AMERICAN BENEFITS COUNCIL

November 21, 2002

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

Re: Blackout Notice Regulation

To Whom It May Concern:

I am writing on behalf of the American Benefits Council (the Council) with regard to the request for comments by the Pension and Welfare Benefits Administration of the Department of Labor (Department) regarding the interim final rule relating to notice of blackout periods to participants and beneficiaries. The Council is a public policy organization representing principally Fortune 500 companies and other organizations that assist employers of all sizes in providing benefits to employees. Collectively, the Council's members either sponsor directly or provide services to retirement and health plans that cover more than 100 million Americans.

The Council commends the Department in producing these interim final rules in a timely manner given the statutory deadline, and we also appreciate the opportunity to convey the concerns of Council members. There are a number of issues in need of additional clarification, and there are other items that are simply impracticable or that impose overly burdensome conditions on plan sponsors and service providers. We feel that if the final rules address these issues, plan participants and beneficiaries will have enhanced information regarding blackout periods and access to their plan accounts without overly burdening plan sponsors and administrators. The specific concerns are detailed below.

As a general comment, however, the final rules should expressly incorporate the concepts of reasonableness and good faith into the compliance requirements for the blackout period notices. The purpose of the rules is to provide participants and beneficiaries with advance notice of temporary plan changes that affect their accounts. If a plan administrator makes reasonable, good faith efforts to provide such notices, and promptly corrects any failure that is brought to its attention, there should clearly be no penalty. Without this type of approach, the final rules could be overly rigid and actually have the reverse effect of forcing employers to extend blackout periods longer than they would normally, as discussed further

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below. The final rules should enhance participant and beneficiary disclosure but not at the expense of the ability to effect investment trades and other participant actions.

Definition of blackout period

Change to the plan. Under section 2520.101-3(d)(1)(ii)(B) of the interim final rule:

> The term "blackout period" does not include a suspension, limitation, or restriction...which is a change to the plan which provides for a regularly scheduled suspension, limitation, or restriction which is disclosed to all affected plan participants or beneficiaries through any summary of material modifications, any materials describing specific investment alternatives under the plan, or any changes thereto....

It would be helpful for the regulations to clarify that this provision applies not only to plan modifications but also to preexisting plan features. The reference to a "change" in the statute should be read to refer to a change in a participant's rights under the plan (which may occur regularly by reason of a plan provision), not to a change in the plan terms or administrative systems. For example, if a plan had a preexisting rule limiting the rights of participants in some way, and that rule had been communicated to participants, such a limitation should clearly not be treated as a blackout period but rather should fall within the "plan change" exclusion.

Second, the statute does not require that the "change" be reflected in the plan document. Moreover, there are many important plan materials, such as materials relating to plan investments or administrative systems, that are typically not contained in the plan document and generally should not be, and the plan document may even incorporate by reference these other materials. Maintaining these materials separately from the plan document makes it much easier to make modifications to adapt to changes in the investment climate or to adapt to systems advances. Maintaining these materials separately from the plan document generally also results in the materials being more readable for participants. If the regulations were to require plan "changes" to be in the plan document, they would force employers to clutter plan documents with excessive amounts of details that are best maintained separately. Accordingly, the regulations should clarify that the "change" need not be set forth in the plan document. The critical statutory requirement is that the change be clearly disclosed to participants. It would not serve any policy purpose to require that changes be contained in the plan document; such a rule would, on the contrary, be very disruptive of current appropriate practices.

One example of a plan change that is typically not in the plan document is a brief freezing of a participant's account that is triggered by a change in mailing address made by the participant through the telephone ('VRS") or the internet. The freeze may apply for a set period of time while a written confirmation of the address change is being provided. Another example is a participant who requests a PIN change through a VRS or the internet; recordkeepers may deny a participant access to the internet system or the VRS until the new PIN is mailed to the participant's home address for security purposes. The participants are informed of this arrangement at the time they change their PIN. To require such administrative details to be contained in the plan document would be burdensome and completely unnecessary.

Regulatory exceptions. Under ERISA section 101(i)(5), the Secretary of Labor may provide for additional exceptions from the blackout period notice rules, provided that the exceptions are in the interests of participants and beneficiaries. We strongly believe that the Secretary should exercise this power to except a category of events that can arguably fit within the definition of a blackout period, but were never intended to be subject to these rules.

