



IMPORTANT INFORMATION

Plan Administration/Operation

March 2003\*

## DOL and SEC Adopt Final Rules on Sarbanes-Oxley Provisions

**WHO'S AFFECTED** The Department of Labor (DOL) rules apply to qualified defined contribution plans that are subject to the ERISA Title I requirements, including multiemployer plans. They do not apply to defined benefit plans, governmental plans or non-electing church plans or to section 403(b) programs. The Securities and Exchange Commission (SEC) rules apply to defined contribution plans that offer publicly-traded company stock as an investment option.

**BACKGROUND AND SUMMARY** On January 24, 2003, the DOL published final rules regarding the blackout period notices required by the Sarbanes-Oxley Act (SOA). The final rules are similar to the interim rules issued in October, but contain a few important amendments. The final rules:

- Provide flexibility in describing the length of the blackout period;
- Clarify that certain situations specific to individual participants are not blackout periods, including the timeframe in which a plan administrator is determining whether a domestic relations order is qualified;
- Provide a special rule for issuers of company stock when the plan administrator and the issuer are the same person; and
- Clarify that regularly scheduled periods are not considered blackout periods, as long as they are disclosed to participants and beneficiaries through various plan materials, such as the summary plan description, summary of material modifications, enrollment forms or other documents.

Along with the final rules, the DOL issued a revised [model notice](#) that may be used by plan administrators to meet the notice requirements. At the same time, the DOL published final rules regarding civil penalties for failure to provide the notice in a timely manner. In addition, on January 22, 2003, the SEC adopted final rules regarding insider trading restrictions. These rules prohibit executive officers and directors from trading employer stock during a retirement plan's blackout period if the stock was acquired in connection with their service or employment as an executive officer or director. These rules are intended to prevent executive officers and directors from trading employer stock, while plan participants are unable to trade due to a blackout.

This publication summarizes the DOL final rules, and provides an overview of the SEC final rules. A copy of the DOL's model notice is included.

\*Republished December 2004 to reflect Prudential Financial's acquisition of CIGNA's retirement business.

ACTION AND NEXT STEPS Sponsors of defined contribution plans should carefully review their procedures to ensure they will comply with the notice requirements, *which apply to blackout periods beginning on or after January 26, 2003*. In addition, sponsors of plans that offer employer stock as an investment option should review the SEC rules with their securities counsel to ensure compliance. If you have specific questions about how these provisions affect your plan, please contact your Prudential Retirement representative.

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## **DOL Issues Final Rules of Blackout Period Notice Requirements**

### **Definition of Blackout Period**

SOA requires plan sponsors to issue blackout period notices to participants and beneficiaries in a defined contribution plan at least 30 days but not more than 60 days before the beginning of a blackout period. For these purposes, a "blackout period" is defined as a period of more than three consecutive business days during which participants or beneficiaries are temporarily suspended or restricted from directing investments or obtaining loans or distributions from the plan, to the extent these transactions would be otherwise available under the terms of the plan. These blackout periods commonly occur when a plan is changing recordkeepers or investment options, or in plan merger or spin-off situations.

The term blackout period does not include suspensions, limitations, or restrictions due to application of securities laws, Qualified Domestic Relations Orders (QDROs), or regularly scheduled periods that have been disclosed to participants through various plan materials. The timeframe in which the plan administrator is determining whether a domestic relations order is a QDRO is not considered a blackout period. In addition, account restrictions due to individual participant actions or the actions of a third party affecting an individual's account are not considered blackout periods. Examples of these situations include tax levies or failure of a participant to obtain a personal identification number (PIN).

## Content Requirements

The blackout notice must be written in a manner that can be understood by the average plan participant. It must contain the following information:

- The reasons for the blackout.
- A description of the rights otherwise available under the plan to the affected participants and beneficiaries that will be temporarily suspended during the blackout period, including identification of the investments subject to the blackout period.
- The length of the blackout period by referencing either:
  - A) The expected beginning date and ending date of the blackout period; or
  - B) The calendar week (seven-day period beginning on a Sunday and ending on Saturday) during which the blackout period is expected to begin and end, provided that during those weeks, information as to whether the blackout period has begun or ended is readily available, without charge, to affected participants and beneficiaries. The notice could include a toll-free phone number or access to a web site that participants can use during those weeks to find out whether the blackout has begun or ended.

