INVESTMENT COMPANY INSTITUTE

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

Re: Blackout Notice Regulation Under Sarbanes-Oxley Act

Ladies and Gentlemen:

The Investment Company Institute[1] (the "Institute") commends the Department of Labor for its expedited issuance of "interim final rules" and a model notice that implement section 306(b) of the Sarbanes-Oxley Act of 2002 (the "Act"). As providers of the mutual funds in which many retirement plans invest,[2] as well as recordkeeping, trust and other plan services, the mutual fund industry has a strong interest in assuring that participants and beneficiaries are properly informed of "blackout periods" that apply to their retirement accounts. Indeed, prior to the passage of the Act, mutual fund firms — as a matter of good business practice — assisted plan administrators in providing advance notice of these temporary suspension periods to participants.

The Act generally requires an administrator of an individual account plan to notify affected participants and beneficiaries of a blackout period at least 30 days in advance of a blackout. The term "blackout period" is defined as any period of more than three consecutive days "for which any ability of participants or beneficiaries under the [individual account] plan, which is otherwise available under the terms of such plan, to direct or diversify assets credited to their accounts, to obtain loans from the plan, or to obtain distributions from the plan is temporarily suspended, limited, or restricted." Excluded from the definition of blackout period 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

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[1] The Investment Company Institute is the national association of the American investment company industry. Its membership includes 8,949 open-end investment companies ("mutual funds"), 527 closed-end investment companies and 6 sponsors of unit investment trusts. Its mutual fund members have assets of about $6.045 trillion, accounting for approximately 95% of total industry assets, and over 90.2 million individual shareholders.

[2] As of year-end 2001, about $2.3 trillion in retirement assets were invested in mutual funds. The $765 billion in 401(k) plans represents about 44 percent of all 401(k) plan assets. The $1.2 trillion in IRAs represents 49 percent of all IRA assets.

to one or more individuals, each of whom is the participant, an alternate payee, or any other beneficiary, pursuant to a qualified domestic relations order.

The Department's interim rules are intended to clarify the manner in which these rules operate "to ensure that participants and beneficiaries have access to information necessary to make informed and meaningful investment decisions."[3] Clarity in the rules is also critical to the compliance efforts of plan administrators, as noncompliance could lead to substantial penalties under the Department's recently-issued civil penalty rules.[4]

Accordingly, the Institute offers the following recommendations in order to (1) enhance the accuracy of the information provided to participants and beneficiaries, (2) further clarify the rules governing blackout period notices, and (3) improve the overall administrability of the guidance.[5]

First, the final regulations should clarify that plan administrators may satisfy the requirement to include an expected ending date in a blackout period notice by providing (1) a single expected ending date, where that date is determinable, (2) a range of dates in which the end date is expected, where the specific expected end date cannot be determined with reasonable accuracy, or (3) a description of the circumstances under which the blackout period is expected to end, in those rare situations where even a range of expected ending dates would be essentially meaningless. In any situation where a single expected ending date is not included in the blackout period notice, the plan administrator should be required to provide a subsequent notice to all affected participants and beneficiaries identifying the ending date once it has been determined.

Second, the Department should clarify that the definition of "blackout period" does not include suspensions required under current law upon a plan administrator's receipt of a domestic relations order, or restrictions resulting from other judicial or government agency-imposed orders.

Finally, with regard to the model notice, the Department should (1) expressly permit plan administrators to exclude portions of the model notice that are irrelevant to the plan at issue, (2) clarify that the beginning and end dates of the blackout period are expected dates, and (3) modify the model language to reflect our recommendation regarding the alternative methods of satisfying the ending date notice requirement.

Each of these recommendations is discussed in more detail below.

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[3] 67 Fed. Reg. 64769 (October 21, 2002).

[4] 67 Fed. Reg. 64774 (October 21, 2002). Under the Act and the interim rules issued thereunder, the Department may assess a civil penalty against a plan administrator of up to $100 per day per participant or beneficiary for the failure or refusal to provide a notice in accordance with the Act's requirements.

[5] Notably, the interim rules clarify 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 Institute strongly supports this mailbox rule and recommends that it be expanded to include mailings by overnight and other similar types of delivery services.

I. NOTIFICATION OF EXPECTED LENGTH OF BLACKOUT PERIOD

The interim rules require that a blackout period notice include "the expected . . . ending date of the blackout period." No guidance is provided, however, regarding how a plan administrator can meet this requirement in those situations (discussed below) where an expected ending date cannot be determined with reasonable accuracy.

If a plan administrator were in all cases required to specify a single expected end date, the administrator could be expected to take a conservative position and overestimate the length of the blackout period. Such an ending date would most likely be inaccurate and could be quite misleading to participants.

