department finds the amendment to paragraph (d)(1)(ii)(B) of the regulation to be in the interest of participants and beneficiaries.

<sup>2</sup> Pursuant to the Department’s authority under section 101(i)(5) of ERISA, the Department finds the amendment to paragraph (d)(1)(ii)(C) to be in the interest of plan participants and beneficiaries.

<sup>3</sup> Section 101(i)(5) of ERISA, as added by SOA section 306(b), provides that the Secretary may establish by regulation additional exceptions to the requirements of subsection (i) of section 101 (the blackout notice requirements) which the Secretary determines are in the interest of participants and beneficiaries. The Department finds this amendment to paragraph (d)(2) of the regulation to be in the interest of participants and beneficiaries.

intended to apply to rights that are eliminated, as opposed to temporarily suspended, limited or restricted. Accordingly, a permanent restriction on new contributions to an investment option, replacement of one investment option with another, a plan termination and similar types of permanent restrictions would not in and of themselves be events that give rise to a blackout notice obligation under the regulation. However, if, in connection with implementing a permanent restriction, some rights would be temporarily suspended, limited or restricted, the blackout notice requirements would apply to such temporary restriction. For example, in replacing investment option A with investment option B, the plan permanently restricts new contributions to option A and during the transfer of funds from option A to option B temporarily suspends participant direction of the funds transferred to option B for 5 days during which transfers and accounts will be reconciled. In this situation, the restriction on new contributions to option A would not constitute a blackout period, but the 5 day temporary restriction on the direction of funds in option B would constitute a blackout period with respect to which notice must be provided under the regulation. On the other hand, if there was no restriction on the direction of funds in option B or if the restriction was for 3 or fewer consecutive business days, there would be no blackout period with regard to such funds under the regulation.

One commenter requested a clarification that a blackout period does not occur solely because of the bankruptcy of an employer and the appointment of a bankruptcy trustee or as a result of abandonment of a plan by the plan sponsor. Such actions would, in the view of the Department, result in a blackout period only if the rights of participants and beneficiaries to direct investments, obtain a loan or obtain a distribution are temporarily suspended, limited or restricted within the meaning of the regulation. In the event there is a blackout period in connection with such actions, notice would have to be provided by the plan administrator or the party assuming the responsibilities of the plan administrator.

One commenter requested clarification that the definition of "blackout period" does not extend to suspensions, limitations or restrictions of services (such as investment education, investment advice, retirement counseling, financial planning) that may facilitate the

exercise of a participant's and beneficiary's right to diversify their assets, obtain a loan or obtain a distribution. It is the view of the Department that to the extent such services are not required in order for a participant or beneficiary to exercise his or her right to direct investments, obtain a loan or obtain a distribution, the suspension, limitation or restriction of such services would not give rise to a blackout period within the meaning of the regulation.

#### b. "One-Participant Retirement Plan"

As with the interim final rule, the final rule adopts the statutory definition of "one-participant retirement plan" set forth in section 101(i)(8)(B) of ERISA, as amended by section 306(b)(1) of the SOA. One commenter suggested the definition of "one-participant retirement plan" be amended to apply the definition in 29 CFR § 2510.3-3(c)(1) and (2) for purposes of the blackout notice requirements. The Department has not adopted this suggestion and retained the statutory definition "one-participant retirement plan" without change.

#### c. "Issuer"

Like the interim final rule, paragraph (d)(4) of the final rule defines the term "issuer" for purposes of the blackout 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),<sup>4</sup> 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.

#### d. Miscellaneous

In response to requests from two commenters, the Department provides the following clarifications. First,

<sup>4</sup> 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.

references to plan administrator and administrator in the regulation mean the "administrator" as defined in section 3(16)(A) of ERISA. Second, the term "affected participant" as used in the regulation means participants and beneficiaries whose rights under the plan are affected by the suspension, limitation, or restriction of their right to direct or diversify assets, obtain a loan or obtain a distribution. Employees who are eligible but who have not elected to participate in the plan would not be "affected participants" within the meaning of the regulation.

