

DEPARTMENT OF LABOR**Pension and Welfare Benefits
Administration****29 CFR Part 2520****RIN 1210-AA90****Final Rule Relating to Notice of
Blackout Periods to Participants and
Beneficiaries****AGENCY:** Pension and Welfare Benefits
Administration, Labor.**ACTION:** Final rule.

SUMMARY: This document contains a final rule under new section 101(i) of the Employee Retirement Income Security Act of 1974 (the Act or ERISA). Section 101(i) of ERISA, which was enacted into law on July 30, 2002 as part of the Sarbanes-Oxley Act of 2002 (the SOA), provides that written notice is to be provided to affected participants and beneficiaries of individual account plans of any "blackout period" during which their right to direct or diversify investments, obtain a loan or obtain a distribution under the plan may be temporarily suspended. The final rules provide guidance to plan sponsors, administrators, participants and beneficiaries regarding the requirements for furnishing notices of blackout periods in individual account pension plans.

DATES: *Effective date:* This final rule is effective January 26, 2003. *Applicability date:* This final rule shall apply to blackout periods commencing on or after January 26, 2003.

FOR FURTHER INFORMATION CONTACT: Janet A. Walters, Office of Regulations and Interpretations, Pension and Welfare Benefits Administration, U.S. Department of Labor, Washington, DC 20210, (202) 693-8510 (not a toll free number).

SUPPLEMENTARY INFORMATION:**A. Background**

The Sarbanes-Oxley Act of 2002 (the SOA), Pub. L. 107-204, was enacted on July 30, 2002. Section 306(b)(1) of the SOA amended section 101 of ERISA to add a new subsection (i), requiring that administrators of individual account plans provide notice to affected participants and beneficiaries in advance of the commencement of any blackout period. For purposes of this notice requirement, a blackout period generally includes any period during which the ability of participants or beneficiaries to direct or diversify assets credited to their accounts, to obtain loans from the plan or to obtain

distributions from the plan will be temporarily suspended, limited or restricted. The most common reasons for imposition of a blackout period include changes in investment alternatives or recordkeepers, and corporate mergers, acquisitions, and spin-offs that impact the pension coverage of groups of participants.

ERISA section 101(i)(6) provides that the Secretary shall issue model notices that meet the requirements of subsection (i). A model notice is included as part of this final rule.

Section 306(b)(3) of the SOA amends ERISA section 502 to establish a new civil penalty applicable to a plan administrator's failure or refusal to provide the blackout notice required by section 101(i) of ERISA. Final rules implementing this civil penalty appear elsewhere in today's issue of the **Federal Register**.

On October 21, 2002, the Department published an interim final rule, including a model notice, in the **Federal Register** (67 FR 64766) for public comment. The Department received 14 comment letters in response to its request for comments. Set forth below is an overview of the final rule and the public comments submitted on the interim final rule.

**B. Overview of Final Rule and
Comments****1. General**

Paragraph (a) of § 2520.101-3 of the final rule, like the interim final rule, describes the general requirement of section 101(i) of ERISA that administrators of certain individual account plans provide notice of blackout periods to participants and beneficiaries whose rights under the plan will be temporarily suspended, limited or restricted by a blackout period (the "affected participants and beneficiaries"), as well as to issuers of employer securities held by the plan.

**2. Content of the Notice § 2520.101-
3(b)(1)**

Paragraph (b)(1) of § 2520.101-3 of the final rule, like the interim final rule, sets forth the content requirements for notices to be furnished to affected participants and beneficiaries. Paragraph (b)(1) provides that the notices shall be written in a manner calculated to be understood by the average plan participant and sets forth the specific content requirements applicable to the notices. The content requirements of the regulation essentially track the requirements of section 101(i)(2)(A) of the Act. Paragraph (b)(1)(ii), like the interim

final rule, provides that the notice must include a description of the rights otherwise available under the plan to affected participants and beneficiaries that will be temporarily suspended during the blackout period, in addition to the identification of the investments subject to the blackout period.

Paragraph (b)(1)(iii) requires that the notice set forth information concerning the length of the blackout period. The interim final rule required that the notice set forth the expected beginning date and ending date of the blackout period. A number of commenters expressed concern about the difficulty of projecting thirty or more days in advance the specific beginning and ending dates of a blackout period, noting that a wide range of events (e.g., problems with plan records or recordkeeper, extensive document reviews and data reconciliation, required modifications to systems and software) that may affect actual dates. As a result of such events, commenters state that specific dates are likely to be missed, and updated notices with their attendant costs would have to be furnished. In an effort to avoid this problem, sponsors and fiduciaries may be encouraged to establish unnecessarily long blackout periods, thereby depriving participants and beneficiaries of their right to exercise their affected rights for a longer period of time. To address this problem, commenters suggested that the notice be permitted to identify a range of dates during which the blackout period might begin and end. The suggestions included: A range of plus or minus 3 business days, 5 days, 7 days; identification of the "week of ____" during which blackout period might begin and end; and a description of events that might result in the end of the blackout period. Some commenters suggested that where a range of dates is provided, participants also would be furnished a toll-free number or web site that would enable them to determine the specific date on which the blackout period began and ended. One commenter suggested that where other than a specific date is given in the notice, a subsequent less formal notice should be provided to inform the participants of the beginning or ending of the blackout.

The Department continues to believe that it is important that participants and beneficiaries have sufficiently specific information to factor the duration of the blackout into their pre-blackout period investment and other decisions and to apprise participants and beneficiaries as to when they will be able to recommence exercising their rights