

Employee Benefits Update

Notice of Blackout Periods

under the Sarbanes-Oxley Act of 2002 (the "Act"). The regulations provide additional guidance regarding the content of the notice, the time, form, and manner of providing the notice, and civil penalties for failing to provide a notice. The regulations are effective for any blackout period beginning on or after January 26, 2003.

Requirement to Provide a Notice

The Act requires the plan administrator, which is usually the company sponsoring the plan, to issue a notice to participants, beneficiaries, and issuers of employer securities subject to a blackout period at least 30 days before a blackout period that affects them. For the purpose of this requirement, a "blackout period" is "any period of more than 3 consecutive business days" during which the ability of the participants or beneficiaries in an individual account plan (generally a defined contribution plan) to direct or diversify assets, to obtain loans, or to obtain distributions is temporarily suspended, limited, or restricted. The regulations incorporate this requirement.

Content of the Notice

The regulations incorporate the requirements of the Act and expand on the list of information to be provided. The regulations require that the notice provide the following information:

- The reasons for the blackout period.
- The expected beginning date of the blackout period.
- The expected ending date of the blackout period.
- A description of rights that will be temporarily suspended, limited, or restricted by the blackout period, including identification of any investments subject to the blackout period.
- If investments are affected by the blackout period, a statement that participants and beneficiaries should evaluate whether their investments are appropriate in light of their inability to direct or diversify assets during the blackout period.
- The name, the address, and the telephone number of the

On October 21, 2002, the Department of Labor issued interim final regulations governing the notice required for blackout periods

plan administrator or other person responsible for answering questions about the blackout period.

The Act and regulations provide limited exceptions to the requirement that the plan administrator furnish the notice to participants 30 days before the blackout period. If the notice is furnished less than 30 days before the blackout period, the regulations require the notice to also include:

- A statement that federal law requires the notice to be furnished 30 days before the last date on which participants and beneficiaries could exercise affected rights.
- An explanation of why the plan administrator could not furnish the notice 30 days before the blackout period.

Time for Providing the Notice

The notice must be furnished to all affected participants and beneficiaries at least 30 days, but no more than 60 days before the last date on which they could have exercised rights affected by the blackout period.

- The 30-day and 60-day periods are determined based on calendar days (in contrast to the use of business days to determine the 3-day blackout period threshold).
- Notice is considered furnished as of the date of mailing, if mailed by first class mail.
- Notice is considered furnished as of the date of electronic transmission, if furnished electronically.

If participants in a plan are not able to exercise the affected rights on a daily basis, then the notice may need to be furnished more than 30 days before the blackout period (because the 30-day and 60-day periods are measured from the last date on which they could exercise affected rights). The following examples illustrate when a notice would need to be furnished:

- Example 1. Participants are able to direct their investments each business day. To change recordkeepers, participant direction of investments will be suspended from May 1st through May 15th. The regulations require that notice be furnished at least 30 days before the last day on which participants may exercise their affected rights. Because the last day on which participants will be able to direct investments is April 30th, the notice must be furnished not later than March 31st, (30 days before April 30th). If April 30th was a Sunday and the last day on which participants could direct investments was Friday, April 28th, then the notice must be furnished no later than March 29th.

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- Example 2. Participants are able to direct their investments the 1st through the 15th of each month. To change recordkeepers, participant direction of investments will be suspended from May 1st through May 15th. Because the last day on which participants will be able to direct investments is April 15th, the notice must be furnished not later than March 16th (30 days before April 15th).
- Example 3. Participants are able to direct their investments only on the first day of each month. To change recordkeepers, participant direction of investments will be suspended on May 1st. Because the last day on which participants will be able to direct investments is April 1st, the notice must be furnished not later than March 2nd (30 days before April 1st).

As noted earlier, the Act and regulations provide limited exceptions to the requirement that the plan administrator furnish a notice 30 days before the blackout period. These limited exceptions include:

- If the blackout period is deferred to comply with the fiduciary duties set forth in sections 404(a)(1)(A) or (B) of ERISA.
- If the inability to provide 30 days advance notice was due to unforeseeable events or circumstances beyond the control of the plan administrator (as determined by a plan fiduciary in writing).
- If the blackout period applies only to participants or beneficiaries becoming or ceasing to be participants or beneficiaries due to a merger, acquisition, divestiture, or similar transaction involving the plan or the plan sponsor.

Form and Manner of Providing the Notice

The regulations provide that the notice must be in writing. The notice may be furnished to participants and beneficiaries in any manner that is consistent with the Department of Labor's disclosure regulations. This permits plan administrators to furnish the notice through first class mail or through the use of electronic media.

Exceptions to the Requirement to Provide the Notice

The Act and regulations provide that the term "blackout period" does not include a suspension, restriction, or limitation on exercising affected rights which occurs due to the following reasons:

- Due to the application of the securities laws.
- Due to a regularly scheduled suspension, restriction, or limitation disclosed to all affected participants and beneficiaries.

- Due to a qualified domestic relations order.

Plans With Employer Securities – Notice to Insiders

The Act prohibits directors and executive officers from directly or indirectly purchasing, selling, acquiring, or otherwise transferring any equity security of the company which the director or executive officer acquired in connection with his or her service with the company during a blackout period if (i) the plan affected is an individual account plan that permits investment in company securities and (ii) the blackout period restricts the ability of fifty percent or more of the participants to exercise their affected rights. To prevent such activity and place insiders on notice, the Act requires the issuer of securities to provide notice of blackout periods to these insiders and to the Securities and Exchange Commission. The Act directs the Securities and Exchange Commission to issue regulations regarding this provision.

The Securities and Exchange Commission issued proposed rules regarding the prohibition on insider trading on November 6, 2002. See <http://www.sec.gov/rules/proposed/34-46778.htm>. A Dorsey & Whitney Corporate Department client advice memorandum addresses these proposed rules.

Civil Penalties

The Department of Labor may impose a penalty of \$100 per day per violation for "failure or refusal, in whole or in part, to provide a notice." The failure or refusal to provide a notice to a single participant or beneficiary counts as a single violation. Therefore, if a plan has 1,000 participants and the plan administrator fails to provide a notice, the Department of Labor may impose a penalty of \$100,000 per day from the date the notice was required to be provided, until the date the notice is actually provided or the final day of the blackout period, whichever is earlier. In addition, a court may require the plan administrator to pay a penalty of up to \$110 per day to the participant or beneficiary for failure to provide a notice, similar to the penalty for failure to provide documents to a participant or beneficiary.

Conclusion

If you anticipate having a blackout period on or after January 26, 2003, we recommend you contact an attorney to discuss the notice requirements. If you have questions relating to the Sarbanes-Oxley Act or implementing notices for blackout periods, please contact the attorney you work with in the Employee Benefits Department. You can also call Mike Punt, our department's Communications Coordinator, at 612-340-2867 to be connected to an attorney.

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