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November 20, 2002

Office of Regulations and Interpretations  
Pension and Welfare Benefits Administration  
Room N-5669  
U.S. Department of Labor  
200 Constitution Avenue, NW  
Washington, D.C. 20210

ATTN: Blackout Notice Regulation

Dear Sir or Madam:

As a nonprofit membership organization of 35 million persons age 50 or older, AARP is the largest organization representing the interests of older persons. Of our 35 million members, approximately 44% are currently in the workforce.

AARP fosters the economic security of individuals as they age by seeking to increase the availability, security, equity, and adequacy of pension benefits. AARP and its members have a substantial interest in ensuring that participants of an individual account plan are given notice about an impending blackout period so they will know about the temporary suspension or restriction of their rights under the plan. With timely and accurate notice, participants may be able to make more informed decisions about their investment options, their benefits and benefit options, and determine what actions they must take to protect their rights before the blackout period starts.

#### A. Background

Section 306 of the Sarbanes-Oxley Act of 2002 (P.L. 107-204) amends §101 of ERISA which establishes general requirements to provide plan information to participants as well as notice under specific circumstances which may affect participants' rights under the plan. The Sarbanes-Oxley Act requires plan administrators to provide notice when, for longer than three business days, individual account plan assets will not be available to participants for the purposes of directing their investment, obtaining loans or receiving distributions. In issuing guidance, the Pension and Welfare Benefits Administration shall also provide a model notice for plan administrators to use.

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## B. AARP Comments on Interim Regulations

### 1. In General

The interim final rule and model notice closely follow the provisions of the Sarbanes-Oxley Act, and make it straightforward for plan administrators to provide notice about impending blackout periods to participants and beneficiaries. In addition, the model notice is easy to understand and contains helpful information for participants to use when evaluating their long-term investment security as well as the short-term effects of the blackout on their accounts. AARP applauds the PWBA's proposed model notice for blackout periods specifically and supports, generally, the practice of providing model notices and language as a part of regulatory guidance.

2. There are fundamental problems in the private pension system that cannot be addressed in this regulation.

While the interim final rule generally will establish commonsense blackout notice requirements and provide participants with the tools to enforce their rights before and after the blackout period, it will not resolve the underlying problems of the private pension system highlighted by, among others, the Enron, Worldcom, Tyco and Global Crossing debacles. Weaknesses in the private pension system—the lack of investment diversification in defined contribution plans; the failure to provide objective, non-conflicted investment advice; and inadequate remedies when the system fails and fiduciaries misuse the plan and its assets—must be dealt with to prevent future situations where participants watch their retirement security disappear like a popped bubble. The debacles of the past year are not the first time we have seen problems—Color Tile was not that long ago. Fundamental problems in the system were not fixed then, and are not addressed now. As a result, we will need to revisit this issue before the next time participants are forced to pick up the pieces to determine when and whether they can retire.

3. The timing of the notice before the blackout period starts is insufficient to allow participants to adequately evaluate the effect of the blackout period on their individual accounts and carry out actions that may be necessary to protect themselves before the blackout period starts.

Section 306(b) of the Sarbanes-Oxley Act provides that the notice to participants shall be furnished at least 30 days in advance of the blackout period. The interim final rule adopts a minimum 30-day notice with a maximum of 60 days before the last date in which affected participants or beneficiaries could exercise the affected rights before the commencement of the blackout period. The minimum period—30 days—does not allow enough time for participants to receive notice that the blackout will occur, evaluate that information and complete action before the blackout period starts. Participants planning to take a distribution, request a plan loan, or to diversify their investments, may need to gather information, assess the timing for any action, request forms from the plan, complete them and then send the form with additional information to the plan. The plan, in its turn, may need sufficient time to process the request. Allowing additional time after notice has been provided and before the blackout period starts would allow both the participants and the plan to timely process and constructively handle transactions that are prompted by the

pending blackout period.

AARP urges the Pension and Welfare Benefits Administration to adopt a minimum notice period of 45 days with a maximum period of 90 days before the blackout goes into effect. This increase in the notice period would comply with the Sarbanes-Oxley Act requirement of at least 30 days before the blackout starts. And, it is our understanding that good plan practices call for a longer notice period before a blackout starts.

4. The regulation should emphasize that it is a breach of a fiduciary duty for a blackout period to be longer than necessary.

The Department should consider adding a statement to the final rule emphasizing the fiduciary duty of the plan and its service providers to the participants and beneficiaries to keep the blackout period as short as reasonably possible.<sup>1</sup> It is our understanding that blackout periods most often happen when a plan changes administrative service providers, usually to obtain lower costs or better service. Not surprisingly, current service providers have little incentive to quickly complete their responsibilities to turn over the administration to the new service providers. Consequently, blackout periods may stretch much longer than anticipated—requiring second or third blackout notices—preventing participants and beneficiaries from engaging in normal plan transactions for an extended period of time. Both the plan and the participants have a coextensive interest in shortening the blackout period.

The Department should consider establishing a limit on blackout periods. AARP has heard of instances of blackout periods as long as six months. AARP believes that causing or accepting such a long blackout period by the service provider or plan is a breach of fiduciary duty. We also note that depending on the change in service providers, some plans run parallel systems to effect a smooth and fast transition (sometimes as fast as three days). This certainly can be touted as a best practice.

We suggest that language similar to that used in the regulation governing participant contributions would be appropriate. See 29 CFR §2510.3-102. Thus, the blackout period should be as short as is practicable. Like the participant contribution regulation, the Department could establish an alternative maximum length of time for the blackout period. In doing so, PWBA would provide general guidance on what would constitute a reasonable length of time for a blackout period. Such guidance would provide plan sponsors and service providers incentive for establishing limits in service provider agreements before the occurrence of a blackout period. In addition, the Pension and Welfare Benefits Administration may wish to consider more specific requirements for the former service provider who has the least incentive to cooperate in shortening the blackout period. For example, specific requirements that ensure that the former service provider forward as expeditiously as possible the information necessary to accomplish the transition to the new service provider would help smooth the transition and shorten the blackout period.

### C. Conclusion

AARP appreciates the opportunity to express its views on these proposed regulations. AARP is willing to provide further assistance on this or related topics. If you have any questions, please feel free to call me at

202/434-3750.

Sincerely,

David Certner  
Director  
Federal Affairs