*For example, in the case of a plan that expects a four week blackout period beginning February 10, 2003, and ending March 7, 2003, the notice could indicate that the blackout period will begin "the week of February 9, 2003, and end the week of March 2, 2003." The notice would also need to include the means that participants and beneficiaries can determine whether the blackout period has begun or ended during the weeks of February 9 and March 2. Also, since the plan identifies the blackout period as beginning the "week of February 9," February 9 is considered the date that signals the beginning of the blackout period for timing purposes.*

- A statement that the participant or beneficiary should evaluate the appropriateness of his current investment decisions in light of his inability to make changes during the blackout.
- In situations where the notice is provided less than 30 days in advance: 1) a statement that Federal Law required the notice at least 30 days in advance; and 2) an explanation as to why the plan was unable to meet timing requirements.
- The name, address, and telephone number of the plan administrator or other contact responsible for answering questions about the blackout period.

Plan administrators may use a single notice to describe different blackout periods, as long as the timing requirements and other requirements can be met. This is helpful for situations where a blackout period affects certain rights longer than others. For example, a 20-day blackout might apply for distributions, while a 10-day blackout applies for investment changes.

Blackout notices may be furnished with other information, such as information relating to a change in service providers. However, the blackout notice information must be prominently identified in the materials.

The DOL has provided a [model notice](#) that plan sponsors can use to meet these content requirements. A copy of the model notice is included with this publication. Plan sponsors are not required to use the model notice. However, the language included in it is intended to satisfy the content requirements described in the regulations. The DOL model notice does not meet the SEC notice requirements described later in this publication.

### **Changes to the Length of the Blackout Period**

If the length of the blackout period changes after the notice is provided, the plan administrator must provide affected participants and beneficiaries with an updated notice, explaining the reasons for the change 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 it is not practical to provide advance notice.

### **Timing Requirements**

The plan sponsor must provide the blackout notice at least 30 calendar days, but not more than 60 days, in advance of the last date on which the affected participants and beneficiaries could exercise their affected rights immediately before the blackout period. The date by which the notice must be provided does not necessarily coincide with the date 30 days prior to the beginning date of the blackout period.

*For example, Plan XYZ provides participants and beneficiaries the right to trade their investments during the first 15 days of each month. Due to a change in recordkeepers, a blackout will occur on the plan from May 1 through May 15. The last date that participants can make changes to their account prior to the blackout period is April 15. Therefore, the plan administrator must provide notice to participants no later than March 16 and no earlier than February 14.*

The final rules list certain situations that do not require a 30-day advance notice, but require the notice to be provided as soon as reasonably possible, unless it is not practical to do so. It might not be practical to provide advance notice if the blackout period is determined only a few days before it begins and the duration of the blackout is only for a short period.

Notice can be provided *as soon as reasonably possible* in situations where:

- Deferral of the blackout period would result in a violation of fiduciary rules.
- Events were unforeseeable or circumstances were beyond the control of the plan administrator. The DOL anticipates that this exception will only be used in rare circumstances.
- A blackout applies to only one or more participants or beneficiaries *solely* in connection with their becoming or ceasing to be participants or beneficiaries under the plan as a result of a merger, acquisition, divestiture, or similar transaction involving the plan or plan sponsor. This is a very narrow exception. It *does not* apply in situations where the affected participants participate in both plans prior to a merger, or in situations where a plan merger or spin-off is not the result of a *corporate* transaction.

In the first two situations listed above, the plan administrator must make a written determination regarding the circumstances preventing the notice from being provided at least 30 days in advance. The plan administrator must sign and date these determinations. Although it does not appear that

these determinations must be submitted to any governmental agency, the plan sponsor should keep them in the plan's files, in the event they are needed for a future audit.

In instances where notice is provided as soon as possible, the plan administrator must provide the notice even if some participants may be notified sooner than others (as may be the case with electronic disclosure). If an employee becomes eligible to become a participant after the blackout notices have been furnished, he must be provided with the notice as soon as reasonably possible, unless it is not practical to do so.

