THE
ERISA
INDUSTRY
COMMITTEE

025

November 20, 2002

By Hand

Pension and Welfare Benefits Administration
Room N-5669
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, D.C. 20210

Attention: Blackout Notice Regulation

Ladies and Gentlemen:

We are pleased to submit the enclosed comments of The ERISA Industry Committee ("ERIC")[1] on the proposed regulation under ERISA § 101(i), regarding written notices with respect to a blackout period.

Respectfully submitted,

Mark J. Ugoretz
President

cc: Ann L. Combs
Alan D. Lebowitz
Morton Klevan
Paul R. Zurawski
Robert J. Doyle
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[1] ERIC is a nonprofit association committed to the advancement of the employee retirement, health, and welfare benefit plans of America's largest employers. ERIC's members provide comprehensive retirement, health care coverage, incentive, and other economic security benefits directly to some 25 million active and retired workers and their families. ERIC has a strong interest in proposals affecting its members' ability to deliver those benefits, their costs and effectiveness, and the role of those benefits in the American economy.

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COMMITTEE

SUBMISSION OF THE ERISA INDUSTRY COMMITTEE TO THE PENSION AND WELFARE BENEFITS ADMINISTRATION U.S. DEPARTMENT OF LABOR

COMMENTS ON THE INTERIM FINAL RULE REGARDING BLACKOUT PERIOD NOTICES

November 20, 2002

The ERISA Industry Committee ("ERIC")[1] is pleased to submit the following comments on the Department's interim final rule under ERISA § 101(i), which was enacted as part of the Sarbanes-Oxley Act of 2002 ("SOA"). In general, § 101(i) requires written notice to be furnished to participants and beneficiaries of individual account plans of any "blackout period" during which their right to direct or diversify investments or to obtain a loan or distribution under the plan is temporarily suspended. *See* SOA § 306(b).

ERISA § 101(i)(5) grants the Secretary of Labor broad authority to provide for exceptions to the notice requirement:

> "The Secretary may provide by regulation for additional exceptions to the requirements of this subsection which the Secretary determines are in the interests of participants and beneficiaries."

ERISA § 101(i)(6) directs the Secretary to issue guidance and model notices that meet the requirements of § 101(i).

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The interim final rule was published in the Federal Register on October 21, 2002. *See* 67 Fed. Reg. 64,766. The preamble to the interim final rule states that comments on the rule must be received by November 20, 2002. Because of the relatively brief period between the publication of the interim final rule and the deadline for filing comments, this submission was prepared with dispatch. ERIC reserves the right to submit additional comments as its members have more time to study, and gain experience with, the rule.

All of ERIC's members sponsor individual account plans, including both relatively small plans, usually sponsored by members' subsidiaries, and some of the largest individual account plans in the country, covering tens of thousands of employees and beneficiaries. These plans commonly experience blackout periods due to events such as mergers, acquisitions, and divestitures, as well as changes in trustees, recordkeepers, and plan investment options. ERIC's members therefore have a vital interest in assuring that the interim final rule achieves its objectives in a fashion that is consistent with effective and efficient plan administration and communication.

Summary of Comments

1. The blackout period notice should be permitted to identify the period within which the ending date of the blackout period is expected to occur rather than the precise ending date. For example, the notice should be permitted to state that the blackout period will end within seven days before or after a specified target ending date -- provided that the administrator furnishes each affected participant and beneficiary with a readily available means (*e.g.*, by calling a designated "800" number) of obtaining updated information regarding the precise ending date.

2. The blackout period notice should be permitted to identify the period within which the beginning date of the blackout period is expected to occur rather than the precise beginning date. For example, the notice should be permitted to state that the blackout period will begin on a specified target beginning date or within seven days thereafter -- provided that the administrator furnishes each affected participant and beneficiary with a readily available means (*e.g.*, by calling a designated "800" number) of obtaining updated information regarding the precise beginning date.

3. A plan administrator should be permitted to send the blackout period notice up to *90* days (rather than up to 60 days) before the last date on which participants and beneficiaries can exercise their affected rights before the start of the blackout period.

