

Legal Alert:

DOL Publishes Regulations on Advance Notice of Plan Blackout Periods

October 23, 2002

On October 21, 2002, the Department of Labor (“DOL”) published [interim final regulations](#) establishing the rules for advance notice to participants and beneficiaries of blackout periods under defined contribution plans. Perhaps of greatest interest to plan administrators, the regulations include a model notice, at 29 C.F.R. § 2520.101-3(e)(2), with general statements that may be used by plan administrators to satisfy certain blackout notice requirements.

As we described in a [prior Legal Alert](#), the Sarbanes-Oxley Act amended section 101 of the Employee Retirement Income Security Act of 1974 (“ERISA”), 29 U.S.C. § 1021, to require that the plan administrator of an individual account plan (such as a 401(k) plan) provide 30-day advance notice to affected participants and beneficiaries of any “blackout period” that restricts the ability of participants and/or beneficiaries to direct investments or request loans or distributions under the plan for a period of more than three days. (For ease of reference, in the remainder of this Legal Alert, we use the term “participants” to refer to both participants and beneficiaries.)

To a significant extent, the regulations simply repeat the requirements set forth in the law for the advance blackout notice. This Legal Alert focuses on the areas in which the DOL has elaborated on the statutory rules or provided additional requirements. Please refer to our [prior Legal Alert](#) for a description of the statutory requirements, including a definition of what constitutes a “blackout period.”

Content of Blackout Notice

The regulations prescribe a few additional requirements for the content of a blackout notice.

- If the required blackout notice is not furnished at least 30 days in advance, the plan administrator generally must explain in the notice that federal law requires at least 30 days advance notice of a blackout and explain why the notice was not provided on a timely basis.

- As described in our [prior Legal Alert](#), the blackout notice need not be provided 30 days in advance, but instead must be provided as soon as reasonably possible, if deferral of the blackout would violate ERISA's fiduciary standards, or if the inability to provide 30-day advance notice results from unforeseeable events or circumstances beyond the control of the plan administrator. In either of these instances, a plan fiduciary must reasonably determine which of these two exceptions to the 30-day advance notice requirement is applicable. The regulations require that the plan fiduciary document the determination in writing and *sign and date* it.
- A plan administrator has to provide notice as soon as reasonably possible, rather than 30 days in advance of a plan blackout, if the blackout occurs solely in connection with an individual's becoming, or ceasing to be, a participant in a plan as a result of a merger, acquisition, divestiture, or similar transaction. The regulations provide that if (and only if) this exception applies, the plan administrator's notice of the blackout period does not have to explain to participants why the notice was not provided 30 days in advance of a blackout period.
- The notice of the blackout period must include the name, address and telephone number of a person who will be responsible for answering questions concerning the blackout.
- While the statute required that the blackout notice list the expected beginning date and length of the blackout, the regulations provide that the notice must state the expected beginning date *and the expected ending date* of the blackout.

Timing and Delivery of Blackout Notice

The regulations also include several provisions that elaborate on the statutory rules regarding the timing and delivery of the blackout notice.

- The regulations specify how to calculate the 30-day notice period: the 30-day period generally is determined by counting calendar days – not business days – back ***from the last date on which the participant could take action prior to the blackout period***. The preamble to the regulations provides the following example to illustrate this rule.
 - Under a plan that permits participants to direct investments during the first fifteen days of each month, when changing recordkeepers in May, direction of investments will have to be suspended from the 1st to the 15th of May. If the 30-day notice period were counted from April 30, the date immediately preceding the beginning of the blackout period, notice could be provided on April 1st; however, participants would then have only 15 days to take any action in anticipation of the blackout period. . . . Therefore, because the last date participants can take action before the

blackout is April 15th, the regulations require that notice would have to be provided no later than March 16th.

- The notice must be provided to participants at least 30 days, but not more than 60 days, before the last day on which participants can exercise their rights immediately before the start of the blackout period. According to the preamble, if a plan administrator chooses to provide notice more than 60 days in advance, participants must again be notified of the blackout within the 30/60-day time frame specified in the regulations.
- The blackout notice must be in writing, but may be provided in any manner permitted under the DOL's general rules for disclosure. Thus, if mailed by first class mail, the blackout notice will be treated as furnished on the date of mailing, or as provided on the date of electronic transmission, if transmitted electronically.
- If a plan holds employer securities that are subject to the blackout, the regulations specify that the plan administrator must also provide notice of the blackout to the issuer of the employer securities. The content and timing requirements applicable for notices to participants also apply for notices to the issuer of employer securities. To avoid confusion, the regulations provide that the blackout notice may be sent 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 model notice, which is set forth below, is intended to satisfy most content requirements for an advance blackout notice. It includes a sample paragraph designed to alert participants to potential risks when investment direction is restricted. Also, another paragraph provides sample language for situations in which notice cannot be sent 30 days in advance.

Civil Penalties

The DOL also published [rules regarding the civil penalties](#) that may be imposed for failure to provide the notice of the blackout period. The regulations implement the provisions of section 502(c)(7) of ERISA, 29 U.S.C. § 1132(c)(7), which provides that the Secretary of Labor may assess a civil penalty of up to \$100 a day for each failure to provide a blackout notice to a participant. In certain technical aspects, these penalty rules differ from prior regulations relating to the imposition of civil penalties under ERISA, and additional conforming changes to the earlier rules are included in the regulations.

Effective Dates and Comments

The rules regarding the notice requirements for plan blackouts will be effective for plan blackouts beginning on or after January 26, 2003. Similarly, the penalty rules are effective January 26, 2003. The DOL is requesting comments on the interim rules by November 20, 2002.



Please contact us if you have any questions concerning the proposed regulations. Click [HERE](#) to obtain contact information for members of our Employee Benefits and Executive Compensation Practice. Click [HERE](#) to learn more about our Employee Benefits and Executive Compensation Practice. Click [HERE](#) to view other Sutherland Legal Alerts.

Model Notice of Blackout Period, from 29 C.F.R. § 2520.101-3(e)(2)

**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 will begin on [enter date] and end [enter date].

4. *[In the case of investments affected by the blackout period, enter the following:* During the 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. 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 29 C.F.R. § 2520.101-3(b)(1)(v)) 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 person responsible for answering questions about the blackout period].