



[Home](#) > [-fs](#) > [Web](#) > [Asppa.org](#) > [Public_html](#) > [Archive](#) > [Gac](#) > [2002](#) > [Government Affairs - Blackout Comments](#)

Comments to the Department of Labor, Pension and Welfare Benefits Administration



Response to the Interim Final Rule Relating to Notice of Blackout Periods to Participants and Beneficiaries

29 CFR Parts 2520, 2560, and 2570

Federal Register
Vol. 67, No. 203
of October 21, 2002
pp. 64766-64774

November 20, 2002

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Notice of Blackout Periods Under Individual Account Plans
29 CFR Parts 2520, 2560, and 2570

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The American Society of Pension Actuaries (ASPPA) and its members appreciate the efforts put forth by the Department of Labor (the Department) in issuing its interim final rules (the Regulation) pertaining to the blackout period notices required by the Sarbanes-Oxley Act (the Act). The rules, in combination with the preamble, are particularly insightful. In response to the request for feedback, ASPPA offers the following comments.

ASPPA is a national organization of more than 5,000 members who provide actuarial, consulting, administrative, legal and other services to qualified retirement plans.

I. Definitions

1. Blackout Period

The single most difficult concept to define within the framework of the Act is what constitutes a blackout period. Both the Act and the Regulation defined the term very broadly. In its preamble to the Regulation, the Department notes that temporary changes in investment alternatives, changes in third party administrators, and mergers/acquisitions/spin-offs may lead to blackout periods. The following describe several aspects of the definition of a blackout for which ASPPA requests clarification in order to assist employers in complying with the Act.

A. Temporary vs. Permanent Changes

The Act and the Regulation both define "blackout period" to be a time during which certain participant rights are "temporarily suspended." The Department should clarify that permanent (rather than temporary) changes in investment options, loans, or distribution options do not create blackout periods. For example, a decision of a plan sponsor to terminate its loan program should not give rise to a blackout period.

Although the elimination of a particular investment option is a permanent change and should not give rise to a blackout period, the example on page 64,767 of the preamble to the Regulation creates significant uncertainty about how the Department interprets whether an event is temporary. Specifically, in discussing the prudence

exception to the timing of the blackout notice, the Department states that the blackout notice requirement would apply to what appears to be the permanent elimination of an investment option. (Under the particular circumstances, the company is filing for bankruptcy and the plan administrator freezes new investments in the company stock fund.) The Department should make it clear that it did not intend by this example to apply the blackout notice requirement to a permanent elimination of an investment option.

Separately, if one option is being replaced by another investment selection of a similar type (such as a change in the Large Cap fund), ASPPA recommends that the Department clarify whether a "suspension" of participant rights occurs if access to one option terminates before investment in the other option is available. ASPPA believes that no blackout should be deemed to occur if participants continue to have other similar investment options available.

B. Exceptions/Clarifications to Blackout Definition

i. Situations Involving Individual Participants/Beneficiaries

ASPPA recommends that the Department amend the Regulation to provide additional exceptions to the definition of blackout applicable to participant specific situations. These exceptions should include the temporary suspension of a particular participant's rights to a distribution or loan due to (a) a tax levy or lien; (b) conflicting claims or a dispute regarding entitlement to all or a portion of the participant's benefits (for example, conflicting claims by beneficiaries upon the death of the participant); (c) a claim by the plan to the benefits of a participant who is a fiduciary of the plan as a result of breach of fiduciary duty; (d) the inability to locate the participant; and (e) other similar circumstances specific to a particular participant that would make it imprudent to allow the full exercise of such participant's rights or options under the plan.

ii. Unique Situations Involving Plans

ASPPA recommends clarifying whether several unique situations at the plan level give rise to blackout periods and, if so, how the notice rules should be satisfied. Examples of such scenarios include those that involve terminations, employer bankruptcies, orphan plans, and fund-to-fund mapping. These situations are discussed in more detail below.

