DOL ISSUES FINAL REGULATIONS ON PENSION PLAN BLACKOUT PERIODS

The Department of Labor ("DOL") has issued final regulations[1] implementing Section 306(b) of the Sarbanes-Oxley Act of 2002 (the "Act"). Under the Act, the plan administrator of an individual account plan (*e.g.*, a profit sharing, 401(k) or money purchase pension plan) must provide at least 30 days' advance written notice to affected participants and beneficiaries of any plan "blackout period."[2] A blackout period is generally defined as any period of more than three consecutive business days during which time the ability of plan participants and beneficiaries to direct or diversify investments or to obtain loans or distributions is suspended, limited or restricted. A blackout notice does not include a suspension, limitation or restriction that occurs by reason of application of the securities laws, is the result of a regularly scheduled limitation in the terms of the plan that is disclosed to participants, or occurs as a result of a qualified domestic relations order. The most common reasons for the imposition of a blackout period include changes in investment alternatives or recordkeepers and corporate mergers and acquisitions that affect plan coverage.

Content and Distribution of Blackout Notice. The blackout notice may be furnished in any manner reasonably calculated to ensure actual receipt, including electronic media. Notice is deemed given as of the date of mailing if mailed by first class, certified or express mail and as of the date of electronic transmission if given electronically. The notice must be written in a manner calculated to be understood by the average plan participant and must include the following:

- The reason(s) for the blackout period;
- A description of the rights that will be temporarily suspended, limited or restricted by the blackout, including the identity of any investments affected;
- The expected beginning and ending dates of the blackout period or the calendar week during which the blackout period is expected to begin and end;
- In any case where investment rights are affected, a statement that participants and beneficiaries should evaluate the appropriateness of their current investment decisions in light of their inability to direct or diversify investments during the blackout period;

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1 68 Fed. Reg. 3716 (January 24, 2003).

2 The plan administrator must also provide notice to the issuer of any employer securities that are subject to the plan blackout period. Pursuant to Section 306(a) of the Act, directors and executive officers of a public company may not trade in the company's securities during a blackout period relating to the such securities. The SEC's final rules on insider trading during plan blackout periods are summarized in a separate Client Memorandum.

- If notice is not furnished at least 30 days in advance of the last date on which participants and beneficiaries could exercise affected rights, the plan administrator must include a statement that federal law generally requires advance notice of at least 30 days in connection with a blackout period and an explanation of the reason(s) why the administrator could not comply; and
- The name, address and telephone number of the plan administrator or other contact responsible for answering questions about the blackout period.[3]

If, following the plan administrator's initial blackout notice, there is a change in the beginning or ending date of the blackout period, the administrator must provide participants and beneficiaries with an updated notice explaining the reasons for the change and identifying all material changes in the information contained in the original notice. The updated notice must be provided by the plan administrator as soon as reasonably possible, unless providing an updated notice before the blackout period will end is impracticable.

Blackout Notice Timing and Exceptions. Notice of the blackout period must generally be provided at least 30 calendar days (but not more than 60 calendar days) in advance of the *last date on which plan participants and beneficiaries could exercise the rights affected by the blackout*. For example, in the case of a plan that permits participants to direct investments only during the first 15 days of each month, notice of a blackout period must be provided no later than March 16th in the case of a blackout period that commences on May 1st. Notice given on April 1st would not satisfy the notice requirement because participants would only have 15 days to take advance action in anticipation of the blackout, even though April 1st is 30 days prior to the start of the blackout period.

There are several exceptions to the requirement that the plan administrator provide 30 days' advance notice of a plan blackout. Advance notice is not required if (i) a plan fiduciary reasonably determines that deferring the blackout period would violate ERISA's exclusive benefit or prudence rule, (ii) the notice cannot be provided due to unforeseeable circumstances beyond the control of the plan administrator or (iii) the blackout period occurs solely in connection with persons becoming, or ceasing status as, participants or beneficiaries as a result of an employer or plan merger, acquisition, divestiture or similar transaction. In these situations, notice must be provided as soon as reasonably possible along with an explanation for the delay, unless such notice in advance of the termination of the blackout is impracticable. The notice must also be signed and dated by the plan fiduciary if the delay is due to an event described in clause (i) or (ii) above. The regulations note that the unforeseen circumstances exception will apply only in rare cases, such as a major computer failure.

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[3] The DOL has issued a model notice that a plan administrator may use to satisfy the blackout period notice requirements.

Penalty for Failure to Provide Notice. The penalty for failure to provide advance notice of a blackout period is a fine of up to $100 per day for each violation. The fine may be applied separately with respect to each person who did not receive the required notice. The penalty applies from the date of the failure until the date the blackout period ends. The DOL may reduce or waive the penalty in the case of mitigating circumstances.

Effective Date. The blackout period notice requirements generally apply for blackouts commencing on or after January 26, 2003. However, for blackouts commencing during the period from January 26, 2003 and February 25, 2003, the plan administrator need only provide notice as soon as reasonably possible.

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If you have any questions regarding the DOL blackout period regulations, please call Frank A. Daniele at (212) 728-8216 or Peter J. Allman at (212) 728-8101.

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