

suspend investments in the ABC company stock, effective immediately. In such a situation, F would not, pursuant to § 2520.101–3(b)(2)(ii)(A), be required to give 30 days notice to the affected participants and beneficiaries, but would be required to notify them in writing as soon as possible of the blackout period.

The second circumstance under which the 30-day advance notice requirement does not apply is where commencement of the blackout period is due to events that were unforeseeable or circumstances that were beyond the control of the plan administrator. For example, the DEF company's profit-sharing plan's recordkeeper has informed plan administrator G that due to a major computer failure, the computer program for recording and processing loans and distributions from the plan has been incapacitated and that it will take approximately ten days to fix the system. In such a situation, G would not, pursuant to § 2520.101–3(b)(2)(ii)(B), be required to give 30 days' notice to the affected participants and beneficiaries of their temporary inability to receive loans and distributions from the plan, but would be required to notify them as soon as reasonably possible, unless G determines that such notice in advance of the termination of the blackout is impracticable. The Department anticipates that plan administrators will rely on this exception only in rare circumstances. In this regard, the Department notes that problems attendant to changes in recordkeepers will rarely be unforeseeable or beyond the control of the plan.

In both of the foregoing circumstances, a plan fiduciary, which can be the plan administrator, must make a written determination with respect to the exceptions to the 30-day advance notice requirement. Like the interim final rule, paragraph (b)(2)(iv) of the final rule requires that such determinations be dated and signed by a plan fiduciary.

Section 101(i)(3) of ERISA provides that in any case in which a blackout period applies only to one or more participants or beneficiaries in connection with a merger, acquisition, divestiture, or similar transaction involving the plan or plan sponsor and occurs solely in connection with becoming or ceasing to be a participant or beneficiary under the plan by reason of such merger, acquisition, divestiture, or similar transaction, the 30-day advance notice requirement shall be treated as met if the notice is furnished to such participants and beneficiaries to whom the blackout period applies as

soon as reasonably practicable. Like paragraph (b)(2)(ii)(C) of the interim final rule, the final rule makes clear that notice to such participants and beneficiaries is an exception to the general rule that the 30-day notice be furnished to all affected participants and beneficiaries.

One commenter requested that the foregoing exception be extended to situations where the affected participants participate in both plans immediately before a plan merger and to situations where a plan merger or spin-off is not the result of a corporate merger, acquisition, divestiture or similar transaction. The Department believes that the exception at issue was intended to be applied to the narrow circumstances set forth in the statute. Moreover, the Department is not persuaded, on the basis of the information provided, that the burdens attendant to providing advance notice in the circumstances described by the commenter outweigh the benefits of the notice to affected participants and beneficiaries.

Paragraph (b)(2)(iii), like the interim final rule, provides that, in any case in which the 30-day advance notice rule is not required to be applied, the administrator is required to provide notice as soon as reasonably possible under the circumstances, unless such notice in advance of the termination of the blackout period is impracticable. If, therefore, a plan administrator or other fiduciary concludes under such circumstances that notice could not be furnished in sufficient time in advance of the termination of the blackout period to alert participants and beneficiaries of the termination date and resumption of plan rights, no notice would be required to be provided under this section. Such might be the case where the need for a blackout period is determined only a few days before the beginning of the blackout period and the blackout period is only a few days in duration.

One commenter requested as a clarification as to whether the ability to furnish sufficient advance notice is determined by reference to the ability of the plan administrator to provide such notice to all affected participants and beneficiaries. It is the view of the Department that paragraph (b)(2)(iii), as well as paragraph (b)(4) relating to changes in the length of the blackout period, require that an administrator take steps to furnish notice as soon as reasonably possible to all affected participants and beneficiaries and, therefore, to the extent that an administrator has the ability to furnish notice to some participants and beneficiaries earlier than other

participants and beneficiaries, which may be the case where electronic disclosure is available, the administrator has an obligation to provide such notice, even though providing advance notice to other participants and beneficiaries (e.g., by mail) may be impracticable.

Two commenters suggested that the timing rules should not apply with respect to new participants inasmuch as furnishing such notice as part of the plan enrollment package might be a problem because different third-party vendors may prepare the materials and, in addition, new participants are likely to have little, if any, funds that would be affected by the blackout period. The Department is not persuaded that administrative burdens and small account balances justify an exception to the timing rules for new plan participants. Accordingly, no exception from the timing requirements has been adopted for new participants. The Department notes, however, that if an employee becomes a participant after blackout notices have been furnished to the plan's participants and beneficiaries, the administrator would be required to furnish a notice to the newly eligible employee as soon as reasonably possible pursuant to the exception in § 2520.101–3(b)(2)(ii)(B).

4. Form and Manner of Furnishing Notice § 2520.101–3(b)(3)

Like the interim final rule, paragraph (b)(3) of the final rule provides that the blackout notice must be in writing and may be furnished in any manner permitted under 29 CFR 2520.104b–1, including through electronic media. One commenter indicated that the "reasonably accessible" standard of the SOA is intended to be broader than the standards under § 2520.104b–1 and the regulation, therefore should be modified accordingly. The Department disagrees with the commenter's interpretation of the statute. It is the view of the Department that the standards set forth in § 2520.104b–1(c), relating to the use of electronic media, are intended to ensure reasonable access to electronic communications by participants and beneficiaries consistent with the statute. Accordingly, the provision of the interim final regulation is being retained without modification.

In the preamble to the interim final rule, the Department indicated that a blackout notice will be considered furnished as of the date of mailing, if mailed by first class mail, or as of the date of electronic transmission, if transmitted electronically. Two commenters indicated that the circumstances under which a notice is considered to be furnished should be