Fidelity Investments®

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

Attention: Blackout Notice Regulation

Re: Sarbanes-Oxley Act Guidance - Written Comments

The US Department of Labor (the "Department") recently issued interim guidance (the "Regulation") to address the blackout notice requirements of Section 306(b) of the Sarbanes-Oxley Act of 2002 (the "Act"). Several members of the controlled group of companies generally known as "Fidelity Investments" provide trustee, investment management and recordkeeping services to many defined contribution retirement plans subject to the Employee Retirement Income Security Act of 1974. The new blackout notice requirements will be of concern to all administrators of such plans, and their service providers, at one time or another.

We appreciate the efforts of the Department to date to issue guidance in response to the Congressional mandate under the Act. The short comment period included in the Regulation notice suggests that the Department would like to respond to requests for modifications or additions as expeditiously as possible. We suggest that a number of issues could be clarified, perhaps by means of an information release, in advance of the publication of the Regulation in final form.

Written comments on behalf of Fidelity Investments are provided as follows:

(1) Mailing

The Regulation states that the 30-day period may be measured from the date that blackout notices are mailed if sent by first class mail, or from the date that notices are sent electronically. We note that there are other mailing procedures designed to deliver mail at least as quickly as first class mail, such as an overnight delivery service or by interoffice mail if used for such purpose. We ask the Department to confirm that such alternative methods are subject to the same timing rule, assuming that the plan administrator can document a reasonable expectation that such alternative method of delivery is of comparable reliability.

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(2) Model Blackout Notice

We suggest that the word "expected" be inserted before the blackout start and end dates in the model language provided in the Regulation (item 3 in the model notice). This change would track the comparable language that appears in the Act and Section 2520.101-3(b)(1)(iii) of the Regulation.

In addition, we want to confirm that the model notice sentences referring to individual securities (item 4 in the model notice) may be deleted for plans that don't permit participant-directed investments in individual securities (that is, plans not offering employer stock or a brokerage account investment option).

(3) Contact Name

The Regulation requires the blackout notice to include the name, address and telephone number of the plan administrator or other person whom participants may contact for more information about a plan blackout. Obviously, for a plan with a substantial number of participants, naming a specific individual would be impractical. It would be helpful if the Department would confirm that the blackout notice may refer to "a member of your benefits department", provided that an address and phone number is also provided.

(4) Written Determination by Plan Fiduciary

In cases where 30 days advance notice is not administratively feasible, the Regulation preamble states that the plan administrator must make a written determination that advance notice is not reasonably possible, in order to satisfy the exception set forth in the Act. The Regulation itself refers more generally to a written determination by a plan fiduciary, which tracks the applicable statutory wording. To avoid any misunderstandings, the Department should confirm that any plan fiduciary who has the appropriate authority regarding a blackout may make the written determination.

(5) Individual Participants Situations

We have reviewed a number of situations in which certain transactions for an individual participant may temporarily be prohibited. For plans that allow participants to change their address by phone or internet, for example, a written confirmation of the address change is mailed both to the old address and to the new address. Loans and withdrawals (although not investment exchanges) would be refused for two weeks after the change as an additional security precaution. Participants are informed of this procedure in the course of communicating their change of address to the plan.

Notices of tax liens and court orders may also compel the plan administrator to temporarily prohibit loans or withdrawals from the relevant participant's account until the claim is resolved. An order issued by an administrative agency may have the same effect. Similarly, the receipt of a domestic relations order may prompt the plan administrator to freeze the participant's account (or a portion therefore) pending a

determination that the order satisfies the requirement for a qualified domestic relations order. Construing these situations as blackouts for purposes of the Act would require a constant stream of written determinations by the plan administrator or other fiduciary that advance notice is not reasonably possible.

Finally, some plans may temporarily freeze the "in-kind" distribution of employer stock during a change in corporate ownership or a corporation merger. Assuming that participants may still receive a cash distribution of their account during such period, this does not appear to constitute a blackout for purposes of the Act.

We strongly encourage the Department to review the application of the Act blackout notice requirements to these types of individual participant transactions. It would be extremely helpful to confirm the general conclusion that Congress did not intend apply the Act blackout notice requirements to these types of situations.

(6) Freezing Investment Options Generally Not a Blackout

The Regulation preamble refers to a situation in which a plan administrator concludes that it would be prudent to close an employer stock fund to participant purchases because the employer has entered bankruptcy proceedings. Notwithstanding the facts supporting closure in that situation, it is not clear why the Act notice requirements would be triggered, provided that the participants' rights to make investment exchanges or withdrawals are otherwise unaffected by the fund closure.

A plan sponsor may close an investment option to new investments for various reasons, including the replacement of one investment menu with a different investment menu pursuant to a change in service providers. The sponsor may close a particular investment option due to poor performance or due to a change in its investment option selection guidelines or due to other changes in the plan investment menu.

In any of these cases, a plan may close an investment option to new investments by participants rather than remove it altogether (that is, rather than map the existing fund position to another investment option). The Department should confirm that such an action would not constitute a blackout for purposes of the Act unless the participants are temporarily unable to move their existing investment balances out of the "frozen" option.

We respectfully suggest that some or all of the comments provided above could be addressed in an information release. We expect to submit additional comments on the Regulation in the near future.

Sincerely,

Douglas O. Kant

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cc: John Kimpel, Esq.