4. A plan administrator should not be required to send the blackout period notice to an eligible employee who does not actually participate in the plan and who therefore does not have an account balance under the plan, as long as the administrator provides a blackout period notice to any such employee who subsequently acquires an account balance under the plan coincident with the employee's enrollment in the plan or as soon as practicable after he or she acquires an account balance under the plan (*e.g.*, by reason of a rollover or a plan-to-plan transfer).

5. A blackout period should not include a period during which a company prohibits plan participants from trading in company stock pursuant to reasonable rules, policies, and directives that the company adopts, as prophylactic or precautionary measures, to prevent its directors and employees from violating the securities laws.

6. A participant-initiated transaction should not be treated as creating a blackout period as long as the participant is informed of the consequences of the transaction before the participant initiates the transaction.

7. A blackout period should not include a restriction imposed by a *putative* qualified domestic relations order or by any other court order or federal tax levy or judgment.

8. A blackout period should not include a restriction imposed by a plan on distributions and withdrawals, pending the resolution of conflicting claims to plan benefits (*e.g.*, a dispute among putative beneficiaries regarding their rights to a deceased participant's account).

9. The 30-day advance notice requirement should not apply where the blackout period applies to participants and beneficiaries who are affected by a plan merger or spin-off -- (a) even if participants or beneficiaries already participate in *both* plans or (b) even if the plan merger or spin-off was not the result of a *corporate* merger, acquisition, divestiture, or similar transaction.

10. The interim final rule's provision regarding electronic communications should be revised to incorporate the "reasonably accessible" standard that appears in the statute.

11. The rule should clarify how its effective date and transition rule provisions apply to a plan that does not permit daily transactions, that has a blackout period that begins on or after January 26, 2003, and under which the last day participants and beneficiaries could exercise affected rights occurred *before* January 26, 2003.

Detailed Comments

1. <u>The blackout period notice should be permitted to identify the period within which the ending date of the blackout period is expected to occur rather than the precise ending date. For example, the notice should be permitted to state that the blackout period will end within seven days before or after a specified target ending date -- provided that the administrator furnishes each affected participant and beneficiary with a readily available means (*e.g.*, by calling a designated "800" number) of obtaining updated information regarding the precise ending date.</u>

Section 2520.101-3(b)(1)(iii) of the interim final rule requires the blackout period notice to include the expected beginning date and ending date of the blackout period. Section 2520.101-3(b)(4) provides that if there is a change in the beginning date or ending date, the plan administrator must furnish all affected participants and beneficiaries an updated notice explaining the reason for the change and identifying all material changes in the information contained in the prior notice.

One major difficulty created by these requirements is that the ending date is highly uncertain. Because the ending date depends on the date by which recordkeeping and other tasks (*e.g.*, data clean-up and reconciliation) are completed, this date is difficult, if not impossible, to predict with precision far in advance of the beginning of the blackout period.

The rule thus makes it likely that plan administrators will be required to send out numerous corrective notices as the ending date draws near. Sending out multiple notices to affected participants and beneficiaries can confuse participants and beneficiaries and will be costly -- especially for large plans covering tens of thousands of participants and beneficiaries. Because plans commonly pay their own administration expenses, many of the participants and beneficiaries of individual account plans will ultimately bear any increase in administration expenses created by the need to send out multiple notices.

The confusion and expense created by multiple notices are unnecessary -- particularly where there is only a minor change (*e.g.*, a few days) in the ending date. We urge the Department to give plan administrators the option of stating in the notice that the blackout period will end within seven days before or after a specified target ending date -- provided that the administrator furnishes each affected participant and beneficiary with a readily available means (*e.g.*, by calling a designated "800" number or by visiting a designated web site) to obtain updated information regarding the precise ending date. This approach will allow the administrator to give affected participants and beneficiaries timely and accurate information. If a participant or beneficiary wishes to obtain updated information, he or she will be able to get it by consulting the designated "800" number or web site.

2. <u>The blackout period notice should be permitted to identify the period within which the beginning date of the blackout period is expected to occur rather than the precise beginning date. For example, the notice should be permitted to state that the blackout period will begin on a specified target beginning date or within seven days thereafter -- provided that the administrator furnishes each affected participant and beneficiary with a readily available means (*e.g.*, by calling a designated "800" number) of obtaining updated information regarding the precise beginning date</u>.