Consequently, we recommend that the final regulations clarify that plan administrators may satisfy the requirement to include an expected ending date in a blackout period notice by providing (1) a single expected ending date, where that date is determinable,[6] (2) a range of dates in which the end date is expected, where the specific end date cannot be determined with reasonable accuracy, or (3) a description of the circumstances under which the blackout period is expected to end, in those rare situations where even a range of expected ending dates would be essentially meaningless. In any situation where a single expected ending date is not included in the blackout period notice, the plan administrator should be required to provide a subsequent notice to all affected participants and beneficiaries identifying the ending date once it has been determined. This approach, we submit, will ensure that participants receive the most accurate and useful information before and during the blackout period.

A number of situations exist where a plan administrator simply cannot determine with any reasonable degree of accuracy the precise date on which a blackout period is expected to end. One illustration of this difficulty comes from the Department's own overview of the interim final rules. Specifically, in explaining the circumstances under which an exception to the 30-day advance notice requirement applies, the Department provides an example where ABC company files for bankruptcy and the plan administrator determines that, given this event, it would not be prudent to continue to permit participants to direct investments into ABC company stock, effective immediately. In this situation, the plan administrator cannot know if or when ABC company will emerge from bankruptcy and, hence, when ABC company stock would again be a prudent investment option.[7] At best, the plan administrator could either generally describe the circumstances under which this investment option would once again become available (*e.g.*, upon emergence of ABC company from bankruptcy) or provide a very broad range of expected ending dates (*e.g.*, between one month and two years from now).

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[6] Where a blackout period is instituted with regard to multiple types of transactions (*e.g.*, ability to take participant loans, take distributions, reallocate investments) and some or all of the transactions are expected to be suspended for different periods, the Department should confirm that a blackout notice may provide multiple expected beginning and ending dates for the various transactions suspended.

[7] As the blackout notice requirement applies only to <u>temporary</u> suspensions, limitations or restrictions on participant accounts, the example must presume that the bankruptcy filing by ABC company will not necessarily result in ABC company stock being eliminated as an investment option. We recommend that the example be clarified to reflect the temporary nature of the prohibition on direct plan investment in ABC company stock.

Perhaps the most common situation where a plan administrator will not be able to determine with reasonable accuracy the expected date on which a blackout period will end is where the plan's recordkeeper is being replaced. The "conversion" of a plan to a new recordkeeper is a highly complex process involving the transfer of detailed plan records and extensive coordination among numerous parties, including the plan sponsor, the plan trustee, the former plan recordkeeper, the new recordkeeper and possibly the provider(s) of the plan's investment options. Not surprisingly, this process necessarily requires that participant accounts be frozen in order to preserve the integrity of plan records.[8]

Factors that may make it difficult to determine the actual length of the blackout period with reasonable accuracy, even after the commencement of the conversion process, include the following.

- The prior recordkeeper may not provide all of the plan records to the new recordkeeper as scheduled, particularly since the former recordkeeper has lost the plan's business and may not view a smooth transition as a priority.

- Even upon receipt of the records, the new plan recordkeeper may discover that the prior recordkeeper maintained poor records or used data software that is difficult to reconcile with the new system, thereby necessitating additional time to review and organize the data.

- Numerous documents (*e.g.*, the recordkeeping service agreement, the trust agreement, the investment policy statement) must be reviewed, approved and signed at various stages of the conversion process. A document left unexecuted by the necessary party could postpone the lifting of the blackout.

- Plan sponsors, while changing recordkeepers, may choose to make plan design changes. For example, the sponsor may choose to add a catch-up contribution feature to its plan. Such changes may lead to systems modifications, possibly causing delays in the transition process.

- Where a plan sponsor elects to replace the investment options under a plan, the liquidation of the prior investments — especially if they consisted of atypical assets that may not be readily valued — and the investment of those amounts in the new menu of options could cause further delays.

Indeed, given the difficulty in prospectively determining the exact length of a blackout period, notices furnished by many plan administrators in the past have typically provided a range of timeframes (*e.g.*, "the blackout period is expected to last between 2 and 4 weeks"). We believe that allowing this approach would be of greater benefit to participants, as the

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[8] Some or all transactions with regard to participant accounts must be suspended from the date the prior plan recordkeeper begins to prepare the account data for transfer to the new recordkeeper through the date that the successor recordkeeper inputs all of the account data into its system, verifies the accuracy of the records, and ensures that the plan's fiduciaries are satisfied that the conversion has been effectively completed.

information they receive would be more consistent with the realities of plan conversions and enable them to better plan for the blackout period. Moreover, because we also propose that plan administrators not providing a single expected ending date be required to furnish a subsequent notice that identifies the specific ending date, once that date has been determined, this approach will ensure that participants receive the most accurate and useful information before and during the blackout period.

