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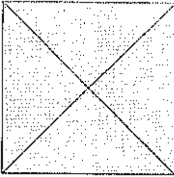

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November 20, 2002

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 and Blackout Civil Penalty Regulations

I am writing on behalf of the SPARK Institute to submit comments regarding the interim final rules under Sections 101(i) and 502(c)(7) of the Employee Retirement Income Security Act of 1974 (ERISA), which were published in the Federal Register on October 21, 2002. These interim final rules relate to amendments to ERISA contained in the Sarbanes-Oxley Act of 2002 ("Sarbanes-Oxley") to require plan administrators to provide participants and beneficiaries at least 30 days written notice before a blackout period, and to provide for civil penalties for failures to satisfy the notice requirements.

The SPARK Institute is the legislative and educational arm of SPARK, the Society of Professional Administrators and Recordkeepers. SPARK was founded in 1989 as an inter-industry association of service providers to employee benefit plans, particularly defined contribution plans, such as 401(k) plans. SPARK represents over 250 member companies, including banks, insurance companies, mutual fund managers, third party administrators, and securities dealers. These member companies currently provide services to plans holding more than 95 percent of the defined contribution assets in the United States.

We appreciate the opportunity to comment upon these interim final rules, and we commend the Department for drafting the interim final rules in such a timely manner.

However, in the interest of making the blackout notice requirements less burdensome and more administrable, we respectfully request that the Department consider the following suggested changes and clarifications.

1. **The Terms Administrator and Plan Administrator**. The interim final rules use the terms "administrator" and "plan administrator" interchangeably in various places. For example, the rules provide that the "administrator" is required to satisfy the general advance notice requirement and the requirement that an updated notice be provided if there is a change in the beginning or ending date of the blackout period. On the other hand, the rules require that the "plan administrator" provide an updated notice to the issuer of any employer securities held by the plan and subject to the blackout, and provide that the model notice contained in the rules is intended to assist "plan administrators" in discharging their notice obligations.

The Department should clarify that the "administrator" or "plan administrator" required to satisfy the various blackout notice requirements is the "administrator" of the plan, as defined by ERISA section 3(16)(A) – i.e., the person specifically so designated by the terms of the plan document or, if an administrator is not so designated, the plan sponsor. This clarification (1) would be consistent with the other reporting and disclosure requirements in Part 1 of ERISA, which generally require that the "administrator" of an employee benefit plan satisfy such requirements, and (2) would reduce the risk that actions regarding notice failures could be brought against non-fiduciary recordkeepers or third party administrators ("TPAs"), parties who by definition do not have discretion or control over the administration of the plan.

Similarly, there should be clarification regarding how the Department will apply language in the penalty rule (sec. 2560.502c-7(j)) that provides that, "if more than one person is responsible as administrator for the failure to provide a notice of blackout period . . ., all such persons shall be jointly and severally liable for such failure." Generally, only one "person" -- e.g., the employer or a named committee or individual -- is the ERISA sec. 3(16)(A) "administrator" of a plan. The Department should clarify that a TPA or recordkeeper is not responsible for providing the notice or for penalties for failures unless the TPA or recordkeeper is named as the administrator under the plan.

2. **Definition of Blackout Period**. The definition of "blackout period" in the interim final rules is virtually identical to the definition in new ERISA section 101(i)(7). In general, a "blackout period" is defined as any period for which the ability of a participant to direct assets, obtain distributions, or obtain loans, which is otherwise available under the terms of such plan, is temporarily suspended for a period of more than 3 consecutive business days. Excluded from this definition are a suspension, limitation, or restriction (1) required by federal securities laws, (2) with respect to one or more

individuals in accordance with a qualified domestic relations order, and (3) "which is a change to the plan which provides for a regularly scheduled suspension . . . which is disclosed to participants or beneficiaries through any summary of material modifications, any materials describing specific investment alternatives under the plan, or any changes thereto."

The interim final rules do not elaborate upon or clarify the reference to rights "otherwise available under the terms of the plan," or the exception for a suspension that is "a change to the plan which provides for a regularly scheduled suspension . . . which is disclosed to participants or beneficiaries" through certain documents. Without clarification, these ambiguous phrases raise issues regarding the specific documents in which plan or investment provider restrictions on trading, loans, or withdrawals must be disclosed. For example, it is not clear whether plan limits on the number of investment allocation changes in a month have to be included in the plan document to be encompassed within the notion of "rights otherwise available under the terms of the plan." Similarly, it is not clear whether restrictions imposed by investment providers -- such as "equity wash" rules (which limit transfers between stable value funds and competing fixed income investment options in a plan), and rules against "day-trading" (which discourage shareholders in mutual funds that invest in international equities from short-term trading to take advantage of price trends) -- have to be included in the plan document or whether such restrictions fall under the exception for changes that provide for a regularly scheduled suspension, so long as they are disclosed to participants in certain documents.