For reasons similar to those identified in the preceding comment, the interim final rule should give plans greater latitude regarding the identification of the blackout period's beginning date. The beginning date often hinges on the date when third parties (*e.g.*, plan recordkeepers) are prepared to take action. Because the blackout period notice must be sent at least 30 days before the last date on which participants and beneficiaries can exercise the affected rights before the start of the blackout period, unanticipated events can, and commonly do, postpone the beginning date.

Since the beginning date is rarely accelerated, our recommendation regarding the beginning date differs slightly from our recommendation regarding the ending date. We urge the Department to give plan administrators the option of stating in the notice that the blackout period will begin on a specified target beginning date or within seven days thereafter -- provided that the administrator furnishes each affected participant and beneficiary with a readily available means (*e.g.*, by calling a designated "800" number or by visiting a designated web site) to obtain updated information regarding the precise beginning date. This approach will allow the

administrator to give affected participants and beneficiaries timely and accurate information. If a participant or beneficiary wishes to obtain current information, he or she will be able to get it by consulting the designated "800" number or web site.

3. A plan administrator should be permitted to send the blackout period notice up to *90* days (rather than up to 60 days) before the last date on which participants and beneficiaries can exercise their affected rights before the start of the blackout period.

Section 2520.101-3(b)(2)(i) generally requires the blackout period notice to be furnished at least 30 days, but not more than 60 days, before the last date on which the affected participants and beneficiaries can exercise their affected rights before the start of the blackout period. The preamble to the rule states that the 60-day limit was imposed in order to assure that the notice is not furnished so far in advance that it undermines the importance of the notice and that the rule does not prevent an administrator from furnishing an earlier notice, *provided* that the administrator furnishes *another* notice that complies with the rule's content and timing requirements. *See* 67 Fed. Reg. 64,767.

A 90-day period would have distinct advantages over a 60-day period. It would allow administrators to distribute blackout period notices together with participants' quarterly account statements. By allowing plan administrators to distribute these two statements at the same time, a 90-day rule would relieve plans of significant additional distribution costs, and also make it more likely that the blackout period notice would attract the attention of plan participants, since participants take great interest in their quarterly statements. We would not object to a requirement that, if the blackout period notice is distributed together with the quarterly statement, the notice must be presented conspicuously (*e.g.*, in large type) and/or in a document that is separate from the quarterly statement.

A 90-day period also would be consistent with the 90-day advance notice provision in Treas. Reg. § 1.411(d)-4, Q&A-2(e)(1)(ii)(A), which permits a defined contribution plan to be amended to eliminate an optional form of payment without violating the anti-cutback rule in Code § 411(d)(6) and ERISA § 204(g) where the amendment applies to a participant with an annuity starting date that does not precede the 90th day after the date the participant is furnished with a summary of the amendment. Allowing a 90-day period for the blackout period notice would permit a plan administrator to combine the blackout period notice with a notice under Q&A-2(e)(1)(ii)(A). If a plan wishes to eliminate certain optional forms of payment at the beginning of a blackout period, a 90-day advance notice rule would allow the plan to improve and coordinate its communications materials, and to reduce plan expenses, by distributing the two notices together.

A 90-day period is not so lengthy that it will undermine the importance of the notice. In fact, it will give participants and beneficiaries a *greater* opportunity to analyze the implications of the blackout period and to consider thoughtfully any actions they should take in anticipation of the blackout.

A 90-day period also has the added advantage of allowing administrators to avoid inundating participants and beneficiaries with too much information within a compressed period of time. Some administrators will wish to give the statutory notice well in advance, and to

supplement the statutory notice with subsequent, shorter, and more targeted notices as the blackout period approaches. We would have no objection to a requirement that if an administrator uses this approach, a subsequent notice that is given within the 60-day period must refer to the prior statutory notice and must give participants and beneficiaries instructions on how they may request another copy of the statutory notice.