#### 8. Model Notice § 2520.101-3(e)

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, like the interim final rule, the 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 final rule, like 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 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.

As discussed earlier, the model notice has been revised to accommodate changes in the final rule. Paragraph 3 of the model (relating to length of the blackout period) has been changed to reflect alternative approaches to describing the length of the blackout period and paragraph 4 (encouraging participants and beneficiaries to review their investments in anticipation of the blackout period) has been modified to make clear that the last two sentences of the paragraph (relating to investments in individual securities) apply only to plans that offer investments in individual securities. Paragraph 6 of the model also was modified to make clear that individual persons are not required to be named as contacts for information about blackout periods.



One commenter suggested that paragraph 4 of the model not be required when notice is furnished as soon as reasonably possible under the circumstances, but after the date on which affected participants and beneficiaries can take action in anticipation of the blackout period. The Department agrees that including paragraph 4 of the model in a notice furnished after the date on which participants and beneficiaries can effectuate changes in anticipation of the blackout period will be of no value to participants and beneficiaries and, accordingly, may be deleted.

One commenter suggested that the model advise participants of the tax consequences relating to net unrealized appreciation of employer securities upon distribution from a plan. The Department believes that, while such information may be useful to participant, the information goes beyond the scope of the intended blackout notice. The Department notes, however, that there is nothing in the regulation which precludes the furnishing information with the blackout period notice that may be helpful to plan participants and beneficiaries.

#### 9. Effective Date § 2520.101-3(f)

Paragraph (f) of § 2520.101-3 sets forth the effective date of the final rule. Like the interim final rule, paragraph (f) provides that the rule is effective on 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. In no event, however, is a blackout notice required to be furnished under the regulation prior to the January 26 effective date. Pursuant to section 553(c) of the Administrative Procedure Act, the Department finds good cause for this rule to be effective less than 30 days after publication. The Department believes that having the rule effective on the effective date of the underlying statutory provisions will avoid confusion for plan administrators. Moreover, the limited extent of the differences between the instant rule and the interim rules will minimize any difficulties in complying with the rule by the effective date.

### C. Regulatory Impact Analysis

#### Summary

The costs associated with this 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 and plan administrators by the statute and final rule cannot be quantified, but are expected to be substantial. These requirements 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 plan participation. The statute and this guidance will also assist plan administrators in their efforts to fulfill their obligations to participants and beneficiaries.

#### Benefits and Costs

The SOA amendments to ERISA and this implementing guidance will have several important benefits. First, while commenters on the interim final rule confirm that many plan administrators currently provide disclosures similar to those required by the statute and interim final rule, these new requirements 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 investment 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 in their individual 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 appropriately. Participants frequently express concern when significant changes are made to plan options, or when rights previously available are temporarily limited. Assuring that they will have knowledge of the timing and reasons for such changes should serve to promote confidence in the security of retirement savings and support continued growth in participation in the retirement plans offered by plan sponsors.

Second, 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 advising participants about important matters affecting their rights under the plan.

The value of these 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 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 drafting 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 attributable to 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.

Although the Department requested input from the public concerning the assumptions used in developing these estimates, the likely frequency of blackout periods, the sources of variability in the costs and benefits of providing notices, and any potential differential impacts on small plans, it received a limited number of comments addressing economic impact. As noted earlier in this preamble, several commenters indicated that the interim final rule's requirement for the disclosure of specific beginning and ending dates in the blackout notice, and a corresponding frequency of the requirement for subsequent notices arising from the inability to predict specific dates, would add to the burden of the blackout notice requirement. The Department has made certain modifications in the final rule to address these concerns. A comment was also received with respect to the Department's assumptions with respect to the use of electronic methods of communication. This comment is addressed in the Paperwork Reduction Act statement below.

#### *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 final rule is significant within the meaning of section 3(f)(4) of the Executive Order. OMB has, therefore, reviewed the final rule pursuant to the Executive Order.