a. Plan Terminations

When a plan is terminating, the plan administrator customarily provides participants and beneficiaries a termination notice (including a statement that investment changes will not be permitted as of the proposed termination date), in addition to all relevant distribution notices and distribution request forms. ASPPA recommends that the Department consider the notices already required to be sufficient to the extent that it is necessary to "freeze" transactions for final calculation and distribution purposes. Moreover, due to the permanent nature of the event, ASPPA believes that termination of a plan, and the necessary "freeze" period should not qualify as a blackout.

b. Employer Bankruptcies/Orphan Plans

If an employer declares bankruptcy and a plan bankruptcy trustee is named, the Department should clarify whether a blackout is deemed to occur and, if so, who is required to provide a blackout notice.

ASPPA recommends that in the case of orphan plans (i.e., plans whose sponsors are no longer in business or cannot be located), the Department clarify that, since no plan administrator can be located, no blackout period is deemed to occur and no notices are therefore required.

If the Department considers a blackout to occur in either of the situations described above, the Department should clarify that the notice requirement must be fulfilled by a plan fiduciary and is not an obligation of a service provider that is not a fiduciary.

c. Direct Fund-to-Fund Mapping

An alternative to a formal cessation of trading and liquidating funds during a transition to a new investment provider includes fund-to-fund mapping. During the process, the new investment provider's products are matched to the old provider's products and assets are directly moved from like funds to like funds. ASPPA encourages the Department to clarify that such a scenario does not result in a blackout if investment elections are otherwise not interrupted.

C. Definition of "the Terms of the Plan"

Section 2520.101-3(d)(1)(i) of the Regulation defines the term "blackout period," in part, as "any period for which any ability of participants or beneficiaries under the plan, which is otherwise available under the terms of such plan, to direct or diversify assets credited to their accounts, to obtain loans from the plan, or to obtain distributions from the plan is temporarily suspended...."

It is quite common for participants and beneficiaries to have rights and abilities that are either incorporated by reference in a written plan document or granted by plan related forms, such as summary plan descriptions, participant-directed investment policies, hardship distribution policies, loan procedures, and enrollment packages. ASPPA recommends that the Department clarify that rights granted in summary plan descriptions, participant-directed investment policies, hardship distribution policies, loan procedures, and enrollment forms are covered by the blackout requirement, and that employers need not amend their plans to include every ability currently available to participants and beneficiaries to satisfy the "terms of the plan" requirement in the Regulation.

In addition, ASPPA recommends that the Department clarify that rights and abilities originating outside of a plan document, or plan document related forms (as described above), are excluded when determining whether a blackout occurs. For example, a recordkeeping service agreement between a service provider and an employer may give participants and beneficiaries access to various online investment education tools to assist them in investing plan assets. The inability to access such information for one reason or another clearly does not prevent participants and beneficiaries from exercising their rights to change investments and should not be viewed as creating a blackout.

D. One-Participant Retirement Plan

The Act applies to all individual account plans, except one-participant retirement plans, as that term is defined in Section 3(34) of ERISA. Section 306(b)(8)(B) of the Act defines a one-participant plan, in part, as a retirement plan that "covered only one or more partners (and their spouses) in a business partnership (including partners in an S or C corporation (as defined in Section 1361(a) of the Internal Revenue Code of 1986)." However, both S and C corporations do not have partners; they have only shareholders.

The definition described above is different from the definition of a one-participant plan described in the instructions to Form 5500-EZ, Annual Return of One Participant (Owners and Their Spouses) Retirement Plan, and is also inconsistent with the definition of employee found in Section 2510.3-3(c)(1) and (2) of the Department's regulations.