4. A plan administrator should not be required to send the blackout period notice to an eligible employee who does not actually participate in the plan and who therefore does not have an account balance under the plan, as long as the administrator provides a blackout period notice to any such employee who subsequently acquires an account balance under the plan coincident with the employee's enrollment in the plan or as soon as practicable after he or she acquires an account balance under the plan (*e.g.*, by reason of a rollover or a plan-to-plan transfer).

Because many eligible employees do not actually participate in an individual account plan (*e.g.*, because they do not wish to make elective contributions to the plan), there are often many more eligible employees than there are actual participants with account balances in the plan. Since such employees do not have account balances under the plan, they are not "affected" participants and have no need for blackout period notices. Requiring plans to send blackout period notices to such employees would saddle plans with needless costs (which are commonly borne by plans and their participants and beneficiaries) and would serve no useful purpose

If, after a blackout period notice is distributed, an eligible employee becomes an active plan participant, the administrator can furnish the employee with a blackout period notice either contemporaneously with his or her enrollment in the plan or as soon as practicable thereafter. This is analogous to the case of a newly-hired employee who becomes eligible for the plan between the date the notice is distributed and the beginning of the blackout period; the administrator can likewise furnish the newly-hired employee with a notice upon enrollment in the plan or as soon as practicable thereafter.

5. A blackout period should not include a period during which a company prohibits plan participants from trading in company stock pursuant to reasonable rules, policies, and directives that the company adopts, as prophylactic or precautionary measures, to prevent its directors and employees from violating the securities laws.

Section 2520.101-3(d)(1)(ii)(A) excludes from the definition of "blackout period" a suspension, limitation, or restriction that "occurs by reason of the application of the securities laws (as defined in section 3(a)(47) of the Securities Exchange Act of 1934)."

The rule should make clear that this exclusion covers not only restrictions that are literally mandated by specific requirements in the securities laws, but also reasonable rules, policies, and directives that a company adopts, as prophylactic or precautionary measures, to prevent its directors and employees from violating the securities laws. For example, some companies have a policy prohibiting officers and directors from trading in the company's stock within a specified period immediately preceding and following release of the company's quarterly financial results. As long as the restrictions are reasonably designed to prevent

violations of the securities laws, the restrictions should be considered covered by the exclusion and outside the definition of "blackout period." A different view would either necessitate repetitive and needless blackout period notices or discourage companies from adopting such prophylactic measures -- contrary to the policies of the securities laws.

6. A participant-initiated transaction should not be treated as creating a blackout period as long as the participant is informed of the consequences of the transaction before the participant initiates the transaction.

Some plans provide that, after a participant initiates certain transactions under the plan (*e.g.*, a withdrawal of funds from the plan or an investment in certain of the plan's investment funds), the participant is prohibited from engaging in certain other transactions for a specified period of time (*e.g.*, making another withdrawal or transferring funds out of the investment fund in which he or she has just invested). The rule should be revised to make clear that this restriction does not create a blackout period by virtue of the exclusion in § 2520.101-3(d)(1)(ii)(B) for regularly-scheduled suspensions, restrictions, and limitations that are disclosed to participants and beneficiaries. The fact that a suspension, restriction, or limitation is triggered by a participant-initiated transaction should not cause it to fail to be deemed to be "regularly scheduled" within the meaning of the rule. The suspension, restriction, or limitation is regularly scheduled because it is scheduled to be imposed regularly following designated participant-initiated transactions.[2]

7. A blackout period should not include a restriction imposed by a *putative* qualified domestic relations order or by any other court order or federal tax levy or judgment.

Section 2520.101-3(d)(1)(ii)(C) excludes from the definition of "blackout period" a suspension, limitation, or restriction that "applies solely to one or more individuals, each of whom is a participant, an alternate payee (as defined in section 206(d)(3)(K) of [ERISA]), or any other beneficiary pursuant to a qualified domestic relations order (as defined in section 206(d)(3)(B)(i) of [ERISA])." The rule should make clear that this exclusion applies to putative qualified domestic relations orders ("QDROs") as well.