### **Form and Manner of Furnishing Notice**

The plan administrator must deliver the notice in a manner that is likely to ensure actual receipt. The notice is considered furnished on the date of mailing if it is sent by first class mail, certified mail or Express mail, or on the date of delivery to a "[designated private delivery service](#)." If the notice is hand delivered or sent through interoffice mail, it is considered furnished when the participant actually receives the notice. If the notice is sent electronically, it is considered furnished on the date of transmission.

In the event of a lost participant, if the plan administrator has taken reasonable steps to keep records up-to-date and to locate individuals, sending the notice to the participant's last known address will be sufficient.

### **Notice to the Issuer of Employer Securities**

If the plan contains publicly-traded employer securities subject to the blackout period, the notice must also be sent to the issuer of the employer securities within the timeframe discussed above. If the plan administrator is designated as the person to receive the blackout period notice for the issuer, the notice is deemed to have been furnished on the same date that notice was provided to participants and beneficiaries. This eliminates the need for the plan administrator to notify itself of the blackout period.

### **Civil Penalties**

The DOL may assess a civil penalty on the plan administrator of up to \$100 per day for each affected participant or beneficiary who is not provided the notice during the required timeframe. Each violation with respect to each participant or beneficiary will be treated as a separate violation. There is no maximum on the number of violations that will be assessed for each day that the penalty applies. The violation is calculated from the date of the failure up to and including the last day of the blackout period.

### **Effective Date**

These rules were effective for blackout periods beginning January 26, 2003. However, for blackout periods beginning between January 26 and February 25, 2003, plan administrators can provide the notice "as soon as reasonably possible" instead of 30 days in advance.

## SEC Issues Final Rules on Insider Trading Restrictions

### Definition of Blackout Period

SOA prohibits any director or executive officer, as defined in the SEC insider trading regulations, from directly or indirectly, trading employer stock during a blackout period. For these purposes, a "blackout period" is defined as a period of more than three consecutive business days in which at least 50% of the plan participants and beneficiaries under all defined contribution plans of the employer are prevented from trading company stock in their plan accounts.

SOA excludes two types of suspensions from the term "blackout period." These exceptions are for:

- A regularly scheduled period in which participants and beneficiaries may not trade company stock under the plan, if the period is incorporated into the plan and it is timely disclosed to employees before they become participants, or as a subsequent amendment.

Under the SEC rules, this regularly scheduled period can be incorporated into the plan in either the official plan documents, or other documents or instruments that govern plan operations. The disclosure is considered timely if the employee is notified any time before, or within the 30 calendar days after, the employee's enrollment in the plan. In the case of a later amendment, notice must be provided within 30 calendar days after the amendment is adopted.

- Any temporary trading suspension that would otherwise be a "blackout period" that is imposed solely in connection with individuals becoming, or ceasing to be, participants or beneficiaries in a defined contribution plan due to a corporate merger, acquisition, divestiture, or similar transaction involving the plan or plan sponsor.

This exception is available only if the individuals becoming participants or beneficiaries are not allowed to participate in the same class of equity securities after the corporate transaction, as before the transaction.

### Notice to Directors and Executive Officers

Issuers of company stock must provide timely notice to directors and executive officers, as well as the SEC, of a blackout period that triggers the insider trading restriction. Although the SEC did not provide a model notice, they did specify certain notice requirements in the final rules. One of these requirements is to describe the length of the blackout period. The length of the blackout period can be described by using either the actual or expected beginning and ending dates, or the calendar week or weeks during which the blackout is expected to begin and end. If the calendar week method is used, the notice must describe the means (e.g., toll-free telephone number, or website) that affected directors and executive officers can use to access information as to whether the blackout period has begun or ended.

Notice to directors and executive officers will be considered timely if an issuer provides it no later than five business days after receiving the required DOL notice from the plan administrator. If the issuer doesn't receive such notice, the issuer must provide its notice to directors and executive officers at least 15 calendar days before the actual or expected beginning date of the blackout

period. The issuer must provide the SEC notice to directors and executive officers even if these individuals have already received the DOL notice, due to differences in the notice content.

### **Effective Date**

The SEC blackout notice requirement applies to blackout periods beginning January 26, 2003. However, for blackout periods beginning between January 26, 2003, and February 25, 2003, issuers should furnish notice to directors and executive officers as soon as reasonably practical. Plan sponsors should work closely with their securities counsel to ensure compliance with these regulations.

### **Pension Analyst by Prudential Retirement**

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