In addition, Section 306(b)(8)(B)(iv) of the Act states that a plan of an employer that is a ".member of an affiliated service group, a controlled group of corporations, or a group of businesses under common control." is a multiple-participant retirement plan and is therefore subject to the blackout notice requirements. This creates an overly broad classification of plans that are required to give notice. For example, it is very common for a sole-proprietor to own several businesses, thereby being part of a controlled group of corporations. In such scenarios, considering the one-participant plan definition in the Act, many small business owners with no employees may be required to notify themselves of an upcoming blackout period.

Having multiple, inconsistent definitions of one-participant plans is unnecessary and confusing. ASPPA recommends that the Department amend the Regulation to apply the definition in 29 CFR Section 2510.3-3(c)(1) and (2) for all purposes of enforcing the Act's blackout rules.

II. Notice to Participants And Beneficiaries

1. Content

Section 306(b)(2)(A) of the Act describes the required contents of a blackout notice. Section 306(b)(2)(A)(iii)

specifically requires that each notice provide the expected beginning date and length of the blackout period. In its preamble to the Regulation, the Department explained that the expected blackout ending date must be disclosed as part of the statutory requirement that the blackout period's length be provided to participants and beneficiaries. In addition, Section 2520.101-3(b)(4) of the Regulation stipulates that an updated notice must be provided explaining the reasons for any change in the previously disclosed ending dates and identifying all material changes to the information previously provided.

Accurate blackout period notices are important. However, from a practical perspective, factors that impact the blackout period preclude an advance determination of the exact beginning and ending dates of the blackout period. In a high proportion of routine conversions, multiple notices will be necessary under the Regulation.

ASPPA recommends that an updated notice satisfying the criteria listed in the Regulation be required only when the anticipated beginning or ending date of a blackout period changes by more than five days. As an alternative, the Department could apply a rule permitting a range of blackout dates only to those plans that do not directly hold employer securities while requiring disclosure of actual dates for plans that hold employer securities.

2. Timing

A. General Clarification

The preamble to the Regulation specifies that, "In the case of a plan that provides participants and beneficiaries the right to direct their investments on a monthly basis, notice would have to be provided at least 30 days prior to the month preceding the month in which a blackout period affecting such rights occurs." In the example that follows in the preamble, a plan permits participants and beneficiaries to change investments during the first 15 days of each month. In order to change service providers, the employer determines that a blackout period is necessary from May 1 to May 15. In applying the above statement, the notice would have to be provided no later than March 1 (30 days prior to April, the month preceding the month in which the blackout period occurred). However, the example provided in the preamble requires the notice to be provided no later than March 16 (30 days in advance of the last date on which participants and beneficiaries could exercise their rights immediately before the beginning of the blackout period, or April 15).

The example provided in the preamble to the Regulation is consistent with Section 2520.101-3(b)(2)(i) of the regulation and ASPPA recommends that the Department simply clarify the wording of the rule description that precedes the example.

B. Length of Blackout vs. Length of Temporary Suspension of Rights

ASPPA recommends that the Department clarify that the notice requirement is tied to the last day on which participants may make elections which can be timely implemented, rather than the last day on which participants may make elections.

For example, a plan permits participants and beneficiaries to change investments during the first 15 days of each month. A blackout period occurs between May 10 and May 20. The Regulation could be interpreted to require a notice to be provided on either April 9 (since the last date on which participants and beneficiaries may change investments prior to the blackout period is the last day prior to the beginning of the blackout period, or May 9) or on March 16 (the date 30 days before the last date on which participants and beneficiaries could actually effect investment changes, or April 15).

ASPPA's recommendation also results in a uniform application of the 30-day rule.

C. Split/Multiple Blackouts

It is relatively common for a blackout to affect certain rights longer than others. For example, a blackout period may be 20 days long when taking plan loans, but 10 days for distributions and investment election changes. ASPPA recommends that the Department clarify that multiple beginning and ending dates may be listed on one notice in order to avoid the expense involved with multiple notices.