There are a wide variety of situations where one participant's account needs to be treated differently in light of developments that arise independently of the employer or the plan. For example, a plan might receive notice of a Federal tax levy with respect to a participant's account. Or a plan could be notified of a dispute with respect to who should receive the death benefits attributable to a deceased participant. A plan might also receive other court orders related to a particular participant's account (such as an order related to the participant's bankruptcy). In all of these cases, it is generally necessary for the plan to freeze at least certain activities (such as withdrawals) with respect to the account until the plan administrator can conduct a proper investigation into the relevant facts and law. After such investigation is complete, it may be subsequently necessary to continue such freeze to some extent in order to comply with the law.

These are not the types of fact patterns that Congress had in mind in enacting the blackout period notice rules. These are instances where it is the participant's own situation, not the employer's or the plan's, that is causing the participant's plan account to be restricted. In such circumstances, the participant or beneficiary generally has full knowledge of the situation long before the plan does. Moreover, where the participant is the one causing the account restrictions, there is little justification for subjecting a plan to a detailed set of notice rules and to the threat of onerous penalties.

Accordingly, we urge the Department to use its regulatory authority to exempt situations where a suspension of a participant's rights is caused by events that

are not initiated by the employer or the plan and that are peculiar to the participant.[1]

QDROs. We believe that restrictions placed on accounts in accordance with a plan's written procedures for determining the qualified status of domestic relations orders ("DROs") should be broadly exempted from the blackout period notice rules. Congress clearly intended this result: ERISA section 101(i)(7)(B)(iii) expressly excludes from the definition of a blackout period any restrictions attributable to a qualified domestic relations order ("QDRO"). Some, however, have raised the following concern. When a plan administrator first receives a domestic relations order ("DRO") (or preliminary materials such as a draft DRO or a notice of an imminent DRO), the administrator's fiduciary duty under ERISA section 206(d)(3)(H) would generally be to immediately segregate the portion of the account to which the DRO relates and to prohibit withdrawals and loans by the participant, pending a determination of whether the DRO is qualified. (In many cases, the prohibition on withdrawals and loans is applied to the entire account, since the scope of the DRO (or draft DRO) may be subject to change.) The concern is that this prudent and legally required course of action may violate the 30-day advance notice rules if (1) the DRO is subsequently determined not to be qualified and (2) the statutory exception is narrowly interpreted not to apply where a DRO is determined not to be qualified.

We strongly believe that such an interpretation of the statute is clearly contrary to Congressional intent, sound principles of statutory construction, and public policy. As noted, ERISA section 206(d)(3) already establishes a set of rules with respect to DROs (or the preliminary materials referred to above), including the following: (1) a requirement that the plan administrator have written procedures for determining the qualified status of DROs, (2) a requirement of notice to affected parties triggered by receipt of a DRO, and (3) required segregation of the participant's account. It does not seem possible that Congress could have intended the exception for QDROs not to apply in cases where a plan administrator is acting in accordance with these statutorily required rules. Such a strange interpretation would inevitably lead to countless unavoidable violations of the blackout period notice rules. That cannot have been Congress' intent. Accordingly, we urge the Department to clarify that the statutory exclusion would apply in the above case (i.e., where the participant's account is restricted in accordance with the plan's written procedures for determining the

[1] If such an exception is not provided, it should be permissible for a fiduciary to make one written determination that specified account restrictions are required by ERISA section 404(a)(1)(A) or (B) in the case of certain events (such as a dispute regarding death benefits or a bankruptcy-related order). If this is communicated to participants, such a determination should fit within the "plan change" rule. Even if not communicated, the exception in ERISA section 101(i)(2)(C)(i) would apply. (In the event that the exception in ERISA section 101(i)(2)(C)(i) is relied on, however, additional flexibility would be needed with respect to the requirement that the plan administrator specify the ending date of the blackout period. The ending date in the case of a death benefit dispute, for example, will generally be impossible to predict.)

qualified status of DROs, but the DRO is subsequently determined not to be qualified).

There are also alternative means to reach the same or a similar result. The regulatory authority granted in ERISA section 101(i)(5) would clearly enable the Department to reach the above result, even if the Department were to disagree about the scope of section 101(i)(7)(B)(iii). In addition, the more general rule discussed above (under "Regulatory exceptions") would address the DRO situation also. Finally, at a minimum, it could be clarified that the immediate suspension of rights can be justified by ERISA section 101(i)(2)(C)(i); a failure to immediately suspend withdrawal and loan rights may well be a violation of a fiduciary's duties under ERISA.

