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November 19, 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

(By Internet to: e-ORI@pwba.dol.gov)

Re: Interim Final Rule Relating to Notice of Blackout
Periods to Participants and Beneficiaries
67 FR 64766 (October 21, 2002)

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OFFICE OF REGULATIONS
AND INTERPRETATIONS
2002 NOV 20 PM 4: 54

Dear Sir or Madam:

America's Community Bankers (ACB)¹ is pleased to submit comments on the Interim Final Rule relating to notice of blackout periods to participants and beneficiaries and the Interim Final Rules relating to the assessment of civil penalties under ERISA Section 502(7) and conforming technical changes on civil penalties under ERISA Sections 502(c)(2), 502(c)(5) and 502(c)(66)² issued by the Pension and Welfare Benefits Administration (PWBA).

Interim Final Rule Relating to Notice of Blackout Periods to Participants and Beneficiaries

ACB commends PWBA for quickly issuing guidance on notification requirements for blackout periods as required by the Sarbanes-Oxley Act of 2002.³ We believe the rules are straightforward and understandable and can be implemented by plan administrators and understood by plan participants and beneficiaries. The Interim Final Rules closely follow the statutory requirements established in the Sarbanes-Oxley Act and provide the initial guidance needed by plan administrators to send the first set of blackout notices required under the law.

However, as the Interim Final Rules are implemented, new issues and problems will be identified and we urge PWBA to be ready and willing to work with plan administrators to

¹ America's Community Bankers represents the nation's community banks of all charter types and sizes. ACB members pursue progressive, entrepreneurial and service-oriented strategies in providing financial services to benefit their customers and communities.

² 67 Fed. Reg. 64766 (October 21, 2002)

³ Pub. L. 107-204

solve immediate problems and to issue additional, clarifying regulations as needed. We hope that PWBA will continually review the process as the regulations are implemented to identify troublesome issues and areas that can be simplified further in future rules.

We have identified some areas of the Interim Final Rules that should be clarified or adjusted to assure that the rule meets the goal of providing early notice of blackout periods and minimizes any negative impacts such a period may have on plan participants and beneficiaries.

§ 2520.101-3. Notice of Blackout Periods Under Individual Account Plans

The Interim Final Rule requires notice to be provided to all affected plan 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 right immediately before the commencement of any blackout period. Plan administrators say that it often is difficult to know when blackout periods will begin and end and that the specific dates required by the Interim Final Rules may cause inadvertent violations or result in longer than necessary blackout periods.

Thus, PWBA should consider providing alternative approaches. For example, plan administrators could be allowed to provide a wider date range for the target blackout period beginning and ending dates, by giving a plus or minus range of dates on either side of the specific dates listed in the notice. The date range could be set at seven on each side to give plan administrators flexibility as they are organizing computer or recordkeeping changes or making changes required by a merger. Such flexibility is especially important for ending blackout dates. Plan administrators also should be allowed the option of setting up a telephone/computer notification system for participants and beneficiaries to call or check to determine if the blackout period has ended during the range of dates provided as an alternative to mailing additional notices.

In the preamble to the Interim Final Rules,⁴ PWBA states that the 60-day limit on the notification of the blackout period was selected to ensure that the importance of the notice to affected participants and beneficiaries is not undermined and that plan administrators who want to send additional, earlier notices may do so. However, plan administrators and others who work with pension plan participants and beneficiaries on a regular basis have suggested that a blackout notice sent with a quarterly statement is more likely to be opened and read, particularly if such notice is in big, bold type on a separate sheet. Thus, an alternative allowing 90 days, but not less than 60 days would allow blackout notices to be sent with quarterly statements where they are likely to be read. It also would make the notification process more efficient.

ACB also suggests that the Interim Final Rules be modified to make clear that the term "affected participant" means that blackout notices should go to current plan participants and beneficiaries and not to employees who are eligible but who have not become

⁴ 67 Fed. Reg. 64767

participants. An employee falling into this category could be given the blackout notice at the time they decide to actually participate in the plan.

ACB is pleased that PWBA has provided a model notice on which plan administrators can rely for notifying plan participants and beneficiaries of blackout periods. We do not believe, however, that the last three sentences of paragraph 4 of the model notice, to be inserted in the case of investments affected by the blackout period, are appropriate. The language goes beyond the statutory requirement to alert participants to review their portfolios to assess the impact of a potential blackout and could be viewed as giving investment advice. Because many plan administrators will adopt the model notice to ensure compliance with the notice requirements, this language could open them up to the claim that they are acting as investment advisers. That was not the purpose of the blackout period provisions in Sarbanes-Oxley. The notice requirement is to inform plan participants and beneficiaries that trading restrictions will go into effect and to encourage them to review their investments. If a plan administrator does not adopt the language in the model notice, he or she could be liable for providing incomplete notices because the language in section 2520.101-3(b)(iv) seems to imply that plan administrators must use the model language to comply with the rule. We suggest that the last three sentences of paragraph 4 be deleted from the model notice.

Civil Penalties Under ERISA Section 502(c) (7) and Conforming Technical Changes on Civil Penalties Under ERISA Sections 502(c)(2), 502(c)(5) and 502(c)(6)

The new civil penalties added by Section 502(c)(7) for failure to provide notice of a blackout period for pension plan investments as required by the Sarbanes-Oxley Act are substantial. The fact that the person against whom penalties are assessed is personally liable makes the penalties even more onerous. Given the inevitability of mistakes, such as misaddressed envelopes, misspelled names, etc., occurring as the new blackout notification procedures are implemented, ACB urges PWBA to carefully exercise its ability to not assess the penalties where violations are the result of inadvertent and/or de minimis errors.

Thank you for consideration of our views on this important matter. We would be pleased to answer any questions about these comments and look forward to working with PWBA to assure that pension plan participants and beneficiaries rights are protected under blackout periods. Please contact Beth Neese at (202) 857-3152 or at theneesegroup@attnet, or the undersigned at (202) 857-3121 or cbahin@acbankers.org.

Sincerely,



Charlotte M. Bahin
Director of Regulatory Affairs
Senior Regulatory Counsel