



DOL Issues Interim Final Rules On Blackout Period Notice Requirements

WHO'S AFFECTED These rules apply to qualified defined contribution plans that are subject to the ERISA Title I requirements. They do not apply to governmental plans or non-electing church plans or to section 403(b) programs.

BACKGROUND AND SUMMARY On July 30, 2002, President Bush signed the [Sarbanes-Oxley Act of 2002 \(SOA\)](#). One of the provisions of SOA requires plan sponsors to provide participants and beneficiaries with at least 30 days advance notice before a blackout period.

On October 21, 2002, the Department of Labor (DOL) issued interim final rules on these notice requirements, along with a model notice to assist plan sponsors in meeting these requirements. The DOL also issued rules regarding civil penalties for failing to provide the notice.

This publication describes the interim final rules on the blackout period notice requirement and the corresponding civil penalty. A copy of the DOL's model notice is also provided.

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*. If you have specific questions about how these provisions affect your plan, please contact your Prudential representative.

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

Blackout Period Definition

For purposes of the blackout period notice, the term "blackout" means a period of more than three consecutive business days during which participants or beneficiaries are temporarily suspended or restricted from directing or diversifying investments, or obtaining loans or distributions from the plan. Typically, these blackout periods occur when a plan is changing its recordkeeper or investment options, or in plan merger or spin-off situations.

The term blackout does not include suspensions, limitations, or restrictions imposed on a participant's account due to Qualified Domestic Relations Orders (QDROs), application of securities laws, or changes in regularly scheduled periods disclosed to participants through plan materials (e.g., quarterly investment direction).

Content Requirements

The interim final rules require the notice to participants and beneficiaries to be written in a manner that can be understood by the average plan participant. The notice must also contain the following information:

- The reasons for the blackout;
- A description of the rights otherwise available under the plan to affected participants and beneficiaries that will be temporarily suspended during the blackout period, including identification of the investments subject to the blackout period; The expected beginning date and ending date of the blackout period;
- A statement advising participants and beneficiaries to review their current investments due to their inability to make changes to their investments during the blackout;
- In situations where the notice is provided less than 30 days in advance: 1) a statement that Federal Law requires the notice at least 30 days in advance; and 2) an explanation as to why the plan was unable to meet these timing requirements. (The explanation as to why the plan was unable to meet the timing requirements is not required for exception situations involving mergers, acquisitions, or similar transactions); and
- The name, address, and telephone number of the plan administrator or other person responsible for answering questions regarding the blackout period.

Timing Requirements

The plan sponsor must provide the notice at least 30 calendar days, but not more than 60 calendar days, in advance *of the last date on which affected participants and beneficiaries could exercise their rights immediately before the blackout period begins*. It is important to note that 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 could 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 DOL has indicated that plan sponsors are allowed to provide the notice earlier and more frequently than required by the interim rule, as long as at least one notice is provided during the required notice period.

In addition, the guidance lists certain situations under which the 30-day advance notice requirement does not apply. In these situations, the plan administrator is still required to provide the notice *as soon as reasonably possible*, unless notice is impracticable. Advance notice might be impracticable 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.

The situations in which the 30-day requirement does not apply are:

- *Deferral of the blackout period would result in a violation of fiduciary requirements. For example, ABC Company has announced it is filing for bankruptcy. ABC Company's 401(k) plan has ABC stock as one of its investment elections. The plan administrator determines that it would not be prudent to continue to allow participants to direct investments into the ABC company stock. In this situation, the plan administrator would not be required to give 30 days notice to participants and beneficiaries, but would be required to provide the notices soon as possible.*
- *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. For example, the recordkeeper for DEF Company's plan has informed the plan administrator that due to a major computer failure, the computer program for processing loans and distributions is not operational, and it will take approximately ten days to fix the system. In this situation, the plan administrator would not be required to give 30 days notice to participants and beneficiaries, but would be required to give notice as soon as possible.*
- *A blackout applies only to 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.*

In the first two situations described above, the plan administrator must make a written determination with respect to the circumstances preventing the notice from being provided at least 30 days in advance. These written determinations must be signed and dated by the plan administrator. Although it does not appear that these determinations need to be submitted to any governmental agency, it would be prudent for the plan sponsor to keep them in the plan's files, in the event they are needed for a future audit.

The notice must be delivered in a manner that is likely to ensure actual receipt. It may be hand-

delivered or may be sent through the U.S. mail, or by electronic delivery (e.g., e-mail, company Intranet, or Internet posting).

Changes to the Length of the Blackout Period

If the beginning or end date of the blackout period changes after notice is provided, the plan administrator must provide all 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 advance notice of the blackout is impracticable.

Notice to Issuer of Employer Securities

If a plan has employer securities subject to the blackout period, a notice must be sent to the issuer of the employer securities within the timeframe described above. Plan sponsors can satisfy this requirement by providing the same notice that was sent to participants and beneficiaries to the issuer of the employer securities. For these purposes, the notice may be provided to the agent for service of legal process for the issuer, unless the issuer has provided the plan administrator with the name of another person for service of the notice.

Model Notice

The DOL published a model notice that plan sponsors can use to satisfy the notice requirements for blackout periods. A copy of the model notice is included with this publication. Plan sponsors are not required to use the model notice. However, the language in the model notice is intended to satisfy the requirements described in the regulations.

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. The violation is calculated from the date of the failure up to and including the last day of the blackout period.

The regulations make it clear that such penalties are the personal liability of the plan administrator, and therefore, cannot be paid with plan assets.

Effective Date

The interim final rules are effective for blackout periods beginning January 26, 2003. However, for blackout periods beginning between January 26 and February 25, 2003, plan administrators must provide the notice "as soon as reasonably possible" instead of at least 30 days before the blackout period begins.

Additional Rules May Be Published

The DOL has asked for public comments on these rules and the model notice. Comments must

be submitted by November 20, 2002. The DOL has limited this comment period to enable them to make any changes to the rules that may be necessary before the January 26, 2003 effective date. We will let you know if any changes are made to these rules.

SEC Proposes Rules Restricting Insider Trading During Blackout Periods

The Securities and Exchange Commission (SEC) has announced proposed rules to clarify the insider trading restriction required by SOA on directors and executive officers. SOA prohibits directors and executive officers from acquiring or disposing of employer stock, either directly or indirectly, during a blackout period. The SEC is requesting comments on these proposed rules. Employers are not currently required to comply with proposed rules.

Pension Analyst by Prudential Retirement

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