II. DOMESTIC RELATIONS ORDERS AND SIMILAR RESTRICTIONS

The Act and the interim rules contain an exception from the definition of blackout period for any suspension, limitation, or restriction "which applies 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" (QDRO). No guidance is provided, however, regarding the application of the blackout notice provisions to the period between the date that a plan administrator receives a domestic relations order and the date that the "qualified" status of that order has been determined. Additionally, it is unclear whether restrictions on plan accounts resulting from other types of court orders or government agency-imposed restrictions would give rise to a blackout period.

Pursuant to ERISA section 206(d)(3)(H), a plan administrator, upon receipt of a domestic relations order, must segregate amounts that are subject to such an order — even prior to the time at which the order has been determined to be "qualified."[9] ERISA section 206(d)(3)(G) also requires an administrator to promptly notify the affected participant (and each alternate payee named in the order) upon receipt of the domestic relations order.[10] Consequently, a participant would receive no additional disclosures if a suspension arising from a plan administrator's receipt of a domestic relations order were treated as a blackout.

We therefore urge the Department to either clarify that the QDRO exception contained in the Act includes suspensions required by current law upon receipt of a domestic relations order or provide an exception under the blackout period definition for the suspension of an account pursuant to a domestic relations order, pending the determination of its "qualified" status.[11]

Likewise, the Department should provide that suspensions resulting from other types of court orders or government-imposed restrictions are exempt from the blackout period definition. For instance, a participant's account may become subject to a federal tax levy or

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[9] *See also* Question 2-11, U.S. Department of Labor Booklet on "QDROs: The Division of Pension Through Qualified Domestic Relations Order" (available at www.dol.gov/pwba/pubs/qdro.htm).

[10] *See also* Question 2-2, U.S. Department of Labor Booklet on "QDROs: The Division of Pension Through Qualified Domestic Relations Order."

[11] Should the Department conclude that blackout notification is required in this case, the final regulations should clarify that an exception to 30-day advance notice rule applies (*e.g.* unforeseeable event exception, prudence rule exception). Otherwise, the participant would receive a notice that a blackout would begin in 30 days even though activity in the account already has been suspended as required by ERISA.

judgment. Such restrictions arise independent of the operation of the plan and should not be subject to the blackout notice requirement.

III. MODEL BLACKOUT PERIOD NOTICE

The Institute appreciates the expedited issuance of a model notice in conjunction with the interim rules. Plan administrators will find the language useful in meeting their obligations under the blackout notice requirements. Significantly, the model notice is illustrative, rather than mandatory. We believe, however, that the following modifications to the model will enhance the accuracy of the information provided and further encourage its use by plan administrators.

First, the Department should clarify that portions of the model notice that may not be relevant to the plan at issue may be deleted without diminishing the "safe harbor" effect of the incorporated language. In particular, paragraph 4 of the model notice, which advises participants to review their current investments in light of their inability to direct their assets during blackout periods, contains language that is relevant only to plans that permit investment in individual company securities (*e.g.*, employer stock).

The Department should provide that administrators whose plans do not offer investments in individual company securities may use the language in paragraph 4 — without the language describing the risks of holding investments in the securities of any individual company — and still be deemed to satisfy the corresponding notice content requirement.[12] For these plans, the language warning against concentration in non-diversified investments is simply irrelevant and could lead to participant confusion and inappropriate investment decisions.

Second, the Department should modify the model language to clarify that the beginning and ending dates of a blackout period provided in a notice are *expected* dates. The proposed model language — "The blackout period for the plan will begin on [enter date] and end [enter date]" — is inconsistent with the statute and the interim rules, both of which refer to the "expected" dates of the blackout period. Moreover, given the difficulty in predicting the precise duration of a blackout period, the rigid nature of the proposed model language may lead to inaccurate participant expectations.

Finally, consistent with the recommendation made above, the model notice should provide language for each alternative method of satisfying the ending date notice requirement. Where a plan administrator provides a range of expected ending dates, for example, the model language could read as follows: "The blackout period for the plan is expected to begin on [enter date] and expected to end between [enter date] and [enter date]."

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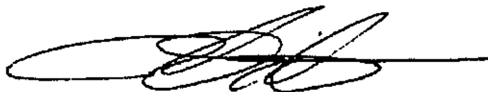
[12] Accordingly, for plans that do not offer investments in individual securities, the administrator should be permitted to exclude from the blackout period notice the following language in paragraph 4: "You should be aware that there is a risk to holding substantial portions of your assets in the securities 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."

The Institute appreciates the Department's consideration of our recommendations. Please do not hesitate to contact the undersigned at 202/326-5837 or Keith Lawson, the Institute's Senior Counsel for tax and pension matters, at 202/326-5832, if you have any questions concerning our comments.

Sincerely,



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