Plan administrators commonly receive court orders that purport to be QDROs, but that require review (and often revision as well) before the administrator can determine that they are QDROs within the meaning of ERISA § 206(d)(3)(B)(i). During the period in which the issue of whether an order qualifies as a QDRO is being addressed, the administrator is required to account separately for the amounts that would have been payable to the alternate payee if the order had been determined to be a QDRO. *See* ERISA § 206(d)(3)(H); *see also* Staff, Joint Comm. on Taxation, Explanation of Technical Corrections to the Tax Reform Act of 1984 and Other Recent Tax Legislation, at 224 (May 15, 1987) ("Joint Comm. Explanation"); Pension &

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[2] Even if the Department is not prepared to agree that the exclusion for regularly-scheduled suspensions in § 2520.101-3(d)(1)(ii)(B) applies in these circumstances, the Department is authorized in any event to create a regulatory exception pursuant to ERISA § 101(i)(5).

Welfare Benefits Administration, U.S. Dep't of Labor, "QDROs: The Division of Pensions Through Qualified Domestic Relations Orders," at Questions 2-11 through 2-13.

Similarly, if a court issues a restraining order prohibiting the disposition of a participant's benefits pending resolution of a dispute with respect to a domestic relations order, the plan administrator is required to honor the order. *See* Joint Comm. Explanation at 224.

In addition, plan administrators are authorized to delay payment of benefit for a reasonable period of time if the administrator receives notice that a domestic relations order is being sought. Id. at 225.

Finally, distribution of a participant's or beneficiary's benefit may be restricted or suspended pursuant to a federal tax levy or judgment. *See* Treas. Reg. § 1.401(a)-13(b)(2).

Although none of these restrictions is imposed by a QDRO, none of them should be regarded as creating a blackout period for purposes of the notice requirement in § 101(i). These restrictions arise because of events outside the plan and are dictated by parties other than by the plan or the plan administrator.[3] They are not the kind of restrictions that Congress intended to address in SOA. *See also* ERISA § 101(i)(5) (authorizing the creation of regulatory exceptions).

8. A blackout period should not include a restriction imposed by a plan on distributions and withdrawals, pending the resolution of conflicting claims to plan benefits (*e.g.*, a dispute among putative beneficiaries regarding their rights to a deceased participant's account).

From time to time, plan administrators are confronted with conflicting claims to plan benefits. For example, two or more individuals might each claim to be the sole beneficiary of a deceased participant under the plan. In these circumstances, the plan administrator commonly prohibits distributions to any of the competing claimants until the dispute is resolved to the administrator's satisfaction. This is not the kind of restriction contemplated by Congress when it enacted the notice requirement, and it should be excluded from the definition of "blackout period." An exception to cover this situations is in the interest of participants and beneficiaries, and should be granted pursuant to the authority conferred by § 101(i)(5).

9. The 30-day advance notice requirement should not apply where the blackout period applies to participants and beneficiaries who are affected by a plan merger or spin-off -- (a) even if participants or beneficiaries already participate in *both* plans or (b) even if the plan merger or

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[3] An extreme example illustrates the point. Suppose a plan participant is held captive, *incommunicado*, by a kidnapper. No one would seriously contend that this creates a blackout period that (after the plan administrator becomes aware of the participant's plight) triggers the blackout period notice requirement. The reason is that the participant's inability to effect plan transactions during the period of captivity is the result of actions outside the design and administration of the plan.

spin-off was not the result of a *corporate* merger, acquisition, divestiture, or similar transaction.

Section 2520.101-3(b)(2)(ii)(C) provides relief from the 30-day advance notice requirement where the "blackout period applies only to one or more participants or beneficiaries solely in connection with their becoming, or ceasing to be, participants or beneficiaries of the plan as a result of a merger, acquisition, divestiture, or similar transaction involving the plan or plan sponsor."