Quarterly freezes. Many plans provide for a quarterly freeze on certain investment activity. These quarterly freezes are timed to coincide with the release of earnings reports and are intended to prevent insider trading. In many cases, the dates of the quarterly freezes are fixed and the dates are communicated to participants; in these cases, the freezes would fit squarely within the "plan change" rule. However, in other cases, the dates of the quarterly freezes are determined on a quarter-by-quarter basis to ensure that the freeze achieves its intended purpose but is also no longer than necessary. These "varying freezes" are also communicated to participants through general plan materials which explain that the exact dates will be determined each quarter. As the precise dates are determined, they are communicated, but possibly not in the precise manner or at the exact times required by the new rule.

We urge the department to clarify that the "varying freezes" are also within the plan change rule as long as the varying freeze period is communicated in plan materials. In these circumstances, participants are clearly given sufficient advance notice of the freeze. Moreover, a contrary rule would in most cases lead to a very disadvantageous result for participants: many plans would shift to a fixed freeze period that would generally be longer than necessary. In other words, if the rules punish plans that minimize the freeze period based on the facts of each quarter, such plans will be effectively forced to stop minimizing the plan freeze periods. This hardly seems to be a result that the Department would favor.

Indefinite restrictions. In some cases, restrictions are imposed indefinitely with the expectation that if circumstances change, the restrictions can be lifted. This can arise where an investment option is performing poorly and new investment in the option is prohibited. In those cases, the expectation is that the restrictions will be indefinite and thus not within the definition of a blackout period (which must be "temporary"). It should be clarified that a subsequent change in the facts leading to a lifting of the restrictions should not retroactively convert the restriction into a blackout period.

Beginning and ending dates

One of the troublesome issues posed by the interim final rule involves the apparent requirement that the notice specify the exact days on which the blackout period will begin and end and, unless impracticable, provide a notice of any changes in those dates. The Council strongly urges the Department to provide additional flexibility with respect to designating the beginning and ending dates, especially the ending date. To do otherwise may needlessly drive up the costs of plan administration and result in longer blackout periods than would ordinarily be the case. Specifically, the final rules should allow plan sponsors to provide an estimate of the ending date of the blackout period with a reference to the possibility that the blackout period could actually end a specified number of days earlier or later. If the blackout period ends within the range of days specified in the initial notice, no notice of a change in the ending date would be required. This recommendation is based on the fact that it is not unusual for blackout periods to end earlier than expected or to be prolonged for a short number of days (due to resolution of small information system issues, minor discrepancies in participant data, or some other minor delay in restarting plan administrative systems).

For example, suppose an administrator issues a blackout period notice at least 30 days prior to a January 1 beginning date and identifies a January 15 ending date. However, the blackout restrictions actually are lifted on January 18. As long as the initial notice identified the expected end date of January 15 with a date range of plus or minus 3 business days, the plan administrator should not have to send out an updated notice.

Without this flexibility with respect to ending dates, plan sponsors and administrators will seek ways of complying that minimize unnecessary costs, including the use of conservative estimates of the blackout period (i.e., choosing the maximum expected blackout period or perhaps longer). This would avoid the potentially significant cost to the plan of providing a notice of a change to a later ending date. In addition, an inflexible rule regarding ending dates could discourage employers from ending the blackout period prior to the originally estimated ending date. If an administrator had to specify a single ending date, ending before that date could cost the plan a significant amount in providing notice of the change; thus, a prudent fiduciary might feel compelled not to end the period early. These results would be especially unfortunate since the driving motive behind the Act's provisions is to enhance participant access to their plan investments.

Another aspect of the ending date rule would be important to clarify. In the context of changing recordkeepers, participant's PINs may be changed. In those cases, the account restrictions with respect to any participant may not be lifted as a practical matter until the participant receives the new PIN is in the mail. Predicting mail receipt is, of course, not possible; accordingly, it should be

clarified that it is permissible to provide, as an ending date, a range of dates during which the new PINs will be mailed.

