

the Department has amended paragraph (d)(1)(ii)(B) of the regulation.¹

As amended, paragraph (d)(1)(ii)(B) excludes from the definition of blackout period a suspension, limitation or restriction “which is a regularly scheduled suspension, limitation, or restriction under the plan (or change thereto), provided that such suspension, limitation or restriction (or change) has been disclosed to affected plan participants and beneficiaries through the summary plan description, a summary of material modifications, materials describing specific investment alternatives under the plan and limits thereon or any changes thereto, participation or enrollment forms, or any other documents and instruments pursuant to which the plan is established or operated that have been furnished to such participants and beneficiaries.” This amendment also serves to clarify that “regularly scheduled suspensions, limitations and restrictions” may be set forth in and disclosed to participants and beneficiaries in a variety of documents.

The amendment to paragraph (d)(1)(ii)(B), by reference to “materials describing specific investment alternatives under the plan and limits thereon,” also is intended to make clear that restrictions on investments or delays in payment or transfers applicable to particular investments are encompassed within the exclusion to the extent disclosed to affected participants and beneficiaries. Similarly, limits on the ability of participants and beneficiaries to give investment instruction (such as limits on the ability of participants to trade daily) would be covered by the exclusion as a “regularly scheduled suspension, limitation or restriction” to the extent disclosed to affected participants and beneficiaries.

A number of commenters requested clarification that quarterly freezes on trading involving employer stock, timed to coincide with earnings reports and intended to prevent insider trading, whether fixed dates or determined on a quarter-by-quarter basis, do not constitute blackout periods within the meaning of the regulation when plan materials disclose the dates or explain how the dates will be determined. It is the view of the Department that such

restrictions on trading employer securities would be “regularly scheduled” to the extent the event (*i.e.*, release of the company’s quarterly earnings report) and the restriction (freeze on trading employer securities) and the period of the restriction are described in plan materials and disclosed to the plan’s affected participants and beneficiaries.

QDRO Exclusion

A number of commenters also expressed concern that the language of paragraph (d)(1)(ii)(C), relating to suspensions, limitations, or restrictions as a result of a qualified domestic relations order (QDRO), did not take into account the obligations of a plan administrator to impose certain restrictions on the account of a participant during the pendency of a determination as to whether a domestic relations order is qualified. Given the specific obligations imposed on plan administrators pursuant to ERISA section 206(d)(3)(H), the Department does not believe that Congress, in drafting section ERISA 101(i)(7)(B)(iii), intended to limit the subject exclusion only to those restrictions arising after a determination that a domestic relations order is qualified. Accordingly, the Department has amended paragraph (d)(1)(ii)(C) to clarify the application of the exclusion to restrictions imposed during the pendency of a QDRO determination. As amended, paragraph (d)(1)(ii)(C) excludes a suspension, limitation or restriction “which occurs by reason of a qualified domestic relations order or by reason of a pending determination (by the plan administrator, by a court of competent jurisdiction or otherwise) whether a domestic relations order filed (or reasonably anticipated to be filed) with the plan is a qualified order within the meaning of section 206(d)(3)(B)(i) of ERISA.”²

Individual Participant Actions

Commenters generally requested clarification that the term “blackout period” is not intended to include account restrictions triggered by individual participant actions. Examples of such actions include: Receipt of a tax levy, a dispute over a deceased participant’s account among putative beneficiaries, failure of a participant to obtain a PIN number, or allegations that the participant committed a fiduciary breach or crime

involving the plan. It is the view of the Department that Congress did not intend to encompass within the meaning of “blackout period” restrictions on investment direction, plan loans and plan distributions imposed solely in response to an action involving an individual participant and affecting only the account of that participant, such as those actions identified in the preceding sentence. Rather, the blackout notice requirements are intended to ensure that plan participants and beneficiaries are afforded advance notice of plan-imposed restrictions on their rights in order that they may take appropriate steps in anticipation of the restriction. In the case of actions involving individual participants, the Department agrees with commenters that the affected participant or beneficiary typically will already have notice of any restriction and reasons for such restriction. In response to these comments, the Department has amended the definition of blackout period at paragraph (d)(2) of the regulation to clarify that suspensions, limitations and restrictions precipitated by a participant’s action or the action of a third-party with respect to an individual participant’s account are excluded from the definition of “blackout period.” Specifically, new paragraph (d)(2)(D) excludes from definition of blackout periods, a suspension, limitation and restriction that “occurs by reason of an act or a failure to act on the part of an individual participant or by reason of an action or claim by a party unrelated to the plan involving the account of an individual participant.”³

Permanent Restrictions

Commenters, noting that the definition of “blackout period” refers to rights that are “temporarily suspended, limited or restricted,” requested clarification that permanent elimination of certain rights would not constitute a “blackout period.” Examples cited by the commenters included: Permanent restriction on new contributions to an investment option, replacement of one investment option with another of a similar type, and termination of the plan. The Department agrees that the blackout notice requirements were not

¹ Section 101(i)(5) of ERISA, as added by SOA section 306(b), provides that the Secretary may establish by regulation additional exceptions to the requirements of subsection (i) of section 101 (the blackout notice requirements) which the Secretary determines are in the interest of participants and beneficiaries. The Department finds the amendment to paragraph (d)(1)(ii)(B) of the regulation to be in the interest of participants and beneficiaries.

² Pursuant to the Department’s authority under section 101(i)(5) of ERISA, the Department finds the amendment to paragraph (d)(1)(ii)(C) to be in the interest of plan participants and beneficiaries.

³ Section 101(i)(5) of ERISA, as added by SOA section 306(b), provides that the Secretary may establish by regulation additional exceptions to the requirements of subsection (i) of section 101 (the blackout notice requirements) which the Secretary determines are in the interest of participants and beneficiaries. The Department finds this amendment to paragraph (d)(2) of the regulation to be in the interest of participants and beneficiaries.