

## DOL Releases Final Rules For Blackout Period Notices

Ilene H. Ferenczy, CPC and David S. Thomas • Powell, Goldstein, Frazer & Murphy LLP • Atlanta, GA  
401(k) Subcommittee of the Government Affairs Committee of ASPA

On January 24, 2002, the Department of Labor issued final regulations under ERISA §101(i), which was added by the Sarbanes-Oxley Act of 2002 [Labor Reg. §2510.101-3]. Section 101(i) requires that 30 days advance written notice be provided by the plan administrator of an individual account plan to participants and beneficiaries if any blackout period will affect the right to direct or diversify investments, or to obtain a loan or a distribution from the plan. The DOL issued interim final regulations last October. The DOL also issued final regulations outlining the procedures for imposition of penalties by the DOL if the notice rules are violated [Labor Reg. §2560.502c-7]. Both sets of interim final regulations (“Interim Regs”) were discussed in *ASPA ASAP* 02-20 issued on November 5, 2002. This *ASPA ASAP* discusses how the final regulations (“Final Regs”) change (or do not change) the rules outlined in the Interim Regs.

### Changes from Interim Regs

In general, the Final Regs depart very little from the Interim Regs. In its formal written comments on the Interim Regs, ASPA’s Government Affairs Committee (GAC) asked for clarification on several situations where temporary suspensions should not be considered blackout periods. The text of the Final Regs did not contain any changes, but the preamble to the Final Regs specifies that the blackout notice rules are not intended to apply to rights that are eliminated (e.g., when an investment option is removed from a plan). However, the preamble notes that, if other rights are temporarily suspended, limited, or restricted in the process of eliminating a right, the plan administrator must give a blackout notice regarding the temporary restrictions. In addition, the Final Regs specify that suspensions and limitation put into effect because of the action of a participant or a third party (e.g., an account is frozen because of a tax levy) are excluded.

One of the more controversial provisions of the Interim Regs was the requirement that the blackout notice state when the blackout period will begin and when it will end. ASPA’s GAC and other commentators raised with DOL that, although information about the length of the blackout period is important to participants, the process surrounding implementing a blackout period is generally very fluid. Therefore, knowing the beginning and ending dates with specificity at the time the notice is given is nearly impossible, and supplemental notices would almost always be required. In response, the Final Regs permit the notice to specify the calendar *weeks* in which the blackout period is expected to begin and end. If the blackout notice uses this broader rule, participants must be able to access, without charge (e.g., through a toll-free telephone number or the Internet), information about whether the blackout has actually begun or ended.

GAC requested clarification about the timing of the notice. In particular, is the notice required to be provided: (1) 30 days before the last day on which a participant may give an instruction, or (2) 30 days before the Plan Administrator could implement that instruction. The DOL clarified in the Final Regs that the blackout notice timing is keyed to the last date on which the participant is able to act and have the instructions implemented prior to the blackout period. **Example:** Suppose a plan executes trades only during the last two weeks of the month, but participants must give instructions as to the trades during the first week of the month. A blackout period will begin on April 15, precluding trades for that month. Therefore, the notice would need to be given at least 30 days before the end of the first week of March, because that is the last time that a participant can give instructions and have them implemented before the blackout period begins.

### ASPA

Actuaries, Consultants, Administrators and Other Retirement Plan Professionals  
4245 North Fairfax Drive • Suite 750 • Arlington, VA 22203  
Phone: (703) 516-9300 • Fax: (703) 516-9308 • [www.aspa.org](http://www.aspa.org)

*ASPA ASAPs* are published as an information service for subscribers. Articles are general in nature and are not a substitute for professional advice or opinion in a particular case.

The DOL responded favorably to GAC's comment that furnishing a notice to the last known address of a participant or beneficiary would be sufficient so long as the notice was delivered by a method otherwise approved under the DOL regulations and the fiduciaries have taken reasonable steps to keep records up-to-date and to locate missing or lost participants.

GAC asked that special notice not be required if the issuer of the securities was the same as the plan administrator and the DOL agreed that no notice would be needed in this situation.

The DOL agreed with GAC's suggestion that the blackout notice be permitted to contain information about more than one blackout period, if there were multiple blackouts with different dates. Furthermore, the DOL noted that the blackout notice may also contain other communications, such as information about investments or amendments to the Plan.

### **GAC Suggestions That Were Not Implemented**

*30-60 Day Rule Remains in Place.* GAC strongly objected to the imposition of the 60-day outside limit on the timing of the blackout notice. Furthermore, GAC requested that the 30 to 60 day time period during which notice must be provided always be keyed off of the originally anticipated blackout start date. GAC was particularly concerned about delays in the blackout period occurring within 30 days of the actual start of the period that would cause the original notice to fall out of the 60-day window. The DOL did not eliminate the 60-day rule nor address the timing issues caused by such a delay, which creates a practical gap in the law that could be problematic.

*Definition of "One-Participant Plan."* The statutory definition of "one-participant retirement plan," which was in-

corporated in the Interim Regs was ambiguous and inconsistent with the Form 5500 instructions because it discusses "one or more partners" when S and C corporations do not have partners. Accordingly, GAC asked that the definition in Labor Regulation 2510.3-3(c)(1) and (2) be incorporated into the Final Regs. The DOL did not make this change.

*Penalty Measurement Period.* The Interim Regs authorized the DOL to impose the \$100 per day per participant penalty for late blackout notice for the period beginning with the date that notice was given and ending on the last day of the blackout period. GAC objected to this, as it did not distinguish between a notice given one day late and one not given at all. The DOL did not modify the potential penalty period, although it emphasized its intent, in practice, to take factors such as the actual timing of the notice into account. The effect of this is that the decision as to the size of penalties actually imposed will be made on a case-by-case basis by the DOL field reviewer. As a result, it becomes very critical that plan administrators respond timely and properly to the DOL's notice of intent to levy penalties. As mentioned in the earlier *ASPA ASAP*, failure to respond is deemed to be an admission of all facts and a waiver of a right to appeal imposition of the penalty. Furthermore, if the DOL is going to be deciding between a small penalty and the statutory maximum on a case-by-case basis, it is critical that the plan administrator be very persuasive in all communications.

*Notices to New Participants.* GAC asked that plan administrators not be required to provide notice to participants who enter in the notice period or blackout period. The DOL did not make this change, thus requiring plan administrators to provide notice to new participants as soon as administratively feasible after entry.

#### **IRS Interest Rates:**

Jan 2003 30-year Treasury securities rate: 4.94%

Weighted average interest rates for current liability (for plan years beginning in Feb 2003):

*permissible range (90%-110%): 4.96% to 6.06%, permissible range (90%-120%): 4.96% to 6.62%*

#### **ASPA**

Actuaries, Consultants, Administrators and Other Retirement Plan Professionals  
 4245 North Fairfax Drive • Suite 750 • Arlington, VA 22203  
 Phone: (703) 516-9300 • Fax: (703) 516-9308 • [www.aspa.org](http://www.aspa.org)

**Search ASAPs**  
 online at  
<https://router.aspa.org>