

intended to apply to rights that are eliminated, as opposed to temporarily suspended, limited or restricted. Accordingly, a permanent restriction on new contributions to an investment option, replacement of one investment option with another, a plan termination and similar types of permanent restrictions would not in and of themselves be events that give rise to a blackout notice obligation under the regulation. However, if, in connection with implementing a permanent restriction, some rights would be temporarily suspended, limited or restricted, the blackout notice requirements would apply to such temporary restriction. For example, in replacing investment option A with investment option B, the plan permanently restricts new contributions to option A and during the transfer of funds from option A to option B temporarily suspends participant direction of the funds transferred to option B for 5 days during which transfers and accounts will be reconciled. In this situation, the restriction on new contributions to option A would not constitute a blackout period, but the 5 day temporary restriction on the direction of funds in option B would constitute a blackout period with respect to which notice must be provided under the regulation. On the other hand, if there was no restriction on the direction of funds in option B or if the restriction was for 3 or fewer consecutive business days, there would be no blackout period with regard to such funds under the regulation.

One commenter requested a clarification that a blackout period does not occur solely because of the bankruptcy of an employer and the appointment of a bankruptcy trustee or as a result of abandonment of a plan by the plan sponsor. Such actions would, in the view of the Department, result in a blackout period only if the rights of participants and beneficiaries to direct investments, obtain a loan or obtain a distribution are temporarily suspended, limited or restricted within the meaning of the regulation. In the event there is a blackout period in connection with such actions, notice would have to be provided by the plan administrator or the party assuming the responsibilities of the plan administrator.

One commenter requested clarification that the definition of "blackout period" does not extend to suspensions, limitations or restrictions of services (such as investment education, investment advice, retirement counseling, financial planning) that may facilitate the

exercise of a participant's and beneficiary's right to diversify their assets, obtain a loan or obtain a distribution. It is the view of the Department that to the extent such services are not required in order for a participant or beneficiary to exercise his or her right to direct investments, obtain a loan or obtain a distribution, the suspension, limitation or restriction of such services would not give rise to a blackout period within the meaning of the regulation.

b. "One-Participant Retirement Plan"

As with the interim final rule, the final rule adopts the statutory definition of "one-participant retirement plan" set forth in section 101(i)(8)(B) of ERISA, as amended by section 306(b)(1) of the SOA. One commenter suggested the definition of "one-participant retirement plan" be amended to apply the definition in 29 CFR § 2510.3-3(c)(1) and (2) for purposes of the blackout notice requirements. The Department has not adopted this suggestion and retained the statutory definition "one-participant retirement plan" without change.

c. "Issuer"

Like the interim final rule, paragraph (d)(4) of the final rule defines the term "issuer" for purposes of the blackout notice provisions. Consistent with the provisions of section 2(a)(7) of the SOA, issuer means an issuer as defined in section 3 of the Securities Exchange Act of 1934 (15 U.S.C. 78c),⁴ the securities of which are registered under section 12 of the Securities Exchange Act of 1934, or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934, or files or has filed a registration statement that has not yet become effective under the Securities Act of 1933 (15 U.S.C. 77a *et seq.*), and that it has not withdrawn.

d. Miscellaneous

In response to requests from two commenters, the Department provides the following clarifications. First,

⁴ Section 3 of the Securities Exchange Act of 1934 defines the term "issuer" to mean any person who issues or proposes to issue any security; except that with respect to certificates of deposit for securities, voting-trust certificates, or collateral-trust certificates, or with respect to certificates of interest or shares in an unincorporated investment trust not having a board of directors or of the fixed, restricted management, or unit type, the term "issuer" means the person or persons performing the acts and assuming the duties of depositor or manager pursuant to the provisions of the trust or other agreement or instrument under which such securities are issued; and except that with respect to equipment-trust certificates or like securities, the term "issuer" means the person by whom the equipment or property is, or is to be, used.

references to plan administrator and administrator in the regulation mean the "administrator" as defined in section 3(16)(A) of ERISA. Second, the term "affected participant" as used in the regulation means participants and beneficiaries whose rights under the plan are affected by the suspension, limitation, or restriction of their right to direct or diversify assets, obtain a loan or obtain a distribution. Employees who are eligible but who have not elected to participate in the plan would not be "affected participants" within the meaning of the regulation.

8. Model Notice § 2520.101-3(e)

Paragraph (e) of § 2520.101-3 provides a model notice to facilitate compliance with the blackout notice requirements by plan administrators. Use of the model is not mandatory. However, like the interim final rule, the final rule provides that use of the advisory statement set forth at paragraph 4 of the model notice will be deemed to satisfy the notice content requirements of paragraph (b)(1)(iv) of the rule pertaining to advising participants and beneficiaries about the importance of reviewing their plan investments in anticipation of their inability to direct or diversify their investments during the blackout period. The final rule, like the interim final rule, also provides that use of the general statement set forth in paragraph 5 of the model notice will be deemed to satisfy the requirement of paragraph (b)(1)(v)(A) that the notice contain a general statement that Federal law requires furnishing of blackout notices in advance of the blackout period.

This model is intended to deal solely with the content requirements prescribed in paragraph (b)(1) and not other matters with respect to which disclosure may be required, such as changes in investment options.

As discussed earlier, the model notice has been revised to accommodate changes in the final rule. Paragraph 3 of the model (relating to length of the blackout period) has been changed to reflect alternative approaches to describing the length of the blackout period and paragraph 4 (encouraging participants and beneficiaries to review their investments in anticipation of the blackout period) has been modified to make clear that the last two sentences of the paragraph (relating to investments in individual securities) apply only to plans that offer investments in individual securities. Paragraph 6 of the model also was modified to make clear that individual persons are not required to be named as contacts for information about blackout periods.