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DOL Finalizes Sarbanes-Oxley Regs on Blackout Periods

The Department of Labor (DOL) issued its final regulations implementing the new requirement that 401(k) plan administrators give participants at least 30 days' prior notice of a blackout period that suspends their rights to change investments or to receive distributions or loans. The new rules, sanctioned in the Sarbanes-Oxley Act enacted last summer in response to Enron and other corporate scandals, are effective January 26, 2003. The rules can apply to any plan that permits participant-directed investments or in-service distributions or loans, but will be most relevant to 401(k) plans. Civil penalty provisions were also issued. Plans maintained by both public and private companies are affected.

The DOL had previously issued interim final regulations for the blackout notice rules. (See the Seyfarth Shaw *Management Alert*, 8/23/02.) The final regulations are basically consistent with the interim regulations, with some clarification and modification of the timing rules.

Highlights of the final blackout regulations' timing rules are:

- ♦ The interim regulations required that the notice specify the anticipated beginning and ending date of the blackout period, and required a supplemental notice of any change to either date. The final regulations loosen this requirement somewhat by allowing the notice to specify the week during which the blackout period is expected to begin and end, as long as the notice also provides either a website address or toll-free phone number from which participants can determine the actual starting and ending date. "Week" for this purpose means a calendar week, not a seven-day period.
- ♦ The notice must be given to participants at least 30 days before the "last day" on which participants have the right to direct their investments (or receive distributions or loans). The final regulations clarify that the "last day" means the date on which a participant has the right to give a direction that will be implemented before the blackout occurs.

For example, a plan that requires a period of time to process loans or hardship withdrawals will have to give the notice more than 30 days prior to the beginning of the blackout period. The notice must be given at least 30 days before the last date a participant can apply for a distribution or loan and have that direction implemented. This also means that for many plans, particularly daily-valued plans, there may be a difference between the effective date of the blackout on investment changes and on loan and withdrawal applications. The notice will need to describe both effective dates, and be dated 30 days prior to the earliest date.

Other **key points** in the blackout rules include:

- ♦ Model Notice Available. The regulations specify the content of the notice, including the anticipated ending date of the blackout period and the name and phone number of a person to be contacted with questions. The final regulations modify the safe harbor form of notice, and clarify that the person designated to answer questions need not be a named individual, but can be a department or call center. We recommend use of the safe harbor notice, which is available as a Word or pdf document from Seyfarth Shaw.
- ♦ Email Notice Allowed. The notice can be given by e-mail under the DOL's new guidelines for electronic communications, but cannot merely be posted. (Posting on a website is generally permissible if participants are sent an e-mail notifying them of the posting and have the ability to access the website and receive a paper copy of the notice). However, where the 30-day advance notice requirement cannot be met and notice must be given as soon as reasonably possible, the final rules provide that if notice can be given to some participants sooner than others, it must be done so. For example, if some participants can receive e-mail and others not, the plan administrator must send email notices even if some participants must wait for regular mail.

- ♦ **Unplanned Blackout Periods.** In addition to the planned blackout periods for a change of administrators or investment options, unplanned events that result in investment changes being unavailable may be subject to the notice requirement. Obviously, the 30-day prior notice is not required for a blackout period that results from technical difficulties or other factors beyond the plan sponsor's control, but if the blackout period lasts for more than three consecutive business days, the notice must be given as soon as reasonably possible, and must explain why the 30-day prior notice was not given. Also, a plan fiduciary must certify, in writing, that giving the notice on a timely basis was not possible. The 30-day prior notice requirement is also waived for blackout periods that accompany a corporate merger, sale or similar transaction, but the notice given need not explain why it was not given 30 days in advance.
- ♦ **Individual Exceptions.** The final regulations clarify that various events that affect only individual participants are not subject to the blackout notice, such as account freezes pending QDRO determination, disputes over the identify of beneficiaries, etc. In addition, regularly scheduled blackout periods are not subject to the notice rules if they are described in the plan's SPD or other participant communications, such as descriptions of individual investment funds. In contrast, the SEC's separate blackout rules for plans with publicly-traded employer stock refer only to scheduled blackout periods set forth in the plan document.
- ♦ **Notice to Issuer.** For a plan that includes publicly-traded employer stock, the regulations require that the issuer of the stock also be notified, so that stock transactions by corporate insiders can be suspended during the blackout period. The final regulations allow the plan administrator and issuer to be the same person, with notice deemed to be made when notice is furnished to participants. However, the regulations do not address any of the other issues related to insider trading during a blackout, which are under the jurisdiction of the SEC rather than the DOL.
- ♦ **Effective Date.** The final regulations apply to all blackout periods beginning on or after January 26, 2003. However, for blackout periods that begin between January 26 and February 25, the notice must be given as soon as possible after January 26, even if that is less than 30 days before the blackout period begins. The maximum penalty for failure to give the notice is \$100 *per participant* per day, and accrues until the end of the blackout period if the notice is not given at all. However, the final regulations provide that the maximum penalty will be assessed only in cases of willful disregard of the rules, and the penalty may be waived on a showing of reasonable cause.
- ♦ **Liability.** The final regulations on civil penalties clarify that if the plan administrator is a committee, joint board or other group, each member may be separately liable for any civil penalty for a notice violation.

The final regulations deal only with the notice requirement, and do not address any of the other fiduciary issues related to a blackout period, such as the mapping of investment funds.

If you have any questions about the application of these new regulations to your plan, please contact the Seyfarth Shaw employee benefits group attorney with whom you work or any employee benefits group attorney listed on the website at www.seyfarth.com.

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