#### *Paperwork Reduction Act*

At the time of publication of the interim final rule, the Department of Labor submitted the information collection request (ICR) included in the interim final rule to OMB for review and clearance in accordance with the emergency review procedures of the Paperwork Reduction Act of 1995 (PRA 95). OMB subsequently approved the information collection using emergency clearance procedures on December 5, 2002. This emergency clearance will expire on April 30, 2003. As a consequence, the information collection included in this final rule is being submitted at this time for continuing approval. The burden estimates are unchanged, and terms of the final rule that constitute collections of information are not substantively or materially changed. 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](mailto: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 February 24, 2003 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.

#### *Information Collection Provisions*

The information collection provisions of this 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 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. Modifications described earlier in this preamble to paragraphs (b)(1)(iii)(A) and (B) allowing the use under specific circumstances of a limited range of beginning and ending dates rather than specific dates should serve to allow for greater flexibility and limit the number of follow-up notices required pursuant to paragraph (b)(4). New paragraph (c)(3) clarifies that where an issuer designates the plan administrator as the person to receive notice under paragraphs (c)(1), the plan administrator need not supply this notice separately to itself. This modification may eliminate the need for duplicate notification under some circumstances. Neither of these changes is considered to constitute a substantive or material change to the existing approved information collection.

#### *Comments*

As noted, the Department received comments concerning the difficulty of including specific beginning and ending dates in the notice pursuant to paragraphs (b)(1)(iii), and the applicability of the notice requirement of paragraph (c) when an issuer designates the plan administrator as the party to receive notices of blackout periods affecting securities of the issuer. The Department has addressed these and other issues raised by commenters with modifications previously described in this preamble. In addition, one commenter expressed the view that the Department's estimates were understated to the extent that they incorporated the use of electronic media for distribution of the notices. The commenter further stated that the use of electronic technology for communicating with participants and

beneficiaries is generally not viable due to the absence of computer capability in certain industries. While the Department did not describe its methodology for incorporating electronic disclosure assumptions in detail in the interim final rule, the methodology does take a variety of factors into account, including the distribution of plan sponsors and participants across industries, data related to access to computers in different industries, survey data on the use of electronic communication methods by plan sponsors and administrators, and comments received in response to the Department's Notice of Proposed Rulemaking on Use of Electronic Communication and Recordkeeping Technologies by Employee Pension and Welfare Benefit Plans (64 FR 4506, January 28, 1999; finalized April 9, 2002, 67 FR 17264).

Specifically, in order to develop estimates of distribution expenses saved through the use of electronic communication technologies, the Department utilized a Census Bureau household survey published in 2001 on computer use<sup>5</sup> and a separate 1999 Census Bureau household survey<sup>6</sup> on pension and health benefit plan participation. Analysis of this information indicates that approximately 21 percent of participants have appropriate access to electronic media at their workplaces, and another 38 percent have such access at home. The pension and health coverage rates were then applied to the computer use rates industry-by-industry to account for the likelihood that computer use is greater among plan participants and especially among large plan participants, because such participants are concentrated in certain industries (e.g., the financial services industry).

The Department then looked at each disclosure required under Title I of ERISA to evaluate the extent to which plan administrators might consider electronic distribution appropriate. For purposes of the required notices of blackout periods, it was assumed that in most cases where plan administrators and participants had consistent access to computers, these notices would be distributed electronically. This is because it is believed that plan administrators will consider the information time sensitive, because electronic distribution is cost effective,

and because the investment companies that provide administrative services for many individual account plans commonly communicate with customers in an electronic format.

While the description of the use of electronic technologies in the preamble to the interim final rule may have been read to suggest that most or all blackout notices were expected to be delivered electronically, the delivery of the majority of notices is in fact still estimated to occur by first class mail. About 38 percent of such notices are expected to be delivered electronically. While the Department agrees with the commenter that many plans will derive no benefit from electronic distribution, it has carefully considered its approach to estimating distribution savings for plans situated to make use of electronic technologies, and continues to believe that the approach supports reasonable estimates.

