

**MEMO# 15585**

January 24, 2003

## **DOL ISSUES FINAL RULES ON BLACKOUT PERIOD NOTICE REQUIREMENTS UNDER SARBANES-OXLEY ACT**

[15585] January 24, 2003 TO: PENSION MEMBERS No. 5-03 PENSION OPERATIONS ADVISORY COMMITTEE No. 5-03 RE: DOL ISSUES FINAL RULES ON BLACKOUT PERIOD NOTICE REQUIREMENTS UNDER SARBANES-OXLEY ACT The Department of Labor has issued final rules and a model notice under section 101(i) of ERISA, a provision enacted as part of the Sarbanes-Oxley Act of 2002.<sup>1</sup> 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 finalized its rules on the assessment of civil penalties under ERISA section 502(c)(7) for failures or refusals by plan administrators to provide notices of blackout periods. The Institute submitted a comment letter<sup>2</sup> in response to the interim blackout notice rules issued in October 2002.<sup>3</sup> The final rules apply to blackout periods commencing on or after January 26, 2003.<sup>4</sup> Set forth below is an overview of the modifications reflected in the final rules in light of comments on the interim rules received by the Department.

**Definition of "Blackout Period"** The final rules clarify the scope of the term "blackout period" by excluding certain types of suspensions, limitations and restrictions from its definition. 1 See Institute Memorandum to Pension Members No. 35-02 and Pension Operations Advisory Committee No. 51-02, dated July 30, 2002. 2 See Institute Memorandum to Pension Members No. 56-02 and Pension Operations Advisory Committee No. 77-02, dated November 22, 2002. 3 See Institute Memorandum to Pension Members No. 50-02, dated October 23, 2002 (memorandum describing the Department's interim final rules). 4 Consistent with the interim rules, for blackout periods beginning between January 26, 2003 and February 25, 2003, the final rules provide that a plan administrator must furnish a notice as soon as reasonably possible.

**2 Regularly Scheduled Suspensions.** The final rules exclude from the definition of blackout period "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." The disclosure may be provided through a 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 participants and beneficiaries. The preamble notes that the reference to "materials describing specific investment alternatives under the plan and limits thereon" is intended to clarify 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. Additionally,

limits on the ability of participants to give investment instructions (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. The preamble also provides that freezes on trading employer stock coincident with the release of earnings reports, whether on fixed dates or determined on a quarter-by-quarter basis, would be “regularly scheduled” to the extent that the event (i.e., the release of an earnings report), restriction (i.e., the freeze on trades), and period of the restriction are described in plan materials and disclosed to affected participants and beneficiaries. QDRO Exclusion. The final rules expand the scope of the statutory exclusion for suspensions pursuant to qualified domestic relations orders (QDROs). Specifically, the final rules exclude from the blackout period definition suspensions, limitations and restrictions occurring “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.” Individual Participant Actions. The final rules exclude from the definition of blackout period suspensions, limitations or restrictions that occur “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 including the account of an individual participant.” The Department noted 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.” Examples of such actions noted in the preamble are receipt of a tax levy, a dispute among putative beneficiaries over a deceased participant’s account, failure of a participant to obtain a PIN number, or allegations that the participant committed a fiduciary breach or crime involving the plan. Permanent Restrictions. The preamble to the final rules clarifies that “the blackout notice requirements were not 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 3 plan termination and similar types of permanent restrictions would not in and of themselves be events that give rise to a blackout notice obligation.”<sup>5</sup> The preamble cautions, however, that if, in connection with a permanent restriction some rights, would be temporarily suspended, limited or restricted, the blackout notice rules would apply to the temporary restriction. The preamble also provides that where a plan sponsor files for bankruptcy or abandons its plan, a blackout period results 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 final rules. In such a situation, the plan administrator or the party assuming the responsibilities of the administrator would be required to provide a blackout notice. Finally, with regard to services such as investment education, investment advice, retirement counseling and financial planning, the suspension, limitation or restriction thereof would not give rise to a blackout period to the extent that 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. Definitions of “Administrator” and “Affected Participant” The preamble to the final rules clarifies that references to “plan administrator” and “administrator” in the rules mean “administrator” as defined in ERISA section 3(16)(A).<sup>6</sup> Additionally, the term “affected participant” does not include employees who are eligible, but do not participate in the plan. Contents of Notice The final rules permit the notice to describe the length of the blackout period by reference to either: (1) the expected beginning date and ending date of the blackout period, or (2) 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 through a toll-free number or access to a specific web site (with the notice describing how to access this information). The preamble also clarifies that a “contact,” rather than a specific person, must be identified in the notice as a party responsible for answering questions regarding the blackout period. The preamble explains that the regulation is not intended to require identification of a specific person, but rather a sufficiently specific source for answering participants’ questions. 5 The preamble also clarifies the example provided to illustrate the “exclusive purpose and prudence” exception to the 30-day advance notice requirement. Specifically, the example in the final rules provides that the exception would apply where ABC company files for bankruptcy and the plan administrator determines that, given this event, it would be prudent to temporarily suspend investments in ABC company stock, effective immediately. 6 That provision defines administrator as “(i) the person specifically so designated by the terms of the instrument under which the plan is operated; (ii) if an administrator is not so designated, the plan sponsor; or (iii) in the case of a plan for which an administrator is not designated and a plan sponsor cannot be identified, such other person as the Secretary may by regulation prescribe.” 4 Lastly, the preamble provides that nothing in the rules limits the use of a single notice to describe different blackout periods (e.g., a 20-day blackout for loans and a 10-day blackout for investment changes), provided that the otherwise applicable requirements are met.