Finally, in finalizing this regulation, the Department should be aware that blackout periods can begin or end on different dates for different groups of participants and, in some cases, the plan administrator may not be in control of the beginning or ending date. For example, in the context of a change in recordkeepers, the length of the necessary blackout period for self-directed brokerage accounts may well be quite different from the length of the period for other accounts. Moreover, the beginning or ending date for self-directed brokerage accounts may be determined by the brokerage firms, not by the plan administrator. This further underscores the need to provide more flexibility with respect to the designation of a beginning or ending date.

Updated notice recipients

As noted, under the interim final rule, an updated notice is required in the case of a change in the beginning or ending date of a blackout period, unless it is impracticable to provide such a notice in advance of the termination of the blackout period.

The Council believes that the final rules should clarify that it is permissible, both under the blackout period notice rules and the general fiduciary rules, for an updated notice to be provided only to those participants and beneficiaries for whom it is practicable to provide the notice before the termination of the blackout period. Whether the employer and administrator can issue an updated notice regarding a later-than-expected end to the blackout period will depend on, among other factors, the employer's size, the employee and beneficiary demographic composition, and the available means of communication. For a small workforce with only a few terminated participants, an updated notice to all participants and beneficiaries via email may be possible. For a larger workforce with significant numbers of terminated participants and beneficiaries, email notification of the revised ending date may still be practicable for active workers, but neither emails nor regular mail may be practicable for terminated participants and beneficiaries. Under the facts of the example described above, if the need for a change in the January 15 ending date is not recognized until shortly before January 15, cards and letters with an updated notice to terminated participants and beneficiaries may not arrive until well after the close of the blackout period on January 18. In such a case, it would be reasonable to send updated notices via email to active workers, but according to the language of the interim final rule, notice to terminated participants and beneficiaries via regular mail may be impracticable such that it would be permissible not to send the notice. A similar approach would apply if the blackout period ends earlier than expected, in which case it may not make sense to send out a full, updated notice to all participants.

Provision of additional information

The regulations should clarify that it is permissible to combine the blackout period notice with other information being provided to the participants and beneficiaries, as long as the materials are provided in such a way as to call attention to the blackout period notice.

In many cases, blackout periods are related to other plan changes, such as changes in available investments or administrative systems. Accordingly, to reduce plan costs, it would be prudent for the plan administrator to combine the blackout period notice with an explanation of the other changes. It is also helpful for participants to have a single source for information regarding upcoming changes. Finally, additional explanations can help participants understand the blackout period better by putting it in the context of related changes. For example, in a recordkeeping conversion, participant investments are often mapped to new investments during the blackout period. It would be very helpful for participants to be simultaneously notified of this process, since it would give more meaning to the model notice language regarding the importance of evaluating the impact of the impending blackout period on one's investments.

Penalty

Section 2560.502c-7 of the interim final rule provides that the penalty for each violation of the blackout period notice rules:

> shall not exceed $100 a day, computed from the date of the administrator's failure or refusal to provide a notice of blackout period up to and including the date that is the final day of the blackout period for which the notice was required.

Assume, for example, that a blackout period was to commence October 1 and end October 15; correspondingly, the notice was required to be provided by no later than September 1. As we read the above provision, it appears that if the notice is given one day late on September 2, the maximum penalty is still $100 (per participant or beneficiary) for each day between September 1 and October 15. Thus, for a one-day violation, the maximum penalty is determined as if it were a 45-day violation.

We strongly urge the Department to correct this anomalous rule. There is no basis in the statute for this result. Nor is there any policy justification for it. The penalty structure should, of course, promote prompt correction of any failure; in the above example, the maximum penalty would be determined in the same manner even if the plan administrator never provided a notice.

Finally, with respect to the notice required to be provided to the issuer, we would urge that the regulations not apply in an overly mechanical rule. If, for example, the plan administrator is the issuer (or an affiliate) or a committee composed of employees of the issuer (or an affiliate), the issuer is clearly aware of the blackout period. Imposing a penalty for a failure by one employee of the issuer to send a notice to another employee of the issuer would serve no purpose and the regulations should reflect this perspective.

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We appreciate the opportunity to provide comments on this important issue. If we can provide further assistance, please contact me or John C. Scott, the Council's Director, Retirement Policy.

Sincerely,

James A. Klein
President

Cc: The Honorable Ann Lynn Combs, Assistant Secretary of Labor
The Honorable Paul Zuraski, Deputy Assistant Secretary of Labor