Accordingly, it has not modified its previous assumptions concerning the likely methods of delivery for notices of blackout periods.

#### *Burden Estimates*

In order to estimate the potential costs of the notice provisions of section 101(i) of ERISA and this 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, producing estimates of 295,000 small and 45,000 large participant-directed individual account plans in 2002 (totaling 341,000). Participant counts were also projected, resulting in estimates of 7.4 million small plan participants and 40.4 large plan participants (totaling 47.8 million) in 2002 that would potentially be affected by blackout notices. A more detailed explanation of the methods and data used in these projections, as well as assumptions underlying the proportion of these plans and participants expected to be affected each year may be found in the preamble to the interim final rules.

Based on available data, the Department assumes that 25% percent of potentially affected plans will impose a blackout period in any given year. The resulting numbers of plans and participants assumed to be affected by the notice provisions annually are 85,150 and about 12 million, respectively.

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 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. In addition, based on the addition of paragraph (c)(3), when the issuer designates the plan administrator as the party to receive of blackout periods involving securities of the issuer, the plan administrator is not required to provide this notice separately to itself. This modification should serve to reduce the number of these notices because the issuer and plan administrator are in some instances the same entity; however, the magnitude of the reduction cannot be estimated. Because only a small segment of participant directed individual account plans holds employer securities that would be subject to the requirements of paragraph (c), the cost of delivering such notices is estimated to be negligible.

The estimated burden for distribution of blackout 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. The 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

<sup>5</sup> "Home Computers and Internet Use in the United States: August 2000," U.S. Census Bureau Current Population Reports (September 2001).

<sup>6</sup> Contingent Work Supplement to the February, 1999 Current Population Survey, U.S. Census Bureau.

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. Commenters were generally in agreement with these assumptions.

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, although a cost is incurred to do so, plan administrators typically inform participants of changes in the duration of a blackout period as part of their reasonable and customary business practices. It is acknowledged that the content and timing might be modified based on the provisions of the SOA and this final rule, however. As noted earlier, the modification of the interim final rule provision describing the nature of the information to be included on blackout period beginning and ending dates should serve to minimize the number of subsequent notices and their attendant costs by clarifying for plan administrators the extent to which their usual practices conform to the provisions of the final rule.

The current estimates of annual respondents, responses, and hour and cost burdens are shown below.

*Type of Review:* Extension of a currently approved collection.

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

*Title:* Notice of Blackout Period under ERISA.

*OMB Number:* 1210-0122.

*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 an extension of the emergency 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 a 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 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 final rule imposes no additional cost on small plans. The Department nevertheless requested comments concerning 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. No comments were received in response.

As to the potential impact of the final rule on small plans, the Department notes that 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. The small affected plans represent about 10% of all pension plans, while the large affected plans represent about 2% of all plans. 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.

The substance of the required notice is likely to be prepared once per plan 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 an average of about \$110 per year. The comparable annual average 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.

#### *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 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 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 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 continues 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. Revise § 2520.101-3 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 length of the blackout period by reference to:

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

(B) The calendar week during which the blackout period is expected to begin and end, provided that during such weeks information as to whether the blackout period has begun or ended is

readily available, without charge, to affected participants and beneficiaries, such as via a toll-free number or access to a specific web site, and the notice describes how to access the information;

(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 contact 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 length of the blackout period (specified in such notice pursuant to paragraph (b)(1)(iii) of this section), the administrator shall furnish all affected participants and beneficiaries an updated notice explaining the reasons for the change 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 length 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 plan 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.

(3) If the issuer designates the plan administrator as the person for service of notice pursuant to paragraph (c)(2) of this section, the issuer shall be deemed to have been furnished notice on the same date as notice is furnished to affected participants and beneficiaries pursuant to paragraph (b) of this section.