**Form and Manner of Furnishing Notice** The final rules, like the interim rules, provide 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. The preamble to the final rules also provides that a blackout notice will be considered to be furnished on the date of mailing if it is accomplished by 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). The preamble, however, notes that interoffice mail is essentially hand delivery and, therefore, would not be considered furnished until received by the participant. Additionally, the preamble clarifies that sending the notice to the last known address of a participant or beneficiary is sufficient where the plan uses a method of delivery described in the Department’s disclosure regulations,<sup>7</sup> and the plan fiduciaries have taken reasonable steps to keep plan records up-to-date and to locate lost or missing participants. Finally, the preamble clarifies that nothing in the rules precludes blackout notice information from being furnished with other plan information, including benefit statements, so long as the blackout notice information is prominently identified in the furnished materials.

**Notice to Issuers of Employer Securities** The final rules clarify a plan administrator’s obligation to provide notice of a blackout period to the issuer of the employer securities held by the plan where the plan administrator and the issuer are the same party. Specifically, the rules provide that if an issuer designates the plan administrator as the person to receive the blackout period notice, the issuer will be deemed to have been furnished a notice on the same date as notice is furnished to affected participants and beneficiaries.

**Model Notice** A number of modifications are reflected in the new model notice. First, paragraph 3 of the model notice, which addresses the expected beginning and ending dates of a blackout period, has been modified to reflect the alternative approaches (discussed above) to describing the length of a blackout period. Second, the new model notice clarifies that the beginning and ending dates identified in paragraph 3 of the model notice are “expected” dates. Third, paragraph 4 of the model notice, which advises participants to review their current investments in light of their inability to direct their investments during blackout periods, has been modified to clarify that the sentences relating to the risks of investments in individual securities are required only where the plan permits investments in individual securities. (The preamble clarifies that paragraph 4 is not necessary where the notice is 7 See generally 29 C.F.R. 2520.104(b). 5 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 — as the paragraph would be of no value to participants if provided after the date by which participants can effectuate changes.) Lastly, consistent with the change described above, paragraph 6 has been modified to make clear that individual persons are not required to be named as contacts for information about blackout periods.

**Civil Penalty Rules** The Department has finalized its rules implementing the new section 502(c)(7) of ERISA, which authorizes the Department to assess a civil penalty against an administrator of an individual account plan up to \$100 per day for a failure or refusal to provide the blackout notice, with each violation with respect to any single participant or beneficiary treated as a separate violation. The final civil penalty rules are substantially similar to the interim rules issued last October. Notably, the preamble to the final rules emphasizes that “the degree and/or willfulness” of the violation — including whether administrators acted reasonably and in good faith and whether the mistakes were inadvertent and promptly addressed — will be considered in the Department’s penalty assessment proceedings.

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