0014

SOCIETY FOR HUMAN RESOURCE MANAGEMENT

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, DC 20210

Re: Blackout Notice Regulation

To whom it may concern:

The Society for Human Resource Management (SHRM) hereby submit comments to the Department of Labor, Pension and Welfare Benefits Administration (PWBA), on its interim final rules regarding Notice of Blackout Periods to Participants and Beneficiaries (Blackout Notice), of which notice was published on October 21, 2002 in the *Federal Register* at 67 Fed. Reg. 64774.

SHRM is the world's largest association devoted to human resource management (HR). Representing more than 170,000 individual members, the Society serves the needs of HR professionals by providing the most essential and comprehensive set of resources available. As an influential voice, SHRM is committed to advancing the human resource profession to ensure that HR is an essential and effective partner in developing and executing organizational strategy. Founded in 1948, SHRM currently has more than 500 affiliated chapters within the United States and members in more than 120 countries.

STATEMENT OF INTEREST

SHRM's membership is comprised of HR professionals who balance strategic, operational, and administrative roles. Additionally, many HR professionals play an extensive role in the administration of employee benefits. SHRM and its members, therefore, have a vested interest in the PWBA's interim final rule governing Blackout Notice. These comments reflect our members' substantial expertise and experiences. They were developed with input from SHRM's Compensation and Benefits committee, comprised of human resource professionals from all levels within a variety of industries with a focus on pension and compensation issues.

INTRODUCTION

SHRM welcomes this opportunity to present comments to the PWBA's Blackout Notice regulations. In light of the recent failures of executives and plan managers at large publicly traded companies, whether intentional or unintentional, to act in the best

1800 DUKE STREET
ALEXANDRIA, VIRGINIA 22314-3499 USA
(703) 548-3440 FAX: (703) 836-0367 TDD: (703) 548-6999
WORLD WIDE WEB: http://www.shrm.org

interest of their plan participants, SHRM believes there is a need to strengthen all components of benefit plan administration, management, and compliance. The Sarbanes-Oxley Act of 2002 (SOA) was passed to regulate the auditing, financial disclosure, executive compensation, and corporate governance practices of publicly traded companies. SHRM agrees that such legislation is necessary, however, it feels SOA's intersection with ERISA and the accompanying interim final rule attempt to standardize the already closely scrutinized plan administrators.

The Sarbanes-Oxley Act and its accompanying interim final rule require that a plan administrator provide notice of any blackout period to all participants and beneficiaries whose rights under the plan will be temporarily suspended, limited, or restricted by the black out period. Additionally, the interim final rule holds a plan administrator personally liable when there is a failure or refusal to provide affected participants or beneficiaries with notice of a black out period. HR professionals are acutely aware of the potential impact of a blackout period on participants' or beneficiaries' financial planning. That said, most SHRM members who deal with benefit plans and blackout periods already provide notice of upcoming blackout periods to affected participants and beneficiaries. SHRM is not opposed to mandating this notice, however, we have some concern with the interim final rules' language regarding the process of notification of a penalty and the computation and assessment of penalties. Additionally, SHRM is strongly opposed to the imposition of personal liability against plan administrators.

BLACKOUT NOTICE

The interim final rules maintain that blackout notices shall be written in a manner calculated to be understood by the average plan participant and sets forth specific content requirements applicable for the notices. The specific content requirements include a brief statement of the law requiring 30 days advance notice; the reasons for the blackout period; a description of the rights that will be suspended; limited or restricted by the blackout period, the expected beginning and ending date of the blackout period; the name, address, and telephone number of a person who can answer questions concerning the blackout period; and, in the case of investments, a statement that the participant or beneficiary should evaluate the appropriateness of their current investment decisions in light of the blackout period. Many SHRM members currently provide notice of blackout periods, which contain the same or similar information as the information required in the interim rules. SHRM considers the specific requirements outlined by the interim rules to be appropriate and sufficient.

