

MEMO# 15289

October 22, 2002

DOL ISSUES GUIDANCE ON BLACKOUT PERIOD NOTICE REQUIREMENTS UNDER SARBANES-OXLEY ACT; CONFERENCE CALL SCHEDULED FOR MONDAY, OCTOBER 28, 2 PM EST

[15289] October 22, 2002 TO: PENSION COMMITTEE No. 42-02 PENSION OPERATIONS ADVISORY COMMITTEE No. 69-02 RE: DOL ISSUES GUIDANCE ON BLACKOUT PERIOD NOTICE REQUIREMENTS UNDER SARBANES-OXLEY ACT; CONFERENCE CALL SCHEDULED FOR MONDAY, OCTOBER 28, 2 PM EST The Department of Labor has issued “interim final rules” and a model notice under the new section 101(i) of ERISA — a provision enacted as part of the Sarbanes-Oxley Act of 2002.¹ As we previously informed you, section 306(b) of that Act amended ERISA to require administrators of individual account plans to notify affected participants and beneficiaries 30 days in advance of any blackout period. In addition, the Department has issued procedures relating to the assessment of civil penalties by the Department under ERISA section 502(c)(7) for failures or refusals by plan administrators to provide notices of blackout periods. Pursuant to the statute, the rules become effective and apply to blackout periods commencing on or after January 26, 2003.² The Department has invited the public to comment on the interim final rules and the model notice; comments must be submitted by November 20, 2002.³ A conference call has been scheduled for Monday, October 28, 2002 at 2:00 p.m. EST to discuss the Department’s guidance on blackout period notices. The dial-in number for this call is 888-955-8941 (passcode: “Blackout Periods”; moderator: Thomas Kim). If you would like to participate in this call, please complete the attached response form and fax it to Brenda Turner (202-326-5841) by Friday, October 25, 2002. ¹ See Institute Memorandum to Pension Members No. 35-02 and Pension Operations Advisory Committee No. 51-02, dated July 30, 2002. ² For blackout periods beginning between January 26, 2003 and February 25, 2003, the interim final rules provide that a plan administrator must furnish a notice as soon as reasonably possible. ³ The interim final rules provide that the comment period is being limited to 30 days to enable the Department to adopt changes to the rules prior to the effective date of the amendments made by the Sarbanes-Oxley Act. ⁴ Notice of Blackout Periods Under section 101(i) of ERISA, a plan administrator of an individual account plan must provide notice of a blackout period — generally 30 days in advance of the blackout — to all affected participants and beneficiaries and to issuers of employer securities subject to such blackout period. The interim final rules, which were required to be issued within 75 days of the enactment of the Sarbanes-Oxley Act, generally track the statutory provisions of the new ERISA section 101(i). Blackout Period Definition. The definition of “blackout

