

identification of a specific person. Rather, the regulation is intended to require the identification of a sufficiently specific source for answering questions concerning the blackout period that participants and beneficiaries will not be confused as to whom their questions should be addressed. The Department has modified paragraph (b)(1)(vi) of the final rule and paragraph 6 of the model notice (at paragraph (e)(2) of the final rule) by substituting "contact" for "person" to clarify this matter.

Finally, two commenters requested a clarification that notice of blackout periods may be furnished with other information, such as information relating to the change in service providers. There is nothing in the regulation that is intended to preclude blackout notice information from being furnished with other plan information, including benefit statements. However, given the importance of the blackout notice information to participants and beneficiaries, plan administrators should take steps to ensure that the blackout notice information is prominently identified in the furnished materials.

3. Timing of the Notice § 2520.101-3(b)(2)

Paragraph (b)(2) of the final rule, like the interim final rule, describes the timing requirements applicable to furnishing the notice to affected participants and beneficiaries. Paragraph (b)(2)(i) of the interim final rule provided that notice shall be furnished at least 30 days, but not more than 60 days, in advance of the last date on which affected participants and beneficiaries could exercise their affected rights immediately before the commencement of any blackout period. Some commenters indicated that the 30 day window created by the regulation within which to provide notices to affected participants and beneficiaries was not sufficient to prepare and furnish notices and suggested that the regulation extend the 60 day maximum period for furnishing advance notice to 90 days. One commenter suggested changing the minimum notice requirement to 45 days and the maximum period to 90 days, while another commenter suggested changing the minimum requirement to 60 days and the maximum requirement to 90 days to enable furnishing of the notice with quarterly benefit statements. After careful consideration of the comments on this provision, the Department has determined to retain the provision of the interim final rule without change.

The Department continues to believe that the 30 day minimum and 60 day maximum advance notice requirements of the interim final rule serve to ensure that affected participants and beneficiaries have sufficiently timely notice to enable them to both to consider the effects of the blackout period on their investments and financial plans and to take action, if appropriate, in anticipation of the blackout period. The 30-day minimum notice requirement is based on the statutory standard set forth in section 101(i)(2)(B) of ERISA. The 60-day maximum period is intended to ensure that notice is not furnished so far in advance of the commencement date so as to undermine the importance of the notice to affected participants and beneficiaries. The Department is concerned that if the only blackout notice is furnished 90 days in advance, many participants and beneficiaries would be inclined to defer consideration of the effects of the period on their individual accounts and some would, by virtue of the passage of time, forget altogether. As noted in the preamble to the interim final rule, there is nothing in the regulation that precludes an administrator from supplementing the requirements of the regulation, by furnishing earlier or more frequent notices than that required by regulation, provided that at least one notice is provided to participants and beneficiaries that complies with the timing and content of the rule. The Department also notes that, in most instances, plan administrators will have the flexibility to determine a beginning date for the blackout period that would permit timely notification of the blackout period to be made with the quarterly benefit statements furnished to affected participants and beneficiaries.

Like the interim final rule, the final rule requires that the notice periods be counted back from the last date on which the participant or beneficiary could exercise the affected rights immediately before the commencement of the blackout period. One commenter requested a clarification that the time period must take into account implementation of the exercised rights of the participant or beneficiary. The point of the advance notice is to enable participants and beneficiaries to take action in anticipation of a blackout period. Accordingly, merely affording participants or beneficiaries the opportunity to give investment instruction, or request a loan, or request a distribution without the ability to have such instruction or request implemented prior to the blackout

period would be contrary to both the regulation and the statute. Therefore, plan administrators must take into account plan requirements, procedures and other factors that may affect implementation of participant or beneficiary instructions or requests in determining the last date on which participants and beneficiaries could exercise the affected rights before the commencement of the blackout period.

The timing rules are exemplified by the following. In the case of an individual account plan that provides for daily trading, the 30-day period would be counted back from the date immediately preceding the commencement of a blackout period affecting the right to trade. In the case of a plan that permits participants to direct their investments during the first fifteen days of each month, if a plan administrator determines that in order to change recordkeepers, participant direction of their investments will have to be suspended from the 1st to the 15th of May. If the 30-day notice period were counted from the date immediately preceding the commencement of the blackout period, notice could be provided on April 1st, thereby affording participants only 15 days (April 1st–15th) to consider and take action in anticipation of the blackout period. Under the regulation, notice is required to be furnished at least 30 days in advance of the last date on which participants could exercise the affected rights immediately before the commencement of the blackout period. In the immediate example, the last date on which participants could take action in anticipation of the blackout period would be April 15th; accordingly notice would have to be provided to participants not later than March 16th.

As with the interim final rule, all references in the regulation to "days" are references to calendar days, not business days, unless specifically noted otherwise.

Like the interim final rule, the final rule, at paragraph (b)(2)(ii)(A) and (B), sets forth two circumstances under which the 30-day advance notice requirement does not apply. The first circumstance is where a deferral of the blackout period would result in a violation of the exclusive purpose and prudence requirements of section 404(a)(1)(A) and (B) of the Act. For example, the ABC Company has announced that it is filing Chapter 11 bankruptcy. The ABC company's 401(k) plan has ABC common stock as one of its investment options. F, the 401(k) plan fiduciary and administrator, determines that, given this event, it would be prudent to temporarily