We recommend that the interim final rules be amended to clarify that these types of restrictions are encompassed within the concept of "rights otherwise available under the terms of the plan" and/or the exception for "regularly scheduled suspensions" -- and therefore do not involve a blackout -- so long as they are disclosed to participants in a summary plan description (SPD), summary of material modifications (SMM), or other documents provided to participants, including materials describing plan investment options.

3. **Specification of Expected Ending Date of Blackout Period.** ERISA Section 101(i)(2)(A)(3) requires that blackout notices include the expected beginning date and length of the blackout period. However, the interim final rules require that the blackout notice specify the expected beginning date and ending date of the blackout period. The rules also require administrators to provide affected participants and beneficiaries with an updated notice if there is a change in the expected beginning or ending date.

Blackout periods often are the result of "conversion" transactions in which a plan

transfers certain administrative and/or investment functions of the plan from one vendor to another. When a plan undergoes a conversion, a blackout with respect to certain plan activities is often necessary to allow accurate records to be compiled and transferred from one vendor to another. At the start of the conversion process, plan fiduciaries are typically able to give a definite date and time for when certain activities will be suspended, and an estimate as to the time period in which they will be suspended. However, it is often impossible for administrators to predict the exact ending date of a blackout period before it begins. A blackout period may end sooner than expected (e.g., because the old vendor's records were in better shape than expected) or be delayed for several days (e.g., because of computer problems or discrepancies in participant account records).

As a practical matter, the interim final rules could result in a requirement that administrators provide two notices – an initial notice with a specific expected ending date and an updated notice to inform participants of any change in that expected ending date. Requiring two notices to participants would be burdensome and increase plan expenses. In fact, requiring a specific ending date and an update on any changes to that date could have the perverse effect of (1) forcing administrators to issue a conservative estimate of the expected ending date, and/or (2) discouraging administrators from terminating a blackout period before the estimated ending date. Accordingly, the Department should amend the rules to give administrators the flexibility to provide a more general estimate of the expected ending date of the blackout period.

4. **Additional Exceptions.** ERISA Section 101(i)(5) grants the Secretary the authority to provide by regulation for additional exceptions to the blackout notice rules if the Secretary determines that the exceptions are in the interests of participants and beneficiaries. We recommend that the Secretary exercise this authority and provide exceptions to the notice rules for the various circumstances in which a restriction or suspension is not related to a plan or employer-wide event and applies solely with respect to a specific individual. One example is where a freeze in activity with respect to a participant's account occurs because the plan receives a notice of federal tax levy with respect to the account and needs to investigate the consequences of the notice. In situations like this one where a freeze occurs because of a participant-specific event that is unrelated to the plan or employer, the participant generally will already be aware of the circumstances behind the freeze, and the administrator should not be required to satisfy detailed notice requirements. Such an exception also would be consistent with the exception in the interim final rules for suspensions with respect to a qualified domestic relations order.

5. **Application of Maximum Penalty Rule.** ERISA Section 502(c)(7)

authorizes the Secretary of Labor to assess a civil penalty of up to $100 per day from the date of a plan administrator's failure to satisfy the blackout notice requirement, and provides that each violation with respect to any single participant or beneficiary is treated as a separate violation. The interim final rules provide that the maximum penalty is 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 example, if 100 plan participants do not receive notice of a blackout period that continues for 20 days, the penalty amount may be up to $10,000 for each of the 50 days in the computation period – the 30 days notice period plus the 20 days blackout period – or $500,000.

The rules do not address whether an administrator may shorten the penalty computation period -- and thereby mitigate the potential penalty -- by providing the blackout notice after the date it was due but before the blackout period ends. Using the above example, one interpretation of the interim final rules is that the Department could use the entire 50-day computation period in computing the maximum penalty even if the notices were provided to participants 29 days before the blackout period commenced. Such a result would reduce the incentive for administrators to provide blackout notices to participants once the 30-day deadline had passed, thereby undermining the principal purposes of the notice requirement -- to give participants advance notice of the blackout (so they have the opportunity to prepare for it) and information about when the blackout period will end (so they know when they can again request transactions). Accordingly, we recommend that the rules be amended to clarify that the penalty computation period ends on the date that the blackout notice is provided.

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We appreciate the opportunity to comment upon these interim final rules. If you have any questions or need any additional information, please feel free to call me at your convenience.

Sincerely,

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Stephen M. Saxon

cc: Robert G. Wuelfing