

expanded to include delivery by overnight mail, third class mail, private delivery services, and interoffice mail. It is the view of the Department that interoffice mail is essentially hand delivery and, therefore, a document would not be considered furnished until received by the participant. On the other hand, the Department agrees that with the commenters that there are other methods of delivery that should be accorded the same deference as electronic transmission and first class mail. In this regard, it is the view of the Department that a blackout notice will be considered furnished on the date of mailing if it is accomplished by first class mail, certified mail or Express Mail; or on the date of delivery to a "designated private delivery service" within the meaning of 26 U.S.C. 7502(f). In the case of notices furnished electronically, notices will be considered furnished on the date of transmission.

One commenter requested clarification of whether furnishing notice to the last known address of a participant or beneficiary is sufficient. Furnishing a notice to the last known address of a participant or beneficiary would be sufficient where the plan utilizes a method of delivery described in § 2520.104b-1 and the fiduciaries of the plan have taken reasonable steps to keep plan records up-to-date and to locate lost or missing participants.

5. *Changes in Length of Blackout Period § 2520.101(b)(4)*

Paragraph (b)(4) describes the notice requirements applicable to changes in the length of the blackout period. The final rule, like the interim final rule, provides that the administrator is required to provide all affected participants and beneficiaries with an updated notice explaining the reasons for the change in the date(s) and identifying all material changes in the information contained in the prior notice. The updated notice must be provided as soon as reasonably possible, unless such notice in advance of termination of the blackout period is impracticable. In this regard, the Department reiterates that 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.

6. *Notice to Issuer of Employer Securities § 2520.101-3(c)*

Paragraph (c) of § 2520.101-3 of the final rule, like the interim final rule, describes the plan administrator's obligation to provide notice of a blackout period to the issuer of employer securities held by the plan and subject to the blackout period. Paragraph (c)(1) generally provides that the content and timing requirements applicable to the furnishing of notices to participants and beneficiaries also apply to the furnishing of notices to the issuer of employer securities. As with the interim final rule, it is the view of the Department that a plan administrator may satisfy its obligation to notify the issuer by providing the same notice furnished to participants and beneficiaries. Paragraph (c)(2) provides that the notice of the blackout period shall be furnished to the agent for service of legal process for the issuer, unless the issuer has provided the plan administrator the name of another person for service of such notice. Paragraph (c)(2) is intended to ensure that there is no ambiguity as to whom the administrator must serve notice of the blackout period. Pursuant to section 306(a)(6) of the SOA, issuers are required to notify directors, executive officers, and the Securities and Exchange Commission of the blackout period.

Three commenters suggested that notice to the issuer should not be required when the plan administrator and issuer are the same person. The Department does not believe that merely because an issuer and the plan administrator may, as a technical matter, be the same legal entity, that the parties will necessarily be privy to the same information. Nonetheless, there is nothing in the regulation that precludes an issuer of employer securities from designating the plan administrator as the party to receive notices of blackout periods. The Department has amended the regulation, at § 2520.101-3(c), to add a new subparagraph (3) making clear that where an issuer designates the administrator as the person to be furnished notice of a blackout period, the issuer shall be deemed to have been furnished notice on the same date as notice is furnished to affected participants and beneficiaries, thereby relieving the administrator of the obligation to notify itself of a blackout period.

7. *Definitions § 2520.101-3(d)*

a. "Blackout Period"

Paragraph (d)(1) of § 2520.101-3 defines the term "blackout period." The

interim final rule adopted the definition set forth in ERISA section 101(i)(7). The Department received a number of comments on the interim final regulation requesting clarification of specific exclusions from the "blackout period" definition, as well as clarification that certain suspensions, limitations or restrictions imposed on an individual participant's account do not constitute a blackout period as contemplated by the statute or regulation.

"Regularly Scheduled" Exclusion

One commenter requested a clarification that the provisions of paragraph (d)(1)(ii)(B), relating to "a regularly scheduled suspension, limitation or restriction," not only applies to those that are plan changes, but also to preexisting plan features. Another commenter requested clarification that "a regularly scheduled suspension, limitation, or restriction" may, for purposes of the exclusion, be contained in and disclosed via enrollment forms, investment policies and other documents pursuant to which the plan is established or operated.

First, the Department does not believe that Congress, in enacting ERISA section 101(i)(7), intended to include preexisting regularly scheduled suspensions, limitations, or restrictions in the definition of the blackout period to the extent such suspensions, limitations, or restrictions are disclosed to participants and beneficiaries. In this regard, the Department notes that section 101(i)(7)(A) of ERISA and paragraph (d)(1)(i) of the regulation, in defining "blackout period," references "any period for which any ability of participants or beneficiaries under the plan, which is otherwise available under the terms of such plan, to direct or diversify assets * * *." (Emphasis supplied). The Department reads the clause "which is otherwise available under the terms of such plan" as referring to preexisting regularly scheduled suspensions, limitations or restrictions. The Department also notes that the "blackout period" definition contained in SOA section 306(a)(4), to be administered by the Securities and Exchange Commission, generally provides that a blackout period does not include "a regularly scheduled period," if such period is incorporated into the plan and timely disclosed to employees. Nonetheless, in an effort to clarify this issue and more closely align the exclusion in ERISA section 101(i)(7)(B)(ii) with SOA section 306(a),