

assumed to receive the notice on paper. Paper distribution is estimated to require one minute per notice for copying and mailing, plus \$0.40 for paper and postage. No time or direct cost is attributed to electronic distribution methods other than the time required to prepare the notice, because it is assumed that notices are drafted in electronic form, plan administrators use existing infrastructure to communicate electronically, and the cost of electronic transmission is negligible. Paper notice distribution is estimated to require 123,500 hours, and cost about \$3 million annually.

The Department considers that this distribution burden estimate is conservatively high due to the fact that many plans already provide advance notices in the event of the imposition of a blackout period, that most blackout periods arise from changes in investment providers or recordkeepers, and that this advance notice either is or will be included with other informational materials that would ordinarily be supplied to participants or beneficiaries to implement that change. Commenters were generally in agreement with these assumptions.

No additional burden is included for the requirements for written documentation that is to be dated and signed under paragraphs (b)(2)(ii)(A) and (B) and (b)(2)(iv). It is assumed that written documentation is normally maintained in the circumstances described, and that the burden of adding a signature or providing a limited number of copies upon request would be negligible.

Further, no additional burden is estimated for subsequent notices required due to changes described in paragraph (b)(4). The Department has no basis for an estimate of the frequency of changes in the length of blackout periods. Further, the Department believes that, although a cost is incurred to do so, plan administrators typically inform participants of changes in the duration of a blackout period as part of their reasonable and customary business practices. It is acknowledged that the content and timing might be modified based on the provisions of the SOA and this final rule, however. As noted earlier, the modification of the interim final rule provision describing the nature of the information to be included on blackout period beginning and ending dates should serve to minimize the number of subsequent notices and their attendant costs by clarifying for plan administrators the extent to which their usual practices conform to the provisions of the final rule.

The current estimates of annual respondents, responses, and hour and cost burdens are shown below.

*Type of Review:* Extension of a currently approved collection.

*Agency:* Department of Labor, Pension and Welfare Benefits Administration.

*Title:* Notice of Blackout Period under ERISA.

*OMB Number:* 1210-0122.

*Affected Public:* Individuals or households; Business or other for-profit; Not-for-profit institutions.

*Respondents:* 85,150.

*Frequency of Response:* On occasion.

*Responses:* 11,956,000.

*Estimated Total Burden Hours:* 166,129.

*Total Annual Cost (Operating and Maintenance):* \$ 9,351,400.

OMB will consider comments submitted in response to this request in its review of the request for an extension of the emergency approval of the ICR; these comments will also become a matter of public record.

#### *Regulatory Flexibility Act*

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) (RFA), imposes certain requirements with respect to federal rules that are subject to the notice and comment requirements of section 553(b) of the Administrative Procedure Act (5 U.S.C. 551 *et seq.*) and that are likely to have a significant economic impact on a substantial number of small entities. For purposes of its analyses under the RFA, PWBA continues to consider a small entity to be an employee benefit plan with fewer than 100 participants. The basis of this definition is found in section 104(a)(2) of ERISA, which permits the Secretary of Labor to prescribe simplified annual reporting for pension plans that cover fewer than 100 participants. Because this guidance is issued as a final rule pursuant to the authority and deadlines prescribed in section 306(b)(2) of the SOA, RFA does not apply, and regulatory flexibility analysis is not required.

The terms of the statute pertaining to the required notices to plan participants and beneficiaries in the event of a blackout do not vary relative to plan size. This final rule addresses the statutory provisions, which are self-executing and do not afford the Department with substantial discretion to exercise regulatory flexibility with respect to small plans. While a cost is expected to be associated primarily with the statutory provisions, the Department believes that the final rule imposes no additional cost on small plans. The Department nevertheless requested comments concerning any special issues

facing small plans with respect to blackout notices, and any alternatives consistent with the objectives of the statute that may serve to facilitate compliance. No comments were received in response.

As to the potential impact of the final rule on small plans, the Department notes that available data suggest that about 341,000 plans, or 47 % of all plans are potentially impacted by the enactment of a blackout notice requirement, in that they are individual account plans that permit any form of individual investment direction.

The statutory blackout notice requirement will potentially affect a significant number of small plans. About 87% of the potentially affected plans are small. However, although most affected plans are small, the participants in those plans represent only about 16% of the 47.8 million potentially affected participants. Based on the assumption that plans will impose a blackout period once every four years on average, about 73,800 small plans and 11,400 large plans will prepare and distribute notices annually. The small affected plans represent about 10% of all pension plans, while the large affected plans represent about 2% of all plans. Affected participants (1.9 million in small plans, and 10.1 million in large plans) represent approximately 2% and 9% of all plan participants, respectively.

The substance of the required notice is likely to be prepared once per plan for each applicable blackout period and distributed to the multiple affected participants. The fixed cost of preparing the notice is estimated at approximately \$100 for both large and small plans. The total cost to affected small plans for both preparation and distribution is expected to be an average of about \$110 per year. The comparable annual average cost to large plans of about \$510 is substantially greater due to the greater numbers of participants in these plans, and the costs attendant to distribution of the notices.

#### *Congressional Review Act*

The rules being issued here are subject to the Congressional Review Act provisions of the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801 *et seq.*) and have been transmitted to Congress and the Comptroller General for review. The rule is not a "major rule" as that term is defined in 5 U.S.C. 804, because it is not likely to result in (1) an annual effect on the economy of \$100 million or more; (2) a major increase in costs or prices for consumers, individual industries, or federal, State, or local