period” in the interim final rules is identical to the statutory definition in ERISA section 101(i). Specifically, the term “blackout period” is defined as any period of more than 3 consecutive business days for which any ability of participants and beneficiaries, which is otherwise available under the terms of the plan, to direct or diversify the assets credited to their accounts, or to obtain loans or distributions from the plan, is temporarily suspended, limited, or restricted.⁵ Excluded from the blackout period definition are suspensions, limitations, or restrictions that (1) occur by reason of the application of the securities laws; (2) are a change to the plan that provides for a regularly scheduled suspension, limitation or restriction that is disclosed through any summary of material modifications, any materials describing specific investment alternatives, or any changes thereto; or (3) apply only to 1 or more individuals, each of whom is the participant, an alternate payee, or any other beneficiary, pursuant to a qualified domestic relations order. Contents of Notice. The notice must be written in a manner calculated to be understood by the average plan participant and must include (1) the reasons for the blackout period; (2) 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, including the identification of any investments subject to the blackout period; (3) the expected beginning date and ending date of the blackout period; (4) 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 credited to their accounts during the blackout period; and (5) the name, address and telephone number of the plan administrator or other person responsible for answering questions about the blackout period. Where the notice is not furnished at least 30 days in advance of the commencement of the blackout period, the notice must provide (1) a statement that Federal law generally requires that a notice be furnished to affected participants and beneficiaries at least 30 days in advance of a blackout period, and (2) an explanation of the reasons why at least 30 days advance notice could not be provided. These statements, however, need not be provided where a blackout period applies only to participants and beneficiaries solely in connection with their becoming, 4 The interim final rules define “individual account plans” by reference to ERISA section 3(34). “One-participant retirement plans,” however, are excluded from the definition. 5 The preamble to the interim final rules provide that the rules do not “deal with the application of the fiduciary provisions as they relate to the timing and administration of a blackout period.” 3 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. Timing of Notice Delivery. The notice must 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 a blackout period. The preamble to the interim final rule states 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.⁶ As under the statute, the 30-day advance notice requirement does not apply if (1) a blackout period is deferred in order to comply with the fiduciary duties set forth in section 404(a)(1)(A) or (B) of ERISA; (2) the inability to provide advance notice is due to unforeseeable events or circumstances beyond the reasonable control of the plan administrator; or (3) the blackout period applies only to participants and 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. For exceptions (1) and (2), a plan fiduciary must determine in writing that the exception applies, and must sign and date such a determination. Under all of these exceptions to the 30-day advance notice requirement, the notice must be furnished 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. Changes in Length of Blackout Period. To the extent that there is a change in the beginning or ending date of the blackout period following the provision of the notice, the administrator must furnish to all affected participants and beneficiaries an updated notice explaining the reasons for the change in the date(s) and identifying all material changes in the information contained in the prior notice. This notice must be furnished as soon as reasonably possible, unless such notice in advance of the termination of the blackout period is impracticable. Form and Manner of Furnishing Notice. The notice must be in writing and furnished to affected participants and beneficiaries in any manner consistent with the requirements in the Department's disclosure regulations,⁷ including the section of the regulations that relates to the use of electronic media.⁸ 6 The Department, however, is specifically inviting comments on whether this rule is appropriate. 7 See generally 29 C.F.R. 2520.104b-1. 8 See Institute Memorandum to Pension Members No. 14-02 and Pension Operations Advisory Committee No. 22-02, dated April 10, 2002 (the Department's final regulations on the use of electronic communications). Notably, the statute simply provides that the notice generally must be provided in writing, but may be in electronic or other form to the extent that such form is reasonably accessible to the recipient. 4 Notice to Issuer of Employer Securities. A notice similar to that provided to affected participants and beneficiaries must be furnished to the issuer of any employer securities held by the plan and subject to the blackout period. Model Notice. The interim final rules contain a model notice "intended to assist plan administrators in discharging their notice obligations" under the notice requirement.⁹ The rules state that the use of the model notice is not mandatory; however, use of the language in the model notice addressing (1) restrictions imposed on the ability to direct investments and (2) the inability to provide 30-day advance notice of a blackout period, will be deemed to satisfy the corresponding requirements under the interim final rules. Civil Penalties Under Blackout Period Notice Requirement The Department has issued separate interim final rules to implement section 502(c)(7) of ERISA. The provision, which was added by section 306(b)(3) of the Sarbanes-Oxley Act, authorizes the Department to assess a civil penalty against an administrator of an individual account plan up to \$100 a day for a failure or refusal to provide the required notice, with each violation with respect to any single participant or beneficiary treated as a separate violation. The rules set forth detailed procedures relating to the assessment and administrative review of civil penalties by the Department pursuant to this new provision. The interim final rules also make conforming technical changes to the Department's rules of practice and procedure for other existing civil penalties under section of 502(c) of ERISA. For instance, the changes seek to conform the filing and service rules under various civil penalty provisions. These rules are also effective January 26, 2003. Thomas T. Kim Associate Counsel Attachment (in .pdf format) 9 See p. 64774 of the attachment. 5 RESPONSE FORM FOR INSTITUTE CONFERENCE CALL ON BLACKOUT PERIOD NOTICES MONDAY, OCTOBER 28, 2002, 2:00 PM EST Please fax this form by Friday, October 25, 2002 to Brenda Turner, Investment Company Institute, at (202) 326-5841. To participate in the call, dial 888-955-8941 and provide the operator with the passcode "Blackout Periods" (moderator: Thomas Kim).

Committee Member

Company

Phone Number

E-Mail If you have comments or issues you
would like to raise on the call, please provide them below or email them to tkim@ici.org. 1.

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