(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 regularly scheduled suspension, limitation, or restriction under the plan (or change thereto), provided that such suspension, limitation or restriction (or change) has been disclosed to affected plan participants and beneficiaries through the summary plan description, a summary of material modifications, materials describing specific investment alternatives under the plan and limits thereon or any changes thereto, participation or enrollment forms, or any other documents and instruments pursuant to which the plan is established or operated that have been furnished to such participants and beneficiaries;

(C) Which occurs by reason of a qualified domestic relations order or by

reason of a pending determination (by the plan administrator, by a court of competent jurisdiction or otherwise) whether a domestic relations order filed (or reasonably anticipated to be filed) with the plan is a qualified order within the meaning of section 206(d)(3)(B)(i) of the Act; or

(D) Which occurs by reason of an act or a failure to act on the part of an individual participant or by reason of an action or claim by a party unrelated to the plan involving the account of an individual participant.

(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 101(i)(8)(B) of the Act.

(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.

(5) *Calendar week.* For purposes of paragraph (b)(1)(iii)(B), the term “calendar week” means a seven day period beginning on Sunday and ending on Saturday.

(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 [enter the following as appropriate: is expected to begin on [enter date] and end [enter date]/is expected to begin during the week of [enter date] and end during the week of [enter date]. During these weeks, you can determine whether the blackout period has started or ended by [enter instructions for use toll-free number or accessing web site].

4. [In the case of investments affected by the blackout period, add the following: During 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.] If the plan permits investments in individual securities, add the following: 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 contact 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: January 16, 2003.

**Ann L. Combs,**

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

[FR Doc. 03-1430 Filed 1-23-03; 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:** Final rules.

**SUMMARY:** This document contains final rules that implement the civil penalty provision in section 502(c)(7) of the Employee Retirement Income Security Act of 1974 (the Act or ERISA) adopted as part of the Sarbanes-Oxley Act of 2002 (SOA). The 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. This document also contains final rules making conforming and technical changes to the agency's rules of practice and procedure for other civil penalties under section 502(c) of ERISA. The final rules affect employee benefit plans, plan sponsors, administrators and fiduciaries, and plan participants and beneficiaries.

**DATES:** *Effective date:* These final rules are effective January 26, 2003.

**FOR FURTHER INFORMATION CONTACT:** Susan Elizabeth Rees, Office of Regulations and Interpretations, Pension and Welfare Benefits Administration, U.S. Department of Labor, Washington,

DC 20210, (202) 693-8537 (not a toll-free number).

#### SUPPLEMENTARY INFORMATION:

##### A. Background

The Sarbanes-Oxley Act of 2002 (the SOA), Pub. L. 107-204, was enacted on July 30, 2002. 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. Elsewhere in the **Federal Register** today, the Department has published a final rule, to be codified at 29 CFR 2520.101-3, implementing the notice requirements in ERISA section 101(i).

Section 306(b)(3) of SOA amended section 502(c) of ERISA to add a new paragraph (7) establishing a civil penalty for an administrator's failure or refusal to provide timely notice of a blackout period to participants and beneficiaries. Specifically, section 502(c)(7) provides that the Secretary may assess a civil penalty of up to \$100 a day from the date of the plan administrator's failure or refusal to provide notice to a participant or beneficiary in accordance with ERISA section 101(i).

On October 21, 2002, the Department published interim rules implementing section 502(c)(7) of ERISA in the **Federal Register** (67 FR 64774) for public comment. The interim rules established procedures relating to the assessment and administrative review of civil penalties by the Department under section 502(c)(7) for failures or refusals by plan administrators to provide notice of a blackout period as required by section 101(i) of ERISA and 29 CFR 2520.101-3. The interim rules also made changes to the existing civil penalty rules under ERISA sections 502(c)(2), 502(c)(5), and 502(c)(6) to incorporate certain technical improvements being adopted as part of the section 502(c)(7) implementing regulations.

The Department received 7 comments on the section 502(c)(7) interim rules in response to its request for comments. Set forth below is an overview of the final rules, which adopt the interim