D. Effective Date

The Regulation applies to blackout periods that begin on or after January 26, 2003. In addition, for the period between January 26 and February 25, the Regulation states that the 30-day notice requirement will be deemed satisfied if notice is provided as soon as reasonably possible.

ASPPA recommends that the Department confirm that notice under the Regulation is not required prior to the effective date of the Regulations. ASPPA also encourages the Department to issue a revised model blackout notice as soon as possible after having considered public comments. Most plan providers and employers will likely wish to begin using the model at the earliest possible date (even before the effective date of the Regulations).

III. Miscellaneous

1. Missing Participants

If a blackout is scheduled and one or more participant or beneficiary is missing, ASPPA recommends that sending the notice to the last known address of the participant or beneficiary will satisfy the Act's requirements.

2. Newly Eligible Participants

With respect to new participants, ASPPA recommends that the Department waive the notice's timing requirements. Notice as part of the participant's enrollment package may not be practical since enrollment packages may be disbursed throughout the company's locations across the US, or by a third party vendor, and adding something to the enrollment package may not be feasible. In most cases, new participants will have little, if any, funds affected by a blackout period in any case.

3. Written Determination of Inability to Comply

ASPPA recommends amending the regulations to eliminate the requirement that the plan administrator make a written determination that it is not possible to comply with the advance notice requirements for the blackout period. Instead plan administrators should be permitted to rely on clear, independent written communication, which is often already provided by a service provider to the plan administrator.

4. Notification of Issuer of Employer Securities

In most cases, blackout period notices will necessarily go to an officer acting on behalf of the "issuer of employer securities," particularly with smaller employers. Accordingly, ASPPA recommends that Section 2520.101-3(c) of the Regulation be revised to state that "if the person to whom the notice in paragraph (c) would otherwise be directed serves as the plan administrator (or as a member of the plan administration committee) or will otherwise receive the notice as a participant in the plan, it is unnecessary to provide a notice under paragraph (c)."

5. Changes in Length of Blackout Period

ASPPA recommends changing Section 2520.101-3(b)(4) of the Regulation to begin as follows: "If following the furnishing of a notice expected (at the time it is issued) to have been issued pursuant to this section...." Such a change would address a problem that would otherwise arise if the change in the beginning date of the blackout period causes the original notice not to have been timely provided.

For example, the employer issues a notice 59 days in advance of the expected beginning of the blackout period. Five days before the beginning of the blackout, the employer discovers that the blackout will be delayed by three additional days. The original notice is no longer issued "pursuant to this section" because it will have been issued 64 days before the first day of the blackout period. In addition, any supplemental notice provided because of the change will not be provided at least 30 days prior to the beginning of the blackout period. As a result, neither the original notice nor the supplemental notice will be given within the 30-60 day period required by the Regulation.

By modifying the Regulation to key the 30-60 day timing to the originally anticipated blackout period beginning date, this problem is avoided.

6. Penalty Implications

Under the proposed regulation to Section 502(c) of ERISA (i.e., Prop. Labor Reg. §2560.502c-7), the penalty for late provision of the blackout notice will be applied for each day between the date on which the notice failure occurred and the end of the blackout period. Under this structure, if the employer provides the notice one day late for a 30-day blackout period, the Section 502(c) penalty will apply for the 30-days preceding the blackout period, plus the full 30-day blackout period, or a total of 60 days. The very large penalties generated by this type of provision (e.g., \$60,000 for a 10 participant plan, or \$600,000 for a 100 participant plan, in our example) are inappropriate. ASPPA recommends that the penalty should apply only to the extent that the

notice is late, or a change in the blackout period exceeds the dates contained in the notice.

These comments were prepared principally by Michael Finch, of the ASPPA Department of Labor subcommittee and Todd Berghuis, JD, with the assistance of Ilene Ferenczy of the ASPPA 401(k) subcommittee, the Government Affairs Committee co-chairs, and Administration Relations chair.

Please contact us if you have any questions regarding our comments.

Sincerely,

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