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Office of Regulations and Interpretations
Pension and Welfare Benefits Administration
U.S. Department of Labor
Washington DC

Attn: Blackout Notice Regulation

November 19, 2002
(submitted via e-mail)

The Profit Sharing / 401k Council of America (PSCA) commends the Department of Labor on its Interim Final Rule Relating To Notice Of Blackout Periods To Participants And Beneficiaries. PSCA is a 1,200 member national association of employer plan sponsors that for over fifty-five years has identified and shared best practices with its members, represented their interests in Washington, and provided analysis and reportage on the latest regulatory changes. PSCA members range in size from a six-employee auto parts manufacturer to firms with hundreds of thousands of employees. Our members believe that profit sharing, 401(k), and related savings and incentive programs strengthen the free-enterprise system, empower and motivate the workforce, improve domestic and international competitiveness, and provide a vital source of retirement income.

The interim rule generally conforms to the statutory language. The additional provisions added by the Secretary, as provided for in the statute, are appropriate and consistent with the statute's intent. PSCA believes the following comments and suggestions will further enhance the effectiveness of this interim rule.

Section 2520.101-3(b)(2)(i) requires that the notice be provided at least thirty days, *but not more than sixty days*, in advance of the last date on which such participants and beneficiaries could exercise the affected rights immediately before the commencement of any blackout period. The sixty-day period is not included in the statutory language. PSCA recognizes the legitimate role of the Department to set a maximum time period in order to insure that the notice is provided in a time period that is closely related to the impending blackout. However, the interim rule creates only a thirty-day window in which a plan administrator must notify all affected participants and individuals. For large plans, thirty days is too short a period to conduct mass mailings, or even mass electronic mailings. Notices are frequently staggered to prevent overwhelming either computer systems or internal mail resources. PSCA recommends a larger window period by allowing the notice to be delivered not more than ninety days in advance.

Section 2520.101-3(c) sets forth requirements of the plan administrator to notify the issuer of any employer securities subject to the blackout period. This requirement is circular in situations in which the

plan administrator is also the issuer. PSCA understands that issuers may have to institute actions to implement a ban on trading of certain employer securities held by directors and executive officers as the result of a blackout. However, when the plan administrator and issuer of employer securities are the same entity, there is no need for a regulatory prescription of the communication. Section 2520.101-3(c) should explicitly not apply when the plan administrator and the issuer of employer securities subject to the blackout are the same legal entity.

Section 2520.101-3(d)(1)(ii)(C) provides that a blackout period does not include a suspension, limitation, or restriction which applies only to one or more individuals, each of whom is the participant, an alternate payee, or any other beneficiary pursuant to a qualified domestic relations order (QDRO) as defined in ERISA. The interim rule follows the statutory language found in section 306(b)(7)(B)(iii) of the Sarbanes-Oxley Act.

Some plan administrators impose limits on an individual account in connection with a divorce proceeding prior to the receipt of a QDRO, consistent with ERISA's intent that retirement assets be properly preserved and allocated during a divorce proceeding. For example, plan administrators must impose limits on an individual account upon receipt of a temporary restraining order issued pursuant to a divorce action or risk contempt of court proceedings. When a restraining order is issued, affected parties are provided notice by the issuing court. Since participants will have already received notice of the divorce proceedings and any restraining order, there is no need to provide any additional notice. The Department should clarify that a blackout period does not include a suspension, limitation, or restriction which applies as the result of a divorce action by specifying that such action will be interpreted as done pursuant to a QDRO, even though a QDRO has not yet been finalized.

Subsection 2520.101-3(e) describes a model notice that may be used to assist plan administrators in discharging their notice requirements. The model notice includes a discussion of the importance of a well-balanced and diversified investment portfolio and the risk in holding substantial portions of individual account assets in the securities of any one company. It is anticipated that some participants and beneficiaries will consider selling employer securities within their individual account plan as the result of this notice. Many participants and beneficiaries are not aware of the special tax treatment of employer securities held within an individual account. PSCA recommends that the model notice include a discussion of the treatment of taxation of net unrealized appreciation of employer securities upon distribution from a plan and that reallocation decisions could have tax consequences.

Thank you for considering these comments. If you have any questions, or if I can be of any assistance, please contact me at 312-441-8550 or Edward Ferrigno, vice president, government affairs, at 202-626-3634.

Sincerely,

David L. Wray
President

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