The Department should make clear that this provision applies even where the affected participants participate in *both* plans immediately before the plan merger. Suppose, for example, that Company A (which sponsors Plan A) acquires Company B (which sponsors Plan B), that effective upon the acquisition, Plan B is frozen (and *not* merged into Plan A), that Company B's employees are immediately covered by Plan A following the acquisition, and that Plan B is merged into Plan A at a later date (for example, two months later). In the event of a blackout period when Plan B is merged into Plan A, § 2520.101-3(b)(2)(ii)(C) should apply even though the Plan B participants were participating in Plan A immediately before the merger. If Plans A and B had been combined in one step (in which the Plans had been merged and the Plan B participants had started contributing to Plan A at the same time), § 2520.101-3(b)(2)(ii)(C) would have applied. The result should be the same if Plans A and B are combined in two steps rather than in one.

In addition, employers commonly merge two or more plans to form a single plan completely in the absence of a corporate merger or acquisition. The Department should make clear that § 2520.101-3(b)(2)(ii)(C) applies in these circumstances. The interim final rule already appears to contemplate this result, since it applies to "a merger, acquisition, divestiture, or similar transaction *involving the plan* or plan sponsor" (emphasis added).

10. The interim final rule's provision regarding electronic communications should be revised to incorporate the "reasonably accessible" standard that appears in the statute.

ERISA § 101(i)(2)(D) provides that a blackout period notice "shall be in writing, except that such notice may be in electronic or other form to the extent that such form is *reasonably accessible* to the recipient" (emphasis added).

By contrast, § 2520.101-3(b)(3) provides that the blackout period notice "shall be in writing and furnished to affected participants and beneficiaries in any manner consistent with the requirements of § 2520.104b-1 of this chapter, including paragraph (c) of that section relating to the use of electronic media." The requirements of § 2520.104b-1, however, go well beyond requiring that electronic communications be "reasonably accessible" as mandated by the statute. In general terms, § 2520.104b-1 is largely designed to require "actual receipt" of electronic communications rather than reasonable accessibility, and requires that participants be furnished, upon request, with a paper version of an electronically-furnished document. Moreover, in the case of participants who receive electronic communications outside the workplace, the regulations require the plan to obtain the participant's consent to receipt of information in electronic form. *See* 29 C.F.R. § 2520.104b-1(c)(2).

Because § 2520.101-3(b)(3) imposes conditions that are far more restrictive than those mandated by § 101(i)(2)(D), this section of the interim final rule goes beyond what the statute requires. Section 2520.101-3(b)(3) should be revised to make it consistent with the statute.

11. The Department should clarify how the rule's effective date and transition rule provisions apply to a plan that does not permit daily transactions, that has a blackout period that begins on or after January 26, 2003, and under which the last day participants and beneficiaries could exercise affected rights occurred *before* January 26, 2003.

Section 2520.101-3(f) states that the rule will apply to any blackout period commencing on or after January 26, 2003, and also provides that for the period from January 26, 2003, to February 25, 2003, plan administrators shall furnish notice as soon as reasonably possible. On the other hand, § 2520.101-3(b)(2)(i) generally requires a blackout period notice to be furnished at least 30 days before "the last date on which [affected] participants and beneficiaries could exercise the affected rights immediately before the commencement of any blackout period." The preamble to the rule states that "*for blackout periods beginning between January 26, 2003 and February 25, 2003,* plan administrators shall furnish notice as soon as reasonably possible. This provision is intended to ensure that a statutorily required notice be provided with *respect to blackout periods which commence before February 26, 2003.*" 67 Fed. Reg. 64,769 (emphases added).

For a plan that does not permit daily transactions (*e.g.*, a plan with monthly or quarterly trading), there may be a lengthy interval between the last day on which participants and beneficiaries can exercise their affected rights before the blackout period and the date on which the blackout period begins. Under the interim final rule, for example, in the case of a plan that permits participants to make certain elections only once a year (*e.g.*, in-service withdrawals as of every March 1st), a blackout period that begins on March 1, 2003, would necessitate a notice at least 30 days before March 1, *2002*, long before the interim final rule was issued and long before SOA was enacted. Neither the preamble nor the interim final rule itself make clear how (or even whether) the rule applies to a blackout period in these circumstances. The Department should address this issue. We will be pleased to meet with the Department to discuss this issue as well as the other issues we have raised.

We very much appreciate the opportunity to submit these comments. We look forward to working with the Department to improve the interim final rule.

THE ERISA INDUSTRY COMMITTEE