Length and Limitation on Advance Notice of Blackout

SHRM agrees with the PWBA's assessment and its timing requirements on advance notice of blackout periods. According to the interim final rules, plan administrators must give at least 30, but not more than 60, days advance notice to participants and beneficiaries prior to a blackout. SHRM members agree that 30 days provides plan participants and beneficiaries sufficient time to act in light of an upcoming

blackout. Additionally, SHRM members find that confining the notice to within 60 days is proper, because providing more than 60 days notice is too far removed from the start of the blackout period to effectively benefit the participants and beneficiaries.

While SHRM does approve of the timing requirements and the limitation on advance notice, SHRM finds the language used to describe the 30-day period unclear. Section 2520.101-3(B)(2)(i) reads that "[t]he notice described in paragraph (a) of this section shall 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 any blackout period." This could be easily amended and made more understandable. SHRM suggests the following: "the notice described in paragraph (a) of this section shall be furnished at least 30 days, but not more than 60 days, from the last date on which participants and beneficiaries could exercise their affected rights preceding the commencement of the blackout period."

Distribution of Blackout Notice and Estimated Costs

The written blackout notices may be furnished in any manner permitted in 29 CFR 2520.104b-1, which includes electronic media and first class mail. If by first class mail, the notice will be considered furnished as of the date of mailing and if by electronic media, as of the date of the electronic transmission. The Federal Register notice specifically seeks comments on the appropriateness of this rule. Electronic media is wonderful in theory; however, in practical terms SHRM feels that sending notice electronically is not a viable option. The interim final rules make the assumption that plan administrators can contact their participants and beneficiaries by computer. This is an unfounded assumption. Many companies that provide benefits to employees do not use computers in the workplace to communicate with their employees (e.g., retail, restaurant and service industries); therefore, few plan administrators contact their participants and beneficiaries through electronic means. The benefit of sending notice through electronic media, therefore, will have little benefit for many plans.

Without the ability to send the blackout notice electronically, plans will have to rely on the first class mail, significantly increasing costs. The regulations claim that the required notice is likely to be prepared once for each applicable blackout period and distributed to the multiple affected participants. The regulations estimate that the fixed cost will be $100.00 for both large and small plans and the total cost would run small plans approximately $110.00 a year and large plans $510.00 a year. These estimates do not reflect reality. If these totals were assessed based on the fact that companies would use electronic media, they should be recalculated, because, as noted, many plans will be unable to use this method of transmission. Additionally, according to the interim rules, if, following the furnishing of notice, there is a change in the beginning or ending of the blackout period, updated notice to all participants and beneficiaries must be refurnished, unless impracticable. This need to address changes if practicable will likely increase the costs to both large and small plans.

According to § 2520.101.3(a) written notice must be furnished to all plan participants and beneficiaries whose rights under the plan will be temporarily suspended, limited, or restricted by a blackout period. Assuming the notice is sent via first class mail, notice is considered furnished as of the date of mailing. The regulations fail to address what occurs should a notice be mailed, but not received by the participant or beneficiary. According to many SHRM members, generally locating and communicating with plan participants and beneficiaries is difficult, especially when people in the plan are not active. It is likely that mail will be returned and the participant or beneficiary not contacted. The regulations should address the extent to which a plan administrator locate a participant or beneficiary and they should address exceptions for the plan administrator should the participant or beneficiary not receive the notice. SHRM suggests that the interim rules make an exception for plan administrators who make a reasonable effort to locate participants and beneficiaries consistent with business practices.

EXCEPTIONS

Blackout notices are to be furnished to plan participants and beneficiaries unless it falls within one of three exceptions: (1) when deferral of the blackout to accommodate notice would result in an ERISA violation; (2) when the inability to provide notice of a blackout period is due to unforeseeable events or due to circumstances beyond the plan administrator's control; and (3) when a blackout period applies only to one or more participants or beneficiaries in connection with a merger, acquisition, divestiture, or similar transaction involving the plan and occurs solely in connection with becoming or ceasing to be a participant or beneficiary. In the first two circumstances, a written determination that notice is not possible must be dated and signed by a fiduciary of the plan. Additionally, the plan administrator must furnish notice to the participants and beneficiaries as soon as reasonably possible.

The term "unforeseeable event" is open to wide interpretation and SHRM recommends that the interim final rules provide examples of what the Department will view as an "unforeseeable event." With regard to the second exception, the overview of the interim final rules states "[t]he Department anticipates that plan administrators will rely on this exception only in rare circumstances." SHRM and its members estimate that this resolve is incorrect and that the exception will be used more than rarely. For example, there have been instances when previous record keepers failed to cooperate; SHRM is concerned that meeting the 30-day notice deadline will be difficult in these situations. According to members of SHRM it is not unforeseeable that prior record keepers, especially those who are no longer clients, will fail to cooperate. Thus, when plan administrators fail to furnish notice in time to meet the 30-day notice requirement, there will be a presumption that they should have been able to meet the deadline and the plan will be in violation of the law and liable for penalties. What's worse, is that plan administrators will be personally liable. (See assessment of penalty discussion below)

SHRM argues that plan administrators should be allowed to use the exceptions without the presumption that they will be used sparingly. SHRM also argues that the regulations should address the need for prior record keepers to cooperate and comply. In

fact, when a prior record keeper fails to cooperate, it would be beneficial for the regulations to address issuing a penalty against a prior record keeper and waiving liability for the plan administrator.

ASSESSMENT OF CIVIL PENALTIES

The bulk of the regulations addressing the civil penalties under ERISA § 502(c)(7) focus on the process used to assess such a penalty. SHRM strongly opposes these regulations because they assume an administrator's wrongdoing and put the burden on the administrators that there is no violation. Under regulation § 2560.502c-7(c) prior to an assessment of penalty, the Department shall issue a notice of intent to assess a penalty, the amount of such penalty and the number of participants and beneficiaries on which the penalty is based, along with the reasons for the penalty. The administrator then has 30 days to file a statement of reasonable cause. The regulations provide that the Department will review the administrator's statement, determine whether a whole or partial waiver will be granted and then notify the administrator of its determination in writing. This notice becomes a final order 45 days from the date of its service.

SHRM argues that the regulations are incomplete. There are no time limitations outlining when the Department must issue its notice of intent. SHRM believes that the regulations should contain a statute of limitations. For example, the Department should be limited to pursing a civil penalty against an administrator to one year from the start date of the blackout period. Additionally, the regulations fail to address factors that the Department would use to conclude whether to remove or reduce the penalty assessed. In fact, the only instruction given is that the statement of reasonable cause is to contain an explanation as to why the civil penalty should be reduced or dismissed.

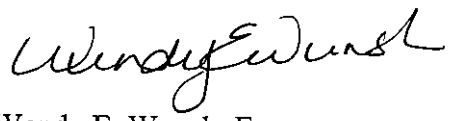
WAIVER

A failure to respond to the Department's letter of intent to assess penalties will be deemed a waiver of the administrator's right to appear and contest the facts alleged. This appears harsh, especially since the letter is not a notice of penalties, but it is the Department's intent to assess penalties. Additionally, the regulations state that such failure to respond shall be deemed an admission of the facts alleged in the notice. This forces a plan administrator to prove that he has sent notice to all affected participants and beneficiaries, rather than the Department putting forth its reasons for asserting a violation has occurred. In essence the "letter of intent to assess a penalty" is a "notice of penalty."

CONCLUSION

SHRM appreciates the opportunity to submit these comments. We would be happy to provide you with additional information or clarification of our concerns.

Respectfully,



Wendy E. Wunsh, Esq.
Manager, Employment Regulation
Society for Human Resource Management